



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF FABRIS v. FRANCE

(Application no. 16574/08)

JUDGMENT

STRASBOURG

21 July 2011

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENTS IN THE CASE ON
07/02/2013 AND 28/06/2013**

This judgment may be subject to editorial revision.

In the case of Fabris v. France,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President*,

Jean-Paul Costa,

Boštjan M. Zupančič,

Mark Villiger,

Isabelle Berro-Lefèvre,

Ann Power,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 7 June 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 16574/08) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national, Mr Henry Fabris (“the applicant”), on 1 April 2008.

2. The applicant was represented by Mr A. Ottan, a lawyer practising in Lunel. The French Government (“the Government”) were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that there had been a violation of Articles 8 and 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

4. On 10 February 2010 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1943 and lives in Orleans.

6. He was recognised at birth by his father, Mr F.

7. At the time of the applicant's conception, his mother – Mrs M., née R – was married and two children had been born of that marriage: A., born in 1923, and J., born in 1941.

8. By a decree of 28 February 1967, the applicant's mother and her husband, Mr M., were pronounced judicially separated.

9. By a deed of 24 January 1970, Mr and Mrs M. divided their property *inter vivos* between their two legitimate children, A. and J. Under the terms of the deed, which was signed before a notary, they retained a life interest by which the legitimate children agreed to let Mr and Mrs M. continue to enjoy possession of their property as life tenants for the rest of their lives. The deed also contained a provision for revoking the gift for the purposes of ensuring that the terms and conditions were complied with. Lastly, when the deed was signed Mr and Mrs M. declared that the two donees were their only offspring.

10. Mr M. died in 1981.

11. In a judgment of 24 November 1983 the Montpellier *tribunal de grande instance* declared the applicant to be the illegitimate child of Mrs M., after finding that his status of illegitimate child had been fully established.

12. The 1970 deed of *inter vivos* division (*donation-partage*) was challenged by the applicant on 26 January 1984 after it had been established in 1983 that he was Mrs M.'s son. No details have been provided regarding the outcome of that procedure.

13. The applicant's mother died on 28 July 1994. The notary administering the estate informed the applicant by letter of 7 September 1994 that his rights were confined to the reserved portion of his mother's estate since she had made a will bequeathing the disposable portion, that is, one quarter, to her son J. The notary told him that, as a child born of adultery, he was entitled to only half the share he would have received if he had been a legitimate child – namely, one eighth. He added that the applicant's brother and sister, A. and J., were willing to pay him 298,311 French francs (FRF) in cash. He pointed out in that regard that in the event of the subsequent birth of a child, only a monetary abatement was possible and in no circumstances an abatement in kind. He asked the applicant to inform him whether A. and J.'s proposal was acceptable to him.

14. No agreement was reached between the three children.

15. By a writ of action dated 5 January 1998, the applicant brought proceedings in the Béziers *tribunal de grande instance* against the two children born of his mother's marriage: A. and J. Relying on Article 1077-1 of the Civil Code, he sought an abatement of the *inter vivos* division, claiming a reserved portion of his mother's estate equal to the share payable to his joint heirs from the assets of his mother's estate, namely, one quarter of that estate, which was one eighth of Mr and Mrs M.'s joint estate.

16. After the Court had found against France in the case of *Mazurek v. France*, on 1 February 2000, France passed Law no. 2001-1135 of 3 December 2001, amending its legislation and granting children born of adultery identical inheritance rights to those of legitimate children. That new Law came into force before the dispute that is the subject of the instant case was decided. It stipulated that its provisions were of immediate application to successions were already open on the date on which it came into force. Section 25(2)(2) of the Law specified that, subject to any prior agreement between the parties or final court decision, the provisions relating to the new inheritance rights of illegitimate children whose father or mother was, at the time of their conception, bound by marriage to another person were applicable to successions that were already open on the date of publication of the Law in the Official Gazette of the French Republic and had not given rise to division prior to that date.

17. In his recapitulatory pleading of 20 February 2003, the applicant relied on the provisions of the Law of 3 December 2001. In his submission, that Law repealed the provisions of the Law of 3 January 1972 stipulating that the rights of heirs entitled as a result of that Law to a reserved portion of the estate could not be exercised to the detriment of *inter vivos* gifts granted prior to the date on which it came into force. He argued that as those provisions of the Law of 1972 had been repealed, he was entitled to bring an action for abatement under Article 1077-1 of the Civil Code even though the deed of *inter vivos* division had been signed on 24 January 1970.

18. In a judgment of 6 September 2004, the Béziers *tribunal de grande instance* held that the applicant was entitled to bring an action for abatement of the *inter vivos* division made by Mr and Mrs M. in 1970. It observed, *inter alia*, that section 14 of the Law of 3 January 1972, which had the effect of depriving illegitimate children of their inheritance rights where their parent had made gifts prior to the date on which that Law came into force, was contrary to Articles 8 and 14 of the Convention. The court held that that provision was also contrary to the Law of 3 December 2001, even if the latter had not expressly repealed the aforesaid section 14 of the Law of 1972. The court also found as follows:

“Section 25(1) of the Law of 3 December 2001 provides that this Law is applicable to successions already open on the date on which it comes into force; subject to any prior agreement between the parties or final court decision, the provisions of this Law are applicable to successions already open on the date of publication of the Law in the French Official Gazette where these have not given rise to division prior to that date.

