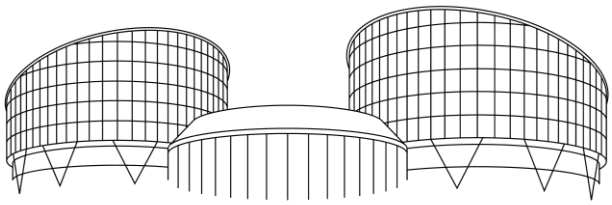

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF FABRIS v. FRANCE

(Application no. 16574/08)

JUDGMENT
(Merits)

STRASBOURG

7 February 2013

This judgment is final but it may be subject to editorial revision.

In the case of Fabris v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Josep Casadevall, *President*,
Françoise Tulkens,
Nina Vajić,
Lech Garlicki,
Karel Jungwiert,
Elisabeth Steiner,
Alvina Gyulumyan,
Egbert Myjer,
Dragoljub Popović,
George Nicolaou,
András Sajó,
Ledi Bianku,
Nona Tsotsoria,
Işil Karakaş,
Guido Raimondi,
Paulo Pinto de Albuquerque,
André Potocki, *judges*,
and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 4 April and 24 October 2012,

Delivers the following judgment, which was adopted on the last-mentioned 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 at the Ministry of Foreign Affairs.

3. Relying on Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 and Article 8 of the Convention, the applicant, a child "born of adultery", alleged that he had suffered discrimination on grounds of birth regarding the division of his mother's estate.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 10 February 2010 the President of

the Section decided to communicate it to the Government. As provided for by former Article 29 § 3 of the Convention (current Article 29 § 1) and Rule 54A, it decided to examine the merits of the application at the same time as its admissibility. On 21 July 2011 it was declared admissible by a Chamber of the Fifth Section composed of the following judges: Dean Spielmann, President, Jean-Paul Costa, Boštjan M. Zupančič, Mark Villiger, Isabelle Berro-Lefèvre, Ann Power and Angelika Nußberger, judges, and also of Claudia Westerdiek, Section Registrar. It held, by five votes to two, that there had been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 and unanimously that there was no need to examine separately the complaint based on Article 14 of the Convention taken together with Article 8.

5. On 9 September 2011 the applicant requested that the case be referred to the Grand Chamber under Article 43 of the Convention and Rule 73. On 28 November 2011 a panel of the Grand Chamber granted the request.

6. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant and the Government each filed a memorial before the Grand Chamber.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 4 April 2012 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mrs A.-F. TISSIER, *Co-Agent*,
Mrs E. TOPIN, Ministry of Foreign and European Affairs,
Mrs M.-A. RECHER, Ministry of Justice,
Mrs C. AZAR, Ministry of Justice, *Advisers*;

(b) *for the applicant*
Mr A. OTTAN, lawyer,
Mrs M. OTTAN, lawyer, *Counsel*.

The Court heard addresses by Mr Ottan and Mrs Tissier.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1943 and lives in Orléans.

A. Background to the case

10. The applicant was recognised by his father at birth. 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.L., born in 1941. By a decree of 28 February 1967, the applicant's mother and her husband, Mr M., were pronounced judicially separated.

11. By a deed of 24 January 1970, Mr and Mrs M. divided their property *inter vivos* (*donation-partage*) between their two legitimate children. The deed, which was signed before a notary, provided for a life interest in their favour and for revocation of the gift in the event of a breach of its terms and conditions. When signing the deed Mr and Mrs M. declared that the two donees were their only offspring.

12. 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.

13. In 1984 the applicant expressed his intention to challenge the 1970 deed of *inter vivos* division. On that date his lawyer informed him that the deed could not be challenged during the donor's lifetime and that his only option was to bring an action for abatement within five years of the donor's death.

14. The applicant's mother died in July 1994. The notary administering the estate informed the applicant by letter of 7 September 1994 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 (at that time the applicable law provided that a child "born of adultery" could inherit only half the share of a legitimate child – see paragraphs 26 and 27 below). He added that the applicant's half-brother and half-sister were willing to pay him 298,311 French francs (FRF) (approximately 45,477 euros (EUR)) in cash, while specifying that "in the event of a reduction following the subsequent birth of a child, only a monetary abatement [was] possible and in no circumstances an abatement in kind". No agreement was reached between the three children.

B. Action for abatement brought by the applicant

15. By a writ of action dated 7 January 1998, the applicant brought proceedings against his half-brother J.L. and his half-sister A. seeking an abatement of the *inter vivos* division in accordance with Article 1077-1 of the Civil Code (see paragraph 25 below). He claimed a reserved portion equal to their share of his mother's estate.

16. After the Court had found against France in the case of *Mazurek v. France* (no. 34406/97, 1 February 2000, ECHR 2000-II), France passed Law no. 2001-1135 of 3 December 2001 (hereafter "the 2001 Law"), amending its legislation and granting children "born of adultery" identical inheritance rights to those of legitimate children (see paragraph 28 below). That new Law came into force before judgment was given in the proceedings instituted by the applicant. Its transitional provisions provided that, subject to any prior agreement between the parties or final court decision, the provisions relating to the new inheritance rights of children born outside marriage 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 (4 December 2001) and had not given rise to division prior to that date (section 25(2) of the 2001 Law, see paragraph 30 below).

17. In his recapitulatory pleading of 20 February 2003, the applicant relied on the provisions of the 2001 Law. In his submission, that Law repealed section 14 of the Filiation Law of 3 January 1972 (hereafter "the 1972 Law", see paragraphs 27 and 29 below), a transitional provision stipulating that the rights of heirs entitled under 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. The applicant argued that as that provision 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.

1. Judgment at first instance

18. In a judgment of 6 September 2004, the Béziers *tribunal de grande instance* upheld the applicant's claim. It found that section 14 of the 1972 Law was contrary to Articles 8 and 14 of the Convention. The court referred in that connection to the *Marckx v. Belgium* judgment (13 June 1979, Series A no. 31) which recognised "that family life also comprise[d] interests of a material kind", and to several judgments of the Court "which ha[d] continued to rule that differences of treatment in inheritance matters between children born within and children born outside marriage were discriminatory (*Mazurek*, *Inze* and *Vermeire*)". It also found that the provision was contrary to the new 2001 Law. It held that the applicant had

the same inheritance rights in respect of the estate as his half-brother and half-sister, for the following reasons:-

> "Section 25(1) of the Law of 3 December 2001 provides that this Law is applicable from the date on which it comes into force to successions that are already open; 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 Official Gazette of the French Republic 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 children born outside marriage whose father or mother was, at the time of their conception, bound by marriage to another person will apply. ...
>
> 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."

2. Judgment on appeal

19. In October and December 2004 J.L. and the heirs of A., who had died during the proceedings, appealed against the judgment.

20. In a judgment of 14 February 2006, the Montpellier Court of Appeal set aside the lower court's judgment and declared that, under section 14(2) of the Law of 1972, the applicant was not entitled to bring an action for abatement of the *inter vivos* division. It held that

> "... under [that section], the rights acquired to a reserved portion of the estate under the present Law or arising from the new rules regarding the establishment of filiation cannot be exercised to the detriment of *inter vivos* gifts granted before that Law came into force.
>
> This provision, which lays down a general rule regarding, among other things, the retroactive effects of the new rules relating to the establishment of filiation deriving from the Law of 3 January 1972, has not been expressly repealed by the Law of 3 December 2001; neither can it be deduced from the terms of the later Law that it has been tacitly repealed, firstly because its provisions do not conflict with the later Law and secondly because it was not limited solely to application of Article 915 of the Civil Code, which was repealed by that Law."

According to the Court of Appeal, that conclusion did not conflict 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:

> "Firstly, the sole purpose of the provisions of section 14 of the Law of 1972 is to prohibit heirs who have 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. Next, there is 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 being observed that [these provisions] are of limited scope both in terms of time and the type of voluntary disposition concerned."

3. Judgment of the Court of Cassation

21. The applicant lodged an appeal on points of law. In his grounds of appeal based on a violation of Article 1 of Protocol No. 1 and Article 14 of the Convention, he argued that peaceful family relations could not take precedence over equality, in terms of civil rights, between children born within marriage and children born outside marriage.

22. 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:

"... should the court not consider that the succession that had been opened did not give rise to division before the date of publication of the Law, seeing that an action for abatement was pending on that date?

The difficulty submitted for your examination does indeed arise from the different approach proposed by the transitional provisions of the 1972 and 2001 Laws. Whilst neither successions already open, 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 children born outside marriage 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 open 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 2001 Law.

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 establishment 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. ..."

23. The Court of Cassation dismissed the appeal in a judgment of 14 November 2007, substituting of its own motion a new legal ground. It found that the effect of the transitional provisions of the 2001 Law was that, subject to any prior agreement between the parties or a final court decision, the provisions relating to the new inheritance rights of children born outside marriage 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 (see paragraph 16 above). It found that as division had been triggered by Mrs M.'s death – in July 1994, and thus prior to 4 December 2001 – the above-mentioned provisions were not applicable.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. *Inter vivos* division of property and action for abatement

24. Under French law, estate-owners can divide their estate themselves between their heirs. An *inter vivos* division (*donation-partage*) is a deed by which the donor divides his or her property immediately among his or her heirs (*inter vivos* transfer). It is an anticipated, definitive and negotiated division. Title to the property is transferred at the time of the donation, which is also the first (anticipated) step in a succession that will be opened later. According to the case-law of the Court of Cassation, an *inter vivos* division becomes a division for the purposes of inheritance on the donor's death. The succession is both opened and definitively liquidated or divided on the date of the ascendant's death (Court of Cassation, 7 March 1876; First Civil Division, 5 October 1994, Bull. 1994, I, no. 27).

