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A Noble Cause: A Case Study of Discrimination, Symbols, and Reciprocity, in: Diversity and European Human Rights

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DIVERSITY AND EUROPEAN HUMAN RIGHTS

Rewriting Judgments of the ECHR

Edited by

EVA BREMS
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cannot be a proportionate means of protecting the interests of the unborn. It is further to be noted that women’s ability to participate in public life, including education and employment, can be significantly curtailed by unwanted pregnancies, and that reproductive freedom is key to the enjoyment of other rights.

272. The Court accordingly finds that there has been a breach of Article 8 in combination with Article 14.

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A noble cause: a case study of discrimination, symbols and reciprocity

YOFI TIROSH

Introduction

In De La Cierva Osorio De Moscoso v. Spain, four Spanish women challenged the succession rule of nobility titles in their country in an application to the European Court of Human Rights (hereinafter ECHR). The rule in question gives precedence to male heirs of the title, such that women inherit the title only if there are no male heirs. All applicants were the oldest offspring of the deceased title-bearer, and would have inherited the title had they not been women: their younger male relatives (mostly siblings) won the titles. The applicants argued that this rule had violated their right to private and family life under Article 8 of the European Convention on Human Rights (hereinafter ‘the Convention’), taken together with the prohibition of discrimination laid down in Article 14. The applicants also based their claim on Article 1 of Protocol 1 to the Convention, which protects the right to peaceful enjoyment of one’s possessions. The ECHR accepted Spain’s reasoning and declared the complaint inadmissible.

Two reasons lead me to discuss this case in a volume dedicated to diversity. First, the case raises the question of accessibility of symbols of prestige to traditionally discriminated social groups. Spain replied to the ECHR that the applicants’ claim should be rejected since nobility titles do not fall under Article 8 because they have long lost their actual importance in determining one’s social rank, property, wealth, or legal status, and remain merely a

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4 I am grateful to Eva Brems and the Human Rights Centre at Ghent University for their intriguing and original invitation to rethink and rewrite a case of the European Court of Human Rights. I am also thankful to Daniel Drenger, Seyda Emek, Zohar Kohavi and Alexandra Timmer for their comments on earlier versions of this chapter. Tami Yakira provided excellent editorial assistance.


3 París, 20 March 1952.
symbolic relic of bygone times. As such, nobility titles are not a material part of the right protected in Article 8 (I.e. they do not shape one’s sense of affiliation with one’s family as names do). This argument is intriguing because it raises questions about the intersections between law and semiotics. Should the argument that titles were ‘merely’ symbolic have appealed the Court, and should it have led to the conclusion that there was no need for legal intervention in this case?

Secondly, underlying the ECHR’s ruling was a theory of anti-discrimination that merits critical examination. I shall argue that this theory is problematic in that it unnecessarily narrowed the scope of protection of traditionally discriminated groups. Spain argued that, by their very nature, titles represented an old social regime of hierarchy and discrimination, which was discordant with the contemporary liberal nature of Spanish law and society. It would therefore be paradoxical, Spain continued, to sustain the practice of passing on titles (which were inherently discriminatory and were based on social hierarchies that were often arbitrary, having nothing to do with merits) while suddenly injecting a sex-equality component to that practice. This, then, was an argument about the authenticity, or the integrity, of the institution of nobility titles: such titles would be distorted and emptied of their essence if they are to be shaped and reshaped according to changing times. Spain’s argument was also one of reciprocity: according to Spain, the female applicants could not focus their argument on sex-based discrimination while ignoring other forms of discrimination that are inherent to the titles, namely, the arbitrary biological fact of being born to an aristocratic family, and the fact that one is older than other potential competitors to the title (primogeniture). It would be inappropriate to invoke anti-discrimination law to allocate something that is in itself unequal and discriminatory.

Moreover, continued Spain, by fine-tuning the succession line so that it would reflect the contemporary commitment to sex equality, nobility titles might gain social resonance, or become even more normalised and legitimate than they have been.

This chapter addresses, then, two challenging issues emanating from De La Cierva Osorio De Moscoso v. Spain (hereinafter ‘De Moscoso’). First, I shall discuss the inherent tension typifying signs such as nobility titles – as merely symbolic or as carrying substantive content. I shall argue that the distinction between form and substance collapses in this case, as in many other cases that involve allocation of allegedly merely symbolic signifiers – particularly to underprivileged groups. Secondly, I shall examine the idea that a party that presents an anti-discrimination claim cannot seek equal allocation of matters that are in themselves inherently discriminatory. This fascinating characteristic of nobility titles – as relics of an old world of rank and social hierarchy – is one of the reasons that the applicants’ discrimination claim was rebutted. I dub such claims ‘reciprocal anti-discrimination arguments’, or RADARS, and sketch guidelines for thinking about this type of claims.

Five years after this case was decided in Strasbourg, a very similar communication, Barcaiztegui v. Spain, was decided by the UN’s Human Rights Committee (hereinafter UNHRC). This time the applicants based their sex discrimination argument on the fact that the succession rule of nobility titles violated the International Covenant on Civil and Political Rights (hereinafter ICCPR). Similarly to the ECHR, the UNHRC found that Spain did not violate the ICCPR (but, unlike the Strasbourg decision, in the latter decision there were three dissenting opinions). Since the parties’ arguments in the UNHRC were very similar to the arguments in De Moscoso, I shall at times refer to the UNHRC decision as another reference for understanding the legal questions of De Moscoso.

My analysis begins by exploring the role of symbols in socio-legal life, and reaches the conclusion that the line between symbolic and material is often blurred, arbitrary, and not as important as we tend to think.

The discussion then moves to the arguments that the application lacks reciprocity and would strip the tradition of titles of their authenticity. A critical examination of these arguments questions their merits in the context of anti-discrimination law.

Finally, the chapter ends with the rewritten opinion in De Moscoso.

