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

THIRD SECTION

CASE OF MAZUREK v. FRANCE

(Application no. 34406/97)

JUDGMENT

STRASBOURG

1 February 2000

FINAL

01/05/2000

In the case of Mazurek v. France,

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

Sir Nicolas BRATZA, *President*,
Mr J.-P. COSTA,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 12 October 1999 and 18 January 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 34406/97) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Claude Mazurek ("the applicant"), on 13 December 1996.

2. On 20 October 1997 the Commission decided to give notice of the application to the French Government ("the Government") and to invite them to submit observations in writing on its admissibility and merits. The Government submitted their observations on 9 March 1998, after an extension of the time allowed, and the applicant replied on 22 April 1998.

3. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998 and in accordance with Article 5 § 2 thereof, the application was examined by the Court.

4. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section. The Chamber constituted within that Section included *ex officio* Mr J.-P. Costa, the judge elected in respect of France (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Sir Nicolas Bratza, President of the Section (Rule 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr L. Loucaides, Mrs F. Tulkens, Mr W. Fuhrmann, Mr K. Jungwiert and Mr K. Traja (Rule 26 § 1 (b)).

5. On 4 May 1999 the Chamber declared the application admissible[1] and decided to invite the parties to submit their observations on the merits at a hearing.

6. The hearing took place in public in the Human Rights Building, Strasbourg, on 12 October 1999.

There appeared before the Court:

(a) *for the Government*
Mrs M. DUBROCARD, Deputy Director,
Human Rights Division,
Legal Affairs Department,
Ministry of Foreign Affairs, *Agent*,
Mrs L. DELAHAYE, *magistrat*,
seconded to the Human Rights Division,
Legal Affairs Department,
Ministry of Foreign Affairs,
Mrs M. FAUCHEUX-BUREAU, *magistrat*,
General Civil Law Office,
Civil Affairs Department,
Ministry of Justice, *Counsel*;

(b) *for the applicant*
Mr A. OTTAN, of the Montpellier Bar, *Counsel*.

The applicant also attended the hearing.

The Court heard addresses by Mr Ottan and Mrs Dubrocard.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, Claude Mazurek, is a French national who was born in Avignon in 1942 and lives at La Grande-Motte.

8. The applicant's mother died on 1 August 1990 of HIV (human immunodeficiency virus) encephalopathy, having been infected after a blood transfusion. She left two children: a son, Alain, born out of wedlock in 1936 and legitimised by his mother's marriage in 1937, and the applicant, born in 1942, on whose birth certificate only his mother's name was entered

1. *Note by the Registry*. The Court's decision (in French) is obtainable from the Registry.

as a parent, she being still married at the time of his birth, but living separately from her husband. They divorced in July 1944.

9. On 30 April 1991 Alain brought an action against the applicant in the Nîmes *tribunal de grande instance* seeking an order that his mother's estate be divided by a notary, that the applicant, as an adulterine child, could not lay claim to more than a quarter of it and that there be deposited with the notary a sum of money unlawfully withdrawn by the applicant from his mother's account and transferred to a personal account while their mother was in a coma.

10. In his pleadings, the applicant agreed to the appointment of a notary to divide the estate, but submitted that Article 760 of the Civil Code, which restricts the inheritance rights of adulterine children, was discriminatory and incompatible with Articles 8 and 14 of the Convention, the provisions of the United Nations Convention on the Rights of the Child and Article 334 of the Civil Code, which enshrines the principle that children born in wedlock and children born out of wedlock have equal rights. He requested the court to hold that he had the same inheritance rights as a legitimate child. He also submitted that the amount which he had been requested to deposit with a notary had been transferred as a gift which he was not required to bring into account, as evidenced by a letter from the deceased of 20 January 1988, a general power of attorney for bank transactions, dated 2 February 1988, and witness statements.

11. In a judgment of 21 January 1993 the court ordered the estate to be divided. With regard to the applicant's rights, it referred to Article 760 of the Civil Code (see paragraph 17 below).

The court conceded that Article 760 of the Civil Code represented a derogation from the principle, enshrined in the first paragraph of Article 334 of the Civil Code, that children should be treated equally regardless of descent, but held that its purpose was not to discriminate between children on the grounds of their birth but to ensure minimum compliance with marital commitments on the part of the married parent who engenders an illegitimate child. It accordingly concluded that Article 760 was necessary in order to protect the rights of others and that it was a principle of public policy which was not contrary to the Convention.

