

FOURTH SECTION

**CASE OF PLA AND PUNCERNAU v. ANDORRA**

*(Application no. 69498/01)*

**JUDGMENT**

**STRASBOURG**

**13 July 2004**

**FINAL**

***15/12/2004***

**In the case of Pla and Puncernau v. Andorra,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:  
Sir Nicolas Bratza, *President*,

Mrs V. Strážnická,

Mr J. Casadevall,

Mr R. Maruste,

Mr L. Garlicki,

Mr J. Borrego Borrego,

Mr S. Pavlovski, *judges*,

and Mr M. O'Boyle, *Section Registrar*,

Having deliberated in private on 7 October 2003, 23 April 2004 and 22 June 2004,

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

## PROCEDURE

1. The case originated in an application (no. 69498/01) against the Principality of **Andorra** lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Andorran nationals, Mr Antoni **Pla Puncernau** and Mrs Roser **Puncernau** Pedro ("the applicants"), on 16 May 2001.

2. The applicants were represented by Mr M. Pujadas, of the Andorran Bar. The Andorran Government ("the Government") were represented by their Agent, Mrs R. Castellón Sánchez, Head of the Government's Legal Office.

3. The applicants alleged that, in determining inheritance rights, the High Court of Justice and the Constitutional Court had discriminated against the first applicant on grounds of filiation. In their submission, that had amounted to a violation of Article 8 of the Convention taken alone and in conjunction with Article 14.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

6. By a decision of 27 May 2003, the Chamber declared the application partly admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 October 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs R. Castellón Sánchez, *Agent*,

Mr M. Vila Amigó, *Counsel*,

Ms M. Fernández Llorens,

Mr J. Medina Ortiz, lawyers, *Advisers*;

(b) *for the applicants*

Mr M. Pujadas,

Ms C. Llufríu,

Ms V. Durich, lawyers, *Counsel*.

9. The Court heard addresses by Mr Pujadas for the applicants and by Mr Vila Amigó for the Government and their replies to a question put by the President of the Chamber.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

10. The first applicant, Mr Antoni **Pla Puncernau**, who was born in 1966, is the adopted son of the second applicant, Mrs Roser **Puncernau** Pedro. The second applicant was the first applicant's supervisor, as Mr **Pla Puncernau** is mentally handicapped. They both lived in **Andorra**. She died when the proceedings were still pending before the Court.

#### A. Background to the case

11. In 1949 Mrs Carolina Pujol Oller, the widow of Francesc **Pla** Guash, died leaving three children: Francesc-Xavier, Carolina and Sara. She had made a will before a notary in 1939. Under the seventh clause of her will, she settled her estate on her son, Francesc-Xavier, as tenant for life. Should he be unable to inherit, the estate was to pass to his sister, Carolina, and if she was also unable to inherit, it was to pass to Sara's son, Josep Antoni Serra **Pla**.

12. The testatrix indicated that Francesc-Xavier, the beneficiary and life tenant under her will, was to transfer the estate to a son or grandson of a lawful and canonical marriage. To that effect she had inserted the following clause in her will: "The future heir to the estate must leave it to a son or grandson of a lawful and canonical marriage ..." (*"El qui arribi a ésser hereu haurà forçosament de transmetre l'herència a un fill o net de legítim i canònic matrimoni ..."*).

Should those conditions not be met, the testatrix had stipulated that the children and grandchildren of the remaindermen under the settlement would be entitled to her estate.

13. The beneficiary under the will, Francesc-Xavier, contracted canonical marriage to the second applicant, Roser **Puncernau** Pedro. By deed drawn up on 11 November 1969 before a notary in La Coruña (Spain), they adopted a child, Antoni, in accordance with the procedure for full adoption. They subsequently adopted a second child.

14. In 1995 Francesc-Xavier **Pla** Pujol made a will in which he left 300,506 euros (EUR) to his son, Antoni (the first applicant), and EUR 180,303 to his daughter. He named his wife, Roser (the second applicant), sole heir to the remainder of his estate. In a codicil of 3 July 1995, Francesc-Xavier **Pla** Pujol left the assets he had inherited under his mother's will to his wife for life and to his adopted son, Antoni, as remainderman. The assets in question consisted of real estate. On 12 November 1996 Francesc-Xavier **Pla** Pujol died. The codicil was opened on 27 November 1996.

15. Accordingly, the only potential heirs to the estate under the will are the applicants, Antoni **Pla Puncernau** and his mother, and two sisters, Carolina and Immaculada Serra Areny, who are the great-grandchildren of the testatrix.

#### B. Civil action brought by the sisters Carolina and Immaculada Serra Areny to have the 1995 codicil set aside

16. On 17 July 1997 Carolina and Immaculada Serra Areny brought proceedings in the *Tribunal des Batlles* of **Andorra** to have the codicil of 3 July 1995 declared null and void and seeking an order requiring the applicants, as defendants in the proceedings, to return to the

plaintiffs all the assets of the estate of Carolina Pujol Oller, their great-grandmother, and to pay them damages for unlawful possession of the assets.

17. In a judgment delivered on 14 October 1999, after hearing submissions from both sides, the Civil Division of the *Tribunal des Batlles* of **Andorra** dismissed the action for the following reasons:

“ ...

III. Both parties agree that it is the contents of the will that determine the testatrix's intention at the time of making it, so that the will has to be interpreted in accordance with that intention, which is to be inferred from the words used in the will (*Digest* 50, 16, 219). Since 1941 it has been apparent from the case-law of the Andorran courts (judgment of the Judge of Appeals dated 3 February 1941) that ‘on both a partially intestate and a testate succession it is principally the testator's intention that must be taken into account, as can be inferred from many provisions of Roman and canon law ...’

IV. In her will dated 12 October 1939, the testatrix stipulated that ... ‘The future heir to the estate must leave it to a son or grandson of a lawful and canonical marriage ...’ [*‘El qui arribi a ésser hereu haurà forçosament de transmetre l’herència a un fill o net de legítim i canònic matrimoni ...’*].

In doing so, the will in question set up a family settlement *si sine liberis decesserit*. An analysis of this type of settlement shows that the purpose is to secure and preserve the estate by keeping it in the settlor's family.

V. In interpreting the contents of the will in question, account has to be taken, as has previously been stated, of the testatrix's intention in the light of the words used and the actual nature of the society in which she lived.

When the will was made, the Constitution had not been enacted and there was no ordinary statute or other relevant analogous provisions. Consequently, for the purposes of interpreting the wording in the will reference has to be made to customary law, the *ius commune*, deriving from the influence of Roman law as amended by canon law, and to the relevant case-law of the Andorran courts ... Foreign legislation, case-law and legal theory cannot apply in the present case.