25. A descendant who has not received a share of the estate may claim his or her reserved portion from the assets existing when the succession is opened. If there are insufficient assets in the estate, he can bring an action for abatement within five years of the donor's death. This was the remedy used by the applicant in accordance with Articles 1077-1 and 1077-2 of the Civil Code, which read as follows at the material time:-

Article 1077-1

"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

"*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."

26. Articles 913 and 915 of the Civil Code on "the disposable portion of assets" in *inter vivos* gifts and wills, which have since been repealed, provided as follows:

Article 913

"Voluntary dispositions, whether granted *inter vivos* or by will, shall not exceed half of the donor's assets where he leaves only one child on his death; one third where he leaves two children; and one quarter where he leaves three or more children; no distinction shall be made between legitimate children and children born outside marriage, save in the case provided for in Article 915."

Article 915

"A child born outside marriage whose father or mother was, at the time of his conception, bound by marriage to another person is entitled to inherit under his parent's estate in competition with the legitimate children born of the marriage; account shall be taken of his presence when calculating the disposable portion; however, he shall receive only half the share to which he would have been entitled if all the children, including himself, had been legitimate.

The children born of the marriage injured by the adultery shall inherit in equal shares the portion by which the adulterine child's share of the estate is thus reduced."

B. Development of the law relating to children "born of adultery"

27. The inheritance laws relating to children born outside marriage were amended by the Filiation Law of 1972, which conferred equal status on them for inheritance purposes save for the case of children "born of adultery" (see *Mazurek*, cited above, § 17), whose rights were limited to "half the share to which they would have been entitled if all the children of the deceased, including themselves, had been legitimate" (see former Articles 757 and 760 of the Civil Code, ibid; see also, regarding gifts, paragraph 26 above*)*.

28. The 2001 Law, which was enacted following the Court's judgment in the case of *Mazurek*, eliminated the restrictions on inheritance rights of children "born of adultery" and conferred equal status for inheritance

purposes on all children, be they legitimate, born to unmarried parents or "born of adultery". Section 1 provides that "no distinction shall be made between birth within or birth outside marriage when determining which relatives are entitled to inherit" (Article 733 of the Civil Code) and that "children or their issue shall inherit from their father and mother or other ascendants, irrespective of sex or primogeniture, and even if they are born of different unions" (Article 735 of the Civil Code). The provisions governing the restriction on the reserved portion of children "born of adultery" and their ability to receive gifts have been repealed. Lastly, order no. 2005-759 of 4 July 2005 reforming the filiation rules establishes the principle of equal status regardless of birth, thus eliminating the very concepts of legitimate children and children born outside marriage.

C. Transitional provisions

1. Transitional provisions of the 1972 Law

29. These provisions limited the scope of the reform introduced by the 1972 Law. Section 14 had excluded any immediate application of the new inheritance rights of children born to unmarried parents or "of adultery", in successions opened before it came into force, and had precluded such children from challenging *inter vivos* gifts granted before the Law came into force on 1 August 1972. It was on the basis of that provision that the Montpellier Court of Appeal dismissed the applicant's action (see paragraph 20 above).

2. Section 25 of the 2001 Law

30. Under section 25(1) of the 2001 Law, entry into force of that Law was in principle deferred until 1 July 2002. However, regarding the repeal of the provisions of the Civil Code concerning the rights of children "born of adultery", the legislature decided, exceptionally, that the Law would come into force immediately on the date of publication of the Law in the Official Gazette, that is, on 4 December 2001. Accordingly, section 25(2) provides:

> "The present Law shall apply to successions that are already open from [1 July 2002], 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:
>
> (a) the provisions relating to the new inheritance rights of children born outside marriage whose father or mother was, at the time of conception, bound by marriage to another person; ..."

31. In so far as it concerns the rights of children "born of adultery", the 2001 Law is therefore applicable to all successions open on 4 December 2001, on condition that there has been no division prior to that date.

3. Law of 23 June 2006 reforming successions and voluntary dispositions

32. This Law amended section 25(2) of the 2001 Law by repealing the terms "whose father or mother was, at the time of their conception, bound by marriage to another person". Section 25(2)(2) no longer mentions whether a child was born of adultery or not.

4. Relevant case-law of the Court of Cassation

33. In a judgment of 6 January 2004 (Court of Cassation, First Civil Division, Bull. 2004, I, no. 10) the Court of Cassation applied the transitional provisions of the 2001 Law, without referring to the provisions of the Convention, in quashing an appeal judgment of 2002 which had set aside gifts granted to a child "born of adultery" under the old provisions whereas there had not yet been division of the estate. In a judgment of 7 June 2006 (Court of Cassation, First Civil Division, Bull. 2006, I, no. 297), also applying the transitional provisions, the Court of Cassation dismissed an appeal by a child "born of adultery" who had received half the share that he would have received if he had been a legitimate child as division had been made before 4 December 2001 (on 13 March 1996 in that case). In a judgment of 15 May 2008, the Court of Cassation held that the provisions of the 2001 Law relating to the new rights of children "born of adultery" were applicable to a succession opened before 1 August 1972 (in 1962 in that case) where this had not given rise to a division prior to 4 December 2001 (Court of Cassation, First Civil Division, Bull. 2008, I, no. 139).

III. ELEMENTS OF COMPARATIVE LAW

34. In the great majority of the countries studied (forty States out of forty-two) a child's status for inheritance purposes is independent of the marital status of their parents. Twenty-one countries confer equal status on all children, while nineteen others (Albania, Azerbaijan, Bosnia-Herzegovina, Cyprus, Spain, Greece, Italy, Latvia, Luxembourg, Republic of Moldova, Monaco, Montenegro, San Marino, Serbia, Slovakia, Slovenia, the United Kingdom, Turkey and Ukraine) make a distinction between legitimate children and children born to unmarried parents/of adultery, but expressly grant them equal status for inheritance purposes. The concept of a child "born of adultery" is not at all common, such children generally being put in the same category as children born outside marriage. Some

differences between legitimate children and children born outside marriage/ "of adultery" still exist, for inheritance purposes, in Malta. The only State Party that still makes a clear distinction, for inheritance purposes, regarding children born outside marriage is Andorra, where the latter are treated less favourably than legitimate children.

IV. RELEVANT DOCUMENTS AND EUROPEAN CASE-LAW

35. The Committee of Ministers Rapporteur Group (GR-J) is still examining the draft recommendation [CM/Rec (2012)] to member states on the rights and legal status of children and parental responsibilities (with the explanatory memorandum) which has been presented to the Committee of Ministers. The draft recommendation seeks to replace the obsolete standards of the European Convention of 1975 on the Legal Status of Children Born out of Wedlock (Convention which France has not ratified), which are no longer in conformity with the Court's case-law. The text, as currently drafted, contains a central element which is the principle of non-discrimination laid down in Principle 1, which provides:

> "Children should not be discriminated against on grounds such as ... birth ...
>
> In particular, children should not be discriminated against on the basis of the civil status of their parents."

Principle 5 – "Rights of succession" – provides that subject to the definition of parents given in Principle 2 and Principle 17(2) (posthumous conception), "children should regardless of the circumstances of their birth have equal rights of succession to the estate of each of their parents and of those parents' family."

The relevant paragraph of the explanatory memorandum is worded as follows:

> "22. Having regard to the general principle of non-discrimination as set out in Principle 1 and to the Court's rulings in Mazurek v. France, Camp and Bourimi v. the Netherlands and Marckx v. Belgium, that ruled respectively that discrimination against children of adulterous relationships and children born out of wedlock with regard to inheritance rights violated Article 14 of the ECHR, taken in conjunction with Article 1 of the first Protocol in the former case, and Article 8 in the latter case, Principle 5 states in broad terms that children should have equal rights of succession regardless of the circumstances of their birth. In this respect, it has a wider application than Article 9 of the 1975 European Convention on the Legal Status of Children born out of Wedlock which gives such children the same rights of succession as children born in wedlock. Principle 5 is subject to the definition of parents given in Principle 2."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1

36. The applicant complained that, as a child "born of adultery", he was unable to assert his inheritance rights and that such unjustified discrimination persisted after the Court's judgment in *Mazurek* and despite the enactment of the 2001 Law.

He alleged that there had been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, which read respectively as follows:

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. The Chamber judgment

37. In its judgment of 21 July 2011 the Chamber held that the applicant's complaint fell within the scope of Article 1 of Protocol No. 1, which sufficed to render Article 14 of the Convention applicable. As his maternal filiation had been recognised in 1983, the applicant had an interest, enforceable in the domestic courts, in asserting his right to receive a share of his mother's estate in a manner compatible with Article 14 of the Convention (see paragraphs 38-42 of the Chamber judgment).

