

**Jersey & Guernsey Law Review – June 2010**  
**INHERITANCE RIGHTS OF CHILDREN BORN OUTSIDE WEDLOCK IN**  
**JERSEY – THE EVENT HORIZON<sup>1</sup>**

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*The draft Wills and Succession (Amendment) (Jersey) Law 201-, adopted by the States on 23 March 2010, aims to put illegitimate children on an equal footing with their legitimate counterparts with regard to rights of succession. Two consultation papers had demonstrated that there were potential human rights issues surrounding the inheritance rights of illegitimate children. This paper analyses Jersey's current inheritance laws relating to illegitimate children and examines the driving forces behind the draft Law; namely Europe's increasingly liberal (social and legal) attitude towards the idea of the "family" within existing legal systems and the manifestation of that progressive attitude in the jurisprudence of the European Court of Human Rights. It concludes the draft Law is a "comprehensive, neat and effective" method of ensuring that Jersey complies with its obligations under the Human Rights (Jersey) Law 2000, yet preserves its Norman Law origins.*

## **1. Introduction**

1 The Human Rights (Jersey) Law 2000 came into force on 10 December 2006, and with the implementation of this Law came Jersey's commitment to ensure that its laws were human rights compliant. The Legislation Committee had prior to December 2006 issued two consultative papers<sup>2</sup> which demonstrated that there were potential human rights issues surrounding the inheritance rights of illegitimate children. On 29 January 2010 the draft Wills and Successions (Amendment) (Jersey) Law 201- was lodged by the Chief Minister. The object of this legislation is to put illegitimate children on an equal footing with their legitimate counterparts in relation to the law of succession. The aim of this paper is four-fold: first, to analyse the current law of succession in relation to an illegitimate child vis-à-vis a legitimate child within Jersey; secondly, to examine the change in social and legal attitudes to the idea of the family, and the correlative effect upon legal régimes; thirdly, to analyse the inter-play between the jurisprudence of the European Court of Human Rights (ECtHR), the Jersey law of inheritance and the rights of inheritance which have been accorded to an illegitimate child; and, fourthly to examine the draft Law and the effect that it will have on the succession rights for such children.

## **2. Inheritance rights of the child in Jersey**

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<sup>1</sup>The authors would like to thank the Jersey Community Relations Trust which commissioned a Report into discrimination and inheritance laws in Jersey.

<sup>2</sup>*Succession Rights for Children born out of Wedlock*, R.C. 32/99 presented to the States on 14 September 1999 and *Succession Rights*, R.C. 3/2001 presented to the States on 2 January 2001, these papers being brought together in a document entitled *Succession Rights for Children Born Out of Wedlock*, which was lodged *au Greffe* by the Legislation Committee on 12 August 2003.

2 Historically the illegitimate child was viewed as *un étranger à sa famille*.<sup>3</sup> Evidence in the early *Coûtume* shows that such a child was deprived of any rights of inheritance,<sup>4</sup> including the right to receive a legacy in a will of movables if that legacy extended beyond that which was required for mere maintenance. While it is conceded that the child born outside wedlock in English law was treated little better and did not receive complete parity with children born inside wedlock until 1987, incremental improvements to his treatment were made by the Legitimacy Act 1929,<sup>5</sup> the Family Law Reform Act 1969<sup>6</sup> and finally the Family Reform Act 1987.<sup>7</sup>

3 The inheritance rights of children born outside wedlock in Jersey have developed at a slower pace. The legal provisions which have permitted an illegitimate child to inherit can be found in the Legitimacy (Jersey) Law 1963, the Legitimacy (Jersey) Law 1973 and the Legitimacy (Amendment) (Jersey) Law 2008. Article 3 of the 1963 Law provides that a child of a void marriage is treated as the legitimate child of the parties to the marriage, if at the time of the act of intercourse resulting in the birth (or at the time of the marriage, if later) both, or either, of the parents reasonably believed that the marriage was valid. The article only applies where the father of the child was domiciled in Jersey at the time of the birth, or, if he died before the child was born, was domiciled in Jersey immediately before his death. Article 2 allows for a child to be legitimated by the subsequent marriage of the father and mother if at the time of conception there was a lawful impediment to the marriage of the mother and father.