In the present case there has not yet been division of Mrs M.’s estate; accordingly, the provisions relating to the new inheritance rights of illegitimate children whose father or mother was, at the time of their conception, bound by marriage to another person will apply.

Consequently, the repeal by the Law of 3 December 2001 of the provisions of the Civil Code introduced by the Law of 3 January 1972 render the new provisions

incompatible with section 14 of the Law of 1972, this latter provision being already contrary to Article 14 and Article 8 of the European Convention on Human Rights.

Indeed, it cannot reasonably be argued that the legislature, in enacting the Law of 3 December 2001, intended to maintain a provision contrary to the spirit and aim of the new Law.

Mr Fabris must therefore be deemed entitled to bring an action for abatement under Article 1077-1 of the Civil Code even though the deed of *inter vivos* division was signed on 21 January 1970.

... This court must therefore hold, in accordance with section 1 of the Law of 3 December 2001, that Mr Fabris has the same inheritance rights as his brother and sister with regard to his mother's estate. ...”

19. The children born of the applicant's mother's marriage appealed. In a judgment of 14 February 2006, the Montpellier Court of Appeal set aside the lower court's judgment and declared that the applicant was not entitled to bring an action for abatement of the *inter vivos* division made on 24 January 1970 by Mr and Mrs M. between their legitimate children. It held that such a ruling was not inconsistent with the general principle of equality of rights regardless of birth, as guaranteed by Article 1 of Protocol No. 1 and Articles 8 and 14 of the Convention. It observed that the sole purpose of section 14 of the Law of 1972 was to prohibit heirs who had acquired rights to a reserved portion of the estate under that Law – and extended by the Law of 3 December 2001 – from exercising them to the detriment of *inter vivos* gifts granted prior to 1 August 1972, without depriving the said heirs of their inheritance rights. It considered, above all, that there was objective and reasonable justification for section 14 of the Law of 1972 in the light of the legitimate aim pursued, namely, ensuring peaceful family relations by securing rights acquired in that context – sometimes long-standing ones – without at the same time creating an excessive imbalance between heirs. It pointed out that the provisions of the impugned section 14 were of limited scope both in terms of time and the type of voluntary disposition concerned.

20. The applicant lodged an appeal on points of law. In his opinion, which was communicated to the parties, the advocate-general at the Court of Cassation recommended dismissing the appeal. He made the following submissions to the judges of the First Civil Division of the Court of Cassation:

“... The difficulty submitted for your examination does indeed arise from the different approach proposed by the transitional provisions of the Laws of 1972 and 2001. Whilst neither successions already opened, nor *inter vivos* gifts granted prior to the coming into force of the Law of 1972, could be challenged under that Law, the Law of 2001 allows illegitimate children whose father or mother was, at the time of conception, bound by marriage to another person to assert inheritance rights in respect of successions already open prior to publication of that Law.

That difference justifies a non-restrictive application of the provisions of the Law of 2001. Only where there has been actual division, or an agreement has been reached between the parties or a final court decision delivered can the new inheritance rights of such children be excluded where the succession has already been opened. On account of the action for an abatement, the succession already opened on the date of publication of the Law of 2001 cannot have “given rise to division” on the date of publication of that Law.

I therefore find the submission that the Law of 3 December 2001 is not applicable difficult to sustain. The terms of section 14 of the Law of 3 January 1972, however, are entirely unambiguous. Heirs who have acquired rights under this Law to the reserved portion of the estate cannot exercise those rights “*to the detriment of inter vivos gifts granted before the Law came into force*”. Should, then, these provisions be deemed to have been tacitly repealed?

Without having regard to the time factor, the applicant maintains in his supplementary pleadings that it must be concluded from the clear contradiction between the transitional provisions of the two Laws that those governing the Law of 1972 have been tacitly repealed. Whilst the approach is different between the transitional provisions enacted in 1972 and those enacted in 2001, they do not, however, appear to me to conflict.

By excluding any challenge to *inter vivos* gifts granted prior to the coming into force of the Law of 1972, the legislature intended to guarantee the legal security required by such gifts. There is nothing to justify calling that legal security into question in 2002, since the earlier transitional provisions complement those laid down by the Law of 2002.

It is on those grounds that I invite you to dismiss the first ground of the appeal: the *inter vivos* gift made on 24 January 1970 cannot be called into question on account of inheritance rights arising from new rules concerning the determination of filiation. In that connection, whilst it remains debatable whether there had actually been division prior to publication of the Law of 3 December 2001, the existence of an *inter vivos* gift granted prior to the coming into force of the Law of 3 January 1972 is not in dispute. ...”