38. The Chamber observed, on the merits, that the 1972 and 2001 Laws had put in place specific transitional provisions in respect of the new inheritance rights enshrined in those Laws. It noted that the domestic courts had considered that the applicant could not benefit from those provisions at the time of lodging his action for abatement of the *inter vivos* gift of 1970. According to the Court of Appeal, the transitional provision of the 1972 Law precluded any challenge to *inter vivos* gifts granted before the Law

came into force. The Court of Cassation had held that as division of the estate had taken place on the mother's death in 1994, this precluded – under section 25(2) of the 2001 Law – application of the new provisions providing for equal inheritance rights. Those interpretations of domestic law pursued the legitimate aim of safeguarding the principle of legal certainty and the long-standing rights of the legitimate children. Moreover, they did not appear unreasonable, arbitrary or blatantly inconsistent with the prohibition of discrimination. The Chamber distinguished the specific situation in the present case from the cases in which there had not yet been division of the estate (*Mazurek*, cited above, and *Merger and Cros v. France*, no. 68864/01, 22 December 2004) in concluding that the difference in treatment in question was proportionate to the aim pursued and that there had been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (see paragraphs 50-59 of the Chamber judgment).

B. The parties' submissions

1. The Government

(a) Applicability of Article 14 of the Convention

39. The Government submitted that the facts complained of by the applicant did not fall within the scope of Article 1 of Protocol No. 1, which rendered Article 14 of the Convention inapplicable. They observed in that connection that the *inter vivos* division of 1970 had vested title to the property in the two legitimate children and established an acquired legal situation which precluded the applicant from obtaining a share in his mother's estate. Neither the 1972 Law nor the 2001 Law had had the effect of enabling him to acquire the share in the estate to which he would have been entitled if the deed of 1970 had not existed. Unlike the cases of *Mazurek* and *Merger and Cros*, in which the applicants had automatically acquired inheritance rights following the death of their parent, the succession in the present case had been settled in 1970 before the death of the applicant's mother. Moreover, division of the property had taken effect several years before the applicant's filiation had been established in 1983. Consequently, according to the Government, the applicant had no inheritance rights in respect of the estate (they referred, *mutatis mutandis*, to *Alboize-Barthes and Alboize-Montezume v. France* (dec.), no. 44421/04, 21 October 2008).

(b) Merits

40. As they had previously submitted before the Chamber, the Government maintained that the applicant had not been "excluded" from his mother's succession but, in so far as the assets had already been disposed of

under the terms of the deed of *inter vivos* division of 1970, he could not acquire the share to which he would have been entitled under the 1972 and 2001 Laws if that deed had not existed. Accordingly, it was not the judicial decisions in question which had prevented the applicant from inheriting under his mother's estate, but a prior deed of transfer of property which had established an acquired legal situation.

41. It was to those rights acquired by the other heirs that the legislature in 2001 – having, moreover, fully satisfied the general obligations incumbent on it to execute the *Mazurek* judgment – had had to have regard when bringing the Law into force. Application of the new Law to pre-existing situations necessarily had to abide by the principles of legal certainty and foreseeability of the law established by the case-law of the Court. Section 25 of the 2001 Law thus excluded application of the new rights to successions already open on the date of its publication that had given rise to division before that date. In the Government's view, the Court of Cassation's interpretation did not therefore conflict with the *Mazurek* judgment. Unlike that judgment and the case of *Merger and Cros*, in which the applicants had challenged situations that were not yet established when they lodged their action in the domestic courts, the action for abatement brought by the applicant in 1998 had sought to challenge a situation in which there had already been division of the estate.

42. The Government acknowledged that a judgment finding a violation of the Convention could give rise to general measures in the respondent State and have an impact going beyond the dispute concerning the parties before the Court. Nevertheless, they stated that the Court had never recognised a retroactive effect of its judgments. To claim that the *Mazurek* judgment should apply to the present case, that is, to a legal situation that had been definitively established before it was delivered, and that it should have retroactive effect, would render Article 46 of the Convention nugatory.

2. The applicant

(a) Applicability of Article 14 of the Convention

43. The applicant did not file additional observations with the Grand Chamber to those produced before the Chamber in which he had expressed his disagreement with the Government on this point (paragraph 37 of the Chamber judgment). He submitted that the establishment of his maternal filiation in 1983 had vested inheritance rights in him at the opening of his mother's succession – pending on the day he lodged his application – which fell within the scope of Article 1 of Protocol No. 1.

(b) Merits

44. According to the applicant, the effectiveness of Article 14 of the Convention had to be guaranteed and only "very weighty" reasons could

lead to a difference in treatment on the ground of birth being regarded as compatible with the Convention. Legal certainty was neither a right guaranteed by the Convention nor a public-interest ground capable of justifying an infringement of the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1.

45. What might have been tolerable in 1972, on grounds of the concept of legal certainty, in frustrating the principle of non-discrimination guaranteed by Article 14 could no longer be so after *Mazurek*. However, the applicant stressed that rights unfairly acquired should not be made secure by the transitional provisions of the 2001 Law, which was meant to put an end to violations of the type found in that judgment. In his submission, in redressing the damage caused to Mr Mazurek the Court had refused to secure pre-existing legal situations obtaining prior to its judgment. The applicant considered that the Court should take note here of the failure to observe the binding force of *Mazurek* and find against France accordingly. To conclude otherwise would be tantamount to accepting that a State enacting legislation designed to draw the consequences of the Court's case-law had an indefinite period of time in which to transpose its decisions, and could be concerned, in the particular circumstance, only with future successions, and thus validate *ex post facto* recognised violations of the Convention. The applicant complained of continuing discrimination which perpetuated the effects of the 1972 Law that had been the subject of a finding against France by the Court and disavowed by the legislature in 2001.

46. He further submitted that the action for abatement that he had brought in 1998 had been pending when the 2001 Law was published, which should have resulted in his benefiting from the new rights granted to children "born of adultery". Consequently, as his action had been pending, his mother's estate could not have been definitively divided; to conclude otherwise would amount to making actions for abatement of *inter vivos* divisions an ineffective remedy.

C. The Court's assessment

1. Applicability of Article 14 of the Convention

(a) General principles

47. According to the established case-law of the Court, Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts in

issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports of Judgments and Decisions* 1997-I; *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II; *Zarb Adami v. Malta*, no. 17209/02, § 42, ECHR 2006-VIII; and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 124, ECHR 2012 (extracts)).

(b) Whether the facts of the case fall within the ambit of Article 1 of Protocol No. 1

48. In the present case it therefore needs to be determined whether the applicant's complaint, regarding his inability to assert his inheritance rights by means of an action for abatement of the *inter vivos* division signed by his mother without regard for his reserved portion, falls within the ambit, that is, the scope of Article 1 of Protocol No. 1.

49. The Court reiterates that the concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision (see *Beyeler v. Italy* [GC], no. 33202/96, § 100, ECHR 2000-I).

50. Article 1 of Protocol No. 1 does not guarantee the right to acquire possessions (see *Slivenko and Others v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-II (extracts), and *Ališić and Others v. Bosnia-Herzegovina Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* (dec.), no. 60642/08, § 52, 17 October 2011), in particular on intestacy or through voluntary dispositions (see, *mutatis mutandis*, *Marckx*, cited above, § 50, and *Merger and Cros*, cited above, § 37). However, "possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (see, among other authorities, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 31, Series A no. 332; *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX; and *Association nationale des pupilles de la Nation v. France* (dec.), no. 22718/08, 6 October 2009). A legitimate expectation must have a "sufficient basis in national law" (see *Kopecký*, cited above, § 52; *Depalle v. France* [GC], no. 34044/02, § 63, ECHR 2010; and *Saghinadze and Others v. Georgia*, no. 18768/05, § 103, 27 May 2010). Likewise, the concept of "possessions" may extend to a particular benefit of which the persons concerned have been deprived on the basis of a discriminatory condition of entitlement (see *Andrejeva v. Latvia* [GC], no. 55707/00, § 79, ECHR 2009). However, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively

cannot be considered as a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see the recapitulation of the relevant principles in *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII, with further references to the Commission's case-law; see also *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 85, ECHR 2001-VIII; *Nerva and Others v. the United Kingdom*, no. 42295/98, § 43, ECHR 2002-VIII; and *Stretch v. the United Kingdom*, no. 44277/98, § 32, 24 June 2003).

51. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see *Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfi v. Turkey*, nos. 37639/03, 37655/03, 26736/04 and 42670/04, § 41, 3 March 2009; *Depalle*, cited above, § 62; *Plalam S.P.A. v. Italy* (merits), no. 16021/02, § 37, 18 May 2010; and *Di Marco v. Italy* (merits), no. 32521/05, § 50, 26 April 2011). The Court considers that that approach requires it to take account of the following points of law and of fact.

52. In the present case the Court observes that it is purely on account of his status as a child "born of adultery" that the applicant was refused the right to request an abatement of the *inter vivos* division signed by his mother, that status being the basis of the Court of Cassation's decision – interpreting the transitional provisions of the 2001 Law – to exclude application in his case of the provisions relating to the new inheritance rights recognised by that Law. In cases, such as the present, concerning a complaint under Article 14 in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular asset on a discriminatory ground covered by Article 14, the relevant test is whether, but for the discriminatory ground about which the applicant complains, he or she would have had a right, enforceable under domestic law, in respect of the asset in question (see, *mutatis mutandis*, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 55, ECHR 2005-X, and *Andrejeva*, cited above, § 79). That test is satisfied in the present case.