4 The 1973 Law broadened an illegitimate child's rights of inheritance. Article 11 broadly achieved what the 1929 Act did in England, and conferred on the illegitimate child, or his issue, the same rights of inheritance under testate and intestate succession, as he would have had were he born inside wedlock, but *only in relation to his mother's estate*. The article never extended the child's automatic right of inheritance to the estate of the biological father, or the father's relations' estates. This limitation applied even where the father acknowledged the child in some way and maintained him during his lifetime. Thus the limitation applied to children born to cohabitants. Furthermore, Jersey law never

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<sup>3</sup>*I.e.*, a stranger to his family.

<sup>4</sup>See, for example, *Le Grand Coutumier de Normandie*, translated by Dr Judith Everard from the Latin text in De Gruchy's *L'Ancienne Coutume de Normandie*, pub. by J&G L Rev., St Helier, 2009, chapter 27.

<sup>5</sup>Section 9(1) allowed a child born outside wedlock or his issue to succeed in an intestacy to the real and/or personal estate of his mother if the mother left no surviving issue born within wedlock, who would in effect be in "competition" with the child born outside wedlock.

<sup>6</sup>Section 14 allowed a child born outside wedlock or his issue to succeed on the intestacy of either parent in the same manner and with the same rights as if the child had been born within wedlock. This section represented a major step forward in conferring inheritance rights on the child born outside wedlock, in that the father did not have to recognise or support the child in any manner.

<sup>7</sup>Section 18 of the 1987 Act allows the child born outside wedlock (post 3 April 1988) to inherit on the intestacy of his brothers or sisters, grandparents, and uncles and aunts. Section 19 changed the rules of construction as they apply to dispositions in a will or codicil post 3 April 1988. Any references to any relationship between two persons are to be construed without regard to whether the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced were married to each other at the time.

permitted the illegitimate child automatically to inherit from the mother's relations, or from the illegitimate child's siblings. The practical consequence of these legal inhibitions has been that an illegitimate child has been excluded from inheriting in intestate succession from the estate of his father, father's relations, mother's relations or from his own siblings, and in testate succession from taking his *légitime* in the movable estate of his father. In testate succession, the father has complete freedom of testation in relation both to his immovables, and to the disposable part of his movables (*i.e.*, that not subject to *légitime*), both of which could be used to provide for an illegitimate child.<sup>8</sup>

### 3. Societal attitudes to the illegitimate child and legal régimes

5 Many reasons have been proffered as to why an illegitimate child should be treated in a different manner to a legitimate child for the purpose of inheritance. There is no doubt that it can, to a large extent, be attributed to religious dogma, but there are more fundamental reasons based on the interaction of ideas promoted to protect the blood line and lineage. Since lineage was all embracing, spurious claims against a man who was wrongly accused of being the father had to be discouraged. The whole system of inheritance was devised to protect the heir, who was usually the eldest legitimate son of the deceased. Historically in England and Wales, France and in Jersey, land or immovable property could not be bequeathed in a will, and would automatically devolve upon the heir. In England the redistribution of land post-Norman Conquest, and the effect of the Statute of Uses 1536 meant that until the Statute of Wills 1540, which allowed a will of certain types of tenure, wills of land were not permitted. Even after 1540 there were still restrictions on the disposition of realty in England, *e.g.* the widow's right of dower. It was not until the Dower Act 1833 that testators became substantially unrestricted in relation to their testamentary freedom. Intestate succession to realty in England pre-1926 had remained largely unchanged since medieval times (the rules were merely given statutory force in the Inheritance Act 1833), and reflected the fact that land passed to the heir, who was ascertained by the application of a fixed order of entitlement centred around the concept of male primogeniture. In Jersey historically the Bailiwick was wedded to the idea which can be summed up in the maxim *la conservation des biens dans la famille*. However *the Loi (1851) sur les testaments d'immeubles* increased a testator's freedom of testation in respect of immovable property, and the only prohibition on freedom of testation now seems to be the widow's right of dower, and the widower's right of *viduité*. In the case of intestate succession the heir had been in the pre-eminent position in Jersey, and the heir was male. Much of this was altered by the Wills and Successions (Jersey) Law 1993. The importance of marriage was promulgated by the church, from which strict marriage codes were introduced. Adultery was punished<sup>9</sup> and it was a natural extension to ostracize the

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<sup>8</sup>Any legacy or bequest which exceeds the disposable portion of the deceased's movable estate will be liable to be reduced in order that the *légitime* may be paid to those entitled, *i.e.*, the legitimate children and issue. See *Nicolle v Crill* (1920) 230 Ex 553.

