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HUMAN RIGHTS COMMITTEE
Eightieth session
15 March – 2 April 2004

DECISION

Communication No. 1008/2001

Submitted by:	Isabel Hoyos Martínez de Irujo (represented by Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	4 September 2001 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 11 November 2001 (not issued in document form)
Date of adoption of Decision:	30 March 2004

[ANNEX]

* Made public by decision of the Human Rights Committee.

Annex

DECISIONOF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eightieth session

concerning

Communication No. 1008/2001[**]

Submitted by: Isabel Hoyos Martínez de Irujo (represented by Mr. José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 4 September 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2004,

Having concluded its consideration of communication No. 1008/2001, submitted by Isabel Hoyos Martínez de Irujo under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

[**] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Three separate individual opinions signed by Mr. Rafael Rivas Posada, Mr. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood are appended to the present document.

Decision on admissibility

1. The author of the communication, dated 4 September 2001, is Isabel Hoyos y Martínez de Irujo, a Spanish national, who claims to be a victim of violations by Spain of articles 3, 17 and 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel. The Optional Protocol to the Covenant entered into force for Spain on 25 January 1985.

The facts as submitted by the author

2.1 The author was the firstborn daughter of Mr. Alfonso de Hoyos y Sánchez, who died on 15 July 1995. Subsequently, she applied to the King for succession to the ranks and titles held by her father, including the *Dukedom of Almodóvar del Río*, with the rank of *Grandee of Spain*. She asserts that she made a formal application with the intention of placing on record her greater right to succession to the title in question.

2.2 In an Order published in the *Boletín Oficial del Estado* of 21 June 1996, succession to the title of *Duke of Almodóvar del Río* was granted to the author's brother, Isidoro Hoyos y Martínez de Irujo.

2.3 The author asserts that, although as firstborn daughter she had the greater right, she had agreed to renounce the title under an agreement she had made with her brothers on the distribution of their father's titles of nobility. She asserts that at the time this took place, the criterion established by the judgement of the Supreme Court of 20 June 1987, pronouncing the precedence for males in succession to titles of nobility discriminatory and unconstitutional, was in force. However, the Constitutional Court's judgement of 3 July 1997 abrogated that decision; it stated that male primacy in the order of succession to the titles provided for in the Acts of 4 May 1948 and 11 October 1820, was neither discriminatory nor unconstitutional, given that article 14 of the Spanish Constitution, which guaranteed equality before the law, was not applicable in view of the historical and symbolic nature of the institution.[1] The author argues that this led to her brothers initiating legal proceedings to strip her of her titles.

2.4 As a result, in June 1999, the author instituted legal proceedings against her brother Isidoro in Majadahonda Court of First Instance No. 6, asserting her greater right to the title.

2.5 In its judgement of 11 May 2000, the Majadahonda Court dismissed the claim, in accordance with the Constitutional Court's judgement of 3 July 1997. The judge said, however, that she sympathized with the author's position but she could not deviate from the interpretation the Constitutional Court had given to the laws and provisions of the legal regime.

2.6 The author asserts that article 38, paragraph 2, of the Constitutional Court Organization Act provides that "Judgements for dismissal of appeals on matters of constitutionality and in disputes in defence of local autonomy may not be the subject of any

[1] Two individual votes by three judges dissented from the content of the judgement; they considered that the provision in question should have been declared unconstitutional.

subsequent appeal on the issue by either of these two means, based on the same violation of the same constitutional precept." Consequently, on the basis of the Constitutional Court's judgement of 3 July 1997, she considers that no effective remedy remains open to her. She nevertheless filed an appeal with the Provincial High Court.

2.7 On 15 April 2002, the State party informed the Committee that judgement had been delivered on 23 January 2002 on the appeal filed by the author with the Provincial High Court, and that the author had subsequently filed an application for review with the Supreme Court, consideration of which was pending.