53. The Government argued that the applicant could not claim any inheritance rights in respect of the *inter vivos* gift of 1970 because this had had the effect of immediately and irrevocably distributing his mother's assets, and had done so before his maternal filiation had been judicially established (see paragraph 39 above). The Court cannot accept that argument, however. It notes that whilst *inter vivos* gifts have the immediate effect of transferring ownership, according to the case-law of the Court of Cassation this does not become a division for inheritance purposes until the death of the donor. The succession is both opened and definitively liquidated or divided on the date of the ascendant's death (see paragraph 24 above), which in this case was not until 1994. By that date the applicant's

filiation had been established. It was thus indeed on grounds of his status as a child "born of adultery" that the applicant was excluded from his mother's estate.

54. In that connection the present case resembles those of *Mazurek* and *Merger and Cros*, cited above, and can be distinguished from the case of *Alboize-Barthes and Alboize-Montezume v. France* (dec.), cited above, in which it was decided that the liquidation of the applicants' father's estate – in 1955, and thus well before their filiation had been established – precluded them from asserting inheritance rights to their late father's estate and claiming title to a "possession".

55. It follows that the applicant's pecuniary interests fall within the scope of Article 1 of Protocol No. 1 and the right to the peaceful enjoyment of possessions which it safeguards. This is sufficient to render Article 14 of the Convention applicable.

2. The merits

(a) General principles

56. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations. For the purposes of Article 14, a difference of treatment is discriminatory 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 realised" (see *Mazurek*, cited above, §§ 46 and 48). Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Stec and Others*, cited above, §§ 51 and 52, ECHR 2006-VI). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background, but the Court must determine in the last resort whether the Convention requirements have been complied with. Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see *Konstantin Markin*, cited above, § 126).

57. According to the Court's established case-law since *Marckx*, cited above, the distinction established for inheritance purposes between children "born outside marriage" and "legitimate" children has raised an issue under Article 8 of the Convention taken alone (see *Johnston and Others v. Ireland*, 18 December 1986, Series A no. 112) and under Article 14 of the Convention taken in conjunction with Article 8 (see *Vermeire v. Belgium*, 29 November 1991, Series A no. 214-C, and *Brauer v. Germany*,

no. 3545/04, 28 May 2009) and Article 1 of Protocol No. 1 (see *Inze v. Austria*, 28 October 1987, Series A no. 126; *Mazurek*, cited above; and *Merger and Cros*, cited above). The Court has extended this case-law to voluntary dispositions by confirming the prohibition on discrimination where testamentary dispositions are concerned (see *Pla and Puncernau v. Andorra*, no. 69498/01, ECHR 2004-VIII). Accordingly, as early as 1979, in *Marckx*, the Court held that restrictions on children's inheritance rights on grounds of birth were incompatible with the Convention. It has constantly reiterated this fundamental principle, establishing the prohibition of discrimination on grounds of a child's birth "outside marriage" as a standard of protection of European public order.

58. The Court also observes that common ground between the member States of the Council of Europe regarding the importance of equal treatment of children born within and children born outside marriage has been established for a long time, which has, moreover, led to a uniform approach today by the national legislatures on the subject – the principle of equality eliminating the very concepts of legitimate children and children born outside marriage – and to social and legal developments definitively endorsing the objective of achieving equality between children (see paragraphs 28, 34 and 35 above).

59. Accordingly, very weighty reasons have to be advanced before a distinction on grounds of birth outside marriage can be regarded as compatible with the Convention (see *Inze*, cited above, § 41; *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 38, ECHR 2000-X; and *Brauer*, cited above, § 40).

60. The Court is not in principle 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 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; *Pla and Puncernau*, cited above, § 59; and *Karaman v. Turkey*, no. 6489/03, § 30, 15 January 2008).

(b) Application in the present case

(i) Whether there was a difference in treatment on grounds of birth outside marriage

61. It is not in dispute in the present case that the applicant was deprived of a reserved portion and definitively placed in a different situation from that of the legitimate children regarding inheritance of their mother's estate. He was precluded from obtaining an abatement of the *inter vivos* division

from which he had been excluded and a reserved portion on grounds of his status as a child "born of adultery".

62. That difference in treatment between the applicant and his half-brother and half-sister derives from section 25(2) of the 2001 Law, which restricts application of the new inheritance rights of children "born of adultery" to successions opened prior to 4 December 2001 that have not given rise to division before that date (see paragraph 30 above). In interpreting the transitional provision concerned, the Court of Cassation considered that division for inheritance purposes had taken place in 1994, at the time of the applicant's mother's death (see paragraph 23 above), in line with long-standing case-law authority to the effect that in respect of *inter vivos* divisions the death of the donor triggers both the opening of the succession and the division (see paragraph 24 above). A legitimate child who had been omitted from the *inter vivos* division or not yet conceived when the deed was signed would not have been precluded from obtaining his or her reserved portion or share of the estate in accordance with Articles 1077-1 and 1077-2 of the Civil Code (see paragraph 25 above). It is therefore not disputed that the only reason for the difference in treatment suffered by the applicant was the fact that he had been born outside marriage.

63. The Court reiterates that its role is not to rule on which interpretation of the domestic legislation is the most correct, but to determine whether the manner in which that legislation has been applied has infringed the rights secured to the applicant under Article 14 of the Convention (see, among many other authorities and *mutatis mutandis*, *Padovani v. Italy*, 26 February 1993, § 24, Series A no. 257-B, and *Pla and Puncernau*, cited above, § 46). In the instant case its task is thus to establish whether there was objective and reasonable justification for the difference in treatment in question, which had its basis in a provision of domestic law.

(ii) Justification for the difference in treatment

(α) Pursuit of a legitimate aim

64. The Government did not advance any further justification for discriminating between legitimate children and children "born of adultery". The Court notes that the French State agreed to amend its legislation following the Court's judgment in the case of *Mazurek*, cited above, and reformed the rules of inheritance law by repealing all the discriminatory provisions relating to children "born of adultery" less than two years after the judgment had been delivered. Moreover, it welcomes this measure bringing French law into line with the Convention principle of non-discrimination.

65. However, according to the Government, it was not possible to undermine rights acquired by third parties – in the instant case by the other

heirs – and that justified restricting the retroactive effect of the 2001 Law to those successions that were already open on the date of its publication and had not given rise to division by that date. The transitional provisions had accordingly been enacted in order to safeguard peaceful family relations by securing the rights acquired by beneficiaries where the estate had already been divided.

66. The Court is not convinced that denying the inheritance rights of one or more of its members can contribute to strengthening peaceful relations within a family. However, it accepts that the protection of acquired rights can serve the interests of legal certainty, an underlying value of the Convention (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII; *Beian v. Romania (no. 1)*, no. 30658/05, § 39, ECHR 2007-V (extracts); *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, §§ 56-57, 20 October 2011; and *Albu and Others v. Romania*, nos. 34796/09 and 63 other cases, § 34, 10 May 2012). Accordingly, with regard to a succession accepted by a child "born of adultery" when it was opened, in 1993, and liquidated in 1996, it has held that the Court of Cassation's ruling of inadmissibility on the ground that there had already been division, which precluded the applicant from benefiting from the new rights, under the transitional provisions of the 2001 Law, was in accordance with the principle of legal certainty as reiterated in *Marckx*. Indeed "a judicial body cannot be required to set aside a freely accepted division in the light of a judgment of the Court delivered after the said division" (see *E.S. v. France* (dec.), no. 49714/06, 10 February 2009). The Court concludes that the concern to ensure the stability of completed inheritance arrangements, which was an overriding requirement in the opinion of the legislature and the court dealing with the case, constitutes a legitimate aim capable of justifying the difference in treatment in the present case. However, the difference in treatment must have been proportionate to that aim.

(β) Proportionality between the means employed and the aim pursued

67. The Court observes that in the present case, subject to the statutory right to bring an action for abatement, the applicant's half-brother and half-sister obtained property rights on the basis of the *inter vivos* division of 1970 by virtue of which Mrs M.'s estate passed to them on her death in July 1994. On that basis this case is distinguishable from those of *Mazurek* and *Merger and Cros*, cited above, in which the estate had not yet passed to the beneficiaries.

68. However, the Court reiterates that "protecting the 'legitimate expectation' of the deceased and their families must be subordinate to the imperative of equal treatment between children born outside and children born within marriage" (see *Brauer*, cited above, § 43). In that connection it considers that the applicant's half-brother and half-sister knew – or should have known – that their rights were liable to be challenged. At the time of

their mother's death in 1994 there was a statutory five-year time-period for bringing an action for abatement of an *inter vivos* division. The legitimate heirs should therefore have known that their half-brother had until 1999 to claim his share in the estate and that such an action was capable of calling into question not the division as such, but the extent of the rights of each of the descendants. Moreover, the action for abatement that the applicant did finally bring in 1998 was pending before the national courts at the time of delivery of the judgment in *Mazurek*, which declared that inequality of inheritance rights on grounds of birth was incompatible with the Convention, and at the time of publication of the 2001 Law, which executed that judgment by incorporating the principles established therein into French law. Lastly, the applicant was not a descendant whose existence was unknown to them, as he had been recognised as their mother's "illegitimate" son in a judgment delivered in 1983 (see paragraph 12 above; see, *mutatis mutandis*, *Camp and Bourimi*, cited above, § 39). That was sufficient to arouse justified doubts as to whether the estate had actually passed on Mrs M.'s death in 1994 (see the conclusions of the advocate-general, paragraph 22 above).