Nobility titles: between form and substance

A central part of Spain’s defence in De Moscoso was that, today, nobility titles are insignificant, and therefore the applicants suffered no deprivation. In one of the domestic proceedings which preceded the application to Strasbourg, Spain’s Constitutional Court wrote:

The distinction on the ground of sex is now only of purely symbolic value, since it no longer has any substantive content within our legal order. On the contrary, the social and legal values enshrined in our Constitution and which, therefore, are fully applicable today would necessarily come into play if the legal distinction had a substantive content, which it certainly does not have.²

⁴ UNHRC, Mercedes Carrión Barcaiztegui v. Spain, 30 March 2004. Another case raising a similar discrimination claim, this time as a communication to the CEDAW Committee (under the Convention on the Elimination of All Forms of Discrimination against Women (1979), 1249 UNTS 13), was decided in 2007. A majority of the Committee found that the communication inadmissible on procedural grounds, but a concurring opinion and a dissent were also written. I shall return to these latter opinions below. See CEDAW, Muñoz-Vargas y Sainz de Vicuna v. Spain, 9 August 2007. As this chapter was written, the Commonwealth cancelled the priority given to males in royal succession. See Nicholas Watt, ‘Royal Succession Gender Equality Approved by Commonwealth’, Guardian, 28 October 2011.

The fact that the titles are (allegedly) merely symbolic guided the Strasbourg Court in finding that access to titles or lack thereof did not violate any of the rights protected in Article 8. This section of the chapter addresses the various questions emanating from the semiotic nature of titles. I shall argue that the symbolic functions of titles are important—especially for women and other minority groups, who have been traditionally excluded from representation in the symbolic order.

Are nobility titles merely symbolic?

The applicants argued that their right to inherit the nobility titles falls within the scope of Article 8 of the Convention, which protects the right to respect for private and family life. They based their argument on the similarity between nobility titles and names. The ECHR had recognised that names and surnames sometimes fell within the right protected under Article 8 because a name is 'a means of personal identification and of linking to a family'. In order to understand why the Court rejected the claim that nobility titles should also be considered protected under Article 8, we need to understand how exactly the Court sees the connection between Article 8 and names, and why this connection was not extendable to nobility titles.

In discussing this question in De Moscoso, the Court said Article 8 includes the right to a name. Although Article 8 'does not contain any explicit provisions on names, as a means of personal identification and of linking to a family, a person's name nonetheless concerns his or her private and family life' [Ibid., p. 6].

Names therefore fulfill the role of personal identifiability and linkage to the family. In Burghartz v. Switzerland, a leading case on the linkage between names and Article 8, the European Commission of Human Rights referred to the connection between names and identity. But the Commission framed the right to identity narrowly—as the right to identifiability; [Ibid., p. 17].

But note that 'identity' here is used in the narrow sense of the term, as technical identifiability. In the terminology of semiotics theory, the function of names here would be described as indexical: they work as labels, to point to the person and differentiate him or her from others and to link him or her to a family. But, if the function of names is merely to provide individual and familial identifiability, then we could hypothesise that in principle, names can be replaced by more impersonal and bureaucratic means of identifications, such as social security numbers or even barcode chips implanted under our skins, if technological circumstances facilitate easy and efficient use of such chips. The ECHR seems to provide a reductive account of the function of names: one that does not encompass the meaning of names, their connotation, or the ideological, religious or aesthetic worlds that they come from.

But names are, of course, much more than a means of identifiability. If names are essential to 'the right to development and fulfilment of one's personality', as the Court recognises, then names cannot be merely understood as arbitrary and random signs that serve the technical function of identifiability or identification. Self-fulfilment and personality require that names do more than provide the technical ability to differentiate between person X and person Y, or membership in family A or in family B.

Like barcodes or ID numbers, names are a specific combination of signs (alphabetical letters) that are attached to a person (although they are less specific than ID numbers or barcodes, because they are not unique or exclusive: different people can have the same name, and even the same first name and surname). But, unlike ID numbers or barcodes, names also carry meaning that extends beyond the technical. Names are laden with cultural associations. They invoke, for example, connotation to a certain religion (e.g. names of saints), to a historical role model, or to a certain language (consider the difference between Jamila and Bella—both meaning 'beautiful', one in Arabic and one in Italian); they may invoke the memory of a beloved ancestor or express a desire for certain moral convictions or personal traits (consider the names Grace, Chastity, Sophie or Fortuna).

I posit that this wider meaning of names falls within the right to personal development and fulfilment under Article 8. A convincing interpretation of the scope of the right to private life under Article 8 would not end at the point of the ability to identify a person correctly through their name (although this is certainly an essential aspect of the right to private life). If the right to private life includes the right to self-fulfilment, then it must include the right to a name that would be meaningful for its bearer.

My suggested understanding of the scope of names under Article 8 is extendable to titles. If surnames tell us something about the affiliation of a person to his or her family and culture, then so do nobility titles.

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9 Ibid., p. 17.


12 For a brilliant mapping of names on the axis of tattoos on the one hand and State registers on the other hand, see D. Riley, 'Your Name Which Isn't Yours', in D. Riley, Impersonal Passion: Language as Affect (Durham, NC: Duke University Press, 2005), pp. 115-28.

13 See e.g. J. Kaplan and A. Bernays, The Language of Names: What We Call Ourselves and Why It Matters (Simon & Schuster, 1999).
In the case at hand, the applicants submitted that nobiliary titles constituted the heritage of their lineage’s honour and a blood tie with their ascendants, and that they had been deprived of those attributes solely because they were females.\textsuperscript{14}

The applicants argued, then, that, although their names were sufficient for the purpose of simple identifiability (i.e. the ability to tell that this individual belongs to family X), titles should fall under Article 8 because they tell a richer story about the applicants’ familial heritage. The title connected them to their family in a way that a name did not and could not, for it added a layer of allusion to the glorious past of their ancestors. This interpretation reflects a notion of development of personhood that is much more akin to the spirit and purpose of Article 8 than the ECHR’s narrow interpretation.

To the question posed in the title to this section (‘Are nobility titles merely symbolic?’), my answer would be negative, because they have the meaning and function of conveying familial history and other content that is important to the development of personhood\textsuperscript{15} (see paragraph 1 of the rewritten judgment).

Finally, the Court based its reasoning that titles do not fall within Article 8 on the notion that nobility titles are merely honorary signifiers, lacking any substantial importance. \emph{But this claim loses its convincing force by the very act of positing it.} For every time that a party claims that something (in this case, nobility titles) is not worth our time and attention because it is merely symbolic, a paradox emerges: if titles are so marginal and insignificant, if they really are meaningless, then why fight so hard about maintaining the order of their succession (or about any of their other aspects, for that matter)? The very fact that the Spanish government defended its position through domestic courts and all the way up to the ECHR is a strong indication that titles are apparently not merely symbolic but very symbolic.