The *Corpus Iuris* provided for the institution of adoption and included in the word ‘child’, children born out of wedlock and adopted children ... by providing for two forms of adoption: one undertaken under the authority of a *princeps* and the other before a judge. The procedure followed in the first case was to ask the adoptive parent if he sought to take the adopted child as his legitimate child and to ask the adopted child if he consented. It was also stipulated that ‘a consanguineous relationship is not instituted by deed but by birth or solemn adoption’ (Diocletian and Maximianus, *Codi* 4, 19, 13). Furthermore, ‘the father-child bond is not created by mere declarations or false assertions, even if both parties consent, but only by lawful marriage or solemn adoption’ (Diocletian and Maximianus, *Codi* 4, 19, 14) ...

Consequently, according to the Roman concept of adoption, the adopted child leaves his family of origin and terminates all legal connection with it. On doing so he becomes the son of the adoptive parent's family and, as such, takes the family name and above all acquires inheritance rights. This institution has essentially been used for inheritance purposes. Subsequently, two forms of adoption became available: full adoption and simple adoption [*menys plena*], the sole purpose of the latter being to safeguard the adopted child's rights over the adoptive parent's estate. Full adoption is based on the idea that adoption must replace or imitate biological filiation.

...

VI. ... If account is taken of the fact that adoption is a legal institution whose purpose is to enable childless couples to have children ... At that time adoption therefore already satisfied a need, with the adopted child being regarded as a legitimate child. That approach was subsequently confirmed by the Constitution and by statute.

It cannot therefore be said that, by inserting that clause, the testatrix intended to prevent adopted or non-biological children from inheriting her estate. If that had been her intention, she would have made express provision for it.

Accordingly, the codicil made by the late heir, Francesc-Xavier **Pla** Pujol, is compatible with the deceased Carolina Pujol Oller's will and cannot be declared null ...”

### C. Appeal to the High Court of Justice of **Andorra**

18. The Serra Areny sisters appealed to the High Court of Justice of **Andorra**. In a judgment delivered on 18 May 2000, after hearing submissions from both sides, the High Court set the lower court's judgment aside. It allowed the appeal, set aside the codicil of 3

July 1995, declared that the appellants were the legitimate heirs to their great-grandmother's estate and ordered the applicants to return the property in question. The grounds for the court's judgment were as follows:

"II. ... Accordingly, the fundamental question to be resolved in the instant case is whether a child who has been adopted in accordance with the procedure for full adoption can be regarded as a child of a lawful and canonical marriage, as required by the testatrix ...

III. This question has to be resolved in accordance with the legal rules on the relationship of adopted children to their adoptive parents that were in force in 1939 and 1949, that is, between the time when Mrs Carolina Pujol i Oller made her will and the date of her death. A will becomes a legal deed from the date on which it is made in accordance with the statutory formalities. Accordingly, in interpreting the testamentary dispositions, regard must be had in the instant case to the legal position of adopted children in the social and family conditions existing in 1939 when the will was made and possibly in 1949 when the testatrix died ...

Legal commentators with first-hand experience of Andorran life stress that adoption is practically unheard of in **Andorra** (Brutails: '*Andorran customs*', p. 122). That assertion is borne out by all the Andorran case-law reports, in which there is no reference to adoption. This silence on the subject is perfectly understandable, moreover, given that the provisions of Roman law on adoption could not easily be transposed to Andorran families living in the first half of the twentieth century for the following reasons: since the nineteenth century it could be regarded as an institution that had become obsolete and, to a certain extent, unnecessary given that the main purpose – to appoint a successor or heir – had been achieved in the Principality of **Andorra** through the institution of *heretament* (agreement, specific to Catalan law, on the succession of a living person), introduced by customary law. In that social and family context, it is difficult to sustain the proposition that, in setting up a family settlement in case her heir should die without leaving offspring of a lawful and canonical marriage, the testatrix was also referring to adopted children, given that, at the time, adoption was not an established institution in the Principality of **Andorra**.

The fact that in the instant case the adoptive parents were married to each other does not make their adopted child a legitimate child or a child born of the marriage. The distinction according to whether a child was born in or out of wedlock is relevant only to illegitimate children ... with regard to adopted children, the distinction according to whether a child was born in or out of wedlock does not apply. Accordingly, a child adopted by a couple is an adopted child and not a legitimate child or a child of the marriage.

Furthermore, the notarially recorded deed of adoption was drawn up in Spain in accordance with the Spanish procedure for full adoption ... The Law of 24 April 1958, amending the Civil Code, is applicable to the conditions and general effects of full adoption. Under that Law, the act of adopting a child gave him or her the status of the adoptive father/mother's child, but did not give the child family status with regard to the adoptive parents' family. Under Article 174-VII of the Spanish Civil Code, adoption created a filial tie between the adoptive parent, the adopted child and his or her legitimate descendants, but not with the adoptive parent's family. Moreover, the inheritance rights were also limited in the present case: the deed of adoption referred to the relevant 1960 Catalan legislation, that is, a compilation of 1960 Catalan civil law. Article 248 provided that on an intestate succession adopted children were entitled to inherit only from their adoptive father or mother and not from the rest of their adoptive parents' family. That rule reflected the idea that adoption created only a filial status and not a family status.

IV. Accordingly, from a legal standpoint, the adopted children of persons on whom an estate was settled by their father or mother were unconnected with the family circle with regard to the beneficiary's ascendants. That approach can largely be explained by the minimal impact of adoption on the social and family consciousness in **Andorra**, both at the time when the will was made and when the testatrix died. The testatrix's presumed intention has to be established in the light of the circumstances existing at the time of her death. The adopted children of her legitimate son or of the marriage were unconnected with the family circle both from a legal and a sociological point of view.

The purpose of a family settlement *si sine liberis decesserit* under Catalan law is to keep the family estate in the legitimate or married family and Catalan legal tradition has always favoured the exclusion of adopted children from such family settlements ... Thus, in order for adopted children to inherit under this type of settlement, there must be no doubt as to the testatrix's intention to depart from the usual nature of this institution. In the instant case, the expression 'offspring of a lawful and canonical marriage', which appears in the 1939 will, does not suffice to infer that the testatrix intended to depart from the usual meaning given to family settlements *si sine liberis decesserit* under the Catalan and Andorran law of succession.

V. It is apparent from the foregoing that, although the law in force when the child was actually adopted allowed adopted children to inherit from their adoptive parents on an intestate succession (code 8, 48, 10),

those rights cannot extend to a testate succession, where the main factor is the testator's intention. Accordingly, any doubt as to the scope of the expression 'offspring of a lawful and canonical marriage' falls away when the testatrix's intention is analysed in the light of the social, family and legal conditions in which she lived. In the present case, nothing militates in favour of including the life tenant's adopted children, given the minimal impact of adoption on Andorran family and inheritance law, the adopted child's status as the adoptive parents' child (son) but not as a member of the parents' family, the purpose traditionally ascribed to family settlements under Catalan law, and Catalan and Andorran legal tradition."

#### **D. Application to the High Court of Justice of Andorra to have the proceedings set aside on grounds of nullity**

19. The applicants lodged an application with the High Court of Justice to have the proceedings set aside. They submitted that the latter had breached the principle of equality before the law enshrined in Article 6 of the Andorran Constitution and that they had breached Article 10 (right to judicial protection and to a fair trial) of the Andorran Constitution. In a decision of 28 June 2000, the High Court of Justice dismissed their application as ill-founded.