21. The Court of Cassation dismissed the appeal in a judgment of 14 November 2007. It found that the effect of section 25(2)(2) of the Law of 3 December 2001, in the version applicable to the facts of the present case, was that, subject to any prior agreement between the parties or a final court decision, the provisions relating to the new inheritance rights of illegitimate children whose father or mother was, at the time of conception, bound by marriage to another person were applicable only to successions that were already open on 4 December 2001 and had not given rise to division before that date. It found that as there had been division on Mrs M.’s death – that is, prior to 4 December 2001 – the above-mentioned provisions were not applicable.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

22. An *inter vivos* division (*donation-partage*) is a deed by which a person divides his or her property during his lifetime among all his presumptive heirs (including, since the Law of 3 January 1972, children born of adultery). The deed must be drawn up before a notary and an *inter vivos* division can concern only present, not future, property. All the heirs must participate in the *inter vivos* division. The property being divided is valued on the date of the gift, and cannot subsequently be revalued.

When making an *inter vivos* division, the donor determines the share of property to be distributed to his or her heirs. He or she can either divide the property into equal shares or give a larger share to one of his or her children, provided that this does not reduce the portion statutorily reserved to the heirs.

Each child is entitled to a minimum share (the “reserved portion”) in his or her parents’ estate and can bring an “action for abatement” (Article 1077-1 of the Civil Code) if the division of the estate at the time of death infringes that right.

The relevant provisions of the Civil Code read as follows:

Article 1075

“Anyone shall be entitled to divide and distribute his assets and his rights among his presumptive heirs.

This voluntary disposition may be made in the form of an *inter vivos* division or a will. It is subject to the formalities, conditions and rules prescribed for *inter vivos* gifts in the former case and those prescribed for wills in the latter case.”

Article 1075-5

“If not all the assets or rights left by the donor or testator on the date of his death have been included in the division, those assets or rights not included shall be assigned or distributed in accordance with the law.”

Article 1076

“An *inter vivos* division shall concern only present property.

The gift and the division can be done by separate deeds provided that the donor signs both deeds.”

23. Law no. 71-523 of 3 July 1971 introduced Articles 1077-1 et seq. of the Civil Code, instituting the possibility of an action for abatement, and came into force on 1 January 1972.

Article 1077-1 of the Civil Code

“A descendant who has not participated in the *inter vivos* division of the estate, or has received a lower share than his or her reserved portion, may bring an action for abatement if, when the succession is opened, there are insufficient assets not included in the division of the estate to constitute or complete his or her reserved portion, regard being had to any voluntary dispositions from which he may have benefited.”

Article 1077-2 of the Civil Code

“*Inter vivos* divisions are subject to the rules governing *inter vivos* gifts as regards determination of the amount, calculation of the reserved portion and reductions.

An action for abatement cannot be brought until after the death of the ascendant who has made the division or the surviving ascendant in the event of a division by the mother and father of their estate among all their issue. Such an action shall become time-barred five years after the death.

A child not yet conceived at the time of the *inter vivos* division may bring a similar action for the purpose of constituting or supplementing his or her reserved portion.”

Section 13 of the Law of 3 July 1971 provided:

“The provisions of this Law shall be directly applicable, irrespective of the date of the voluntary disposition in question, to successions opened after it comes into force. They shall also apply, subject to any contrary agreement, to estates that have not yet been liquidated, where no request for division of the estate has been lodged before 15 April 1971. ...”

24. The relevant provisions of the Civil Code, introduced by Law no. 72-3 of 3 January 1972 on filiation, provide:

Article 745

“Children or their issue shall inherit from their father and mother, grandfathers, grandmothers or other ancestors, irrespective of sex or primogeniture, and even if they are born of different marriages.

The estate shall devolve upon them in equal portions and per capita if they are all first-degree issue and heirs in their own right; they shall inherit per stirpes if all or some of them inherit through their ascendants.”

Article 757

“Children born out of wedlock shall, in general, inherit from their father and mother or other ancestors, as well as from their brothers and sisters or other collateral relatives, on the same terms as legitimate children.”

Article 760

“Children born out of wedlock whose father or mother was, at the time of their conception, bound by a marriage of which legitimate children were born are entitled to inherit from that parent in competition with the legitimate children; however, they shall each receive only half of the share to which they would have been entitled if all the children of the deceased, including themselves, had been legitimate.

The children born of the marriage injured by the adultery shall inherit in addition the fraction by which the adulterine child’s share of the estate is thus reduced; it shall be divided between them in proportion to their share in the estate.”

Section 14 of the Law of 3 January 1972 provided:

“The inheritance rights instituted by the present Law or resulting from the new rules regarding determination of filiation shall not be exercised in respect of successions that have been opened before it came into force.

The rights statutorily reserved to heirs that are instituted by the present Law or result from the new rules regarding determination of filiation shall not be exercised to the detriment of *inter vivos* gifts made before it came into force. ...”

25. On 4 December 2001 Law no. 2001-1135 of 3 December 2001 “on the rights of the surviving spouse and children born of adultery and modernising various provisions of the law of succession” was published in the Official Gazette. It abolished any difference in treatment of illegitimate children whose father or mother was, at the time of their conception, bound by marriage to another person. Section 25 is worded as follows:

“II. - The present Law shall apply to successions that are already open as of the date provided for in I, subject to the following exceptions:

... 2° Subject to any prior agreement between the parties or final court decision, the following shall apply to successions already open on the date of publication of the present Law in the Official Gazette of the French Republic and not having given rise to division prior to that date:

- the provisions relating to the new inheritance rights of illegitimate children whose father or mother was, at the time of conception, bound by marriage to another person; ...”