\textbf{Do titles fall within the scope of Article 8?}

The applicants added that the fact that, according to Spanish law at the time, titles of nobles and dignitaries would be entered into a civil register means that the title serves ‘as an additional element identifying and linking the holder with the founder’s lineage for transmission to future generations’.\textsuperscript{16}

To this argument Spain replied that nobiliary titles do not fall within the scope of the right protected in Article 8, because:

\emph{[I]dentification with a family was expressed through the surname and not through a nobiliary title ... A person’s surname and first names, which were indisputably elements of the right to respect for private and family life, could not be confused with a nobiliary title.}\textsuperscript{17}

The Court recognised that its jurisdiction indeed considered first names and family names as part of Article 8, but it ironically stated that the case law relating to names is simply irrelevant, because the dispute is not over names:

\emph{Identity with a family was expressed through the surname and not through a nobiliary title. That was made clear by section 55 of the [Spanish] Law on the Civil Register, which provided statutory protection for surnames. A person’s surname and first names, which were indisputably elements of the right to respect for private and family life, could not be confused with a nobiliary title.}\textsuperscript{18}

This formalist statement is disappointing, because it does not offer a theory to justify why the Court drew the lines of Article 8’s scope between surnames and nobiliary titles. After all, both surnames and titles are signs of identification; both are registered by the State; and both signify a connection to one’s family. It is therefore unclear why the Court so offhandedly rejected the analogy between names and titles, by stating that titles are simply not names and that was that.

The applicants argued, further, that, even if Article 8 did not include the right to inherit a nobility title, the fact that Spain regulated this practice obligated it to ensure that it was done equally:

\emph{While it was true that ‘the enjoyment of a nobiliary title’ did not constitute a human right, once a person’s right to use the title had been recognised, it necessarily concerned Article 8 of the Convention since it constituted an element of identification of the holder of the right with their parents, their lineage and their ancestors, one that was not unconnected with the holder’s family life. Consequently the holder could not be subjected to discrimination on the ground of sex.}\textsuperscript{19}

In Barcina de la Cierva Osorio de Moscoso v. Spain (the similar case from the UNHRC mentioned earlier), the State’s involvement in regulating titles is depicted more elaborately (albeit by a dissenting opinion):

The distribution of family titles in Spain is regulated by public law. Decisions on succession to titles of honor or nobility are published as official acts of state in the Boletín Oficial del Estado. The order of succession

\begin{itemize}
  \item \textsuperscript{14} ECHR, De La Cierva Osorio De Moscoso v. Spain, 28 October 1999, p. 7.
  \item \textsuperscript{15} At this point of the analysis, once we have established that Spain interfered with the right to private and family life under Article 8 § 1, we should have normally moved to analyzing whether this interference was necessary in a democratic society according to Article 8 § 2. However, since this discussion did not occur in the case itself (because the Court did not find that the complaint fell within the scope of Article 8), it seems unnecessary to conduct this hypothetical discussion in the present context. On the bifurcation between the definition and scope of the Convention’s rights, and the review of the justification for interfering with them, see J. Gerards and H. Senden, ‘The Structure of Fundamental Rights and the European Court of Human Rights’ (2009) 7(4) International Journal of Constitutional Law 619–53.
  \item \textsuperscript{16} ECHR, De La Cierva Osorio De Moscoso v. Spain, 28 October 1999, p. 8.
  \item \textsuperscript{17} Ibid., pp. 7–8.
  \item \textsuperscript{18} Ibid., pp. 7–8.
  \item \textsuperscript{19} Ibid., p. 8.
\end{itemize}
is not a matter of private preference of the current titleholder. Rather, female descendants are statutorily barred from any senior claim to a title, pursuant to the preference for males regardless of the wishes of the ascendant titleholder. Such a statutory rule ... would seem to be a public act of discrimination.23

While the argument about the State's involvement was rejected in *De Moscoso*,21 subsequent Strasbourg jurisprudence did accept this argument and developed a doctrine that broadens the application of Article 14. In *EB v. France* (hereinafter EB),22 the Grand Chamber held that, if the State guaranteed rights that go far beyond the scope of what was guaranteed in Article 8, then it must do so without discrimination. In *EB*, France guaranteed the right to adoption to its citizens. There was no doubt that the right to adoption fell outside the scope of the Convention's Article 8 - but there was also no doubt that the right to adopt fell within the ambit of the right to private and family life that Article 8 guaranteed. The Court held:

The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide.23

Applying the doctrine of *EB* to our case, once the Spanish State enabled registration of nobility titles, it operated within the ambit of Article 8 (because, even under the narrow interpretation of Article 8, there can be no doubt that nobility titles are also means of identifiability, which associate their bearer with his or her family). In granting the right to register titles and operating within the ambit of Article 8, Spain was obligated to provide this right without discrimination. Otherwise, it would be operating in violation of Article 14 in conjunction with Article 8.

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20 *Barcaastegui v. Spain*, 30 March 2004, Individual Opinion by Committee member Ms Ruth Wedgwood. A dissenting opinion with a similar reasoning was written in the CEDAW Committee case of *Munoz-Varga y Sainez de Vicuna v. Spain*, 9 August 2007 (para. 13. Individual Opinion by Committee member Mary Shanthi Dairiam) (holding that States must in no context provide for a differential treatment of women and men in a manner that establishes the superiority of men over women, and that historical grounds or the perceived immaterial consequence of a differential treatment are a violation of women's right to equality).


So far, I have argued against the notion that titles are merely symbolic. In the next section, I will argue that, even if titles have only a symbolic function, they still mattered, and the Court should have dealt with the issue of their succession rules on its merit (see paragraph 4 of the rewritten judgment).

And what if titles are 'merely' symbolic? On the importance of the semiotic Spain successfully argued that titles lost their 'density' in contemporary Spanish society, in that they no longer actually determined status, formally or informally. Spain and the Court operated on the assumption that what mattered was the reality 'behind' or 'under' the symbols, and that, once this reality is uncertain - once we establish that titles did not determine status - then the conversation is over and the case should be closed. But much important activity happens on the symbolic or semiotic level itself.24 Even if symbols such as titles operate only on the symbolic level without clear manifestations in the 'reality behind the symbols' - even if persons carrying a nobility title are not necessarily richer or more privileged than others in their social or legal status - the symbolic level still matters, and the way symbols are allocated should not be dismissed as a matter so trivial and petty that the law should not intervene in it.