<sup>9</sup>For an early (post-Christian) example of this in Anglo-Saxon law see Æthelberht, 31—"If a freeman lie with a freeman's wife let him pay for it with his "wer-geld", and provide another wife with his own money, and bring her to the other."

offspring of an adulterous relationship. The marriage codes not only promoted marriage but also spawned the state of illegitimacy. While these rules, laws and codes may have reflected the convictions, attitudes and morals that spanned many centuries, they do not necessarily reflect the convictions, attitudes and morals that have developed in 20th and 21st century western culture. Advances in scientific testing now allow for the biological paternity of the father to be determined with certainty. The system protecting the heir was abandoned in England and Wales at the beginning of the 20th century,<sup>10</sup> in France much later in the 20th century, and major reforms were made in Jersey by the Wills and Successions (Jersey) Law 1993, whereby the privileges of the heir were largely eroded.<sup>11</sup> The idea of the “nuclear” family is disappearing and being replaced with complicated variations of the “extended” family,<sup>12</sup> and the concept of punishing a child for an act that occurred before his birth, and for which he bears no responsibility, is anathema to modern legal systems.

6 An international interest in the recognition and protection of the rights of children born outside wedlock has only developed over the last sixty years. One rather unforeseen result of World War II was the birth of the “war baby”, as large numbers of servicemen fathered children while stationed in Europe and returned home unaware of the related pregnancy or birth. This situation led to “illegitimacy being a common interest among European Nations”.<sup>13</sup> However, despite this and the fact that the protection of the rights of minorities took precedence in the discussions that led to the creation of the United Nations,<sup>14</sup> the first international rights instrument to follow World War II, the 1945 UN Charter,<sup>15</sup> made no specific reference to discrimination on the basis of birth. Instead the Charter speaks of “human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.<sup>16</sup>

7 It was not until three years later, in arts 2, 12 and 25(2) of the Universal Declaration of Human Rights 1948<sup>17</sup> that an international convention recognized that children born inside and outside wedlock should be granted equal rights. There is a direct reference to the

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<sup>10</sup>See the Administration of Estates Act 1925.

<sup>11</sup>See, *inter alia*, arts 5, 6 and 7 which give pre-eminence to the surviving spouse in the case of an intestacy, as opposed to the heir, and art 24 which further abolishes other rights that were previously bestowed on the heir.

<sup>12</sup>Statistics from Eurostat demonstrate an increase in the number of “live births outside marriage” over the last decade across the majority of Europe. See: [epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search\\_database](http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search_database)

<sup>13</sup>Krause, *Illegitimacy: Law and Social Policy*, at 175–176 (1971).

<sup>14</sup>See Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 Hum Rts Q 447 (1992); Lauren, *First Principles of Racial Equality: History and the Politics and Diplomacy of Human Rights Provisions in the United Nations Charter*, 5 Hum Rts Q 1, at 2–3 (1983).

<sup>15</sup>The Charter of the United Nations was signed on 26 June 1945 in San Francisco at the end of the United Nations Conference on International Organisation, and came into force on 24 October 1945.

<sup>16</sup>The Charter of the United Nations 1945, art 13.

<sup>17</sup>Universal Declaration of Human Rights adopted 10 December 1948, UNGA Res 217 A III (1948). Article 25 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family” and that “[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection”.

rights of children born outside and inside wedlock in art 25(2), where the article speaks of an infant child's right to "social protection", i.e., social rights.<sup>18</sup> This is clearly not according to an illegitimate child rights of inheritance, but it is important in that it lays the groundwork for the manner in which all children should be treated, and it represents a paradigm shift in the treatment of children born outside wedlock. It is the interplay between arts 2 and 12 that is far more important, however. Article 2 states that everyone is entitled to the rights laid out in the declaration without distinction of any kind, such as birth.<sup>19</sup> Article 12 provides that every individual has the right not to have his family or home arbitrarily interfered with.<sup>20</sup> Articles 2 and 12 of the Declaration formed the basis of arts 14 and 8 (respectively) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1953 ("the Convention") which, along with art 1 of the First Protocol to the Convention, form the main discussion points of this paper.