B. Relevant domestic case-law

26. According to the case-law of the Court of Cassation, an *inter vivos* division is a division of property in advance by which the donor’s property is divided between the joint donees and becomes a division of an inheritance on the donor’s death (Cass. Civ. I, 5 October 1994, Bull. 1994, I, no. 27). The First Civil Division of the Court of Cassation held that where an agreed division of property was challenged before a notary the inheritance was disputed and the estate could not therefore be regarded as having been

liquidated (Cass. Civ. I, 7 February 1989, Bull. 1989, I, no. 66, appeal no. 86-19.537).

27. In a judgment of 15 May 2008, delivered after the judgment that is the subject of this case, the Court of Cassation held that the provisions of the Law of 3 December 2001 relating to the new inheritance rights of children born of adultery were applicable to a succession opened before 1 August 1972 where this had not given rise to a division prior to 4 December 2001. In that case, which concerned Polynesia, the succession had opened in 1962 (Cass. Civ. I, 15 May 2008, Bull. 2008, I, no. 139, appeal no. 06-19.331). The court gave the following reasons for its judgment:

“Tafae X... died on 11 September 1962 leaving provision in his will for Mr Etienne F..., his son adopted under Tahitian law, as universal legatee, with a condition that he care for the two children conceived whilst he was bound by marriage to a person other than their mother: Mr Monoïhere X... and Rita X..., the latter deceased on 19 April 1996, and whom he had recognised after the death of his wife. During the proceedings brought by Mr F... for recognition of his ownership of a plot of land known as “Atioro”, situated in Teahupoo, which he claimed belonged to Tafae X... and for division of that land into three shares, Mr Monoïhere X ... sought an abatement of the legacy on grounds of an infringement of the rights of the heirs entitled to a reserved portion of the estate.

In dismissing Mr X’s claim, the Court of Appeal noted that the children born of adultery prior to the date on which the Law of 3 January 1972 came into force had no inheritance rights in respect of their parent’s estate, so had no legal basis for disputing the legacy left by Tafae X ... to Mr Etienne F

In ruling thus, whereas the provisions relating to the new rights of children born of adultery were applicable to Tafae X’s estate ... as the division had not been made before 4 December 2001, the Court of Appeal, which added a condition to the Law not contained therein, infringed the above-mentioned provisions.” ...

THE LAW

I. THE GOVERNMENT’S OBJECTION ON GROUNDS OF INADMISSIBILITY

28. The Government raised an objection based on the incompatibility *ratione temporis* of all the applicant’s complaints. The Government submitted that the complaints concerned a legal situation that had been established in 1970, that is, before the Convention had come into force in respect of France. In their submission, the situation complained of by the applicant had not arisen as a result of his exclusion from his mother’s estate by the national courts, but because the latter had respected the *inter vivos*

division freely undertaken by Mr and Mrs M., on 24 January 1970, under the legislation then in force. In that connection they relied on the judgment in the case of *Kopecký v. Slovakia* (no. 44912/98 [GC], § 38, ECHR 2004-IX), pointing out that the Convention imposed on the Contracting States “no specific obligation to provide redress for wrongs or damage caused prior to their ratification of the Convention”.

29. The applicant submitted that the application was based on the discrimination he had suffered as an heir statutorily entitled to a reserved portion of his mother’s estate and the resulting inheritance rights, which had to be assessed as at the date of Mrs M.’s death in 1994, and not the date of the deed of *inter vivos* division signed in 1970 as submitted by the Government. He pointed out that his maternal filiation had been established by a judgment of 24 November 1983 and that the succession had been opened on 28 July 1994, that is, twenty years after France ratified the Convention. Consequently, at the time of his mother’s death the applicant had been an heir statutorily entitled to a reserved portion and enjoyed the inheritance rights recognised by the domestic law applicable to illegitimate children.

30. The Court refers to the case of *Blečić v. Croatia* ([GC], no.59532/00, §§ 73 to 82, ECHR 2006-III), in which it reiterated the relevant principles relating to the Court’s jurisdiction *ratione temporis*. It stated, *inter alia*, that in order to establish the Court’s temporal jurisdiction it was essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated (see *Blečić*, cited above, § 82).

31. The Court reiterates that the deprivation of an individual’s property is in principle an instantaneous act and does not produce a continuing situation of “deprivation” of his rights (see, among other authorities, *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII, and, *mutatis mutandis*, *Ostojić v. Croatia* (dec.), no. 16837/02, ECHR 2002-IX). However, the Court points out in the instant case that the deed of *inter vivos* division drawn up before a notary in 1970 was destined, from when it was signed, to come into effect when the succession was opened, that is, on the death of the surviving spouse between Mr and Mrs M. As Mrs M. died in 1994, it was on that date that the deed of 1970 came into effect.