#### **E. Appeal (*recurso de empara*) before the Constitutional Court**

20. The applicants lodged an *empara* appeal with the Constitutional Court against the decisions of the High Court of Justice. They alleged a violation of Article 13 § 3 (principle of children's equality before the law regardless of filiation) and Article 10 (right to judicial protection and a fair trial) of the Andorran Constitution. In a decision of 13 October 2000, the Constitutional Court declared their appeal inadmissible for the following reasons:

"... It seems clear that the judgment of the High Court of Justice is limited to clarifying and determining, that is, interpreting, a specific point concerning the testatrix's intention, as expressed in her will in the form of a family settlement in favour of a child or grandson of a lawful and canonical marriage.

The High Court of Justice does not at any point suggest that there is general discrimination against, or inequality between, children according to whether they are biological or adopted. Such an assertion would evidently amount to a flagrant breach of Article 13 § 3 of the Constitution and would also be contrary to the prevailing legal opinion according to which legal systems must always be interpreted, which is that all children are equal, irrespective of their origin. However, as submitted in substance by State Counsel, 'discrimination against adopted children as compared to biological children does not in the instant case derive from an act of the public authorities, that is, from the judgment of the Civil Division of the High Court of Justice, but from the intention of the testatrix or settlor regarding who should inherit under her will' in accordance with the principle of freedom to make testamentary dispositions, which is a concrete manifestation of the general principle of civil liberty.

In its judgment, the High Court of Justice confined itself to interpreting a testamentary disposition. It did so from the legal standpoint it considered adequate and in accordance with its unfettered discretion, seeing that the interpretation of legal instruments is a question of fact which, as such, falls under the jurisdiction of the ordinary courts.

..."

21. The applicants lodged an appeal (*recurso de súplica*) with the Constitutional Court, which dismissed it on 17 November 2000.

## **II. RELEVANT DOMESTIC LAW**

22. Articles 6, 13 and 14 of the Andorran Constitution of 14 March 1993 provide:

#### **Article 6**

"1. Everyone is equal before the law. No one may be discriminated against on grounds of birth, race, sex, origin, religion, opinions or any other personal or social condition.

2. The public authorities shall create the conditions necessary to give full effect to the principles of equality and freedom.”

### Article 13

“1. The civil status of persons and forms of marriage shall be regulated by law. Canonical marriages are recognised as having civil effects.

...

3. Both spouses have the same rights and duties. All children are equal before the law, regardless of their filiation.”

### Article 14

“Everyone has the right to respect for their privacy, honour and image. Everyone is entitled to legal protection from unlawful interference with their private and family life.”

23. Section 24 of the Special Law (*qualificada*) of 21 March 1996 on the adoption and protection of minors in distress provides:

“... Adopted children have the same rights and obligations within the adoptive family as legitimate children.”

## THE LAW

### I. THE GOVERNMENT’S PRELIMINARY OBJECTION

24. The Government raised the objection that Article 8 of the Convention was inapplicable to the facts of the case because there had been no “family life” within the meaning of that provision between the applicants and Carolina Pujol Oller. In that connection, the Government referred to the lack of a genuine relationship between the grandmother, Carolina Pujol Oller, who had died in 1949, and the first applicant, who was adopted in 1969. In the Government’s submission, the Court had always adopted a pragmatic approach to the concept of “family life” in order to protect *de facto* rather than *de iure* family life. In that sense, the existence of a formal family tie was insufficient to attract the protection of Article 8.

25. For their part, the applicants disputed the Government’s submission, arguing that, if upheld, it would, for example, exclude posthumous children from the scope of Article 8. Moreover, the Government’s argument also concerned Carolina and Immaculada Serra, who had brought the proceedings in the Andorran courts to have the codicil set aside and had not known their great-grandmother either.

26. The Court points out that in *Marckx v. Belgium* (judgment of 13 June 1979, Series A no. 31, pp. 23-24, §§ 51-52), it accepted that the right of succession between children and parents, and between grandchildren and grandparents, was so closely related to family life that it came within the sphere of Article 8. It has thus considered that matters of intestate succession – and voluntary dispositions – between near relatives prove to be intimately connected with family life. Family life does not include only social, moral or cultural relations, for example in the sphere of children’s education; it also comprises interests of a material kind, as is shown by, amongst other things, the obligations in respect of maintenance and the position occupied in the domestic legal systems of the majority of the Contracting States by the institution of the reserved portion of an estate (*réserve héréditaire*). The fact that Carolina Pujol Oller had died before the first applicant was adopted is no reason for the Court to adopt a different approach in the present case (see, *mutatis mutandis*, *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 35, ECHR 2000-X).

Article 8 of the Convention is therefore applicable.

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

27. The applicants complained that, in determining inheritance rights, the High Court of Justice and the Constitutional Court had breached the applicants' right to respect for their private and family life by unjustifiably discriminating against the first applicant on the ground of his filiation. They submitted that this had resulted in a violation of Article 14 of the Convention taken in conjunction with Article 8.

28. Article 8 of the Convention provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

29. Article 14 provides:

“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.”

### A. The parties' submissions

#### 1. The applicants

30. The applicants stressed at the outset that the Court was faced with a problem that it had never had to deal with before. The previous cases it had examined (see *Marckx*, cited above; *Inze v. Austria*, judgment of 28 October 1987, Series A. no. 126; and *Mazurek v. France*, no. 34406/97, ECHR 2000-II) had concerned the statutory provisions governing instances of intestate succession that had given rise to an unlawful interference by the State with the applicants' family life and/or discrimination in family relations on grounds of birth.

31. The present case related to the private sphere since it concerned the freedom to arrange one's affairs in the form of a will made by Carolina Pujol Oller in 1939. The testatrix had died in 1949. The first applicant was adopted in 1969 and it was not until 1996, after the death of Carolina's son and life tenant under her will, that the codicil he had drawn up in 1995 was opened. The applicants were in no doubt that the case fell to be examined under the provisions of private law, which had to be read in the light of Andorran law as in force in 1996 and the Convention. Those rules had evidently not been applied by the High Court of Justice.

32. The applicants pointed out that customary law (*ius commune*) was a supplementary source of civil law under the Andorran law. The *ius commune* in force in **Andorra** incorporated Andorran customary law based on Roman law as revised in the light of canon law. That was the applicable legal framework in 1939, when the will was made. Adoption had already been a feature of canon law when it was first drafted over a thousand years ago. The Catholic Church attributed to adopted children the status laid down in canon 1094 of the Benedict XV Code, which was the relevant legislation in force when the will had been drafted in 1939. That status had been confirmed in 1983 by canon 110 of the modern Code of Canon Law, which enshrined the principle that adopted children and legitimate children were equal. There was abundant case-law authority to support the submission that canon law was a supplementary source of law in the Principality of **Andorra**. Moreover, under Roman law adopted children had the same inheritance and family rights as legitimate and illegitimate

children. Adoption had therefore been envisaged both in canon law and in Roman law. It was therefore undeniably a known legal institution that had been used by Andorrans in 1939.