In respect of the sum which had been withdrawn by the applicant and transferred to his own account, the court held that the applicant had merely executed his mother's intention to gift him a sum of money in addition to his share in the estate and that although that gift should notionally be brought into account in calculating the disposable portion of the estate, it was inappropriate as matters stood to order that the amount in question be deposited with the notary dividing the estate.

12. The applicant appealed, arguing, among other things, that Article 760 of the Civil Code was incompatible with Articles 8 and 14 of the Convention and Article 1 of Protocol No. 1.

13. In a judgment of 24 March 1994, the Nîmes Court of Appeal upheld the provisions of the lower court's judgment ordering the estate to be divided and determining the applicant's inheritance rights. It considered, however, that the amount transferred to the applicant's account should be returned to the estate to be divided because he had not proved that his mother had intended it as a gift.

14. With regard to the complaint that the discrimination between legitimate children and adulterine children was incompatible with the provisions of the Convention, the Court of Appeal held:

> "In the instant case the provisions of Article 760 of the Civil Code, which limit the inheritance rights of adulterine children, are directly linked to the French legal principle of public policy according to which marriage should be monogamous and the interests of the spouse and legitimate children of an adulterer protected.
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> Article 760 was not enacted in order to disadvantage adulterine children, but to protect the interests of the spouse and legitimate children of an adulterer; the provision does not therefore intentionally discriminate against adulterine children, but ensures the protection of children born of the marriage who might be disadvantaged on the division of their parents' estate by the presence of an adulterine child who, on account of the predecease of the non-adulterous spouse and the system of matrimonial property elected by the spouses, might otherwise inherit from his or her parent both the assets from that parent's estate and the assets from the estate of the spouse who is not his or her parent.
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> The court was thus properly entitled to hold that it was not the intention of the legislature to discriminate between children on the grounds of their birth, but to ensure minimum compliance with the marital obligations of a married parent with regard to his or her legitimate children; the court was also properly entitled to hold that Article 760 of the Civil Code was a provision necessary for the protection of the rights of others, that it was a French legal principle of public policy and that it was not contrary to the European Convention on Human Rights."

15. The applicant appealed on points of law to the Court of Cassation, which delivered its judgment on 25 June 1996.

With regard to the applicant's complaint of unjustified discrimination on grounds of birth between children born in wedlock and children born out of wedlock, contrary to Articles 8 and 14 of the Convention, the Court of Cassation held that inheritance rights had nothing to do with respect for private and family life guaranteed by Article 8 of the Convention.

In respect of the complaint that the Court of Appeal had ordered the sum transferred to the applicant's account to be returned to the estate to be divided, the Court of Cassation held that in deciding that the facts of the case had not shown any intention on the part of the deceased to bestow a gift on her son in advance of the division of her estate the Court of Appeal had determined an issue which it alone had jurisdiction to determine.

16. On 14 January 1994 the Commission of the Compensation Fund for Transfusion Patients and Haemophiliacs awarded the applicant, in his personal capacity, compensation of 40,000 French francs (FRF) and

assessed the deceased's loss at FRF 500,000, to be paid to her heirs. That amount was thus paid to the notary dealing with the estate and the applicant subsequently received one quarter of it.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. The Civil Code

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

Article 745

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

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

Article 757

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

Article 760

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

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

B. The United Nations Convention on the Rights of the Child

18. The relevant provisions of the United Nations Convention on the Rights of the Child, which came into force on 2 September 1990, read as follows:

Article 2

"1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

C. Suggestions and proposals for reform

19. In a report entitled "Status and Protection of Children", adopted in May 1990, the *Conseil d'Etat* referred to the issue of equal treatment of children regardless of descent in the following terms:

"The restriction of adulterine children's inheritance rights is the subject of much criticism. It appears to be in direct conflict with the principle that children should be treated equally regardless of descent and constitutes an infringement of the principles enshrined in the Civil Code according to which children born out of wedlock have, in general, the same rights as children born in wedlock. Such discrimination, based on descent, also appears to be contrary to the European Convention on Human Rights and to the Convention on the Rights of the Child. It should therefore be abolished."