The Court observes that it was in 1994, when the succession was opened, that the applicant suffered the legal effects of a situation that had arisen as a result of a deed of 1970. It also notes that the applicant brought his action for abatement in 1998 to assert his inheritance rights.

32. The Court refers to the case of *Pla and Puncernau*, in which it had declared that it had jurisdiction to decide whether the Andorran courts’ interpretation of a testamentary disposition, which had been drafted in 1939,

was compatible with the guarantees of Articles 14 and 8 of the Convention taken together (see *Pla and Puncernau v. Andorra*, no. 69498/01, § 59, ECHR 2004-VIII). As in the case of *Pla and Puncernau*, the Court is required to determine here a question of alleged incompatibility with the Convention of the French courts' interpretation of domestic law (see *Pla and Puncernau*, cited above, § 45).

Accordingly, it cannot validly be maintained that the infringement of the applicant's rights predated the coming into force of the Convention in France.

33. Consequently, the Government's objection on grounds of inadmissibility for incompatibility *ratione temporis* must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1 AND ARTICLE 8 OF THE CONVENTION

34. The applicant complained that, as a child born of adultery, he was unable to assert his inheritance rights. He alleged that he was therefore the victim of unjustified discrimination on grounds of his status as a child born of adultery, with the result that there had been an infringement of his right to respect for his private and family life and his right to peaceful enjoyment of his possessions.

35. Accordingly, the applicant alleged that he was the victim of a violation of Articles 8 and 14 of the Convention, and of Article 1 of Protocol No. 1, which respectively read as follows:

Article 8

"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."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... birth ..."

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the 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.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

36. The Government raised an objection based on the inapplicability of Article 1 of Protocol No. 1 to the present application, submitting that it should be examined only under Article 8 of the Convention. They submitted that whilst, in the *Mazurek* and *Merger and Cros* judgments, the Court had found violations of Article 1 of Protocol No. 1 in respect of inheritance disputes concerning illegitimate children, this was only because the applicant’s parent had already died at the material time so the applicant had acquired rights to a share in the estate (see *Mazurek v. France*, no. 34406/97, § 42, ECHR 2000-II, and *Merger and Cros v. France*, no. 68864/01, § 32, 22 December 2004). They submitted that, contrary to the aforementioned cases, the applicant in the instant case did not have any right to a share in his late mother’s estate or property. They alleged, more specifically, that the applicant had inheritance rights but that, by virtue of the deed of *inter vivos* division of 1970, those rights lacked any real substance. The Government concluded that Article 1 of Protocol No. 1 was inapplicable (see, *mutatis mutandis*, *Alboize-Barthes and Alboize-Montezume v. France* (dec.), no. 44421/04, 21 October 2008).

With regard to Article 8 of the Convention, the Government submitted that the applicant had not relied on that provision, even in substance, before the domestic courts. They alleged that domestic remedies had thus not been exhausted in respect of that complaint

37. Regarding the applicability of Article 1 of Protocol No. 1, the applicant disputed the Government’s reasoning and affirmed that he had in fact acquired rights to a share in his mother’s estate when the succession was opened, in 1994. As his maternal filiation had been established by a court judgment of 24 November 1983, he had, on that date, automatically acquired rights to a share in his mother’s estate and thus her property. He observed, furthermore, that the Court had already held that where the succession had already been opened when an application was lodged, the application should first be examined under the head of an alleged infringement of the applicant’s right to the peaceful enjoyment of his possessions, in conjunction with the principle of non-discrimination (see, *mutatis mutandis*, *Inze v. Austria*, 28 October 1987, § 38, Series A no. 126, and *Mazurek*, cited above, § 24).

Regarding the Government's objection on the grounds that the applicant had not expressly relied on Article 8 of the Convention in the proceedings before the domestic courts, the applicant maintained that he had unequivocally relied on that provision in his pleadings at first instance and on appeal and also in his grounds of appeal to the Court of Cassation.

38. The Court notes that it has had the opportunity, in previous cases, to examine allegations of difference in treatment in inheritance cases, both under Article 14 taken in conjunction with Article 8 (see *Marckx v. Belgium*, 13 June 1979, § 54, Series A no. 31; *Pla and Puncernau*, cited above, § 42 ; and *Brauer v. Germany*, no. 3545/04, 28 May 2009) and under Article 14 taken in conjunction with Article 1 of Protocol No. 1 (see *Inze*, cited above, § 38; *Mazurek*, cited above; and *Merger and Cros*, cited above). In the present case it observes that the applicant relied on the three provisions of the Convention in his application and expressly referred to them before the domestic courts. Accordingly, it rejects the objection based on inadmissibility for failure to exhaust remedies concerning Article 8 of the Convention.

39. With regard to Article 1 of Protocol No. 1, the Court must decide whether the applicant's interests fell "within the ambit" or "within the scope" of that Article (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 41, ECHR 2005-X).

40. Without expressing a view at this stage as to whether the applicant has a right to receive a share in his mother's estate, the Court observes that it cannot validly be argued, having regard to the cases of *Mazurek* and *Merger and Cros* cited above, that the applicant's interests did not fall "within the ambit" or "within the scope" of Article 1 of Protocol No. 1. The present case can be distinguished in this respect from the case of *Alboize-Barthes* and *Alboize-Montezume* referred to by the Government, in which it was clear that the applicants did not have any right to a share in their father's estate because this had been fully and finally administered well before proof of their filiation had been established.