33. With regard to the rules on interpreting wills, the applicants observed that, in accordance with the relevant Roman tradition, where a testamentary disposition was clear and unambiguous there was no need to depart from it on the pretext of ascertaining its meaning.

34. Accordingly, if the testatrix had really intended to exclude adopted children from the family settlement, she would have inserted a specific clause to that effect, as was habitually done by Andorran and Catalan notaries. In that connection, the applicants referred to the many forms, notarial deeds and court decisions by which adopted sons were in practice always prevented from inheriting an estate by an express exclusion clause which required the child to be legitimate and biological. This was phrased in the following ways: “*son of a lawful, canonical and carnal marriage*”, or “*legitimate and biological son of a canonical marriage*” or “*son procreated by lawful and carnal marriage*”. In the present case, however, Carolina Pujol Oller had made no mention in her will of any tacit or express exclusion of adopted sons. The sole purpose of the clause had been to exclude illegitimate sons.

35. The High Court of Justice of **Andorra** had therefore failed to apply the appropriate law in the present case. In the applicants’ submission, the court should have interpreted the will in accordance with the legislation in force in 1996, particularly the Andorran Constitution of 1993 and the adoption law of March 1996. That total failure to apply the appropriate law had resulted in an interference with their rights by the Andorran authorities, which were the ultimate guarantors of their right to enjoy their family life without any unjustified discrimination. In their view, the testatrix had clearly not made any distinction in her will regarding adopted children. Accordingly, it was neither for individuals nor the courts to make such a distinction, which was moreover contrary to the Andorran Constitution and the European Convention. The judgment of the High Court of Justice therefore amounted to an unlawful interference with their private and family life, which was clearly discriminatory as regards the first applicant. That interference and discrimination were expressly prohibited by the Andorran Constitution of 1993 and the Special Law on adoption and protection of minors in distress enacted in March 1996.

36. In conclusion, the applicants submitted that there had been a violation of Articles 8 and 14 of the Convention.

## 2. *The Government*

37. The Government stressed at the outset that Andorran law did not in any way discriminate between adopted children and legitimate children. In *Marckx*, the Court had found a violation of the Convention, but that had been based on a statutory discrimination. It was the exact opposite situation here, since Andorran law recognised that grandchildren, be they legitimate, illegitimate or adopted, had the same statutory inheritance rights with regard to their parents (reserved portion of the estate on a testate succession and hereditary rights on an intestate succession) and with regard to their grandparents. In the Government’s submission, the present case differed substantially from *Marckx* because the first applicant had been left more than EUR 300,000 by his father and had had the same inheritance rights as his sister or any other legitimate brother or sister if there had been one.

38. The property dispute in the present case arose as a result of the free will of a testatrix who, under domestic law, had been entirely free to dispose of her property as she wished, apart from the reserved portion. Subject to that restriction, the freedom to dispose of the remaining assets was protected under Andorran law. Once the portion reserved to the heirs was protected, testators were free to dispose of the rest of the property as they wished. That was precisely what had happened here. The Government submitted that there had been no interference with the applicants’ family life. Moreover, even supposing that the decisions of

the Andorran courts could be deemed to have interfered with the rights to which the applicants referred, the interference had been justified. Firstly, the decision of the High Court could be deemed to have pursued the legitimate aim of protecting the right of the true heirs under the settlement and, accordingly, was aimed at protecting the rights and freedoms of others. Secondly, the decision complained of fell within the States' margin of appreciation in areas such as the one in issue here. In sum, a fair balance had been struck between the competing rights in question.

39. In the Government's submission, the High Court of Justice's interpretation was in keeping with the testatrix's intention in 1939 and the law in force in **Andorra** at the time of her death in 1949. According to the legal tradition applicable at the time, adopted sons did not have the same rights as legitimate sons under family settlements because the purpose of that institution was to keep the family estate in the family. The postglossators had already observed that extending family settlements to adopted sons meant that the fulfilment of the condition was in the hands of the life tenant, with the clear risk of fraud or abuse of right that that entailed.

40. The Government reiterated that the interpretation of domestic law was a matter solely for the domestic courts, which were the best placed to interpret and apply domestic law. The Court's scrutiny was limited to ensuring that that application and interpretation were compatible with the requirements of the Convention. In the present case, the High Court of Justice had found, after examining the domestic law and the parties' allegations in detail in the course of the due exercise of its functions in interpreting the intention of the testatrix, that she had not included a provision expressly excluding adopted children because, to her mind, they had clearly been excluded by the term "son of a legitimate and canonical marriage". In sum, the High Court of Justice's interpretation had not breached the Convention, because the judgment contained no humiliating expression or declaration or one that could be regarded as infringing the human dignity of adopted children. The judgment was limited to finding that the testatrix had not intended adopted children to inherit her estate. Moreover, the will did not contain any clause that was illegal or contrary to public policy. The Government observed that any entitlement under a will was, by definition, discriminatory in that it generated differences between heirs.

41. In conclusion, the Government submitted that there had been no violation of the provisions in question.

## **B. The Court's assessment**

42. Since the issue of alleged discriminatory treatment of the first applicant is at the heart of the applicants' complaint, the Court considers it appropriate to examine the complaint first under Article 14 of the Convention taken in conjunction with Article 8.

43. The Court has had occasion in previous cases to examine allegations of differences of treatment for succession purposes both under Article 14 taken in conjunction with Article 8 (see *Marckx*, cited above, p. 24, § 54, and *Vermeire v. Belgium*, judgment of 29 November 1991, Series A no. 214-C, p. 83, § 28) and under Article 14 taken in conjunction with Article 1 of Protocol No. 1 (see *Inze*, cited above, p. 18, § 40, and *Mazurek*, cited above, § 43). The Court reaffirms that the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities (see, for example, *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A no. 112, p. 25, § 55, and *Camp and Bourimi*, cited above, § 28). That being said, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for private or family life (see *Marckx*, cited above, pp. 14-15, § 31).

The factor common to those cases was that the difference of treatment of which complaint was made resulted directly from the domestic legislation, which distinguished between legitimate and illegitimate children (see *Marckx*, *Vermeire* and *Inze*, cited above) or between children born of an adulterous relationship and other children, whether or not born in wedlock (see *Mazurek*, cited above). The question raised in each of these cases was whether such difference of treatment within the legal system of the respondent States violated the rights of the applicants under Article 14 taken in conjunction with Article 8 of the Convention or Article 1 of Protocol No. 1.

44. The essential difference between the present case and the above-cited ones is that in the instant case the Court is not required to determine whether there is an incompatibility between the Convention and the Andorran statutory provisions on adopted children's inheritance rights. The Court notes in that connection, moreover, that the parties agreed that both the Andorran Constitution of 1993 and the special law on adoption of 21 March 1996 were compatible with the principle under Article 14 of the Convention prohibiting discrimination on grounds of birth. In the present case, the question in issue concerns the High Court of Justice of **Andorra**'s interpretation, upheld by the Constitutional Court, of a testamentary disposition drafted in 1939 and executed in 1995. The Court has to determine whether that interpretation breached Article 14 of the Convention taken in conjunction with Article 8.