69. The Court observes on that point that, according to the Government, the specific nature of *inter vivos* divisions precluded any calling into question of an existing legal situation – in this case the division effected in 1970 and subsequently definitively implemented on the estate-owner's death – notwithstanding the legal proceedings under way (see paragraphs 40 and 41 above). The applicant challenged that submission (see paragraph 46 above). In the particular circumstances of the case, in which European case-law and the national legislative reforms showed a clear tendency towards eliminating all discrimination regarding the inheritance rights of children born outside marriage, the Court considers that the action brought by the applicant before the domestic courts in 1998 and dismissed in 2007 is a weighty factor when examining the proportionality of the difference in treatment (see paragraphs 22 and 68 above, and paragraph 72 below). The fact that that action was still pending in 2001 could not but relativise the expectation of Mrs M.'s other heirs that they would succeed in establishing undisputed rights to her estate.

70. Accordingly, in the light of the foregoing, the Court considers that the legitimate aim of protecting the inheritance rights of the applicant's half-brother and half-sister was not sufficiently weighty to override the claim by the applicant to a share in his mother's estate.

71. Moreover, it would appear that, even in the eyes of the national authorities, the expectations of heirs who are the beneficiaries of an *inter vivos* division are not to be protected in all circumstances. Indeed, if the same action for an abatement of the *inter vivos* division had been brought at the same time by another legitimate child, born at a later date or wilfully excluded from the division, it would not have been declared inadmissible.

72. In that connection the Court questions the decision of the national court, in 2007 – years after the *Marckx* and *Mazurek* judgments cited above – to apply the principle of protection of legal certainty differently according to whether it was asserted against a legitimate child or a child "born of adultery". It also notes that the Court of Cassation did not address the applicant's principal ground of appeal relating to an infringement of the principle of non-discrimination as guaranteed by Article 14 of the Convention. The Court has previously held that where an applicant's pleas relate to the "rights and freedoms" guaranteed by the Convention the courts are required to examine them with particular rigour and care and that this is a corollary of the principle of subsidiarity (see *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 96, 28 June 2007, and *Magnin v. France* (dec.), no. 26219/08, 10 May 2012).

(γ) Conclusion

73. In the light of all the aforementioned considerations, the Court concludes that there was no reasonable relationship of proportionality between the means employed and the legitimate aim pursued. There was therefore no objective and reasonable justification for the difference in treatment regarding the applicant. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

74. This conclusion does not call into question the right of States to enact transitional provisions where they adopt a legislative reform with a view to complying with their obligations under Article 46 § 1 of the Convention (see, for example, *Antoni v. the Czech Republic*, no. 18010/06, 25 November 2010; *Compagnie des gaz de pétrole Primagaz v. France*, no. 29613/08, § 18, 21 December 2010; *Mork v. Germany*, nos. 31047/04 and 43386/08, §§ 28 to 30 and 54, 9 June 2011; and *Taron v. Germany*, (dec.), no. 53126/07, 29 May 2012).

75. However, whilst the essentially declaratory nature of the Court's judgments leaves it up to the State to choose the means by which to erase the consequences of the violation (see *Marckx*, cited above, § 58, and *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, § 61, ECHR 2009), it should at the same time be pointed out that the adoption of general measures requires the State concerned to prevent, with diligence, further violations similar to those found in the Court's judgments (see, for example, *Salah v. the Netherlands*, no. 8196/02, § 77, ECHR 2006-IX (extracts). This imposes an obligation on the domestic courts to ensure, in conformity with their constitutional order and having regard to the principle of legal certainty, the full effect of the Convention standards, as interpreted by the Court. This was not done in the present case, however.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

76. The applicant complained, on the same grounds as those relied on above in connection with the right to peaceful enjoyment of possessions, of unjustified discrimination infringing his right to respect for his private and family life guaranteed by Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life ...
>
> 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."

A. Chamber judgment

77. As in the *Mazurek* judgment, the Chamber did not consider it necessary to examine this question separately, as no distinct arguments had been submitted (see paragraph 60 of the Chamber judgment).

B. The parties' submissions

78. The applicant made no observation under Article 8 of the Convention.

79. The Government submitted, as their main argument, that there had been no interference in the present case. Questions concerning inheritance on intestacy could fall within the scope of Article 8 but that provision did not guarantee a right to inherit. A decision not to call into question a legal situation acquired in 1970 was not an interference with the applicant's right to respect for his family life.

80. If, however, the Court were to consider that there had been interference, this had been prescribed by law, namely, the 1972 Law prohibiting heirs to a reserved portion of the estate from exercising those rights to the detriment of gifts granted prior to 1972. It had pursued a legitimate aim, namely, guaranteeing peaceful family relations by securing long-standing rights. Relying on the Court's judgment in *Marckx*, the Government submitted that it would be contrary to the principle of legal certainty to set aside a division implemented several years (1972 Law) or even several decades (2001 Law) before the legislative and jurisprudential changes amending the inheritance rules applicable to children "born of adultery". Lastly, that interference had been proportionate because the implementation of the impugned provisions by the domestic courts was limited both in time and in respect of the voluntary dispositions concerned. The Government concluded that the transitional provisions, as interpreted

by the domestic courts, were in conformity with the decision in *Mazurek* and with the Convention. The 2001 Law, in particular, provided for application of the new provisions with regard to the time factor, taking account of acquired situations that it would be undesirable from a social point of view – and unfeasible in certain cases – to call into question. The Government stressed the margin of appreciation available to the State when balancing the competing interests.

C. The Court's assessment

81. Having regard to the Court's conclusions regarding Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (see paragraph 73 above), the Court considers that it is not necessary to examine separately whether there has been a violation of that provision read in conjunction with Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Under Article 41 of the Convention

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

83. The applicant claimed EUR 128,550.75, which is the share of the estate that would have been paid to him if he had been treated as having equal rights to his half-brother and half-sister, plus interest. The applicant also claimed compensation for non-pecuniary damage which he assessed at EUR 30,000. Lastly, the applicant assessed at EUR 20,946 the costs and expenses incurred before the domestic courts and before the Court.

84. The Government submitted that the finding of a violation would be adequate compensation for the pecuniary loss suffered by the applicant. Any monetary compensation awarded for non-pecuniary damage could only be symbolic. With regard to costs and expenses, the Government considered that the award of an aggregate sum of EUR 10,000 would be appropriate.

85. In the circumstances of the present case the Court finds that the question of the application of Article 41 of the Convention is not ready for decision. Consequently, it will reserve the question in its entirety and fix the subsequent procedure, bearing in mind the possibility of an agreement being reached between the respondent State and the applicant (Rule 75 § 1 of the Rules of Court). The Court gives the parties three months for that purpose.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No.1;

2. *Holds* that there is no need to examine separately the complaint under Article 14 of the Convention taken in conjunction with Article 8;

3. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision;

accordingly,

a) *reserves* the said question in its entirety;

b) *invites* the Government and the applicant to submit, within three months from the date of notification of this judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;

c) *reserves* the further procedure and *delegates* to the President of the Grand Chamber the power to fix the same if need be.

Done in French and English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 February 2013.

Johan Callewaert	Josep Casadevall
Deputy to the Registrar	Président

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Popović joined by Judge Gyulumyan ;

(b) Concurring opinion of Judge Pinto de Albuquerque.

J.C.M.
J.C.

CONCURRING OPINION OF JUDGE POPOVIĆ JOINED BY JUDGE GYULUMYAN

I think that the Court failed to specify in paragraph 75 of the judgment what the obligations of member States are in terms of ensuring the full effect of Convention standards in the light of the general obligation of member States to comply with judgments of the Court. To my mind, an analysis of the relevant case-law leaves no doubt as regards the scope of the obligation.

It is true that the State is entitled to choose appropriate general measures under the supervision of the Committee of Ministers, by the adoption of which it will prevent further violations of the Convention provisions. The Court nevertheless held in *Vermeire* (*Vermeire v. Belgium*, 29 November 1991, § 26, Series A no. 214-C) as follows: "The freedom of choice allowed to a State as to the means of fulfilling its obligations [under Art. 46] cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed." In *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) ([GC], no. 32772/02, § 37, ECHR 2009) the Court confirmed its endorsement of the obligation of the States to perform treaties in good faith. This applies to the Convention as well.

The Court reiterated its stance on the issue in *Dumitru Popescu v. Romania (no. 2)* (no. 71525/01, § 103, 26 April 2007), as well as in *Verein gegen Tierfabriken v. Switzerland (no. 2)*, cited above, § 61). In *Dumitru Popescu* the Court stated, with reference to its ruling in *Vermeire*, cited above, that the duties of a national judge included ensuring the full effect of the Convention provisions by considering them superior to and giving them precedence over any contrary provision of the domestic legislation. In *Verein gegen Tierfabriken v. Switzerland (no. 2)* the Court revisited its previous jurisprudence and confirmed that the High Contracting Parties to the Convention undertook to abide by the final judgments of the Court in any case to which they were parties.