41. In cases such as the present one, concerning a complaint under Article 14 taken in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of his inheritance rights on a discriminatory ground covered by Article 14, the relevant test is whether, irrespective of the question as to the applicable Law, the applicant would have had a right, enforceable under domestic law, to receive a share in the estate in question (see *Stec*, cited above, § 55). Although Article 1 of Protocol No. 1 does not include a right to inherit or obtain rights to a share in a deceased parent's estate, if a State does decide to create particular inheritance rights it must do so in a manner which is compatible with Article 14. In the present case the applicant's maternal filiation was recognised in a judgment of 1983.

42. It follows that the applicant's interests fall within the scope of Article 1 of Protocol No. 1 and that of the right to peaceful enjoyment of possessions secured by that provision, which suffices to render Article 14 of the Convention applicable.

43. The Court concludes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court notes, moreover, that no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

44. The applicant complained that he had been denied any share at all in his mother's estate as a result of the domestic courts' refusal to recognise his right to bring an action for abatement in respect of the deed of *inter vivos* division; this had, he alleged, been to the detriment of his rights as heir statutorily entitled to a reserved portion of the estate. He submitted that the discrimination he had suffered was a direct consequence of the interpretation of the transitional provisions of the Laws of 3 January 1972 and 3 December 2001 by the Court of Appeal and the Court of Cassation. Like the court of first instance, he contended that section 14 of the Law of 3 January 1972, which had had the effect of depriving illegitimate children of their inheritance rights where their parent had made a gift prior to the date on which the Law had come into force, should be disregarded as being contrary to Articles 8 and 14 of the Convention. In his submission, the provisions of the Law of 3 December 2001 should apply to the present case because his mother's succession had opened on the date of publication of the Law but had not yet given rise to division. The deed of *inter vivos* division of 1970 did not itself produce final and unalterable effects, since it contained a reserve clause retaining title to all the immovable property and a sum of FRF 130,000. He added that the deed had also contained a provision whereby the donors retained throughout their lives the possibility of revoking the terms of the deed and securing the return of the property.

45. Relying on the Court's relevant case-law, the applicant observed that very weighty reasons needed to be put forward before a difference in treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention (see *Inze*, cited above, § 41; *Mazurek*, cited above, § 49; and *Brauer*, cited above, § 40). He submitted that the inequality of treatment he had suffered was not based on any objective and reasonable justification. He argued that his inability to bring an action for abatement conflicted with the public-policy provisions relating to the reserved portion of an estate. He alleged, further, that maintaining

transitional provisions enacted by the legislature almost forty years ago led to totally unjustified inconsistencies and disparities.

46. The Government argued that it was not the court decisions in issue which had prevented the applicant from obtaining a share of his mother's estate, but a deed of 1970 that had resulted in an established legal situation which could no longer be challenged in the proceedings brought by the applicant several decades later. The Government did not dispute that at the time of his mother's death the applicant had had rights in respect of her estate. Nevertheless, as all the assets belonging to Mr and Mrs M. had already been disposed of under the deed of *inter vivos* division, when the succession was opened there were no further assets available to satisfy the applicant's rights. That situation, which had arisen as a result of a deed of 1970, could no longer be challenged either on the basis of the Law of 3 January 1972 or the Law of 3 December 2001.

47. The Government observed, further, that statutory and regulatory provisions remained in force as long as they were not repealed (even if they fell into disuse, and even if used to opposite effect), unless new provisions explicitly repealed them or were deemed to be incompatible with them. In the instant case, they argued, the transitional provisions of the Laws of 1972 and 2001 were not incompatible in any respect.

48. The Government did not see how the refusal to call into question the legal situation established in 1970 could be regarded as an interference with the applicant's right to respect for his family life within the meaning of Article 8 of the Convention. They added that if the Court were to consider that there had been an interference, this was prescribed by section 14(2) of the Law of 1972. In their submission, the Montpellier Court of Appeal had been correct in ruling that the transitional provisions of the Law of 1972 prohibited heirs statutorily entitled to the reserved portion from exercising those rights to the detriment of *inter vivos* gifts granted prior to 1 August 1972, without thereby depriving such heirs of their inheritance rights.

49. According to the Government, the transitional provisions provided for in section 14 of the Law of 1972 pursued a legitimate aim, namely, ensuring peaceful family relations by securing established rights, sometimes long-standing ones. The decisions of the domestic courts were correct for overriding and obvious reasons of legal certainty.

2. *The Court's assessment*

50. The Court considers that since the succession was already open when the application was lodged, the complaint should first be examined under the head of an alleged infringement of the applicant's right to the peaceful enjoyment of his possessions, in conjunction with the principle of non-discrimination (see *Mazurek*, cited above, § 24).