The complaint

3.1 The author maintains that the State party is in violation of article 26, which guarantees that all persons are equal before the law, and prohibits any discrimination, inter alia, on the ground of sex. She asserts that the law governing succession to titles of nobility discriminates against her merely because she is a woman, since the title was granted to her younger brother owing to male primacy. In her view, succession to titles is regulated by the law and the judge of first instance failed to apply article 26 of the Covenant, owing to her obligation under the irremediable bond linking courts and judges to the jurisprudence of the Constitutional Court, as established in Spanish law.

3.2 The author reminds the Committee that in its general comment No. 18 on the right of non-discrimination, it stated: "*While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations*", and that "*In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities.*" The author argues that article 26 therefore refers to the obligations imposed on States in respect of their laws and the application of those laws, and that, accordingly, in adopting a law, the State party must ensure that it is in compliance with the provisions of article 26 in that its content is not discriminatory. She contends that, as she is the firstborn daughter, the granting of the title to her younger brother constitutes an unacceptable breach of the principle of equality between men and women.

3.3 The author asserts that article 3 of the Covenant has also been violated, in conjunction with article 26, since States parties have the obligation to grant equality to men and women in the enjoyment of civil and political rights. She further claims that the foregoing may be linked to article 17 of the Covenant since, in her opinion, a title of nobility is an element of the private life of the family group of which it forms part. In this regard, she recalls that, in its general comment No. 28 concerning article 3 of the Covenant, the Committee stated: "*Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture ...*". She also notes that, in paragraph 4 of the same comment, the Committee established that "*Articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights.*"

3.4 In a written submission of 28 August 2001, the author comments on the effects of the discrimination of which she claims to be the victim. In her opinion, while the title of nobility

has no financial value, the fact that it was not awarded to her on the ground of her sex was wounding to her dignity as a woman and also involved the investment of time and efforts - including financial efforts - to defend her right not be discriminated against. She claims that she has been prevented from appearing in her own right as *Duchess of Almodóvar de Río* in the official list of holders of titles of nobility, published by the Ministry of Justice and entitled "*Guía de Grandezas y Títulos del Reino*" (Guide to the Nobility and Titles of the Kingdom).

State party's observations on admissibility and the merits

4.1 The State party, in its written submission dated 9 November 2002, argues that the communication should be declared inadmissible by virtue of article 2 and article 5, paragraph 2 (b) of the Optional Protocol, since domestic remedies have not been exhausted. It asserts that the author has an appeal pending with the Madrid Provincial High Court, consideration of which has not been unduly delayed.

4.2 The State party goes on to argue that an alleged violation of the Covenant cannot be asserted on the basis of a violation of the Covenant itself and the Optional Protocol, nor on the basis of a breach of domestic law. It points out that judicial proceedings and possible successive appeals are regulated under the Spanish legal regime. After the judgement of the court of first instance, it is possible to appeal to the Provincial High Court, whose decision can in turn be appealed to the Supreme Court; if it is considered that some fundamental right has been violated, an application for *amparo* can be lodged with the Constitutional Court. The State party argues that "*to lodge and uphold an appeal only in order to mark time until the Committee expresses its views on this case, and to simultaneously submit a communication to the Committee, whose future comments in this connection will provide valid substance for the appeal, is to seek undue interference by the Committee with a domestic court, which would come within the competence of the Special Rapporteur on the independence of judges and lawyers*".

4.3 The State party asserts that the same matter was submitted by other women to the European Court of Human Rights, which declared these applications inadmissible *ratione materiae*, not for the reason given by the author but because it arrived at the conclusion that the use of a title of nobility fell outside the purview of the right to privacy and family life.

4.4 The State party asserts that the communication fails to substantiate any violation of article 26, since the use of a title of nobility is merely *nomen honoris*, devoid of any legal or material content. It argues that if the use of a title had any material substance, i.e. if it was a human right, it would be inherited by all the children, without discrimination on the ground of primogeniture or sex, as in the case of the property of the deceased in the institution of inheritance, which is regulated by the Civil Code. It adds that it would be unconstitutional for titles to have material content, since that would be the expression of "the most odious discrimination, that of birth, which for many centuries prevented human beings from being born free and equal in dignity and in rights". The State party further argues that the author does not claim a possible inequality before the law or that there is a violation of articles 3 and 17 of the Covenant. It accordingly contests the admissibility of the communication *ratione materiae* in accordance with article 3 of the Optional Protocol.