Elsewhere, I dubbed symbolic aspects of identity such as physical appearance, names or titles as the poetics of personhood.25 I argued that a lot of meaning-making occurs on the level of representation of self or appearance. Names, dress, accent, and in our case titles, make up the semiotic domain of personhood: the interface through which individuals are perceived by others and by which they constitute their identity and personhood. I further argued that the fact that we cannot stably anchor every signifier to a stable signified 'behind it' (or an appearance to an identity that supposedly lies underneath it) does not mean that we should ignore or dismiss this semiotic level of personhood.26

If, as I suggest, nobility titles are not to be expected to function as accurate depictions of wealth or status, then the argument that they are merely symbolic loses its grip. *De Moscoso* is indeed a case about symbols, and the Court was asked to determine the allocation of access to symbols, but that the drama and the conflict occurred on the symbolic level does not mean that there was no drama and conflict at all. Spain knew this, the Court knew this, and the applicants knew this. The applicants knew that their identity was not accurately represented by the nobility title, but, rather, the relationship between the title and its bearer is one of allusion or connotation. Nobility titles certainly suggested a connection of their bearers to certain familial relations, to a past of


25 Ibid.

26 Ibid., pp. 56-7.
aristocratic status, etc., but in today's Spain, they did not guarantee such connection, nor did they constitute it.

The Court was therefore wrong to accept Spain's argument that, because nobility titles no longer constituted a special, privileged status, they were meaningless and unworthy of judicial attention. Titles should fall within the scope of the right protected in Article 8 because they serve to connote affiliation to and identification with one's family (see paragraph 2 of the rewritten judgment).

A note before proceeding with the analysis: the applicants also argued that denying their right to inherit nobility titles violates their right to peaceful enjoyment of their possessions under Article 1 of Protocol 1 to the Convention. Because I am willing to accept, for the sake of the argument, Spain's claim that titles were symbolic and had no pecuniary value, the question of violation of Article 1 of Protocol 1 indeed becomes irrelevant, and I shall not elaborate on it.

Gender and signs

So far, I have offered a semiotic analysis of the case at hand, but the picture would not be complete without adding the gender component to our understanding of the case. Historically, women have been particularly vulnerable regarding access to social visibility, and the reasoning in *De Moscoso* echoes the patriarchal notions that have traditionally denied women access to symbols of public prestige.

In an article that analysed the ECHR's case law on gender and surnames, I showed that the prevailing patrilineral surname custom made it hard for women to remain socially visible and present as stable and independent individuals. Bearing the surname of their fathers when they are born, they receive a different surname in every transition from one patriach to another. Once they marry, it is hard to trace them because their surnames change (all the more so when they divorce or remarry). This invisibility is true not only in women's own lifetime: it is also hard to trace women in historical records, even when they were significant figures, because they appeared as Mrs John Smith, or were mentioned only by their first names -- a practice that was rarely the case for men.

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27 Cf. the author's argument in Barcainzegui: 'The lack of any financial value of the titles is without importance since for the holders they possess great emotional value.' *Barcaiztegui v. Spain*, 30 March 2004, para. 5.5.


29 Ibid., p. 283.

30 See T. Keren-Paz, *Torts, Egalitarianism, and Distributive Justice* (Ashgate Publishing, 2007), pp. 23-160; A. Porat, 'Misalignments in Tort Law' (2012) *Yale Law Journal* (forthcoming). Tort scholars suggest ways to achieve the equalisation of compensation by relying on objective and uniform assessments of lost income, that would mitigate factors such as the social class, ethnicity or gender of the injured party. Such ways include, for example, relying on the scope of physical disability after the injury, or relying on average income rather than on concrete past income.
Reciprocal anti-discrimination

As we have seen, the ECHR dismissed the significance of titles as 'merely symbolic'. But it used another important reasoning to reject the discrimination claim, namely, that applicants cannot rely on anti-discrimination law in order to gain access to something that is in itself inherently discriminatory. This Part focuses on this challenging reasoning, and examines it from the perspective of anti-discrimination theory.

32 The upper classes typically have a sense of ease and of entitlement to their high social rank, and therefore fighting such rank betrays them as not truly noble. See, generally, P. Bourdieu, Distinction: A Social Critique of the Judgment of Taste (Richard Nice trans., Cambridge, MA: Harvard University Press, 1984 (1979)).
33 See, generally, C. Gilligan, In a Different Voice (Cambridge, MA: Harvard University Press, 1982).
Women who, like the applicants, want to inherit titles without being discriminated against on the basis of sex, and yet at the same time cannot reciprocate with sensibility to arbitrary class and age (i.e., primogenitary) distinctions, have an incoherent position, according to Spain. Let me dub this type of claim ‘the reciprocal anti-discrimination argument’, or, in short, RADAR. RADARS, then, are arguments that serve to rebut a plaintiff's anti-discrimination claim by asserting that the plaintiff itself is unwilling to reciprocate with non-discriminatory practices. I find this reasoning intriguing, appealing and challenging.

The use of RADAR as a reason for denying anti-discrimination claims is intriguing in that it posits a logic of reciprocity that is not commonly used in legal anti-discrimination contexts: ‘Do not ask the law for assistance regarding your discrimination if you yourself participate in discriminatory practices in your very appeal to the law.’

This reasoning is appealing because it represents, at least on its face, a holistic approach to inequality. If the goal is to eliminate discrimination, then this goal is best achieved when legal decisions are based on a deeper and larger conception of equality, and do not confine themselves to the narrow and formalistic examination of discrimination as the plaintiff frames it (justifiably or not). We, the Court, might solve your problem of discrimination, but, by doing so, we would simultaneously exacerbate another form of discrimination.

Another appeal of RADAR is that it echoes fairness arguments: if one expects not to be discriminated and seeks legal remedy against one's discrimination, then one should also refrain from discriminating or from relying on discriminatory structures. This reasoning can be analogous to the doctrine of ‘unclean hands’ in private law.

The reasoning is also appealing because the ECHR seems to be positing an argument about the legitimising power of law: its decision suggests that if the

37 But cf. Barca and others v. Spain, 30 March 2004, where two dissenting opinions in the UN's Human Rights Committee argued that, in deciding to find the communication inadmissible on the basis of a supposed inconsistency between the author's claim and the “underlying values behind” the principle protected by Article 26, it has clearly ruled ultra petita, i.e., on a matter not raised by the author. The author confined herself to complaining of discrimination against her by the State party on the grounds of her sex, the discrimination in the case before us was clear, and the Committee should have come to the decision on admissibility based on the merits of the petition at hand in the communication.’ *Ibid*, para. 4 of Individual Opinion by Committee member Rafael Rivas Posada. See also Individual Opinion by Committee member Hipolito Solari Yrigoyen, *ibid*.
38 The doctrine of ‘unclean hands’ is a defence against a petition for equitable relief. To take advantage of the doctrine, the defendant must show that the plaintiff did not act in good faith with regard to his or her complaint. See T. L. Anenson, 'Limiting Legal Remedies: The Doctrine of Unclean Hands' (2010–11) 99 Kentucky Law Journal 65.

petition is accepted, it might reify the significance of nobility titles in Spanish society — and this, again, is contrary to the egalitarian spirit of the application (and also of the Convention).