51. The Court would stress that it has previously been required to give a ruling, in the cases of *Mazurek* and *Merger and Cros*, cited above, on the

question of the division of an estate between a legitimate child and an illegitimate child conceived while his parent was bound by marriage to another person. It had found no ground in those cases on which to justify discrimination based on birth outside marriage. It had pointed out that a child born of adultery could not in any event be blamed for circumstances for which he or she was not responsible and had found a violation of both Articles taken together (see *Mazurek*, cited above, §§ 54 and 55).

52. The Court reiterates that, with regard to the inheritance rights of children born of adultery, the relevant French legislation was amended by the Laws of 3 January 1972 and 3 December 2001, which modernised the law of succession. The Law of 1972 provided that children born of adultery, like legitimate children, could henceforth claim a share in the estate of their father or mother who, at the time of their conception, was bound by marriage to another person. It stated, however, that a child born of adultery would receive only half the share of a legitimate child. The Law of 3 December 2001 was enacted after the Court had found against France in the aforementioned case of *Mazurek*. Since that Law, children born of adultery have the same inheritance rights as legitimate children.

53. The Laws of 3 January 1972 and 3 December 2001 had introduced, through transitional provisions, specific rules as to their respective application to successions already under way. Section 14 of the Law of 1972 provided that “the rights statutorily reserved to heirs that are instituted by the present Law or result from the new rules concerning the determination of filiation shall not be exercised to the detriment of *inter vivos* gifts made before the Law came into force”. Accordingly, that transitional provision prohibited any challenge to *inter vivos* gifts granted before that Law. Section 25 of the Law of 3 December 2001 provided that the Law was applicable to successions already under way from the date of its application. Section 25(2)(2) added, further, that subject to any prior agreement between the parties or a final judicial decision, the provisions of that Law were applicable to successions already under way on the date of publication of the Law in the Official Gazette of the French Republic where these successions had not given rise to division prior to that date.

54. In the present case the Law of 3 December 2001 was passed after the applicant had brought an action for abatement in 1998. He nonetheless relied on that Law before the domestic courts, which expressly based themselves on those provisions when upholding his action for abatement, at first instance, and when dismissing it on appeal.

55. The Court observes that the heart of the dispute is thus the interpretation by the domestic courts of the Law applicable to the present case, through the transitional provisions of the Laws of 3 January 1972 and 3 December 2001 (see paragraphs 18 to 21 above).

In that connection, whilst the authorities enjoy a wide margin of appreciation in examining the various competing rights and interests

(see *De Diego Nafria v. Spain*, no. 46833/99, § 39, 14 March 2002), the Court's task is confined to determining whether, in the circumstances of the case, the applicant was a victim of discrimination contrary to Article 14 of the Convention (see *Pla and Puncernau*, cited above, § 57). Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice, appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention (see *Larkos v. Cyprus* [GC], no. 29515/95, §§ 30-31, ECHR 1999-I).

56. In the instant case the Court notes that, according to the Court of Appeal and the Court of Cassation, there existed in 1998, when the applicant brought his action for abatement of the *inter vivos* division, a legal situation that had been established since 1970, namely, a gift of the property belonging to Mr and Mrs M. to their legitimate children and division of that property between them.

57. As observed by the Court of Appeal, in excluding any challenge to *inter vivos* gifts made before the Law of 1972 came into force, the legislature intended to ensure the legal certainty that such gifts required. It thus observed that the provisions of section 14 of the Law of 3 January 1972, which had not been repealed by the Law of 3 December 2001, provided objective and reasonable justification as regards the legitimate aim pursued, namely, ensuring peaceful family relations by securing rights established in that context, sometimes long-standing ones. The Court of Cassation also based its decision on the fact that the estate had been divided between the two legitimate children on the mother's death before the Law of 3 December 2001 came into force, concluding that the provisions of that Law relating to the new inheritance rights of illegitimate children were not applicable in the present case. That interpretation of the relevant provisions by the domestic courts pursued a legitimate aim, namely ensuring the principle of legal security, "which is necessarily inherent in the law of the Convention as in Community law" (see *Marckx v. Belgium*, 13 June 1979, § 58, Series A no. 31, and *E.S. v. France* (dec.), 10 February 2009, no. 49714/06). Unlike the cases of *Mazurek* and *Merger and Cros*, cited above, in which there had not yet been division of the estate, the Court considers that the difference in treatment between Mr and Mrs M.'s legitimate children and the applicant regarding their rights in respect of their mother's estate, was proportionate to that aim. In that connection the Court finds that the domestic courts struck a proper balance between the competing interests – namely, the long-established rights of Mr and Mrs M.'s legitimate children and the pecuniary interests of the applicant –

by applying the transitional provisions of the Laws of 1972 and 2001 in that specific situation.

58. Accordingly, the interpretation by the Court of Appeal and the Court of Cassation of the statutory provisions applicable to the dispute in question does not appear unreasonable or arbitrary or blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention.

Having regard to all the foregoing, the Court concludes that there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

59. Accordingly, there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

60. In the absence of separate arguments, the Court considers that it is unnecessary to examine separately the complaint under Article 14 of the Convention taken in conjunction with Article 8 (see, *mutatis mutandis*, *Mazurek*, cited above, § 56).