8 The Convention followed a line of international instruments that generally recognized the rights of children born outside wedlock.<sup>21</sup> However, the "illegitimacy issue" only came into sharp focus in 1967 when the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities adopted a statement promulgating the importance of the equal treatment between children born inside and outside wedlock.<sup>22</sup> Later, in 1967, the Sub-Commission published a report based entirely on the discrimination against these children.<sup>23</sup> This international focus culminated in the Council of Europe adopting the European Convention on the Legal Status of Children born out of Wedlock, which aimed "to improve the legal status of children born out of wedlock",<sup>24</sup> by coupling a determined approach to equality with a liberal approach to parental affiliation.<sup>25</sup>

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<sup>18</sup>*Ibid.* Article 25(2): Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

<sup>19</sup>Declaration of Human Rights, adopted 10 December 1948, UNGA Res 217 A III (1948). Article 2 of the Universal Declaration of Human Rights provides that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty".

<sup>20</sup>Declaration of Human Rights, adopted 10 December 1948, UNGA Res 217 A III (1948). Article 12 of the Universal Declaration of Human Rights provides that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

<sup>21</sup>These instruments include the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the African Charter on Human and Peoples' Rights; and the American Convention on Human Rights.

<sup>22</sup>According rights to previously discriminated persons is also redolent of social justice theory dominant as a political influence throughout Western European democracies in the latter 20th century and early 21st century.

<sup>23</sup>Vieno Voitto Saario, United Nations, Sub-commission on Prevention of Discrimination and Protection of Minorities, *Study of Discrimination Against Persons Born Out of Wedlock: Draft General Principles of Equality and Non-Discrimination in Respect of Persons Born Out of Wedlock*, UN Doc E/CN.4/Sub.2/265 (1967).

<sup>24</sup>European Convention on the Legal Status of Children Born Outside of Wedlock 1975 (Preamble).

<sup>25</sup>See particularly arts 2, 3, 4, 5, 6 and 9.

Article 9 of this Convention provides that “A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father’s or mother’s family, as if it had been born in wedlock”. To date this Convention is only in force in respect of 21 of the Council of Europe’s 47 member states. Jersey is not one of them.<sup>26</sup>

#### **4. The relevant provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms, the case law of the European Court of Human Rights and application to Jersey**

9 The cases from the European Court of Human Rights (ECtHR) concerning the inheritance rights of children born outside wedlock over their parents’ estate fall into two distinct categories. The first is based on a breach of art 1 of the First Protocol<sup>27</sup> in conjunction with art 14<sup>28</sup> (we shall call these category 1 cases), and the second is based on a breach of art 8<sup>29</sup> in conjunction with art 14 (we shall call these category 2 cases).

10 Article 14, the common denominator to both categories, safeguards individuals from discrimination in their enjoyment of the Convention’s rights and freedoms. A distinction will only be discriminatory if it has no objective and reasonable justification i.e., if it does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.<sup>30</sup> Article 14 is not “freestanding”.<sup>31</sup> Hence, it cannot be applied unless a case falls within the ambit of one or more of the other substantive rights, although an actual breach of the other provision(s) is not necessary<sup>32</sup> – the relevant provision must merely be “engaged”.

11 The substantive rights that are affected by matters of inheritance are those contained in art 1 of Protocol 1 and art 8 of the Convention. The former provides that no one shall be arbitrarily deprived of their possessions and the terms of the article indicate that it only applies to acquired property rights i.e. those an individual already possesses, and does

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<sup>26</sup>Jersey is not a member state nor is it an associate member of the European Communities, nor is it a member of the Council of Europe.

<sup>27</sup>Article 1 of Protocol 1 states “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.”

<sup>28</sup>Article 14 states “The enjoyments of the right and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... birth or other status.”

<sup>29</sup>Article 8 states “Everyone has the right to respect for his private and family life, his home and his correspondence.”

<sup>30</sup>*Marckx v Belgium*, [1979] ECHR (App No 6833/74); *Camp & Bourimi v Netherlands*, [2000] ECHR (App No 28369/95); and *Brauer v Germany*, [2009] ECHR (App No 3545/04). Furthermore, it is understood that contracting states will enjoy a certain margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justify a different treatment in law. The scope of this margin will vary according to the circumstance, subject-matter and background of a case. *Inze v Austria*, [1987] ECHR (App No 8695/79); *Mazurek v France*, [2000] ECHR (App No 34406/97).