Moreover, the Spanish government (and this was denied by the Court) expressed a worry that the very core constitutional values of equality and dignity would be diluted or compromised if they were to be applied in cases that deal with hierarchical institutions such as nobility titles:

...Accordingly, it would be paradoxical if a peerage could be acquired by succession not, as historical practice dictates, on the basis of the criteria which governed previous transmissions, but of other criteria, since that would amount to ascribing the values and principles enshrined in the Constitution, and which today have a substantive content within our legal order, to something which, because of its symbolic nature, does not have such content.

Finally, this reasoning is challenging because it leaves many questions yet unanswered: what are additional cases in anti-discrimination doctrine in which this logic is applied by courts (a descriptive question)? How should courts determine when to apply this logic and when to refrain from applying it (a normative question)? And what is the vision of equality that should lie at the basis of judicial decisions when judges deny discrimination claims on the grounds that the claims are themselves discriminatory?

Despite their appeal, RADARS should be treated with caution. In what follows, I shall describe what I see as the pitfalls and shortcomings of RADARS. These shortcomings would lead me to conclude that the Court erred in using a RADAR to deny the application in *De Moscoso*.

Who is vulnerable to RADARS?

When courts use reciprocal anti-discrimination arguments to rebut an applicant's discrimination claim, they send the applicant back home empty-handed because his or her discrimination claim was not ‘discrimination-free’: it was flawed with discriminatory effects such that, if the applicant's discrimination claim were accepted, this would lead to discrimination for others.

The first and main question we should ask when encountering a RADAR is who is most prone, or exposed, to the usage of RADAR for blocking their discrimination claim. The answer is that RADARS can be invoked precisely against those groups which anti-discrimination law is crafted to assist (that is, individuals from traditionally discriminated groups, such as women, people of colour, the disabled, etc.). Here are three reasons for the heightened vulnerability of traditionally discriminated groups to RADAR claims.

39 ECHR, De La Cierva Osorio De Moscoso v. Spain, 28 October 1999, p. 3.
First, as an almost trivial and self-evident empirical matter, generally speaking, the majority of discrimination plaintiffs are members of groups that suffer from discrimination.\textsuperscript{40} Therefore, to tell discrimination plaintiffs that they need to 'purify' their discrimination claim from any adverse affects that their claim might have on other groups is to double their burden: not only should they prove that they were discriminated against, but they should now also prove that remedying their discrimination would not hurt anyone else.

Secondly, we should keep in mind that contemporary societies are imbued with unequal social and legal structures. Thus, invoking RADAR against plaintiffs in discrimination cases is an easy task – perhaps often too easy – and might lead to conservative outcomes in inhibiting the evolution of anti-discrimination adjudication. For example, RADAR could have been used against the black American citizens fighting for their suffrage in the United States before the Fourteenth Amendment: how could they fight for equal access to the vote when women were denied suffrage, thereby entrenching the vote as a deeply egalitarian institution (just like nobility titles?\textsuperscript{27}) But this is clearly a paralysing claim that could hamper any effort to social reform.

In a deeply egalitarian world, it would be hard to come by a discrimination claim that would be 'pure' and free of any 'contaminating' discrimination that might be paradigmatically attached to it. The ease of producing a RADAR to rebut discrimination plaintiffs should serve as a cautionary signal, because it means that almost any discrimination claim could potentially be blocked by a RADAR.

Thirdly, although RADARs could be formulated against almost any discrimination claim, coming either from members of underprivileged groups or from members of the dominant group, courts would be generally less prone to invoke a RADAR to rebut discrimination claims of the latter than of the former. Phrased differently, when members of the dominant group argue discrimination, they are less likely to encounter a RADAR as the argument that rebuts their claim.

\textsuperscript{40} Indeed, rich literature teaches us that the picture is much more complex than that, and that, for example, it is the relatively privileged within the discriminated group that use those laws (e.g., strong and educated women use sex equality laws more than poor or undereducated women). We also know that, in some cases, the lack of plaintiffs from a particular group cannot serve as an indication that its members do not suffer discrimination. An example of this is the Palestinian citizens of Israel, who, as data suggest, are constitutively discriminated in the Israeli workplace, and yet refrain from suing in courts. See G. Mundla, 'The Law of Opportunities in Employment: Between Equality and Polarization' (2009) 90 Comparative Labor Law and Policy Journal 213. We also know that members of the privileged group often use anti-discrimination law for their own purposes (e.g., when white students attack race-based affirmative action programs in education); see C. A. Sullivan, 'The World Turned Upside Down: Disparate Impact Claims by White Males' (2004) 96 Northwestern University Law Review 1505. All that being said, still the majority of discrimination plaintiffs are those who come from traditionally discriminated groups.

I will illustrate this argument through the surname adjudication of the ECHR. The ECHR hears a fair amount of cases in which women or men argue that the patriarchal naming system regulated by their State violates their right to private and family life under Article 8 of the Convention, in conjunction with Article 14.\textsuperscript{41} A woman could argue, for example, that she had a right to keep her pre-marital surname after marriage,\textsuperscript{42} or a man could argue that his child should bear his surname: after the mother remarried and had additional children with her new spouse, and wanted to change the surname of the child from the first marriage such that the entire family would bear the same surname.\textsuperscript{43}

Examining these cases through the analytical lens of RADAR reveals that men and women are positioned differently when they argue for their right not to be discriminated against in the naming system. When men argue discrimination in the context of the naming laws, their argument is flawed in a very similar way to the weakness that the ECHR found in the applicants’ claim in De Moscoso: they are asking to be treated equally within a discriminatory system from which they are the constant and primary beneficiaries. In other words, restoring equal treatment for them would not entail equal treatment for all, but rather would mean sustaining and even deepening the unequal treatment of women by the naming system.