4.5 In its written submission dated 7 March 2002, the State party reiterates its arguments on inadmissibility, and on the merits asserts that the author alleges "*discrimination against women in the order of succession to titles of nobility*", which constitutes an *actio popularis.* In this respect it argues that the system established in the Covenant and the Optional Protocol requires there to be a victim of a specific violation.

4.6 The State party draws attention to the fact that the author, who holds the titles of "*Marquise of Hoyos, Marquise of Almodóvar del Río, Marquise of Isasi and Grandee of Spain*", succeeded her father in the use of two of the titles and renounced the *Dukedom of Almodóvar del Río* in favour of her brother Isidoro. It adds that this "*extremely personal and voluntary*"[2] renunciation led her brother to apply to succeed in the use of the title.[3]

4.7 The State party recalls that when the title of nobility in question was granted to the first *Duke of Almodóvar del Río* in 1780, men and women were not yet considered to be born equal in dignity and rights. It argues that nobility is a historical institution, defined by inequality in rank and rights through the "divine design" of birth.

4.8 For the State party, a title of nobility is not property, but simply an honour of which use may be made but of which no one has ownership. Accordingly, succession to the title is by the law of bloodline, outside the law of inheritance, since the holder succeeding to the title does not succeed to the holder most recently deceased, but to the first holder, the person who attained the honour. The State party further argues that use of the title is not a human right, nor is it part of the inheritance of the deceased, nor does it adhere to the laws on inheritance in the Civil Code.

4.9 The State party contends that the use of a title of nobility cannot be considered part of the right to privacy, since membership of a family is attested to by the name and surnames, as regulated under article 53 of the Spanish Civil Register Act and international agreements. To consider otherwise would raise a number of questions, such as whether those who do not use titles had no family identification, or whether relatives in a noble family who did not succeed to the title would not be identified as members of the family. In the view of the State party, inclusion of the use of a title in the human right to privacy and family life would contravene the equality of human beings and the universality of human rights.

4.10 The State party points out that the rules of succession for the use of the title of nobility in question embody a first element of discrimination by reason of birth, since only a descendant can succeed to the title; a second element of discrimination lies in birth order, based on the former belief in the better blood of the firstborn; and lastly, sex constitutes a third element of discrimination. The State party contends that the author accepts the first two elements of discrimination, even basing some of her claims thereon, but not the third.

4.11 The State party contends that the Spanish Constitution allows the continued use of titles of nobility, but only because it views them as a symbol, devoid of legal or material

[2] The notarized document stated that the author renounced her claim to the title "*as an expression of affection towards her brother Isidoro*".

[3] The State party attaches a copy of the notarized document of 17 May 1996, recording the renunciation of her claim to use of the title.

content, and cites the Constitutional Court to the effect that if use of a title meant "*a legal difference in material content, then necessarily the social and legal values of the Constitution would need to be applied to the institution of the nobility*". It argues that, admitting the continued existence of a historical institution, discriminatory but lacking in material content, there is no cause to update it by applying constitutional principles.[4] Only 11 judgements of the Supreme Court - not adopted unanimously - have departed from the ancient doctrine of the historical rules of succession to titles, as a result of which the question of constitutionality arose, the matter being decided by the judgement of the Constitutional Court of 3 July 1997. The State party affirms that respect for the historical rules of institutions is recognized by the United Nations and by the seven European States which admit the institution of nobility with its historical rules, as it does not represent any inequality before the law, since the law does not recognize that there is any legal or material content in titles of nobility. Consequently, there can be no violation of article 26 of the Covenant.