The *Conseil d'Etat*'s report also sets out socio-demographic data. It emerges from the report that as at 1 January 1990 one in ten children had been born out of wedlock, this being true of more than one in four births in 1988. In addition to that, major shifts in family models appeared during the second half of the 1970s, "with a 30% decrease in the annual number of marriages between 1975 and 1985, 2.5 times more births out of wedlock over the same period, and a rise in the number of cohabiting unmarried couples so sharp that it is now the typical first union for two in three French citizens ... as for divorces, the annual figure had already almost doubled between 1960 and 1975, and it doubled again during the next ten years".

20. A government bill, registered on 23 December 1991 (no. 2530), proposed bringing the inheritance rights of adulterine children into line with that of other children. It was subsequently abandoned.

21. On 3 February 1998 the Minister of Justice instructed Mrs Irène Théry, a sociologist, to study shifts in family models. The report, entitled "Couples, Descent and Kinship today" was submitted on 14 May 1998. It found that there was no sociological fracture according to whether couples were married or not, and criticised the inegalitarian status of adulterine children.

22. In August 1998 a working group on family law was set up by the Minister of Justice to consider, among other things, "possible changes to the

law in the light of factual developments" in order to avoid "a gulf developing between [citizens'] aspirations and the law". Chaired by Professor Françoise Dekeuwer-Defossez, the commission submitted its report on 14 September 1999. It contained a set of proposals for "renovating family law". In particular, the commission recommended "giving full effect to the principle that children should be treated equally regardless of descent" as follows:

> "The principle that children should be treated equally regardless of descent was one of the two guiding principles underlying the 3 January 1972 Act. At the time, a compromise had to be made, however, and full equality was not achieved. Today, it appears essential to complete the exercise and achieve full equal treatment of children regardless of descent. In order to attain that objective, full equality of status needs to be achieved and the right to affiliation made equal so that the possibility of establishing or contesting descent will no longer depend on the parents' legal status.
>
> SS1. *Achieving equality of status*
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> The working group considers, unanimously and unhesitatingly, that the time has come to abolish the legal restrictions on adulterine children's inheritance rights. The current position is that their rights are halved where they are competing with half-brothers and sisters or with the adulterer's spouse.
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> A number of arguments militate strongly in favour of abolition. The first is quite simply chronological. The solutions adopted by the 3 January 1972 Act constituted, according to the most eminent commentators, 'an inglorious trade-off', the fruit of a 'Law of compromise'. That compromise was necessary as a transitional phase during which the principle of equality which the Act had intended to promote could be progressively inserted into our law. Twenty-seven years later, the transitional phase has come to an end. The second argument stems from the case-law of the European Court of Human Rights. It is likely that the Court will soon find that the French rule violates the Convention, and it would be preferable for an amendment of our law not to appear to be imposed from outside. Lastly, and above all, the solution favoured by the group of making the law of descent equal by abolishing divisive classifications makes it more and more difficult to maintain inequalities based on conditions of birth, without inevitably incurring the two-fold complaint of injustice and contradiction.
>
> Is there a danger that the importance of marriage will be lessened by undermining the trust which husbands and wives have placed in each other? The group does not think so. Adultery is clearly a serious injury inflicted on the spouse who is the victim of it and, over and above the spouses, on the children born of their marriage. In more legal terms, adultery is always an instance of misconduct and can be serious misconduct, for the duty of fidelity is inherent in the marital commitment. If such misconduct must be punished, however, it is only those who have committed it who should be punished and certainly not, we feel, the child born as a result. It is contradictory to declare on the one hand that parents have equal responsibility for their children irrespective of how they choose to lead their life as a couple and, on the other hand, to impose on a child, on the grounds that he or she is adulterine, the consequences of the parent's infidelity.
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> More specifically, to enforce marital duties through inheritance rights appears to be neither fair nor appropriate. For one thing, relations between husband and wife will

often have been broken off well before the birth of the child, and there is therefore something hypocritical about imposing on that child the ties of a commitment from which those who entered into it have long since freed themselves. For another thing, even if the marital ties have remained intact until the end, is it not vain to hope that a hereditary advantage will succeed in healing a split which by its very nature belongs to a completely different realm? Moreover, as the law currently stands, it is almost always possible for the child's parent to 'erase' this reduction in rights by legitimising – after divorcing and re-marrying, or, without divorcing, by seeking a court order – or even adopting the child. Far from making the rule more easily bearable, that option has the effect of leaving the child's ultimate destiny to the discretion of the adulterous parent. Thus the current provisions have the effect of multiplying inequalities, without succeeding in strongly affirming the importance of the marital commitment.