And yet, throughout the extensive adjudication of the ECHR on surnames and gender, there has not been even a single case in which a man’s claim was rebutted using a RADAR. That is, never did the Court say to a male applicant: ‘You cannot come here and ask for our help because your hands are not clean; you ask for remedy against your own discrimination, but you are unwilling to reciprocate with non-discrimination of women in the very area in which you seek equal treatment.’

The case of Burghartz v. Switzerland\textsuperscript{44} serves as a good example. Without entering into all its factual nuances, the case concerned a man, Alfred Schnyder, who took his wife’s surname (Burghartz); upon marrying her, but, since he was an academic and was known in professional circles as Schnyder, he sought the


\textsuperscript{42} See e.g. ECHR, Ŭnal Tekeli v. Turkey, 2004; ECHR, Hagemann-Hülsler v. Switzerland, 1977.


possibility to hyphenate his pre-marital surname in professional contexts such as academic publications (Schneider-Burghart). The European Commission of Human Rights, granted his application, finding that his right to private and family life under Article 8(1) of the Convention, in conjunction with Article 14, was violated. But, if we were to apply the RADAR logic of De Moscoso to Burghart, the Commission should have rejected his application, on the ground that, in wishing to maintain his pre-marital surname, the applicant sought equal access to a patriarchal naming system (that is, to a system that is imbued with sex discrimination and, in the eyes of many, represents an old and bygone value system).

I imagine most readers do not think Alfred Schneider-Burghart should have lost his case. Similarly, the applicants in De Moscoso should not have lost their case either.

Earlier, I noted that discrimination claims are likely to be imbued with residual discriminatory effects. Although this happens both to discrimination claims by members of underprivileged groups, and to discrimination claims of members of dominant groups, only the former tend to be exposed to RADARs as blocking their discrimination argument. Why this difference? Perhaps because in order to accept and remedy the discrimination claim of members of traditionally discriminated groups a much more radical change in the status quo is needed than that which would be required in order to accept and correct the discrimination claim of members of dominant groups. Removing an unfair treatment that is aimed against a member of the hegemonic group is like restoring things back to their natural state: these people are usually handled fairly, and, if something is wrong in the picture, it is a detail, a small section of the entire picture, that should and could be easily fixed. In contrast, when it comes to members of discriminated groups, the dynamics are different. They are usually embedded in a deep structure of discrimination, and changing any detail of this structure so that it will be free of discrimination is radical – both because it contradicts the rest of the picture, and because it might entail changing other parts of the picture as well, since working on the detail alone would not bring significant change. This might be why courts recognise more readily a reciprocal anti-discrimination argument when the plaintiff is a member of a generally discriminated group than when the plaintiff is a member of the dominant group.

I enumerated three reasons for why members of traditionally discriminated groups are particularly vulnerable to the invocation of RADAR against their discrimination claim. These reasons place RADAR-type claims in a less positive light than at first appeared. They should lead to caution in using RADARs in anti-discrimination cases, and they should have lead the ECHR to refrain from using RADAR in the current case (see paragraphs 7–8 of the rewritten judgment).

Who has the power to change the discriminatory reality?

Another question we should ask in order to assess RADARs as an instrument in rebutting discrimination claims is who has the power to change the residual discriminatory effect that the RADAR alerts us to – is it the plaintiff or the defendant? In our case, such a question would be formulated as follows: if nobility titles have a discriminatory effect in invoking a bygone world of social hierarchies, then who can mitigate this effect? The system of nobility titles, including their succession rules, lies beyond the control of the applicants. Conversely, the Spanish State recognises the titles in that it keeps a registered record of title bearers. It is somewhat odd that the same entity that registers the titles also argues that they are horribly inegalitarian and therefore women should not rely on an equality argument in order to gain equal access to them. If the ‘inequality residue’ of title bothers the Spanish government that much, it should have discontinued the registration of titles, rather than oppose the reform in their succession line as it did in De Moscoso. The State should thereby stop granting titles the official recognition that they have so far been receiving (see paragraphs 2 and 6 of the rewritten judgment).

These observations should not lead to the conclusion that RADARs are never a just argument for rebutting a discrimination claim. RADARs reflect a holistic understanding of discrimination, and therefore they might be appropriate in certain situations. However, as I showed here, they may unequally burden groups that are already burdened with discrimination, and therefore they should be used with caution.

The question of authenticity

One last issue regarding De Moscoso warrants critical attention: Spain’s argument that changing the succession rule to a rule that would be sex-equalitarian would complicate the authenticity of titles as the historic relic that they are. Spain argued that the practice of nobility titles should be kept unmodified if it is to survive in the modern age. Here are some quotes from Spain’s Constitutional Court on that matter:

[P]eersages are now passed on as they stand by succession. In most instances, those are titles that were attributed under the Old Regime and were defined in the historical past to which, precisely, they now refer . . . Thus, the legal rule governing their transmission on death has, with time, itself become an inherent feature of nobiliary titles acquired by succession . . . If
the nobiliary title is not discriminatory and, therefore, not unconstitutional, the precedence (given to the male over the female line) is not either. In other words, since it is accepted that peerages are consistent with the Constitution owing to their purely honorary nature and their purpose, which is to keep alive the historic memory of their grant, a specific element of that institution - the rules governing their transmission on death - cannot be regarded as being exempt from the conditions laid down in the royal charter of grants.  

Modifying the way titles are passed down the generations, writes the Constitutional Court, would amount to altering a quality so inherent in titles that they could no longer fulfil even the purely symbolic function that they do now.

There is certainly logic, and even charm, to this reasoning. It reflects the Constitutional Court's general unease and ambivalence about the whole business of nobility titles. The Court is worried that, once it starts meddling with the titles so that they would fit contemporary mores about sex equality, it would then be required to fix the other misfits of titles to current moral sensibilities (namely, that they create class and primogenital distinctions). This would be an impossible mission, because class- and age-based distinctions lie at the basis of nobility titles - this is what they do: they give ranking to certain segments of the population, and, since they are indivisible, only the oldest offspring receives them.

Additionally, if the State or the Court embark on the task of trying to improve the flaws of nobility titles by making their succession rule more egalitarian, they would be perceived as embracing the value system that titles represent - an honour-based system that welcomes hierarchical and vertically stratified social distinctions - distinctions that are not based on merits but on the arbitrariness of fate or biology.

This reasoning is problematic. Recent history provides us with many examples of institutions that were originally imbued with discrimination based on sex, race or sexuality, yet they managed to march with time and adapt to increasing commitments to equality without endangering their very essence.

The last century and a half saw the entrance of women into politics, into universities, into the professions, and (still to a limited degree) into the church.