Author's comments on the State party's observations

5.1 In her written submission of 21 January 2002, the author reiterates that, in the case submitted to the Committee, it was futile to make a further submission to the domestic courts, since article 38, paragraph 2, and article 40, paragraph 2, of the Constitutional Court Organization Act pre-empt reopening of consideration of the constitutionality of the Spanish legal system as it relates to succession to titles of nobility. For that reason, despite the fact that the judge of first instance in Majadahonda had expressed her personal sympathy for the author's case, she said that she had no option but to dismiss her action, in view of the Spanish Constitutional Court's position in that regard. The author emphasizes that she continued with domestic remedies to avoid the case being declared *res judicata*, thereby preventing possible views by the Committee against the State party from being made effective. The author argues that if the Committee found in her favour, for example before the Supreme Court concluded its consideration of her application for judicial review, she could enter the decision as evidence with sufficient force to permit a return to the former jurisprudence of equality of men and women in succession to titles of nobility, thereby obtaining effective redress for the injury done to her fundamental right to non-discrimination, that is, recovery of the title. She further maintains that, in accordance with the Committee's often stated jurisprudence, the victim is not obliged to use remedies that are ineffective.

5.2 The author claims that the ground for inadmissibility cited by the State party relating to article 5, paragraph 2 (a), is erroneous, since she was not a party to the proceedings brought by four Spanish women regarding succession to titles of nobility before the European Court of Human Rights. She recalls the Committee's decision in *Antonio Sánchez López v. Spain*,[5] that the concept of "the same case" should be understood as including the same claim and the same person.

5.3 The author claims that she is indeed a victim, that she is bringing a specific violation before the Committee, and that it is not an *actio popularis* as the State party maintains since

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[4] The State party cites a case in which the Constitutional Court rejected an application for *amparo* by a person who sought to succeed to a title, but did not accept the condition of marrying a noble.

[5] Case No. 777/1997, paragraph 6.2, decision of 25 November 1999.

she herself was discriminated against on the ground of sex. She reasserts that there has been a violation of article 3 of the Covenant, in conjunction with articles 26 and 17, since a person's sex is an element of his or her private life and to accord unfavourable treatment solely on the ground of membership of the female sex, irrespective of the nature of the discrimination, constitutes invasion of the privacy of the individual. She further argues that the title of nobility is itself a distinguishing feature of the family, a legacy of her ancestors, and that she therefore cannot be denied the further protection of article 3 in conjunction with article 17 of the Covenant. She adds that the conclusion of the European Court cannot influence any interpretation the Committee may make.

5.4 The author affirms that Spanish law, which regulates the succession of titles of nobility, maintains the earlier sexist tradition and discriminates against women. The law is not only anachronistic, but also manifestly incompatible with articles 26 and 3 of the Covenant, in conjunction with article 17. She asserts that when a State ratifies the Covenant, it has the obligation, in keeping with article 2, to adopt the legal reforms necessary to ensure that the Covenant is implemented in its entirety and without exceptions.

5.5 In a further written submission dated 12 June 2002, the author reiterates her comments on the admissibility of her complaint and emphasizes that the remedies must be exhausted provided they are indeed effective remedies. She observes that the State party refrains from comment on that point because it considers that the appeal and application for judicial review would be effective. In the author's opinion, these remedies would only be effective if they took into account a possible favourable expression of Views by the Committee. She goes on to say that decisions on applications for review take an inordinate amount of time - up to seven years.

5.6 With reference to the titles which the State party says she holds, the author affirms that one of the three is her husband's title and that the others, held by her father, have been the subject of judicial claims by her brothers on the basis of male precedence. Furthermore, the notarized document to which the State party refers is now out of date and was not even used in the judicial proceedings by her opponent. She maintains that the State party intends to challenge the facts of the domestic debate with discarded documents which were not presented to the domestic court by the person who had the right or possibility of doing so.