We add that we are not in favour of an intermediate solution whereby the current protection afforded by law to children born in wedlock (particularly Articles 760 and 915) would be abolished, while the protection afforded to the wronged spouse, the direct victim of the adultery, under Articles 759 and 767, second paragraph, would be maintained. The effect of that solution would be minimum compliance with the international conventions, whose sole concern is to secure equality between children, whereas the protective provisions specific to the spouse apply, by definition, only where the deceased leaves no other issue. Such a hybrid solution would merely be a means of failing to resolve the debate. What is actually at issue is not only material equality between children born of different partnerships in the division of their common parent's estate, but, in both more abstract and stronger terms, equality of the rights conferred by descent.

Proposal:

– Abolish the restrictions on adulterine children's inheritance rights."

THE LAW

23. The applicant alleged that he was a victim of a violation of Articles 8 and 14 of the Convention and of Article 1 of Protocol No. 1 because the provisions applicable in French civil law limited his inheritance rights over his mother's estate as compared to those of his half-brother.

24. The Court considers that since division of the estate had already begun when the application was lodged, the complaint should first be examined under the head of an alleged infringement of the applicant's right to the peaceful enjoyment of his possessions, in conjunction with the principle of non-discrimination (see, *mutatis mutandis*, the Inze v. Austria judgment of 28 October 1987, Series A no. 126, p. 17, § 38).

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

25. The applicant complained that, owing to the application by the French courts of Article 760 of the Civil Code, he was awarded a smaller portion in his mother's estate than the portion awarded to his half-brother, by reason of his being an adulterine child.

26. Article 1 of Protocol No. 1 and Article 14 of the Convention provide:

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."

Article 14 of the Convention

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

27. The applicant stated that his half-brother was a child born out of wedlock who was subsequently legitimised by his parents' marriage. He submitted that the distinction drawn, as regards inheritance rights, between a child born out of wedlock subsequently legitimised by marriage and a competing adulterine child did not pursue a legitimate aim. He added that, even if it were sought to defend the institution of marriage and the traditional family, the difference in treatment of an adulterine child as compared to a legitimised child born out of wedlock was unacceptable since, in both cases, the child had been conceived out of wedlock. Thus equality of rights would not impede in any way the resolution of a situation which had not arisen within marriage, but outside marriage. Furthermore, the protection of the non-adulterous spouse was an irrelevant issue here since the divorce had been pronounced on 4 July 1944.

28. The applicant went on to observe that the domestic courts' disregard for the deceased's intention to make him a gift made the differentiation between his inheritance rights and those of his half-brother even more illegitimate.

29. The applicant submitted that the means employed to protect the legitimate family were disproportionate to the aim pursued.

30. He pointed out that the Convention, which was a dynamic text and entailed positive obligations for States, was a living instrument, to be interpreted in the light of present-day conditions and that great importance was attached today in the member States of the Council of Europe to the question of equality between children born in and children born out of wedlock as regards their civil rights. Accordingly, very weighty reasons had to be advanced before a difference in treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention.

31. Basing himself on European comparative law, the applicant submitted, in response to the Government's arguments, that France stood out in the Council of Europe by its maintenance of an excessively restrictive and discriminatory position on this question.

32. With regard to the State's margin of appreciation, the applicant argued that no grounds or evidence had been adduced to justify making a special case for France in the realm of morality such as to render implementation of the constantly reaffirmed principle of equality impossible.

33. The Government submitted that the provisions of Article 760 of the Civil Code were based on very solid reasons which pursued a legitimate aim and complied with the relationship of proportionality required by the Court. They added that, according to the case-law, a distinction was discriminatory if it had no objective and reasonable justification.