45. Clearly, the Andorran authorities cannot be held liable for any interference with the applicants' private and family life any more than the Andorran State can be held liable for a breach of any positive obligations to ensure effective respect for family life. The applicants confined themselves to challenging a judicial decision that had declared a private deed disposing of an estate to be contrary to the testatrix's wishes. The only outstanding question is that of the alleged incompatibility with the Convention of the Andorran courts' interpretation of domestic law.

46. On many occasions, and in very different spheres, the Court has declared that it is in the first place for the national authorities, and in particular the courts of first instance and appeal, to construe and apply the domestic law (see, for example, *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 20, § 46; *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 61, ECHR 2003-V; and *Slivenko v. Latvia* [GC], no. 48321/99, § 105, ECHR 2003-X). That principle, which by definition applies to domestic legislation, is all the more applicable when interpreting an eminently private instrument such as a clause in a person's will. In a situation such as the one here, the domestic courts are evidently better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute submitted to them and the various competing rights and interests (see, for example, *De Diego Nafria v. Spain*, no. 46833/99, § 39, 14 March 2002). When ruling on disputes of this type, the national authorities and, in particular, the courts of first instance and appeal have a wide margin of appreciation.

Accordingly, an issue of interference with private and family life could only arise under the Convention if the national courts' assessment of the facts or domestic law were manifestly unreasonable or arbitrary or blatantly inconsistent with the fundamental principles of the Convention.

47. The present case dates back to 1939 when Carolina Pujol Oller, Francesc **Pla** Guash's widow, made a will before a notary, the seventh clause of which settled her estate on her son, Francesc-Xavier (the first applicant's father) as life tenant with the remainder to a son or grandson of a lawful and canonical marriage. Should those conditions not be met, the testatrix stipulated that her estate had to pass to the children and grandchildren of the remaindermen under the settlement. In 1949 Carolina Pujol Oller died.

48. The beneficiary under the will, Francesc-Xavier **Pla** Pujol, contracted canonical marriage to the second applicant, Roser **Puncernau** Pedro. By deed sworn before a notary in La Coruña (Spain) on 11 November 1969, the couple adopted a child, Antoni (the first applicant), in accordance with the procedure for full adoption in force under Catalan law. They subsequently adopted a second child.

49. By a codicil dated 3 July 1995, Francesc-Xavier **Pla** Pujol left the assets he had inherited under his mother's will to his wife (the second applicant) for life, with the remainder to his adopted son, Antoni. Francesc-Xavier **Pla** Pujol died on 12 November 1996. The codicil was opened on 27 November 1996. The assets in question consisted of real estate.

50. Submitting that, as an adopted child, the first applicant could not inherit under the will made by the testatrix in 1939, two great-grandchildren of hers brought civil proceedings in the *Tribunal des Battles*, which dismissed their action. The High Court of Justice set the judgment aside on appeal and granted the appellants' claim. An appeal (*empara*) against that judgment was dismissed by the Constitutional Court.

51. With regard to the interpretation of the testamentary disposition, which is at the heart of the dispute, the *Tribunal des Batlles*, which dealt with the case at first instance, analysed the clause grammatically in the light of the historical background and applying Roman law as amended by canon law, which is a source of the general law applicable in **Andorra**. It concluded that the action should be dismissed. The court added that no foreign legislation, case-law or legal theory was applicable in the Principality. In its view, neither the wording of the clause nor the intention of the testatrix could prevent adopted children from inheriting under the will.

52. On appeal, the High Court of Justice construed the relevant facts and law differently. In the first place, it found that adoption had been practically unheard of in **Andorra** during the first half of the twentieth century. It concluded from this that it was difficult to reconcile the testatrix's act of creating a family settlement in case the life tenant should die without leaving offspring of a lawful and canonical marriage with an intention to extend the arrangement to adopted children. Similarly, the court observed that the deed of adoption had been drawn up in Spain in accordance with the Spanish procedure for full adoption. Under the Spanish law applicable at the time, particularly Catalan law (to which the deed of adoption referred), on an intestate succession adopted children could inherit only from their adoptive father or mother and not from the rest of the adoptive parents' family. When examining the testatrix's intention, the court found that both at the time when the will was made in 1939 and on the testatrix's death in 1949 the adopted children of her legitimate son or son of the marriage were outside the family circle from a legal and sociological point of view. The court found that, in order for adopted children to be able to inherit under a Catalan family settlement, there would have to be no doubt as to the testatrix's intention to depart from the usual meaning ascribed to that arrangement. The terms used in the will did not support that conclusion.

53. The Court notes that the Andorran courts gave two different interpretations: the first, given by the *Tribunal des Batlles*, was favourable to the applicants and the second, given by the High Court of Justice, went against them. Both are based on factual and legal elements that were duly evaluated in the light of the particular circumstances of the case.

54. The Court reiterates that 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*, judgment of 21 February 1997,

*Reports of Judgments and Decisions* 1997-I, p. 184, § 33, and *Camp and Bourimi*, cited above, § 34).

55. The Court has found above that the facts of the case fell within Article 8 of the Convention. Accordingly, Article 14 can apply in conjunction with Article 8.

56. The Court does not consider it appropriate or even necessary to analyse the legal theory behind the principles on which the domestic courts, and in particular the High Court of Justice of **Andorra**, based their decision to apply one legal system rather than another, be it Roman law, canon law, Catalan law or Spanish law. That is a sphere which, by definition, falls within the competence of the domestic courts.

57. The Court considers that, contrary to the Government's affirmations, no question relating to the testatrix's free will is in issue in the present case. Only the interpretation of the testamentary disposition falls to be considered. The Court's task is therefore confined to determining whether, in the circumstances of the case, the first applicant was a victim of discrimination contrary to Article 14 of the Convention.

58. In the present case, the Court observes that the legitimate and canonical nature of the marriage contracted by the first applicant's father is indisputable. The sole remaining question is therefore whether the notion of "son" in Carolina Pujol Oller's will extended only, as the High Court of Justice maintained, to biological sons. The Court cannot agree with that conclusion of the Andorran appellate court. There is nothing in the will to suggest that the testatrix intended to exclude adopted grandsons. The Court understands that she could have done so but, as she did not, the only possible and logical conclusion is that this was not her intention.

The High Court of Justice's interpretation of the testamentary disposition, which consisted in inferring a negative intention on the part of the testatrix and concluding that since she did not expressly state that she was not excluding adopted sons this meant that she did intend to exclude them, appears over contrived and contrary to the general legal principle that where a statement is unambiguous there is no need to examine the intention of the person who made it (*quum in verbis nulla ambiguitas est, non debet admitti voluntatis queastio*).

59. Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention (see *Larkos v. Cyprus* [GC], no. 29515/95, §§ 30-31, ECHR 1999-I).

60. In the present case, the High Court of Justice's interpretation of the testamentary disposition in question had the effect of depriving the first applicant of his right to inherit under his grandmother's estate and benefiting his cousin's daughters in this regard. Furthermore, the setting aside of the codicil of 3 July 1995 also resulted in the second applicant losing her right to the life tenancy of the estate assets left her by her late husband.

Since the testamentary disposition, as worded by Carolina Pujol Oller, made no distinction between biological and adopted children it was not necessary to interpret it in that way. Such an interpretation therefore amounts to the judicial deprivation of an adopted child's inheritance rights.

61. The Court reiterates that a distinction is discriminatory for the purposes of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, *inter alia*, *Fretté v. France*, no. 36515/97, § 34, ECHR 2002-I). In the present case, the Court does not discern any legitimate aim pursued by the

decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based. In the Court's view, where a child is adopted (under the full adoption procedure, moreover), the child is in the same legal position as a biological child of his or her parents in all respects: relations and consequences connected with his or her family life and the resulting property rights. The Court has stated on many occasions that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention.

Furthermore, there is nothing to suggest that reasons of public policy required the degree of protection afforded by the Andorran appellate court to the appellants to prevail over that afforded to the first applicant.

62. The Court reiterates that the Convention, which is a dynamic text and entails positive obligations for States, is a living instrument, to be interpreted in the light of present-day conditions and that great importance is 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 (see *Mazurek*, cited above, § 30). Thus, even supposing that the testamentary disposition in question did require an interpretation by the domestic courts, that interpretation could not be made exclusively in the light of the social conditions existing when the will was made or at the time of the testatrix's death, namely in 1939 and 1949, particularly where a period of fifty-seven years had elapsed between the date when the will was made and the date on which the estate passed to the heirs. Where such a long period has elapsed, during which profound social, economic and legal changes have occurred, the courts cannot ignore these new realities. The same is true with regard to wills: any interpretation, if interpretation there must be, should endeavour to ascertain the testator's intention and render the will effective, while bearing in mind that "the testator cannot be presumed to have meant what he did not say" and without overlooking the importance of interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court's case-law.

63. Having regard to the foregoing, the Court considers that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

64. In the light of the conclusion set out in the previous paragraph, the Court is of the opinion that there is no need to examine the application separately under Article 8 of the Convention taken alone.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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. Pecuniary and non-pecuniary damage**

66. The applicants submitted, firstly, that just satisfaction should take the form of setting aside the High Court of Justice's judgment, upholding the judgment of the *Tribunal des Batlles* and reinstating the first applicant as life tenant of the estate of his grandmother, Carolina Pujol Oller. Should that not be possible, they submitted that their pecuniary loss corresponded to the value of the assets in Carolina Pujol Oller's estate, which consisted of the following real property in the Principality of **Andorra**: the Hort de la Canaleta, the Hort d'ensucaranes, the Rec Vell de l'Obach, the Hôtel **Pla** and the Boïgues del **Pla**. According to an expert valuation dated 10 May 2001, the property was estimated to be worth 127,625,000

pesetas (767,042 euros (EUR)). In their last pleadings submitted at the hearing before the Court, the applicants submitted that, according to a recent expert valuation, the pecuniary damage amounted to EUR 1,195,913.

67. In respect of non-pecuniary damage, having regard to the health problems they had suffered – particularly the second applicant who was now 80 years old – and in view of the various proceedings brought before the Andorran courts, the applicants assessed the non-pecuniary damage sustained by the first applicant at EUR 120,000 and that sustained by the second applicant, who was his mother and supervisor, at EUR 30,000.

68. The Government, for their part, maintained that these claims were manifestly excessive. They submitted that since, under Andorran law, the first applicant's father could have kept for himself half the assets inherited from his mother, the Government were liable for only half the value of the estate in question, this being the assets that had to be transferred to the first applicant. They did not accept the applicants' valuation of the assets. According to their expert's valuation, the Hôtel **Pla** was worth EUR 661,885. The aggregate value of the other property (land) was EUR 89,281. In all, the Pla family's fortune had to be estimated at a maximum of EUR 751,166, to be reduced by one half: one quarter being the reserved portion of the estate and a further quarter being the amount of which the life tenant (the first applicant's father) could freely dispose. With regard to non-pecuniary damage, the Government submitted that the finding of a violation would constitute in itself adequate just satisfaction.

## **B. Costs and expenses**

69. In respect of the costs and expenses relating to their legal representation, the applicants claimed the reimbursement of EUR 76,460. They provided the following supporting documents:

(i) EUR 30,094 for fees incurred in the proceedings at first instance (supporting invoice dated 26 October 1999);

(ii) EUR 14,320 for fees incurred in the proceedings before the High Court of Justice (supporting invoice dated 10 May 2000);

(iii) EUR 7,611 for fees incurred before the Constitutional Court (supporting invoice dated 30 November 2000);

(iv) EUR 967 for fees paid to the solicitor in the domestic proceedings (supporting invoices dated 2 November 1999 and 10 November 2000);

(v) EUR 9,916 for fees incurred in opposing enforcement of the High Court of Justice's judgment of 18 May 2000 (supporting invoice);

(vi) EUR 1,171 for fees incurred in having Carolina Pujol Oller's estate valued (supporting invoice dated 10 May 2001);

(vii) EUR 12,378 for fees incurred in the proceedings before the Court (supporting invoices itemising the costs of defending the applicants before the Court).

70. The Government considered that the amounts claimed by the applicants under this head were exorbitant. In their submission, the costs incurred in the domestic courts should not be taken into consideration.

71. Having regard to the foregoing, the Government requested the Court not to rule at this stage on the question of the application of Article 41 of the Convention, which, in their opinion, was not ready for decision.

72. In the circumstances of the case, the Court considers that the question of the application of Article 41 of the Convention is not ready for decision. Consequently, it must be reserved and the subsequent procedure fixed taking due account of the possibility of an

agreement between the respondent State and the applicants (Rule 75 § 1). The Court allows the parties six months in which to reach such agreement.

## FOR THESE REASONS, THE COURT

1. *Holds* unanimously that the Government's objection must be dismissed;
2. *Holds* by five votes to two that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;
3. *Holds* unanimously that it is not necessary to examine the application separately under Article 8 of the Convention taken alone;
4. *Holds* unanimously that the question of the application of Article 41 is not ready for decision; accordingly,
  - (a) *reserves* the whole of the said question;
  - (b) *invites* the Government and the applicants to inform it within six months of any agreement they might reach;
  - (c) *reserves* the subsequent procedure and *delegates* to the President of the Chamber power to fix the same if need be.

Done in French and English, and notified in writing on 13 July 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle Nicolas Bratza  
Registrar President

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) partly dissenting opinion of Sir Nicolas Bratza;
- (b) dissenting opinion of Mr Garlicki.

N.B.  
M.O'B.