Similar stories could be told about the entrance of non-whites or of gays into these institutions (still very much a work in progress). The point is that the entrance of women and minorities into these institutions is precisely what keeps them viable, since they adapt to the changing times.

This point was made very well by one of the dissenting opinions in Barcaiztegui v. Spain:

The use of titles can be adapted to take account of the legal equality of women. Even within the tradition of a title, a change of facts may warrant a change in discriminatory rules. For example, in an age of national armies, it is no longer expected that a titleholder must have the ability to fight on the battlefield. (Admittedly, Jeanne d'Arc might suggest a wider range of reference as well.)

Indeed, we do not feel the ambivalence that we do vis-à-vis nobility titles towards many of the institutions I just mentioned, because the latter have some intrinsic values that we cherish (universities promote knowledge and education, parliaments promote the democratic process, etc.). However, going back to our case, if Spain finds reasons to sustain the titles as a viable practice (if only due to symbolic reasons), then it ought not to be tight-fisted about changing the way they are passed through the generations (see paragraph 9 of the rewritten judgment).

Conclusion

This chapter examined De Moscoso through two theoretical perspectives: that of semiotics theory, and that of anti-discrimination theory. In analysing the case, my aim was to question some of the unstated assumptions on which the ECHR relied in denying the application admissibility, namely, assumptions on the nature and role of symbols such as nobility titles, identity, gender, reciprocity and authenticity.

The applicants in this case were presented, albeit in the subtext of the opinion, as dishonourable: as if by their very battle over nobility titles they prove themselves as unworthy of such titles. Noble persons, as members of the high class, supposedly have an inherent sense of ease in their social position; of entitlement in their rank in society. Thus launching a legal campaign to chase a nobility title perhaps seemed to the Court as a deeply un-aristocratic endevour. I hope that the analysis offered here succeeded in presenting the application as less petty and nobler than it might have initially seemed.


See the discussion on p. 132 above.
Rewriting De La Cierva Osorio De Moscoso v. Spain

As to the law

1. The Court observes, firstly, that it has on a number of occasions held that disputes relating to individuals’ surnames and first names come within Article 8 of the Convention. Although that provision does not contain any explicit provisions on names, as a means of personal identification and of linking to a family, a person’s name nonetheless concerns his or her private and family life (see, mutatis mutandis, the following judgments: Burghart v. Switzerland of 22 February 1994, Series A no. 280-B, p. 28, ¶ 24; Stjerna v. Finland of 25 November 1994, Series A no. 299-B, p. 60, ¶ 37; and Guillot v. France of 24 October 1996, Reports of Judgments and Decisions 1996-V, pp. 1602-03, ¶ 21). Indeed, the case law cited above concerns names and the instant case concerns nobility titles, but the cited cases can still serve to illustrate the nature and scope of the right protected under Article 8. Like names, nobility titles are a means of personal identification and connote linkage to one’s family. The facts of this case suggest that nobility titles have symbolic significance for the aristocratic families, for individual family members who pass the titles down the generations, and for the Government as it recognises and monitors their succession.

2. The fact that a nobiliary title may be entered on the civil register as an item of additional information facilitating the identification of the person concerned cannot suffice to bring the debate within the scope of Article 8, but it can serve as an indication of the importance of titles. If Spain partakes in sustaining nobility lines as a meaningful category in Spain’s society and culture, and in monitoring that the titles are appropriately passed on, then it is hard to accept Spain’s argument that the practice of title-bearing lacks meaning. Furthermore, even if we accept Spain’s claim that titles are ‘only’ of symbolic significance, we stress that symbolic significance is still significance. That is, symbols maintain their symbolic function because they mean something to those for whom they are symbolic. Therefore, this Court sees Spain’s participation in registering the title bearers and monitoring their succession as revealing in relation to the present-day significance of titles in Spanish society. Indeed, Spain’s very insistence on objecting to the applicants’ petition to change the succession order serves to attest that titles are still important and meaningful in the Government’s view.

The Court concludes that the applicant’s complaint [fragment deleted] can be regarded as coming within the scope of application of Article 8 of the Convention. [Fragment deleted]

Spain did not provide any arguments to demonstrate that its interference in the private and family life of the applicants was necessary in a democratic society, therefore we conclude that Article 8 was violated.

3. The applicants also alleged a violation of Article 14 taken together with Article 8 of the Convention in that giving precedence to males in the transmission of peerages amounted to discrimination which pursued no legitimate aim and was in any event disproportionate.

The Court reiterates that Article 14 concerns only discrimination affecting the rights and freedoms guaranteed by the Convention and its Protocols. Since the Court has found that Article 8 has been violated, it should examine whether Spain discriminated against the applicants in setting unequal conditions for enjoying the right.

4. As a preliminary note, the Court indicates that, even if it would have found that Article 8 was not violated (and the right to nobility titles was not part of the right to private and family life under Article 8), the applicants might still have an argument under Article 14. The prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms of the Convention. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case law (see Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v. Belgium (Merits), Judgment of 23 July 1968, Series A no. 6, ¶ 9). The present case concerns facts that, if not falling within the core of Article 8 (and in our view they did), surely would have fallen within Article 8’s ambit: In registering titles, Spain operates at least within the ambit of Article 8, and in providing for the right to inherit titles it cannot take discriminatory measures within the meaning of Article 14. The sole criterion that distinguishes the applicants from other competitors on the titles is their sex. Therefore, even if this Court had found that there had been no violation of Article 8 standing alone, it would still have found that Article 14 in conjunction with Article 8 is applicable in the present case.

5. The applicants demonstrate that female offspring receive the title only as a last resort, in the absence of a male heir. By this they have shown that the succession rule, on its face, arbitrarily discriminates against female offspring of nobility because it significantly reduces their chances of inheriting the title. It follows that the burden shifts to the respondent
to demonstrate that the sex-based distinction in the succession order of
nobility titles did not violate Article 14 in conjunction with Article 8, in
that it did not prevent women from equal enjoyment of their right under
Article 8 (see ECHR (GC), Şerife Yigit v. Turkey, 2 November 2010, para.
71, in which this Court has established that, 'once the applicant has
shown a difference in treatment, it is for the Government to show that
it was justified').