34. With regard to justification, the Government stressed that, in the spirit of the 3 January 1972 Act acknowledging equal treatment of children regardless of descent, Article 760 of the Civil Code had been introduced as an exception designed to protect the legitimate family, which was based on the institution of marriage from which flowed rights and obligations, such as the duty of fidelity.

35. They added that to grant an adulterine child exactly the same rights as a legitimate child would be tantamount to having no regard whatsoever to a situation established on the basis of marital trust, and that the protection of the legitimate family was thus ensured by affording special protection to the members of that family who were particularly affected by the adultery, that is, the spouse and the legitimate children.

36. The Government submitted that such an aim was legitimate.

37. They also submitted that the means employed were proportionate to the aim pursued and stressed that the State had a margin of appreciation in this field.

38. They added that the member States of the Council of Europe did not have a shared approach to the rights of adulterine children and that the Court had taken that factor into consideration in its judgment in the case of Rasmussen v. Denmark (judgment of 28 November 1984, Series A no. 87).

39. The Government considered, *mutatis mutandis*, that the lack of a shared approach within the Council of Europe should result in the States being permitted a margin of appreciation sufficient to allow them to determine measures to protect the members of a legitimate family where they were competing with adulterine children in their parent's estate. They also relied on the existence of moral interests which fell to be considered in this type of situation.

40. In any event, the Government considered that the measures taken were not disproportionate to the aim pursued.

Adulterine children's rights were restricted only in exceptional circumstances, that is, where they were competing with a child born in wedlock or one born out of wedlock but not of an adulterous relationship. They added that there were several ways in which an adulterous spouse could erase that inequality, such as legitimising the child through marriage or by a court order.

41. The Court points out first of all that Article 1 of Protocol No. 1 in substance guarantees the right of property (see the Inze judgment cited above, p. 17, § 38).

42. Since the applicant's mother had died at the material time, the Court notes that the applicant had automatically acquired hereditary rights over her estate under Articles 745, 757 and 760 of the French Civil Code. The estate was therefore the joint property of the applicant and his half-brother.

43. The facts of the case therefore attract Article 1 of Protocol No. 1, and Article 14 of the Convention can be applied in conjunction with that provision.

A. Whether there was a difference in treatment

44. The Court notes at the outset that the Government do not dispute the fact that, under the relevant Articles of the Civil Code, the two half-brothers were not in the same position with regard to their mother's estate.

45. The Court notes that it was on account of his status as an adulterine child that the applicant's share in the estate was reduced, in favour of his half-brother, by half of the portion to which he would have been entitled if he had been a child born in wedlock or one born out of wedlock but not of an adulterous relationship, and that such difference in treatment is expressly provided for in Article 760 of the Civil Code.

46. The Court reiterates on this point 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 (see the Hoffmann v. Austria judgment of 23 June 1993, Series A no. 255-C, p. 58, § 31).

47. It must therefore be determined whether the alleged difference in treatment was justified.

B. Justification for the difference in treatment

48. For the purposes of Article 14 of the Convention, 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, among other authorities, the Inze judgment cited above, p. 18 § 41, and the Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24).

49. The Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, among other authorities, the Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, pp. 24-25, § 53). Today the member States of the Council of Europe attach great importance to the question of equality between children born in and children born out of wedlock as regards their civil rights. This is shown by the 1975 European Convention on the Legal Status of Children born out of Wedlock, which has not been ratified by France. Very weighty reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention (see, *mutatis mutandis*, the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, pp. 37-38, § 78, and the Inze judgment cited above, p. 18, § 41).

50. The Court considers that the aim relied on by the Government, that is, the protection of the traditional family, is arguably a legitimate one.

51. The question remains whether, regarding the means employed, the establishment of a difference of treatment between adulterine children and children born in wedlock or out of wedlock but not of an adulterous relationship, with regard to inheritance under their parent, appears proportionate and appropriate in relation to the aim pursued.