<sup>31</sup>*Inze v Austria*, *ibid.*, and *Brauer v Germany*, *ibid.*

<sup>32</sup>*Pla & Puncmau v Andorra*, [2004] ECHR (69487/01).

not guarantee a person a right to acquire property. Article 8 provides that “everyone has the right to respect for his private and family life ...”,<sup>33</sup> yet the exact nature and extent of this article has not always been clear.<sup>34</sup> It goes without saying that by guaranteeing the right to respect for family life art 8 presupposes the existence of a family, and although at one time it was permissible and indeed normal in many European countries to draw a distinction between a legitimate and an illegitimate family<sup>35</sup> the use of the word “everyone” in art 8 is inconsistent with this notion. The ECtHR has taken a wide view of the concept of the family:<sup>36</sup> it is not a fixed idea.<sup>37</sup> At the time the Convention was drafted the protection of the legitimate family (or traditional family) against the illegitimate one and the promotion of marriage might have been one of its legitimate aims, but the Convention is a “living instrument” that must be interpreted against the backcloth of contemporary society and present day conditions, although the extent to which it leads or follows these “conditions” is a moot point. A single woman and her child are now one form of family,<sup>38</sup> a father and his natural son another.<sup>39</sup> The existence or non-existence of “family life” within art 8 is a question of fact depending upon the existence of close personal ties, in particular, a demonstrable interest in and commitment by the father to the child, both before and after birth.<sup>40</sup> A difference in treatment based on the grounds of birth outside wedlock would require very weighty reasons indeed before it could be regarded as compatible with the Convention.<sup>41</sup>

12 The notion of family life includes not only moral, social and cultural relations, but also comprises interests of a material kind,<sup>42</sup> i.e., the so-called “economic or quasi-economic interests”. The courts have made it clear that patrimonial rights of succession and gifts *inter vivos* inevitably form part of family life, as do matters of intestate succession between

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<sup>33</sup>The aim of art 8 is to protect the individual against arbitrary interference by a public authority. See *Belgian Linguistic Case* (1968), 1 EHRR 252; *Marckx v Belgium*, *op. cit.*, fn 31 and *Camp & Bourimi v Netherlands*, *op. cit.*, fn 31.

<sup>34</sup>As late as 1979 in *Marckx v Belgium*, *ibid.*, Judge Sir Gerald Fitzmaurice (dissenting) said he believed the object of art 8 was to achieve what he called the “domiciliary protection” of the individual. Its aim was to safeguard against a whole gamut of fascist and communist inquisitorial practices that had become prevalent before, during and after the two world wars. The internal domestic regulation of family relationships did not, he said, come within the sphere of art 8. While the genesis of the Universal Declaration of Human Rights may have emerged from the ashes of the Second World War and evolved in a Europe which was divided by communism, Europe has moved onwards and forwards, and the case law of the ECtHR makes it clear that the Convention must be interpreted in the light of present-day conditions.

<sup>35</sup>*Marckx v Belgium*, *op. cit.*, fn 31.

<sup>36</sup>*Marckx v Belgium*, *ibid.* Also note that the presence of the word “everyone” in art 8 and the absence of any idea of the obligation to marry in art 12 illustrates that the meaning of the term “family” in art 8 is far wider than the way in which the term is employed in art 12.

<sup>37</sup>*Mazurek v France*, *op. cit.*, fn 31, para 52.

<sup>38</sup>*Ibid.*

<sup>39</sup>*Camp & Bourimi v Netherlands*, *op. cit.*, fn 31.

<sup>40</sup>*Brauer v Germany*, *op. cit.*, fn 31.

<sup>41</sup>*Camp & Bourimi v Netherlands*, *op. cit.*, fn 31 *Brauer v Germany*, *ibid.* and *Inze v Austria*, *op. cit.*, fn 31.

<sup>42</sup>See *Pla & Puncamau v Andorra* (2004), *op. cit.*, fn 33, para 26. This can be illustrated by two examples. The first is the obligation on the parents to maintain the child in most contracting states. The second is the position occupied in the domestic legal systems of the majority of the contracting states by the institution of the reserved portion of the deceased estate for the child.

near relatives: they come within the scope of art 8.<sup>43</sup> Yet there is a limit to the width of art 8, since it does not guarantee that rights of inheritance be provided by the domestic legislation.<sup>44</sup> The Convention does not force a member state to implement a law which will guarantee a child the right of inheritance, since the right to inherit is not an indispensable feature of normal family life. What the Convention does, however, is ensure that where a state does accord inheritance rights to children, *all* children of the family are treated with parity.