The Court's firm and repeated stance on the obligation of member States to comply with its judgments is also in line with the recommendation of the Committee of Ministers, which is competent to supervise the execution of judgments. The Committee of Ministers, in their Recommendation (2004)6, highlighted the fact that the Convention had now become an integral part of the domestic legal order of the member States.

For those reasons I find that it was indeed the principle of legal certainty which should have led the domestic judiciary to comply with the Convention rules even in the absence of immediate action by the legislature.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

The *Fabris* case raises the substantive question of discrimination before the law regarding the inheritance rights of children born out of wedlock. In addition to the question of the principle of equality before the law, the case deals with two other questions of cardinal importance for the system of protection of human rights in Europe, namely, the retroactive effect of the Court's judgments and the Court's competence to control the execution of its own judgments by the national authorities. I agree with the finding of a violation of Article 14 in conjunction with Article 1 of Protocol No. 1, but with all due respect I disagree with the reasoning of the judgment for the reasons that follow.

The direct and *erga omnes* effect of the Court's judgments

At first sight the Convention provides that the effects of the Court's judgments are restricted to the parties to the case, that is, the applicant or applicants and the respondent State or States. This first reading is misleading, however, and a correct construction of Article 46 requires it to be read jointly with Article 1. In the light of these provisions read together, the Court's judgments have a direct and *erga omnes* effect[1].

In fact, the Court formulated the *erga omnes* effect of its judgments when it affirmed, in *Ireland v. the United Kingdom*, that the Court's judgments served to elucidate, safeguard and develop the rules instituted by the Convention[2]. Thus, the Court has on many occasions refused to strike out a case, even though the applicant had sought to withdraw his or her application, because it considered that the case raised questions of a general character affecting the observance of the Convention. The same underlying general interest justified the introduction of the concept of "potential victim"[3] and the practice of third party intervention[4]. The "maintenance and

[1] In *Vermeire v. Belgium*, 29 November 1991, § 26, Series A no. 214-C, the Court explicitly reasoned that it could not reject in 1991, with respect to a succession which had taken effect on 22 July 1980, complaints identical to those which it had upheld on 13 June 1979 in *Marckx v. Belgium*, 13 June 1979, Series A no. 31. The failure by the Belgian legislature to implement *Marckx* at the national level did not absolve the respondent State of its international obligation to prevent future breaches of the Convention as a result of the same deficient inheritance law, having regard to the fact that the courts were also bound by the Convention as interpreted by the Court. Thus, the Court recognised the *stare decisis* force of *Marckx*, which had already settled the issue raised by the applicant in *Vermeire*.

[2] *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25, and in even clearer terms, *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003-IX.

[3] See, for example, *Marckx*, cited above, § 27; *Johnston and Others v. Ireland*, 18 December 1986, § 42, Series A no. 112; and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 29, ECHR 2009.

further realization of human rights and fundamental freedoms" in the Council of Europe and the "achievement of greater unity between its members" indeed call for this broad understanding of the Court's mission, not only in regard to the conditions for admissibility of applications to the Court and the striking out of applications, but also to the effects of its judgments. The collective nature of the Court's input logically impacts on the *erga omnes* nature of its output. States Parties not involved in the proceedings must not turn a blind eye to the authoritative interpretation of the Convention made by the Court, which is the final instance invested with that power[5]. If they were to do so, either wilfully or negligently, they would be at variance with their own Convention engagements as interpreted by the Court, and thus fail to show the attentive commitment to the fulfillment of treaty obligations which is called for by the principle of good faith in performing a treaty. However, if the States Parties abide by the standards set in the Court's case-law, even when they have not been involved in the particular disputes in respect of which the case-law was established, they not only avoid future findings of a violation, but also anticipate the implementation of the rights and freedoms foreseen in the Convention. This proactive approach by the States Parties is also required by a rigorous application of the principle of subsidiarity. The full implementation of the Convention at national level requires States Parties to take all measures necessary to redress, and preferably to prevent, violations. Failure to comply with the Court's case-law, even by States not party to the disputes in respect of which this has been established, would run counter to the aforementioned obligation to act effectively, promptly and in a preventative way in order to secure to everyone the rights and freedoms of the Convention[6]. These developments have culminated in the recognition of the Convention as a "constitutional instrument of European public order"[7] and therefore of the

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[4] Opinion on the implementation of the judgments of the European Court of Human Rights, adopted by the Venice Commission at its 53rd Plenary Session, 2002, paras. 86-87.

[5] The Brighton Declaration, para. 10.

[6] In his "Memorandum to the States with a view to preparing the Interlaken Conference", 3 July 2009, the President of the Court himself stressed this idea: "It is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system. The binding effect of interpretation by the Court goes beyond *res judicata* in the strict sense. Such a development would go hand in hand with the possibility for citizens to invoke the Convention directly in domestic law ("direct effect") and the notion of ownership of the Convention by the States." This idea was enshrined in point 4 (c) of the Interlaken Declaration and has been the States Parties' practice (Venice Commission Opinion, cited above, para. 32).

[7] *Loizidou v. Turkey (preliminary objections)*, 23 March 1995, § 75, Series A no. 310, and Court's Opinion on the Reform of the control system of the ECHR, 4 September 1992, para. I (5).

Court as "Europe's Constitutional Court"[8]. Hence, all bodies and representatives of any public authority of the respondent State, at all levels of its organisation (national, federal, regional or local), are directly bound by the Court's judgments and therefore, to use the phrase coined by the Brighton Declaration, "all laws and policies should be formulated, and all State officials should discharge their responsibilities, in a way that gives full effect to the Convention." In this context, the Court being tasked with the power to interpret and apply the Convention through final and binding judgments (Article 19 of the Convention), the direct and *erga omnes* effect of the Court's judgments may not be restricted by the States Parties. Only the Court itself can determine a restriction of the effects of its judgments[9].

The Court's competence to control the execution of its own judgments

The Court's initial policy of refraining from issuing consequential orders has given way to a broad policy of directions and even orders to the respondent States regarding how to execute the judgment. The Court's judgments are no longer purely declaratory, but prescriptive[10]. In view of the increasingly prescriptive nature of the Court's judgments, and consequently of the growing dual *facet* of the States parties' obligation to comply with the Court's judgments as an obligation of result and means, the Court's control of the application of Article 46 of the Convention is crucial[11].

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[8] To quote the expression of former Presidents Ryssdal, "Vers une Cour constitutionelle européenne", in *Collected Courses of the Academy of European Law*, II, 1993, p. 20, and Wildhaber, "Un avenir constitutionnel pour la Cour européenne des droits de l'homme?", in RUDH, 2002, p. 1.

[9] Hence, the German Federal Constitutional Court judgment of 14 October 2004, 2 BvR 1481/04, para. 47, and the Italian Constitutional Court judgment no. 311 of 26 November 2009 are problematic, in so far as they allow non-implementation of the Court's judgments, in full or in part, on grounds of domestic unconstitutionality (see below).

[10] See, among many other authorities, *Belvedere Alberghiera S.r.l. v. Italy*, no. 31524/96, § 69, ECHR 2000-VI; *Fatullayev v. Azerbaijan*, no. 40984/07, § 177, 22 April 2010; and *Sejdovic v. Italy* [GC], no. 56581/00, § 126, ECHR 2006-II, and obviously all the "pilot" and "quasi-pilot" judgments. In fact, this policy shows that judgments should be based on a principled, rather than a casuistic, approach to the legal issues at stake in order to provide the clarity, precision and foreseeability needed for national authorities to fully understand the repercussions of the Court's choices (see the Parliamentary Assembly Resolution 1226 (2000) of 28 September 2000, and the Venice Commission Opinion, cited above, paras. 56-58). Obviously, the more the case-law is attached to the specific circumstances of the case, the less interpretative value it has, the bigger the risk of inconsistency in the case-law, and the less guidance it provides to States Parties in general and the respondent State in particular. True *jurisdictio* can only be achieved when a court makes the effort to rise above the contingent factors of the individual case and formulate general standards.

[11] In *Olsson v. Sweden (no. 2)*, 27 November 1992, § 94, Series A no. 250, the Court was faced with the persistent failure by the national authorities to allow contacts between the applicants and their children in spite of a previous judgment of the *Court* in favour of the

Human rights treaties should be interpreted in a way which is most protective of the rights and freedoms which they foresee[12]. In the light of this principle, it is evident that the jurisdictional nature of the Court would be dangerously at risk if the Court did not react to infringements of its judgments and, even worse, if the final word on the execution of its judgments were *de facto* dependent on the will of the first addressees of the judgments themselves: the governments. The entire system of human rights protection would be sacrificed on the altar of politics, the Court's judgments being downgraded to provisional statements on disputes in need of a subsequent political *satisfecit* to be effective. The applicant's victory at the Human Rights Building would be a Pyrrhic one, the respondent State having a second chance to fight the case in the *Palais de l'Europe*. Human rights would then be a deceptive mirage in Europe. To ensure that human rights do not become a mere mirage, the most protective interpretation of the Convention's rights and freedoms is required: to guarantee real, not virtual, independence of the judicial power and an *effet utile*, not apparent, of the rights and freedoms of the Convention, it is indispensable that the Court be vested with the implied power to oversee the execution of its judgments, and, if need be, to contradict a decision of the Committee of Ministers in this regard[13].