52. The Court notes at the outset that the institution of the family is not fixed, be it historically, sociologically or even legally. Thus the 3 January 1972 Act constituted, among other things, a major step forward in the development of family law and the position of children born out of wedlock, since it settled the question of establishing the descent of all children. The United Nations Convention on the Rights of the Child, which enshrined the prohibition on discrimination based on birth, was adopted on 20 November 1989 (see paragraph 18 above). Subsequently, in May 1990 the *Conseil d'Etat* published a report recommending, in the light of socio-demographic data, the abolition of discrimination against adulterine children in inheritance matters (see paragraph 19 above). In December 1991 a bill proposed bringing the inheritance rights of adulterine children into line with those of other children (see paragraph 20 above). In 1998 the Minister of Justice set up two projects, one designed to study shifts in family models

from a sociological angle, and the other to consider possible changes to the law in the light of factual developments. The first report, submitted on 14 May 1998, criticised the inegalitarian status of adulterine children (see paragraph 21 above) while the second report, submitted on 14 September 1999, recommended abolishing the restrictions on adulterine children's inheritance rights (see paragraph 22 above). With regard to the situation in other member States of the Council of Europe, the Court notes, contrary to the Government's assertions (see paragraph 38 above), a distinct tendency in favour of eradicating discrimination against adulterine children. It cannot ignore such a tendency in its – necessarily dynamic – interpretation of the relevant provisions of the Convention. In that connection, the reference made by the Government to the Rasmussen judgment (see paragraph 38 above) is not convincing, since the factual and temporal circumstances have now changed.

With regard to the argument based on the moral dimension of the case (see paragraph 39 above), the Court cannot but take account of the socio-demographic findings at the material time and, among other things, the 1991 bill recommending the abolition of all discrimination.

53. It is not the Court's task to rule on whether the applicant's mother had or had not breached the commitments entered into on her marriage with regard to the legitimate family unit. It merely notes that the applicant's mother and her husband were living apart when the applicant was born and that they divorced very soon thereafter (see paragraph 8 above).

54. The only issue submitted to the Court concerns the question of inheritance from the mother by her two children, one born out of wedlock and the other adulterine. The Court does not find any ground in the instant case on which to justify discrimination based on birth out of wedlock. In any event, an adulterine child cannot be blamed for circumstances for which he or she is not responsible. It is an inescapable finding that the applicant was penalised, on account of his status as an adulterine child, in the division of the assets of the estate.

55. Having regard to all the foregoing, the Court concludes that there was not a reasonable relationship of proportionality between the means employed and the aim pursued.

There has therefore been a violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention.

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

56. Having regard to the conclusion set out in the previous paragraph and to the fact that the arguments advanced by the parties are the same as those examined in the context of Article 1 of Protocol No. 1 taken in

conjunction with Article 14 of the Convention, the Court does not consider it necessary to examine this complaint.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. Article 41 of the Convention provides:

> "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."

A. Damage

58. The applicant claimed under the head of pecuniary damage the difference between the amount distributed to him and the amount he would have received if the estate had been halved. The Government did not contest that claim. In the circumstances, the Court holds that the applicant should be awarded 376,034.61 French francs (FRF) for pecuniary damage.

59. The applicant also claimed compensation for non-pecuniary damage in the sum of FRF 100,000. The Government disputed that claim. The Court decides, on an equitable basis, to award the applicant FRF 20,000 for non-pecuniary damage.

B. Costs and expenses

60. The applicant sought reimbursement of all the costs which he had incurred both in the domestic courts and before the Convention institutions, that is FRF 55,322.69 and FRF 72,360 respectively.

61. The Government argued that account should be taken only of the costs incurred in the European proceedings, on production of the relevant vouchers.

62. The Court considers that the costs incurred, both in the domestic courts and before the Convention institutions, were intended to remedy the alleged violation of the Convention. It awards, on an equitable basis, an aggregate sum of FRF 100,000 under that head.

C. Default interest

63. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 3.47% per annum.

FOR THESE REASONS, THE COURT

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

2. *Holds* by five votes to two that it is not necessary to examine the complaint based on Article 8 of the Convention taken in conjunction with Article 14;

3. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) FRF 376,034.61 (three hundred and seventy-six thousand and thirty-four French francs sixty-one centimes) in respect of pecuniary damage;
      (ii) FRF 20,000 (twenty thousand French francs) in respect of non-pecuniary damage;
      (iii) FRF 100,000 (one hundred thousand French francs) in respect of costs and expenses;
   (b) that simple interest at an annual rate of 3.47% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 1 February 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

N. BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Mr Loucaides and Mrs Tulkens is annexed to this judgment.

N.B.
S.D.