### **Category 1 cases: art 1 of the First Protocol and art 14**

13 In *Inze v Austria*<sup>45</sup> and *Mazurek v France*,<sup>46</sup> both applicants, who were illegitimate and adulterine issue (respectively), had acquired property rights following their mothers' deaths, but faced national inheritance laws that treated legitimate children more favourably. In *Inze* legitimate children were given precedence over illegitimate children in relation to property rights over farms. In *Mazurek* adulterine children were given a smaller share of the deceased parent's estate than a legitimate child or an illegitimate child of a non-adulterous relationship. Both applicants were successful in arguing their rights under art 1 of the First Protocol and art 14 had been breached.

14 The cases illustrate that in order to invoke art 1 of the First Protocol and art 14 an illegitimate child must have *acquired* actual property rights in his deceased parent's estate, which are less favourable than those of his legitimate siblings. For example, laws that provide that a legitimate child receives a *légitime*, whereas an illegitimate child receives half the *légitime* that the legitimate child receives, would violate art 1 of the First Protocol in conjunction with art 14. However, since an illegitimate child in Jersey does not, at anytime, acquire any rights guaranteed by the state in either his father's estate or those of his remoter relations, it is suggested that Jersey law does not violate art 1 of the First Protocol and art 14.

### **Category 2 cases: Article 8 and Article 14**

15 Category 2 cases subdivide into three further sub-categories. They are where the illegitimate child is claiming inheritance rights against (a) the mother's estate; (b) the father's estate; and (c) the estates of remoter relations.

16 The first sub-category has no relevance to Jersey, since the Law of 1973 permitted a child born outside wedlock to receive property from his mother's estate.<sup>47</sup> The case of *Marckx v Belgium*<sup>48</sup> is the principal case in this sub-category, and arose because the domestic law resulted in there being no legal bond between the unmarried mother and her

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<sup>43</sup>*Brauer v Germany*, *op. cit.*, fn 31.

<sup>44</sup>*Camp & Bourimi v Netherlands*, *op. cit.*, fn 31.

<sup>45</sup>*Op. cit.*, fn 31.

<sup>46</sup>*Op. cit.*, fn 31.

<sup>47</sup>See *ante*.

<sup>48</sup>*Op. cit.* fn 31.



child, unless there was a declaration by the mother of recognition of her child.<sup>49</sup> Even so, this recognition did not formalize the child's relationship with her mother's family, nor did it give the child full inheritance rights over her mother's estate on intestacy and under a will. The case is important for the principles it explores which are dealt with elsewhere in this paper.<sup>50</sup>

17 The triumvirate of cases (*Camp and Bourimi*,<sup>51</sup> *Haas v Netherlands*<sup>52</sup> and *Brauer v Germany*<sup>53</sup>) demonstrate that a child born outside marriage must be "recognised" by his father before that child can claim to be discriminated against in relation to the rights of inheritance over his father's estate. For almost two centuries the principles expounded in the *Code Napoléon* determined the law of legitimacy throughout most of Western Europe. Under the *Code* the illegitimate child was *filius nullius*<sup>54</sup> at birth, and it was only through acknowledgement (or recognition) that the child acquired a parent.<sup>55</sup> Hence civil law countries have historically incorporated the concept of recognition or acknowledgement into their filiation law.

18 There must be a family for the purpose of art 8, however unconventional that family may be. The ECtHR looks for evidence and acts by the father which demonstrate the existence of this "family", and the idea of "recognition" was seized upon by the Court mainly because the trio of cases originated in civilian jurisdictions. Other acts would suffice, provided that they have been performed by the father and demonstrate that the child is looked upon by him as being part of a "family". Both *Haas v Netherlands*<sup>56</sup> and *Brauer v Germany*<sup>57</sup> allude to this, but a domestic court would still have to determine what amounted to recognition (or its equivalent in a non-civilian jurisdiction). If the father "accepts", acknowledges or recognizes the child in some way (bearing in mind that Jersey law is not based on the *Code Napoléon* and has no formal civilian type recognition procedure in its law) then the inheritance laws of Jersey, which fail to guarantee illegitimate children inheritance rights while according such rights to the legitimate offspring, would appear to violate Convention rights, but these laws do not violate the Convention if there is no acknowledgment or recognition by the father.