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds* by five votes to two that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;
3. *Holds* unanimously that it is not necessary to examine separately the complaint lodged under Article 14 of the Convention taken in conjunction with Article 8.

Done in French, and notified in writing on 21 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Spielmann and Judge Costa is annexed to this judgment.

D.S.
C.W.

JOINT DISSENTING OPINION OF JUDGE SPIELMANN AND JUDGE COSTA

We are unable to subscribe to the majority finding of no violation for the following reasons.

In substance, the finding of no violation is based on the fact that the division of the estate had already taken effect in 1994, on the mother's death, and thus before the coming into force of the Law of 2001 which was enacted by the legislature in order to render the legislation conform with our Court's judgment in the case of *Mazurek* (see *Mazurek v. France*, no. 34406/97, ECHR 2000-II) but whose transitional provisions preclude any challenge to the division in question, unfavourable to the applicant. The reasoning is that the Law of 2001 is not arbitrary, but protects legal certainty and the established rights of the other children.

We are not convinced by that reasoning, however attractive it may at first appear. We consider the principle of non-discrimination to be more important in law and equity than those of established rights and legal certainty. Moreover, it would be paradoxical for a Law that is supposed to draw the consequences from one of our judgments to apply that judgment only to successions that have not been opened. This is particularly true in that, between delivery of the judgment in *Mazurek* and the enactment of the Law of 2001 (and thus before the transitional provisions of that Law), a number of courts, starting with the Montpellier *tribunal de grande instance*, did apply our judgment and ceased applying the former Law (Article 760 of the Civil Code) in favour of the Convention as interpreted by the Court, in accordance with Article 55 of the French Constitution. Lastly, to conclude in the present case that there has been no violation is tantamount to allowing the legislature to disregard retroactively – for reasons that may, moreover, be valid – the binding force of judgments under Article 46 of the Convention. We would point out that in the case of *Mazurek* the State was ordered, under Article 41, to pay the applicant, in respect of pecuniary damage, a sum corresponding to the difference between the amount he should have received and the amount he actually received. Accordingly, our judgment was necessarily of retroactive effect.

With regard, more specifically, to the present case, we can but note that whilst the date on which the succession was opened (on the death of the mother in 1994) is not in dispute between the parties, they disagree as to the date on which division of the estate took effect. The Government, relying on the judgments of the Court of Appeal and the Court of Cassation, considered that the division of the estate took effect in 1994 on the death of the applicant's mother, whilst the applicant considered that there had not been division of the estate on that date.

It should first be pointed out that, in his letter of 7 September 1994, the notary administering the estate informed the applicant that he was entitled to

a share in his mother's estate, namely the reserved portion, and that, as a child born of adultery, he was entitled to only half the share that would devolve on a legitimate child, bringing his share to one eighth (see paragraph 13 of the judgment).

Secondly, it should be noted that when Mr and Mrs M. signed the deed of *inter vivos* division in 1970, they solemnly declared that they had no other offspring than the children named in the deed. Consequently, the applicant challenged the deed of *inter vivos* division (see paragraph 11 of the judgment) as soon as he obtained recognition of his status as the illegitimate child of his mother (by a judgment of 1983). That action by the applicant in 1984 shows that a dispute had arisen regarding the inheritance ten years before his mother's death.

The interpretation by the Court of Appeal and the Court of Cassation of the transitional provisions of the Laws of 1972 and 2001 had the effect of totally depriving the applicant of his inheritance rights in respect of his mother's estate, in favour of her two legitimate children.

The Convention, which is a dynamic text and entails positive obligations for States, is a living instrument that is to be interpreted in the light of present-day conditions, and the member States of the Council of Europe attach importance to the question of equality, in terms of civil rights, between children born in and children born out of wedlock (see *Mazurek*, cited above, § 30; *Pla and Puncernau v. Andorra*, no. 69498/01, § 62, ECHR 2004-VIII; and *Brauer v. Germany*, no. 3545/04, § 40, ECHR 2009-...).

We cannot find any sufficient grounds today to justify an interpretation of the legal provisions that would result in discrimination based on birth outside marriage, especially as the applicant was denied any share in his mother's estate, his action for an abatement having been declared inadmissible.

Moreover, the case-law on the question is now well established (see *Mazurek*, cited above; *Pla and Puncernau*, cited above; *Merger and Cros v. France*, no. 68864/01, 22 December 2004; and *Brauer*, cited above) and, having regard to the circumstances of the case, the domestic courts should have given precedence to the transitional legislative provision in a manner most in keeping with the Convention as interpreted in the Court's case-law. As there were conflicting views as to which Law was applicable, having regard to the transitional provisions of the two aforementioned Laws, they should have applied the provision that was the most favourable to the applicant, a child born of adultery. The domestic courts' interpretation of the applicable Law could not be done purely in the light of the context prevailing at the time of the *inter vivos* division of 1970, especially as the applicant's filiation had been established subsequently, which they should have taken into account (see, *mutatis mutandis*, *Pla and Puncernau*, cited above, § 62).

In our view, there is therefore no reasonable relationship of proportionality between the means employed and the aim pursued.

Accordingly, we are of the opinion that there has been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.