JOINT PARTLY DISSENTING OPINION OF JUDGES LOUCAIDES AND TULKENS

(Translation)

Although we voted for finding a violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention, we do not, however, agree with the decision of the majority that "it is not necessary to examine the complaint based on Article 8 of the Convention taken in conjunction with Article 14". We are surprised by that decision to the extent that the examination of this case and the question put to the parties with a view to holding a hearing concerned mainly the applicant's complaint based on Article 8 of the Convention taken in conjunction with Article 14. Contrary to the opinion of the Court as expressed in paragraph 56 of the judgment, we do think that the Court should have ruled, firstly, on the question of the right to respect for family life, although that would have meant concluding that no separate issue arose under Article 1 of Protocol No. 1.

We shall confine ourselves to mentioning two reasons which, in the instant case, are linked and mutually supportive.

1. The first reason concerns the respect due to the applicant. Throughout the case, both in the domestic courts and before this Court, the applicant did not wish to reduce the dispute to a merely pecuniary issue, but presented it as a matter of discrimination linked to the status of "children born out of wedlock whose father or mother was, at the time of their conception, bound to another person in wedlock" and still unfortunately labelled "adulterine" illegitimate children. That, moreover, was the reason why he declined a proposal for a friendly settlement limited to the financial aspect of the dispute alone.

The mere fact that the division of the estate had already begun to take effect when the application was lodged, which, in the Court's view, justified examining it under the head of an alleged infringement of the right to the peaceful enjoyment of possessions (see paragraphs 24, 42 and 43 of the judgment), as the Government had requested, does not appear to us to be conclusive. The Family Law Commission set up in 1998 in order, among other things, to avoid "a gulf developing between [citizens'] aspirations and the law", rightly considered, in its report of 14 September 1999, that dealing with the issue solely from the standpoint of inheritance rights "appears to be neither fair nor appropriate", for "is it not vain to hope that a hereditary advantage will succeed in healing a split which by its very nature belongs to a completely different realm?" (see paragraph 22 of the judgment).

2. The second reason concerns the restriction of inheritance rights as provided for in Article 760 of the Civil Code. That restriction, which the Court rightly held to be contrary to Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention, stems from the inferior

status of "adulterine" children, which still subsists in other provisions of the Civil Code (Articles 334-7, 759, 761, 762, 767, third paragraph, 908, 915-2, 1097-1) following the uncompleted reform of the 3 January 1972 Act. It is thus indeed here, in the realm of family life, that the problem arises, namely discrimination based on descent. The same Family Law Commission's report of 14 September 1999, to which we referred in the previous point, pinpointed it when it recommended "giving full effect to the principle that children should be treated equally regardless of descent" and, to that end, considered it necessary "to achieve equality of status" (see paragraph 22 of the judgment). By confining itself to one of the consequences of that status, in this case the restrictions on "adulterine" children's inheritance rights (in respect of which, moreover, there is a broad consensus in favour of abolition), the Court has perhaps not addressed the issue in its most meaningful terms, that is, the maintenance of inequalities, in the law of descent, based on conditions of birth. To apply a *lex specialis* in the instant case risks resembling a form of judicial "minimalism" or, to quote from the report of the Commission chaired by Professor Dekeuwer-Defossez, a "hybrid solution", for "what is actually at issue is not only material equality between children born of different partnerships in the division of their common parent's estate, but, in both more abstract and stronger terms, equality of the rights conferred by descent" (see paragraph 22 *in fine* of the judgment). Furthermore, the Court's judgment leaves unresolved the question as to whether it considers, as the Government suggested, that inheritance rights fall outside the ambit of respect for private and family life guaranteed by Article 8 of the Convention, which may appear to be a regression compared with earlier judgments.

In the light of the importance which the member States of the Council of Europe attach to equality in respect of civil rights between children born in wedlock and children born out of wedlock, the clarity of our case-law, which is essential for the execution and enforcement of the Court's judgments and their contribution to the collective guarantee of human rights, appears to us to be a requirement worth reiterating. We hope, however, that the present judgment will result in a long-awaited change and thus establish the principle that children should be treated equally regardless of descent.