19 The third sub-category of cases concerns the rights of inheritance of an illegitimate child to the estate of its remoter relations. The case of *Vermeire v Belgium*<sup>58</sup> concerned the rights of the child over the estate of the relations of its father, and the case of *Marckx*<sup>59</sup>

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<sup>49</sup>See *post*.

<sup>50</sup>See *ante*.

<sup>51</sup>*Op. cit.*, fn 31.

<sup>52</sup>*Op. cit.*, fn 31.

<sup>53</sup>*Op. cit.*, fn 31.

<sup>54</sup>*I.e.*, the child of nobody.

<sup>55</sup>As we have seen in *Marckx* this could apply not only to the father, but to the mother in some jurisdictions.

<sup>56</sup>*Op. cit.*, fn 31.

<sup>57</sup>*Op. cit.*, fn 31.

<sup>58</sup>[1991] ECHR (App No 128449/87).

<sup>59</sup>*Marckx v Belgium*, *op. cit.*, fn 31.

concerned the rights of the child over the estate of the relations of its mother. It is clear from the former case that where an illegitimate child is recognized by its father, any provision in the domestic law which discriminates against or excludes that child *vis-à-vis* legitimate offspring, in relation to his inheritance rights over the estates of the father's remoter relations, is contrary to that child's Convention rights.<sup>60</sup> In *Marckx* the Court said that it failed to see any objective and reasonable justification to exclude an illegitimate child from an entitlement in the estate of the mother's family, while according such an entitlement to a legitimate child.<sup>61</sup>

20 In the light of *Vermeire* and *Marckx* the inheritance laws of Jersey, which have excluded an illegitimate child from inheritance rights over his mother's relations' estates and his father's relations' estates (where the father has recognized or acknowledged the child), while according these rights to a legitimate child, have violated the Convention.

##### **5. Draft Wills and Successions (Amendment) (Jersey) Law 201-**

21 There were a number of ways in which Jersey could have addressed the issue of succession rights and the illegitimate child. *Légitime* could have been abolished, as discussed by the Legislation Committee,<sup>62</sup> or extended to include illegitimate children; although neither of these solutions would have resulted in Jersey law complying with Convention rights, since this would not have affected intestate succession from which the illegitimate child would still have been precluded. Furthermore, the abolition of *légitime* would deal a blow to the cultural and historical heart of Jersey succession, further removing it from its Norman law origins. An alternative was that art 11 of the 1973 Law could have been extended to provide succession rights between the father and illegitimate child, as well as the mother and illegitimate child, and succession rights to remoter ancestors and collaterals, but this undoubtedly would have involved complex drafting.

22 The States have instead introduced a draft Law which, when implemented, in the authors' opinion, is comprehensive, neat and effective. Article 11 of the 1973 Law will be abolished, and the draft Law, rather than concentrating on amending the 1973 Law, will amend the Wills and Successions (Jersey) Law 1993. A new sub-article is to be introduced into art 1 of the 1993 Law, whereby "any reference to a 'child', 'heirs at law', "'issue', or 'relatives' or to *any other description of relative* [emphasis added] shall be construed in accordance with art 8C. Article 8C will introduce the "Equality Article" which will give equal succession rights to legitimate and illegitimate children and their issue. This

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<sup>60</sup>On the facts of *Vermeire* the applicant was the recognised illegitimate daughter of her father, and she had been excluded from a share in the inheritance in her paternal grandmother and grandfather's estates. The applicant brought an action in the domestic courts alleging that her inability to inherit was discriminatory. The case was ultimately brought before the ECtHR. The applicant's succession to her grandmother's estate took place before the delivery of the judgment in *Marckx*, and therefore the Court would not reopen the issue. In relation to the applicant's grandfather's estate the court said that the exclusion of the applicant from a share in the inheritance violated art 14 in conjunction with art 8 of the Convention.

<sup>61</sup>Although it did not have to decide the point in the case itself.