5.7 As regards the State party's various arguments on the institution of the title of nobility, the author argues that the subject of the debate should be restricted to ascertaining whether male primacy, applied as the sole and exclusive argument in the author's case, is or is not consistent with the provisions of the Covenant. In her view, the State party is endeavouring to introduce new elements which were not included in the domestic judicial proceedings and asserts that the privileges, referred to by the State party, which formerly accompanied a title no longer exist.

5.8 With reference to the State party's argument that the title is devoid of legal or material content, the author argues that the title in question has legal existence, since it is a document issued by the State and is embodied in an official instrument. She asserts that the question of titles is governed by article 1 of the Act of 4 May 1948, article 5 of the Decree of 4 June 1948, elaborating on the foregoing Act, article 13 of the Ley Desvinculadota of 1820, and Acts Nos. 8 and 9 of Title XVII of the Novísima Recopilación, referring to the Leyes de Partidas y de Toro and to section II, title XV, of Act No. 2. She states that a title of nobility

has material existence since it is embodied in a provision issued by the Executive. The title is furthermore a symbol for which taxes are even paid and which also gives rise to numerous court cases. She argues that, for the State party, the "immaterial" component of the title justifies discrimination against women in succession, but does not take into account its symbolic and emotional value; she stresses that male primacy is an affront to the dignity of women and in her own case has caused her offence and wounded her self-esteem.

5.9 In the author's opinion, the State party's arguments reveal the considerable change that has taken place in the concept of titles of nobility, which have been stripped of aspects incompatible with the values of a constitutional State, except for that of discrimination against women. She considers that the State party is attempting to impugn titles of nobility for what they were and what they represented in the past, and not what they are in Spanish society today.

5.10 As to the use of a title of nobility not being a human right, as contended by the State party, the author claims that article 26 establishes equality of persons before the law and that the State party violates the article in according, on the one hand, legal status to succession to titles while, on the other hand, discriminating against women, in which connection the lack of any financial value of the titles is without importance since for the holders they possess great emotional value. She asserts that the title of *Dukedom of Almodóvar del Río* forms part of the private life of the Hoyos family, from which she is descended, and that even if certain family assets may not be heirlooms since they are indivisible or have little financial value, they should enjoy protection from arbitrary interference. She accordingly states that she is entitled to the protection established under article 3, in conjunction with article 17, of the Covenant.

5.11 The author asserts that it is not true that titles of nobility involve discrimination by birth, since this view would hold that inheritance as a general concept was discriminatory, and that claiming discrimination on the ground of progeniture is also erroneous, since the assertion is contrary to the Roman law principle of *prior tempore prior iure*, and moreover the allegation refers to a situation other than that raised by the communication. The author adds that consideration of progeniture in awarding a singular hereditary asset such as a title of nobility is a criterion that does not create unjust inequality, given the indivisible and emotional nature of that asset.

5.12 As to the information transmitted by the State party regarding the regime governing titles of nobility in other European countries, the author contends that in those countries the titles do not have formal legal recognition, as they do in Spain, and that as a result any dispute that may arise in other States would be different from that in the present case. What is involved is not recognition of titles, but just one aspect of such recognition already existing in legislative provisions in Spain, namely, discrimination against women with regard to succession.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party maintains that the author's communication should be found inadmissible on the basis of article 5, paragraph 2 (a), of the Optional Protocol. In this regard, the Committee notes that while the complaint that was submitted to the European Court of Human Rights concerned alleged discrimination with regard to succession to titles of nobility, that complaint did not involve the same person. Accordingly, the Committee considers that the author's case has not been submitted to another international procedure of investigation or settlement.