6. The respondent State replies with two arguments. First, nobility
titles are today merely symbolic and have no material or actual value. The
Court cannot accept this argument as sufficient to justify a discrimina-
tory allocation of the titles - as symbolic as they might be. As noted
above, symbols have meaning; otherwise human societies would not have
sustained and preserved them as symbols. If the titles are indeed insig-
nificant as the respondent State argues, then it follows that either their
succession order is insignificant as well, and should therefore be outside
the interest of the State (and the respondent State would not object to a
reform of their succession rule towards a more egalitarian rule that would
comply with domestic and European law), or titles should be done away
with altogether, as a practice that is no longer viable in this modern and
more egalitarian era, in which democratic societies seek to minimise
arbitrary hierarchies of rank and honour. The respondent cannot hold
both ends of the stick by saying that nobility titles do not matter, and that
they matter a great deal, thus the discriminatory inheritance rules remain
untouched and receive State recognition.

7. The Government's second argument is that nobility titles are a
historic relic of a bygone world, and part of sustaining their nature as
such entails maintaining the original rules of passing them on from
generation to generation. The applicants, continues the Government,
could not simultaneously ask to remedy their alleged sex discrimination
while at the same time sustaining the age and class distinction that are
embedded in the practice of nobility titles. Titles are inherently
contradictory to the egalitarian values of the liberal State, and therefore,
according to the respondent Government, it would be absurd to impose
on them a constraint that belongs to the modern commitment to sex
equality.

We find this argument unconvincing. Indeed, Spanish domestic courts
decided this case have recognised an inherent paradox in the argument
that nobility titles should be passed down equally on the basis of sex. As
relics of the old regime in which social hierarchies based on class and rank
were accepted as natural, it might indeed seem paradoxical to argue for
sex equality in the allocation of a rank that is passed on according to
arbitrary criteria (whether one was born to the right family, and whether
one is the oldest sibling).

However, if we were to decide about the values that underline nobility
titles, we would have ruled ultra petita - on a matter that was not raised
by the applicants. The application is confined to the sex based discrimina-
tion argument, and the Court should not decide based on grounds that
fall outside its scope, such as the age or class distinctions that titles
allegedly create. The ratio decidendi is limited to determining whether
or not the applicants were discriminated against by reason of their sex, in
violation of Article 14. The Court could not include in its decisions issues
that have not been submitted to it because, if it did so, it would be
exceeding its authority. A discussion of the age- and class-based distinc-
tions inherent in titles should be conducted separately, if at all, and cannot
be included in the present application.

8. Additionally, the Government's argument amounts to asking the
applicants that they rid their discrimination claim from any hint of
accompanying discrimination. The logic implied here is the logic of
reciprocity: according to the Government, one cannot argue against
one's discrimination if the way there are other forms of discrimi-
nation that one's claim does not remedy. The Court is concerned by this
logic of reciprocity, as it might lead to setting a very high bar that would
block most discrimination claims. In the Court's view, to rebut a discrimi-
nation claim of a group that suffers from discrimination by saying that
its discrimination claim suffers from discriminatory residue is to poten-
tially block the chances of almost any discrimination claim from
succeeding.

An analogy would illustrate this point. In Burghart, mentioned above,
this Court held that Switzerland's refusal to allow the applicant to keep
his pre-marital surname for professional purposes despite the fact that
when he married he took his wife's pre-marital surname as the joint
family name, amounted to a breach of Article 8 and Article 14 taken
together. Note that the applicant sought equal access to a patriarchal
naming system (that is, to a system that was imbued with discrimination
and, in the eyes of many, represented an old and bygone value system).
Still, this Court did not block the applicant's discrimination claim by
arguing that he sought equal access to a good that was imbued with
discrimination. In other words, the Court did not require that the
applicant reciprocate by demonstrating commitment to the principle of
anti-discrimination.

9. If we accept the argument that the rules governing the transmission
of nobility titles by death had themselves become an inherent feature of
nobility titles, we might reach absurd conclusions that impede progress
towards social and legal equality between men and women. Many of the finest institutions in contemporary societies have been historically closed off for women, and only became open to them in the last century (for example, universities, the legal profession, the vote and the parliament, or the church clerkship). Still, we do not say that male monopoly is an inherent part of academia, law, politics, or the church. Social institutions change with time according to changing moral and legal commitments, and they survive such reforms. There is nothing unique in nobility titles in that regard. As this Court has stated repeatedly, ‘the Convention is a living instrument which must be interpreted in light of present-day conditions’ (see, for instance, ECHR Tyrer v. United Kingdom, 25 April 1978, para. 31).

10. In applying anti-discrimination clauses, courts should be careful not to allow prevailing norms to shape their view whether a particular practice is discriminatory or not. Accordingly, this Court takes into account that, throughout history, men have had an easier access to positions of prestige and public visibility (including to nobility titles), while women have been traditionally excluded from such positions. This state of affairs makes it harder for women to demonstrate what is at stake for them in gaining equal access to nobility titles – because they need to demonstrate the damage in being deprived of something that was never theirs. That nobility titles have been passed down from one man to the next for generations does not mean that nobility titles should be passed down in that manner.

We therefore hold that Article 14, in conjunction with Article 8, was violated.

11. Relying on Article 1 of Protocol No. 1 to the Convention, the applicants argued that the fact that they had been deprived of the peerages concerned had infringed their right to the peaceful enjoyment of their possessions, without any reasonable justification and without compensation. The titles concerned had not been merely of honorary value but also had a pecuniary value, for example, in the form of social advantages and increased prestige. Furthermore, assets from the family estate, especially immovable property, frequently reverted to the holder of the peerage by custom.

The applicants contended that in a country which, like Spain, recognises, regulates, protects and grants nobiliary titles, such titles are indisputably perceived as conferring a social advantage. As for the commercial exploitation of peerages, that was constant practice in Spain. On that point, the applicants referred to the well-known commercial exploitation of peerages in the wines and spirits sector, where they served as trademarks. Ultimately, the commercial, social and honorary use of a nobiliary title was an integral part of the estate of the person enjoying it, such that Article 1 of Protocol No. 1 was indisputably applicable.

Based on our earlier findings that nobility titles are part of the right to private and family life regardless of whether they are merely of honorary value or carry pecuniary implications, and that Article 8 was violated, we do not need to determine whether the right to peaceful enjoyment of possessions was infringed in this case.

For these reasons, the Court unanimously

[Fragment deleted]

1. Declares the application admissible;
2. Holds that there has been a violation of Article 8 of the Convention;
3. Holds that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;
4. Holds that it is not necessary to consider the complaint under Article 1 of Protocol No. 1 of the Convention, taken alone or in conjunction with Article 14.