International law and practice have long acknowledged the "implied powers doctrine", according to which international organisations not only have the powers which are explicitly foreseen in their founding texts, but also such powers as are necessary for the most efficient exercise of their tasks. Applied to the present case, this doctrine requires that international tribunals and adjudication bodies be implicitly vested with the power to supervise the execution of their judgments when this is necessary for the discharge of their functions[14]. In the European legal framework of human

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applicants. The Court held that "the facts and circumstances underlying the applicants' complaint under Article 53 ... are essentially the same as those which were considered above under Article 8, in respect of which no violation was found" and concluded that "no separate issue arises under Article 53". Thus, the Court left open the possibility that there might be circumstances under which a complaint under former Article 53 (now Article 46, § 1) of the Convention could be examined. The answer to the question left open by *Olsson (no. 2)* calls for a teleological interpretation of the Convention.

[12] *Wemhoff v. Germany*, 27 June 1968, § 8, Series A no. 7, and following a long tradition of the Inter-American Court, *Ricardo Canese v. Paraguay*, 31 August 2004, Series C No. 111, para. 181. This principle is based on Article 31 of the Vienna Convention on the Law of Treaties, which provides for a teleological interpretation of international law.

[13] See Judge Martens's arguments in "Individual complaints under Article 53 of the European Convention on Human Rights", in Lawson and de Blois (eds.), "The dynamics of the protection of human rights in Europe: Essays in honour of Henry Schermers", vol. III, London, 1994, pp. 262, 274 and 285.

[14] For the formulation of this consolidated doctrine see *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: ICJ Reports 1949*, p. 180, and specifically on the implied powers of an international court, see *Factory at Chorzow*

rights, the Court's power to supervise the execution of its judgments is implied in its duty to ensure compliance with States Parties' obligations under the Convention and its power to decide any question regarding the application of the Convention (Article 19 in conjunction with Article 32).

Protocol No. 14 was a step in the right direction, but still did not fully enshrine this implied power. The Protocol provides for an enlargement of the Court's power to control the execution phase: the Court can interpret its own judgments and decide that a respondent State has not complied with them when problems arise during the execution process. The explicit recognition in Protocol No. 14 that these important powers vest in the Court does not conceal the fact that they are dependent on a request by the Committee of Ministers, that is, by the States Parties. If the same powers to interpret the Court's judgments and determine that the respondent State had not complied with them were not conferred on the Court when the initiative belonged to the injured party, not only would the injured party be placed in a position of inferiority with regard to the respondent Government, but, worse still, the respondent State could "block" the effects of the Court's judgments at the level of the Committee of Ministers, the Court being powerless to oppose any political "blockage" during the execution phase[15]. In the event of failure of the aforementioned supervisory mechanism of the Committee of Ministers, the injured party's only effective legal avenue by which to address an incorrect interpretation of or non-compliance with a Court's judgment remains access to the Court itself. Faced with some regrettable cases of clear non-compliance with its judgments, the Court has affirmed its power to censure such non-compliance. It could not have done otherwise. This was the only way to protect the Court's authority and the Convention's legal force. The danger of denial of the authority of the Court's judgments and the concomitant deprivation of the legal force of the Convention were wisely avoided by the enlightening judgment in the case

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(Germ. v. Pol.), 1927, PCIJ, Series A, No. 9 (July 26), pp. 21-22, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986*, p. 142, and *LaGrand (Germany v. United States of America), Judgment, ICJ Reports 2001*, p. 485, and IACHR, *Baena-Ricardo and Others v. Panama, judgment on competence*, 28 November 2003, Series C, no. 104, paras. 72, 114 and 132.

[15] See the remarks of former President Costa, warning about the "risk of blocking the situation" at the political stage, in his separate opinion in *Assanidze v. Georgia* [GC]. Several ways of circumventing the effects of the Court's judgments, such as delaying tactics in fulfilling them or the lodging of a Convention derogation after the finding of a violation, have proven how real this risk is. Ultimately, the risk of "self-amnesty" is not far off. The qualified majority of two thirds of the Governments' representatives entitled to sit on the Committee required to launch interpretation and infringement proceedings, the limited fact-finding and data-collection powers of the Committee, namely, the lack of on-site visits, hearings of witnesses and other means of assessing the real effects of norms enacted and measures taken, and the imbalance between the injured party's and the Government's position in the execution proceedings before the Committee, aggravate this risk.

of *Verein gegen Tierfabriken Schweiz (VgT)* (no.2)[16]. With a firm statement of the Court's power to oversee the infringement of Article 46 of the Convention, *Emre (no. 2)* applied the crowning touch to that approach[17]. In the crystal-clear and decisive wording of paragraph 75, the Court censured the respondent State's conduct after the first *Emre* judgment. Furthermore, the Court affirmed in straightforward terms what would have been the "most natural execution" of the first *Emre* judgment: nullification with "immediate effect" of the impugned measure of expulsion from the national territory. In this context, the finding of a violation of Article 46 was a logically necessary consequence of the reasoning[18].

In sum, the Court not only assists the execution process in a number of ways, for example by itself providing guidance as to the proper execution measures, it also bears the ultimate responsibility for the long-term effectiveness of the entire system of protection of human rights in Europe by overseeing the compliance of the execution process with Article 46. The exercise of the Court's competence to supervise the execution of its own judgments prevails over a contrary decision of the Committee of Ministers. If the Court is not bound by a decision of the Committee to close the execution proceedings, *a fortiori* it is not estopped on grounds of *lis pendens* from examining the issue of execution of its judgments.

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[16] *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 65, ECHR 2009. The cornerstone of the Grand Chamber's judgment was the Court's assumption of its inherent (implied) competence to examine the domestic authorities' conduct after the first *Verein gegen Tierfabriken* judgment, with the crucial argument that if the Court were unable to examine it, it would escape all scrutiny under the Convention. Thus, the rationale of *Verein gegen Tierfabriken Schweiz (VgT)* (no.2) covers not only the actions of national authorities that conflict with the Court's judgment, but *a fortiori* also omissions by national authorities where they are required by a judgment of the Court to take measures to terminate a violation of the Convention. The importance of this position is further enhanced by the fact that the Court did not refrain from contradicting the Committee of Ministers' Resolution ResDH(2003)125 terminating its supervision of the execution of the first *Verein gegen Tierfabriken* judgment. See also *Wasserman v. Russia* (no. 2), no. 21071/05, § 37, 10 April, 2008, and *Ivantoc, Popa and Others v. Moldova and Russia*, no. 23687/05, §§ 86, and 95-96, 15 November 2011.

[17] The respondent State had expelled the applicant for an indeterminate period of time, which the Court found disproportionate. The Federal Court maintained the expulsion order, but reduced the period to ten years. The question put by the Court in paragraph 68 of *Emre (no. 2)* – namely, whether by reducing the period of the applicant's expulsion to ten years the Federal Court had complied with the conclusions and spirit of the Court's previous judgment of 2008 – signals the intention of the Court to treat the second complaint as true infringement proceedings.

[18] *Emre v. Switzerland (no. 2)*, no. 5056/10, § 43, 11 October 2011, and for its implementation see Committee of Ministers' Resolution CM/ResDH(2012)139.

The application of *Mazurek* in the instant case

The present case tests the material and temporal effects of *Mazurek*[19], in as much as it raises the question of the applicability of the 2000 judgment to a succession opened in 1994 in France. The retroactive effect of the Court's judgments calls into question the foreseeability of judicial activity[20]. Hence, legal certainty favours the prospective effect of judgments. Nevertheless, the full implementation of the rights and freedoms protected by the Convention may require that a Court's judgment be applied retroactively, that is to say, to facts submitted in a new application which have occurred prior to the date when the judgment became final[21]. In the instant case, the applicant had a legitimate expectation of being counted among the inheritors of his mother's estate from 24 November 1983, the date on which his filiation was established, until his mother's death on 28 July 1994. On the day of his mother's death, the applicant's legitimate expectation condensed into an acquired right to his reserved portion of his mother's opened succession[22]. Although the *inter vivos* gift in 1970 had the effect of transferring property to the donees, this did not become a division of the donor's estate for inheritance purposes until the date of her death. By that time, the applicant's filiation had already been established and an event prior to the opening of his mother's succession – the *inter vivos* division –

[19] *Mazurek v. France*, no. 34406/97, ECHR 2000-II.

[20] It is true that the Convention must be applied according to present-day conditions. Since the Court does not endorse a strictly literal reading or historical interpretation of the Convention, its judgments do not set out to determine the original meaning of the Convention provisions. Accordingly, the canon of evolutive interpretation of the Convention favours the non-retroactive applicability of the Court's judgments. The principle of legal certainty strengthens this conclusion (*Marckx*, cited above, § 58).