## PARTLY DISSENTING OPINION OF JUDGE Sir Nicolas BRATZA

1. While I share the view of the majority of the Chamber that the applicants' claim falls within the ambit of Article 8 of the Convention and that Article 14 is accordingly applicable, I am unable to agree with the majority's conclusion that there has been a violation of the two Articles taken in conjunction.

2. As is noted in the judgment, the present case is of an entirely different character from those previously examined by the Court involving allegations of discriminatory treatment in the field of succession and inheritance. In each of the earlier cases, it was the domestic legislation itself which gave rise to the difference of treatment of which complaint was made under the Convention, distinguishing as it did between the rights of succession of legitimate and illegitimate children (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 24, § 54; *Vermeire v. Belgium*, judgment of 29 November 1991, Series A no. 214-C, p. 83, § 28; and *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, p. 18, § 40) or between children born of an adulterous relationship and other children, whether legitimate or not (see *Mazurek v. France*, no. 34406/97, § 43, ECHR 2000-II). In the present case, no such complaint is made or could be made against **Andorra**, discrimination on grounds of birth being expressly prohibited by both the Andorran Constitution and the special law on adoption.

3. It is also important to observe that, although the applicants complain of the decisions of the High Court of Justice and the Constitutional Court of **Andorra**, it is not asserted that the decisions directly interfered with the applicants' Article 8 rights or subjected the first applicant to discriminatory treatment in the enjoyment of his family life by creating distinctions between the biological and adopted members of his family. As appears from the terms of its judgment, in upholding the appeals of the Serra Areny sisters and finding that, as an adopted child of the life tenant under the will of Carolina Pujol Oller, the first applicant was excluded from inheriting under the will, the High Court of Justice of **Andorra** sought to give effect to the intention of the testatrix herself in the exercise of her right to dispose of her property on her death. The circumstances of the present case are in this respect quite different from those which have frequently been examined by the Court, in particular under Article 10 of the Convention, in which it was the decisions of the domestic courts themselves which had restricted, penalised or otherwise interfered with the exercise of the Convention right in question and which required to be justified.

4. The fact that, under the Convention, the legislative or judicial organs of the State are precluded from discriminating between individuals (by, for instance, creating distinctions based on biological or adoptive links between children and parents in the enjoyment of inheritance rights) does not mean that private individuals are similarly precluded from discriminating by drawing such distinctions when disposing of their property. It must in principle be open to a testator, in the exercise of his or her right of property, to choose to whom to leave the property and, by the terms of the will, to differentiate between potential heirs, by (*inter alia*) distinguishing between biological and adoptive children and grandchildren. As pointed out in the opinion of Judge Garlicki, the testator's right of choice finds protection under the Convention, namely in Article 8 and in Article 1 of Protocol No. 1. The State must in principle give effect, through its judicial organs, to such private testamentary disposition and cannot be held to be in breach of its Convention obligations (including its obligations under Article 14) by doing so, save in exceptional circumstances where the disposition may be said to be repugnant to the fundamental ideals of the Convention or to aim at the destruction of the rights and freedoms set forth therein. This

remains true even if there may appear to be no objective and reasonable justification for the distinction made by a testator.

5. In my view, the distinction which was held by the domestic courts to have been intended by the testatrix in the present case between biological and adopted grandchildren cannot be said to be repugnant to the fundamental ideals of the Convention or otherwise destructive of Convention rights and freedoms. Nor do I understand the majority of the Chamber of the Court to suggest to the contrary. It is true that in paragraph 46 of the judgment it is said that an issue of interference with private and family life under the Convention could arise if the national court's assessment of the facts or domestic law were "blatantly inconsistent with the fundamental principles of the Convention" and in paragraph 59 such inconsistency is found to have existed in the national courts' assessment in the present case. However, I do not read this finding as suggesting that the upholding by a national court of a will which distinguishes between biological and adopted children is of itself to be seen as incompatible with Convention principles. The majority's finding is, as I understand it, based rather on the ground that the High Court's interpretation of the will in the present case and its assessment of the intention of the testatrix were clearly wrong and that accordingly it was that court's decision that, as an adopted grandchild, the first applicant was excluded from inheriting the estate which itself gave rise to a violation of Article 14.

6. The central question thus raised is whether the manner in which the domestic courts interpreted the will of the testatrix or applied the principles of domestic law was such as to permit such a finding. The majority of the Chamber have reiterated in paragraph 46 of the judgment the principles established by the Court's jurisprudence concerning the interpretation and application of domestic law: it is in the first place for the national authorities, and in particular the national courts, to construe and apply domestic law. I would agree with the majority that this principle applies *a fortiori* when the national courts are concerned with resolving disputes between private individuals or interpreting a private testamentary disposition, such courts being better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute and the competing rights and interests involved.

This being so, an issue would in my view only arise under the Convention if the Court were satisfied that the interpretation of the will or of the relevant principles of domestic law by the national courts was, to use the terms of the judgment, "manifestly unreasonable or arbitrary".

7. Thus far, I am in agreement with the majority's approach. Where I strongly disagree is as to the majority's application of these principles when examining the judgments of the national courts. Far from assessing the judgments according to these strict standards, the majority have to my mind substituted their own view of the proper interpretation of the will for that of the High Court of Justice of **Andorra**, preferring the construction placed on the will by the *Tribunal des Batlles*. While I can readily accept that one might prefer both the reasoning and the result reached by the first-instance court, I cannot accept that the decision of the appeal court may be characterised as either arbitrary or manifestly unreasonable.

8. I note at the outset that there was no real divergence between the *Tribunal des Batlles* and the High Court of Justice as to the appropriate date for the purposes of interpreting the testamentary disposition. Both agreed that the testatrix's intention had to be construed essentially in the light of the legal status of adopted children in the social and family conditions that obtained in 1939 when the will was drafted. The difference of opinion centred rather on the meaning to be ascribed to the clause "son of a legitimate and canonical marriage".

9. As noted in the judgment, the *Tribunal des Batlles* analysed the clause grammatically in the light of the historical background and applying Roman law as amended by canon law,

being a source of the general law applicable in **Andorra**. In its view, it could not be said that, by inserting the clause, the testatrix had intended to prevent adopted or non-biological children from inheriting her estate; had this been her intention, she would have made express provision for it.

10. On appeal, the High Court of Justice construed both the relevant facts and law differently. As appears from the judgment, it found that adoption had been practically unheard of in **Andorra** during the first half of the twentieth century. It concluded from this that it was difficult to reconcile the testatrix's act of creating a family settlement in case the life tenant should die without leaving offspring of a lawful and canonical marriage with an intention to extend the arrangement to adopted children, since adoption was not an established institution in the Principality at the time. Similarly, the court observed that the deed of adoption had been drawn up in Spain in accordance with the Spanish procedure for full adoption. Under the Spanish law applicable at the time, particularly Catalan law (to which the deed of adoption referred), on an intestate succession adopted children could inherit only from their adoptive father or mother and not from the rest of the adoptive parents' family. When examining the testatrix's intention, the court found that both at the time when the will was made in 1939 and on the testatrix's death in 1949 the adopted children of her legitimate son or son of the marriage were outside the family circle from a legal and sociological point of view. The purpose of a family settlement *si sine liberis decesserit* under Catalan law was, in the view of the court, to keep the family estate in the legitimate or married family and Catalan legal tradition had always favoured the exclusion of adopted children from such family settlements. The court thus found that, in order for adopted children to be able to inherit under a Catalan family settlement, there would have to be no doubt as to the testatrix's intention to depart from the usual meaning ascribed to that arrangement. The terms used in the will did not support that conclusion.