<sup>62</sup>*Op. cit.*, fn 2, Annex 2, para 2.

is an efficacious way of achieving human rights compliancy, since the 1993 Law deals with both testate (arts 5, 6, 7, and 8) and intestate (arts 2, 3 and 4) succession: the draft Law will achieve human rights compliance in both testate and intestate succession at a stroke. Furthermore, the reference to “any other description of relative” seems to be all embracing and covers situations where there is a right of *représentation* in a collateral succession on intestacy to movables or *acquêts*<sup>63</sup> and a direct succession. The proposed art 8F which states, “customary laws of succession are hereby amended to confer the rights expressed in Article 8C” will also cover the right of *représentation* in a collateral succession of *propres*. The proposed art 8A introduces a provision whereby, in all wills and codicils and instruments executed *entre vifs* which relate to rights of succession (which are executed after the coming into effect of the draft Law) all references to “child”, “issue”, “son” and “daughter” and any similar description shall include legitimate and illegitimate persons of the said description, unless the document contains a contrary provision. This in effect renders otiose the Royal Court decision in *In re a Settlement*,<sup>64</sup> in which the court held that it could construe a settlement widely to include the illegitimate children of the settlor’s daughter. The court certainly demonstrated in this case that it had a much greater scope than the pre-1969 Act English courts did, to look behind the wording of a disposition and ascertain the actual intention of the testator or settlor. This will no longer be necessary. Finally the draft Law extends the equality of succession rights of legitimate and illegitimate children to applications to reduce the will *ad legitimum modum*,<sup>65</sup> and in relation to his entitlement to a grant as an administrator or administrator dative – art 8A.

23 The proposed Law is simple and causes “minimum disruption” to the existing law of succession in Jersey, which is at times complex: in short it does not over-complicate an already complicated area of law. The Jersey law of succession has Norman customary law as its foundation stone. It is a culturally unique system<sup>66</sup> which the authors believe should be preserved. The draft Law does not interfere with the Norman law origins of succession any more than is necessary: it does not abolish *légitime* or alter the customary law rules that pertain to intestate succession. These remain intact. It will bring Jersey’s law of succession into the 21st century by according illegitimate children the same rights of inheritance as legitimate children, thereby reflecting the changes to the family in Jersey society. Furthermore, it rejects an “English” approach to solving its human rights problem, which would involve abolition of much of the existing law of succession (a measure that should be avoided, in the authors’ opinion) and implementing something akin to an Inheritance (Provision for Family and Dependants) Act 1975.<sup>67</sup> The proposed law is not selective, however, in that it gives *all* illegitimate children the same rights of succession to their father’s estate and father’s relatives’ estates, as those accorded to their legitimate counterparts, rather than merely to those who have been recognized, accepted *etc.*, by

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<sup>63</sup>Wills and Successions (Jersey) Law 1993, art 2.

<sup>64</sup>1996 JLR 226.

<sup>65</sup>*I.e.*, where the testator has exceeded his testamentary power in relation to *légitime*.

<sup>66</sup>Shared in part with the other Channel Islands.

<sup>67</sup>Which, in any case, is in the process of being reformed in England. See Law Commission Consultation Paper No 191, *Intestacy & Family Provision Claims on Death*.

their father. We have said that the concept of “recognition” is well developed in civilian law, but not in Jersey. If the States had decided to adopt a more selective approach, the proposed Law would either have had comprehensively to define the term “recognition” – although it could possibly have been linked to “affiliation” proceedings in some way. Otherwise it would have been left to the Court to decide on a case by case basis whether the child had been recognized, although this approach would clearly have prevented an illegitimate child who had never had any contact with the father and his family from inheriting.

## **6. Conclusion**

24 Jersey has acknowledged that there is a necessity to address the position of children born outside wedlock to achieve both social parity and compliance with its international human rights obligations. Despite lagging behind Guernsey in some respects, Jersey has shed its “Nelsonian” approach to the jurisprudence of the ECtHR, and the States have taken an important step in the process of social and legal integration of children irrespective of the marital status of the parents. The draft Law is a fair, comprehensive and all-embracing measure that involves a natural evolution of succession law, and in this way best preserves the legal and cultural bases of its law whilst reflecting the undoubted liberalisation of family and correlative legal relations in post-war Western Europe. Subject to Privy Council sanction, it is now in the hands of the States to cement these principles with a timely completion of the legislative process.

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