[21] In *Merger and Cros v. France*, no. 68864/01, § 33, 22 December 2004, the Court applied the principle of equal inheritance rights in respect of a succession which had been opened on 12 March 1986. In short, the Court applied *Mazurek* retroactively to a succession which had been opened before the date the judgment became final. Thus, all successions already opened and the respective divisions of estates pending in France at the time *Mazurek* became final – and not only the one affecting Mr Mazurek – should have been dealt with according to the principle of equality of children born in and out of wedlock. Wherever, after 1 February 2000, the estate of the deceased person had not yet been definitively divided and it was still possible to apply *Mazurek* and thereby secure to children born out of wedlock an equal share in the estate, that should have been done. This conclusion gained even more force after the *Merger and Cros* judgment.

[22] Comparative law shows that the "opening of the succession" occurs on the date of the estate-owner's death and that this date is often used as the decisive starting point in the context of transitional provisions in the province of succession law (see Article 8 of the *Hague Convention on the Conflict of Laws relating to the Forms of Testamentary Dispositions*, and the report on the draft Convention, where it is stated that "This is the solution most frequently adopted in comparative law." (*Actes et documents de la IXe session*, III, p. 27). That is also the case in France.

could not deprive him of his right to obtain his reserved portion[23]. To argue otherwise would be tantamount to disregarding the filiation established in 1983 and depriving of all useful effect the abatement action brought by the applicant in due time[24]. In other words, the establishment of the applicant's maternal filiation in 1983 vested inheritance rights in him at the opening of his mother's succession which fall within the scope of Article 1 of Protocol No. 1.

The Law of 3 December 2001 provided that successions opened on 4 December 2001 would be distributed according to the principle of equality of children born in and out of wedlock, save in cases where division of the estate had taken place prior to that date. This exception was applied by the Court of Cassation in the instant case. In the light of *Mazurek*, this transitional rule of the 2001 Law cannot stand. The choice made by the national legislature by means of the transitional provisions still differentiates, without any plausible reason, between children born in and children born out of wedlock[25]. In other words, this Law runs counter to *Mazurek*, which had censured all discriminatory treatment regarding inheritance rights of children born out of wedlock. Hence, the Court should have distanced itself from Resolution ResDH(2005)25, adopted by the Committee of Ministers on 25 April 2005, and from Resolution CM/ResDH(2010)191, adopted on 2 December 2010, according to which the respondent State had satisfactorily implemented the *Mazurek* judgment in its domestic legal order[26].

As the legislative framework was deficient, the domestic courts should have applied *Mazurek* retroactively to Mrs M.'s succession. Since Mrs M.'s

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[23] Thus, I find paragraphs 52-55 of the judgment insufficient for three reasons. First, they do not identify the "right" to which the applicant was entitled and which has been denied him; second, they do not clarify when the applicant acquired that right and the moment from which it was enforceable under domestic law; third, they do not distinguish the applicant's legal position in regard to his mother's estate before and after her death.

[24] Regardless of the well-known discussion of the nature of an *inter vivos* division as a "pre-succession" (*présuccession*) or an "anticipated succession" (*anticipation successorale*), the fact is that the applicant was deprived of any share for the sole reason that he was not a party to a deed from which the donors had knowingly excluded him.

[25] I cannot assume that there is a special interest in ensuring "peaceful family relations" in a succession where children born out of wedlock are involved. Neither can I agree that the scope of the exception is temporally and substantively limited. But even assuming the alleged limited nature of the exception, this argument could never justify the fact that these transitional rules perpetuate and multiply inequalities which punish a child born out of wedlock for behaviour of his or her parent. Children simply should not bear the consequences of their parents' acts.

[26] Accordingly, I do not find it rigorously exact to state, as in paragraph 68 of the judgment, that the Law of 3 December 2001 "executed that judgment by incorporating the principles established therein into French law". This general evaluation neglects the problematic nature of the transitional rules of the Law. The problem was also avoided in the Committee of Ministers' Resolution ResDH(2005)25, which omits any reference to the 2001 transitional rules.

succession was not definitively closed at the time *Mazurek* became final, on account of a timely action for abatement brought by an heir with a right to a reserved portion who had been excluded from the *inter vivos* division, the courts should have considered that *Mazurek* prevailed over the transitional provisions of the 2001 Law and those of the 1972 Law, giving precedence to the Convention and acknowledging the applicant's right to inherit his reserved portion of his mother's estate[27].

The legacy of *Fabris*

Just as *Loizidou* brought full recognition of the Court as "Europe's Constitutional Court", whose task could not be endangered by States Parties exercising their right of reservation, *Fabris* reaffirms the constitutional force of the Court's judgments and the Court's jurisdiction to verify whether a State Party has complied with the obligations imposed on it by one of the Court's judgments. This force, which has been steadily strengthened by the Court's and the Committee of Ministers' practice, as has been demonstrated, is certainly not called into question by the unfortunate sentence included in paragraph 75 of the present judgment which says "in conformity with their constitutional orders and having regard to the principle of legal certainty". That sentence apparently limits the States parties' obligation to give full effect to Convention standards as interpreted by the Court to their "conformity with their constitutional order". If it is understood as implicit authorisation for a fully-fledged, unrestrictive filtering mechanism of the domestic constitutionality of the Court's judgments, this sentence would simply annihilate decades of construction of the European human rights system, empty the Convention of its legal force and reduce the Court to the position of an annex to domestic constitutional courts. Moreover, it would be a blow to Article 27 of the Vienna Convention on the Law of Treaties, in so far as it would allow a State Party to the Convention to invoke the

[27] To be more precise, it should be noted that *Marckx* itself had laid down a principle applicable to all States Parties to the Convention, including the respondent State in the *Fabris* case. It is a fact that at the time of Mrs M.'s death and the claim for his reserved portion of his mother's estate from the notary in 1994 as well as at the time of the initiation by Mr Fabris of an action for abatement before the French courts in 1998, the French authorities already had knowledge of the principle of non-discrimination regarding the inheritance rights of children born out of wedlock that had been established many years earlier, in *Marckx* in 1979, and reaffirmed in *Inze* in 1987 and *Vermeire* in 1991, and applied directly by supreme courts, such as the *Hoog Raad* and the Luxembourg Court of Cassation in their remarkable judgments of 13 June 1979 and 17 January 1985 respectively. Accordingly, the principle of good faith in fulfilling treaty obligations should have prompted the French authorities to deal with the applicant's claim in a non-discriminatory manner. After *Mazurek* became final in 2000, the international obligation of the respondent State to avoid future violations of the Convention was reinforced, since it was not only bound by the principle of good faith, but also by the national *erga omnes* effect of *Mazurek*.

provisions of its constitutional law as justification for its failure to perform a treaty. The Court's judgments' validity and efficacy do not depend on a *fiat* of national constitutional courts[28]. Hence, the reference to the "conformity with their constitutional orders" is nothing but an anodyne reference to the principle of the safeguard for existing human rights foreseen in Article 53.

In this context, the additional reference to the principle of legal certainty is no less problematic. Domestic courts cannot annul, restrict or delay the effect of the Court's judgments on the grounds that they threaten the principle of legal certainty. If they could, this would allow for a pick-and-choose application of the Court's judgments by domestic courts, with the risk of having forty-seven different implementations of the same judgment. Thus, the reference to the principle of legal certainty, in addition to being a reminder of the *Marckx* rationale[29], is also an injunction to domestic courts to comply strictly, without any margin of discretion, with the Court's judgments. Any discretionary conduct of the domestic courts while implementing the judgments of the Court would call into question the principle of legal certainty.

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[28] See *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion, 1932, PCIJ, Series A/B, No. 44 (Feb. 4)*, p. 24 ("a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.") and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988*, pp. 34 and 35, and *Dumitru Popescu v. Romania (no. 2)*, no. 71525/01, § 103, 26 April 2007, and for the States Parties' acceptance of this understanding see, Resolution DH (95) 211 of 11 September 1995, Resolution DH(96)368 of 26 June 1996, and Resolution DH (96) 150 of 15 May 1996. *A fortiori*, the overriding authority of international obligations over domestic law, including constitutional law, is also valid in the field of international human rights law, in view of the nature of human rights as a matter not reserved to the domestic jurisdiction of States (Article 2 § 7 of the United Nations Charter) and the fact that human rights treaties not only bind States Parties, but also recognise rights and freedoms of citizens within the jurisdiction of the States Parties (Article 1 of the Convention). The conclusion is inescapable: without prejudice to Article 15 of the Convention, no domestic provision, including constitutional provisions, may limit or derogate from any of the rights and freedoms set forth in the Convention as interpreted by the Court. Domestic courts, and constitutional courts at their apex, are not precluded from providing a higher degree of protection of the individual's freedoms and rights (Article 53), which means that the Convention standards may be set aside only where the domestic provisions provide for better protection of the applicant's claim.

[29] Based on "the principle of legal certainty, which is necessarily inherent in the law of the Convention", the Court "may dispense States from questioning legal acts or situations that antedate judgments of the Court declaring domestic legislation incompatible with the Convention" (see *Marckx*, cited above, § 58, and *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 65, 30 November 2010).

Conclusion

Having regard to the direct and *erga omnes* applicability of *Mazurek* in the respondent State and its retroactive applicability to the division of Mrs M.'s estate, considering the Court's competence to oversee the execution of *Mazurek* by the respondent State and applying the principles of equality before the law and non-discrimination between children born in and out of wedlock, I find that the respondent State did not satisfactorily implement the *Mazurek* judgment in the present case and therefore breached Article 14 in conjunction with Article 1 of Protocol No 1.