11. The majority of the Court, while finding it neither appropriate nor necessary to analyse the legal theory behind the decision of the High Court to apply one legal system rather than another, be it Roman, canon, Catalan or Spanish law (see paragraph 56 of the judgment), reject that court's conclusion that the clause in the will referred only to biological "sons". It is said that "there is nothing in the will to suggest that the testatrix intended to exclude adopted grandsons" and that, as it was open to her to have done so, "the only possible and logical conclusion is that this was not her intention" (see paragraph 58). The judgment goes on to state that the High Court's interpretation of the will, by which it inferred a negative intention on the part of the testatrix, "appears over contrived and contrary to the general legal principle that where a statement is unambiguous there is no need to examine the intention of the person who made it" (*ibid.*).

12. In my view, this analysis does not do justice to the reasoning of the High Court, which examined the meaning to be attributed to the disputed clause in the will in the light of the surrounding circumstances, both factual and legal, at the time of the disposition. Whether or not that reasoning is convincing and whether or not the view of the *Tribunal des Batlles* is to be preferred, I am quite unable to conclude, as the majority do, that the High Court's decision was unreasonable, arbitrary or "blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention" (see paragraph 59 of the judgment). Nor can I accept the majority's view that because it was "not necessary" to interpret the will to exclude adopted children, "such an interpretation ... amounts to the judicial deprivation of an adopted child's inheritance rights" (see paragraph 60).

13. The majority go on to assert that, even if the will required interpretation, it should not have been interpreted exclusively in the light of the social conditions existing at the time when the will was made or when the testatrix died; any such interpretation should have taken

account of the profound social, economic and legal changes which had occurred in the succeeding period of fifty-seven years. In particular, it is suggested that any interpretation should not have overlooked “the importance of interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court’s case-law” (see paragraph 62 of the judgment).

14. As to this argument, I consider that if it was open to the domestic courts, as I believe it was, to endeavour to ascertain the intention of the testatrix in using the disputed clause, it was also in principle open to them to interpret the clause in the light of the social and legal conditions which prevailed at the time when the will was drafted, rather than at the time the clause fell to be examined.

15. For these reasons, regrettable as the result of the High Court’s judgment may seem, I am unable to find that the decision gave rise to a violation of the applicants’ rights under Article 14 of the Convention taken in conjunction with Article 8.

## DISSENTING OPINION OF JUDGE GARLICKI

It is with regret that I have to disagree with the majority.

This case relates to two important principles which determine the scope of the Court's jurisdiction: the principle of subsidiarity and the principle of State action.

In respect of the former, I fully subscribe to the arguments developed by Judge Sir Nicolas Bratza that the interpretation of the will or of the relevant principles of domestic law by the national courts cannot be regarded as arbitrary or manifestly erroneous or unreasonable.

In respect of the latter, it should be noted that the case did not involve any direct interference by the national courts with the applicants' Article 8 rights. The courts were confronted with a will which contained a clause discriminating against adopted children *vis-à-vis* biological children. The courts first determined the correct interpretation of the will and, in accordance with that interpretation, gave effect to it. Thus, the real question before our Court is to what extent the Convention enjoys a "horizontal" effect, that is, an effect prohibiting private parties from taking action which interferes with the rights and liberties of other private parties. Consequently, to what extent is the State under an obligation either to prohibit or to refuse to give effect to such private action?

It seems clear that the authors of the Convention did not intend this instrument to possess a "third-party effect" (see A. Drzemczewski: "The European Human Rights Convention and Relations between Private Parties", *Netherlands International Law Review* 1979, no. 2, p. 168). However, under our case-law it is obvious that there may be certain positive obligations of the State to adopt measures designed to secure respect for Convention rights, even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p.11, § 23). Such "indirect third-party effect" has been addressed by the Court in many different areas, such as the right to life (State obligation to carry out an effective investigation in a case of a murder committed by private persons – see, for example, *Menson v. the United Kingdom*, (dec.), no. 47916/99, ECHR 2003-V), freedom of expression (*Appleby v. the United Kingdom*, no. 44306/98, ECHR 2003-VI, in which the Court indicated that the State may be obliged to adopt "positive measures of protection, even in the sphere of relations between individuals", § 39), freedom of association (*Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, representing the first ruling of this kind), freedom of assembly (*Plattform "Ärzte für das Leben" v. Austria*, judgment of 21 June 1988, Series A no. 139) and, above all, the protection of private life (see, for example, *Ignaccolo-Zenide v. Romania*, no. 31679/96, ECHR 2000-I, in particular § 113).

Nevertheless, it seems equally obvious that the level of protection against a private action cannot be the same as the level of protection against State action. The very fact that, under the Convention, the State may be prohibited from taking certain action (such as introducing inheritance distinctions between children – see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31; *Vermeire v. Belgium*, judgment of 29 November 1991, Series A no. 214-C; and *Mazurek v. France*, no. 34406/97, ECHR 2000-II) does not mean that private persons are similarly precluded from taking such action. In other words, what is prohibited for the State need not necessarily also be prohibited for individuals. Of course, in many areas such prohibition may appear necessary and well-founded. However, it should not be forgotten that every prohibition of private action (or any refusal to judicially enforce such action), while protecting the rights of some persons, unavoidably restricts the rights of other persons. This is particularly visible in regard to "purely" private-law relations, such as inheritance. The whole idea of a will is to depart from the general system of inheritance, that is, to discriminate between potential heirs. But at the same time, the testator must retain a degree of freedom to

dispose of his/her property and this freedom is protected by both Article 8 of the Convention and Article 1 of Protocol No. 1. Thus, in my opinion, the rule should be that the State must give effect to private testamentary dispositions, save in exceptional circumstances where the disposition may be said to be repugnant to the fundamental ideals of the Convention or to aim at the destruction of the rights and freedoms set forth therein. As in respect of all exceptional circumstances, however, their presence must be clearly demonstrated and cannot be assumed.

No exceptional circumstances of the above-mentioned kind existed in the present case. The testatrix had taken a decision, which was perhaps unjust, but cannot, even by present-day standards, be regarded as repugnant to the fundamental ideals of the Convention or otherwise destructive of Convention rights. Thus, the State was under a duty to respect and give effect to her will and was neither allowed nor expected to substitute its own inheritance criteria for what had been decided in the will. Accordingly, the State cannot be held to be in breach of the Convention by giving effect to this will.

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