6.3 The State party maintains that the communication should be found inadmissible, affirming that domestic remedies have not been exhausted. Without entering into consideration of the motives which prompted the author to take further legal action subsequent to the first-instance decision, the Committee notes that any resubmission of her case before domestic courts would be futile, since article 38, paragraph 2, and article 40, paragraph 2, of the Constitutional Court Organization Act, in conjunction with the Constitutional Court judgement of 3 July 1997, rule out reopening of consideration of the constitutionality of the Spanish legal regime governing succession to titles of nobility. The Committee recalls its often stated view that, for a remedy to be exhausted, the possibility of a successful outcome must exist.[6]

6.4 The State party further maintains that the author is attempting an *actio popularis*; the Committee, however, notes that the author claims a violation of article 26, in conjunction with articles 3 and 17 of the Covenant, arguing that she was denied primacy regarding succession to the title of *Duchess of Almodóvar del Río* because she is a woman, which, in her view, constitutes discrimination and a violation of her right to family life. She links her complaint to the Constitutional Court decision of 3 June 1997 establishing male precedence in succession to titles of nobility. The Committee thus finds that the communication from Ms. Hoyos y Martínez de Irujo relates to her own situation.

6.5 The Committee notes that while the State party has argued that hereditary titles of nobility are devoid of any legal and material effect, they are nevertheless recognized by the State party's laws and authorities, including its judicial authorities. Recalling its established jurisprudence[7], the Committee reiterates that article 26 of the Covenant is a free-standing provision which prohibits all discrimination in any sphere regulated by a State party to the Covenant. However, the Committee considers that article 26 cannot be invoked in support of claiming a hereditary title of nobility, an institution that, due to its indivisible and exclusive nature, lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26. It therefore concludes that the author's communication is incompatible *ratione materiae* with the provisions of the Covenant, and thus inadmissible pursuant to article 3 of the Optional Protocol.

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[6] *Gómez Vásquez v. Spain*, communication 701/1996, paragraph 6.2; *Joseph Semen v. Spain*, communication 986/2001, paragraph 8.2.

[7] See e.g. Views on communication Nº 182/1984 (Zwaan de Vries vs. The Netherlands) Views adopted 9 April 1987.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author and to her counsel.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

ANNEX

Individual opinion by committee member Rafael Rivas Posada (dissenting)

1. At its meeting on 30 March 2004, the Human Rights Committee decided to rule communication No 1008/2001 inadmissible under article 3 of the Optional Protocol. While recalling its consistent jurisprudence that article 26 of the Covenant is an autonomous provision prohibiting any discrimination in any area regulated by the State party, it states, in paragraph 6.5 of the decision, that article 26 "cannot be invoked as the basis for the claim to a hereditary title of nobility, an institution which, given its indivisible and exclusive nature, is peripheral to the values underlying the principles of equality before the law and non-discrimination which article 26 protects". On the strength of that reasoning, the Committee concludes that the author's complaint is incompatible *ratione materiae* with the Covenant and, thus, inadmissible under article 3 of the Optional Protocol.

2. In her complaint, the author alleges a violation of article 26 by the State party, pointing out that the article states that all persons are equal before the law and prohibits all discrimination, including discrimination on grounds of sex. Her application relates to discriminatory treatment she has suffered because of her sex, and the Committee should accordingly have restrticted itself to considering this key element of her complaint and not, where admissibility is concerned, gone into other matters relating to the institution of hereditary titles.

3. The author's claim to be recognised as the heir to a noble title was based on Spanish law, not a caprice. The law was declared unconstitutional by a ruling of the Supreme Court on 20 June 1987 insofar as it related to a preference for the male line in succession to noble titles, i.e. because it discriminated on grounds of sex. Later, however, on 3 July 1997, the Constitutional Court found that male primacy in the order of succession to noble titles as provided for in the Act of 11 October 1820 and the Act of 4 May 1948 was neither discriminatory nor unconstitutional. As such decisions by the Constitutional Court are binding in Spain, legal discrimination on grounds of sex in the matter of succession to noble titles was reinstated.

4. The Committee, in deciding to find the communication inadmissible on the basis of a supposed inconsistency between the author’s claim and the "values underlying" (*sic*) the principles protected by article 26, 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 a decision on admissibility on the strength of the points clearly made in the communication.

5. Besides ruling *ultra petita*, the Committee has failed to take account of a striking feature of the case. Article 26 says that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Yet the law in Spain not only does not prohibit discrimination on grounds of sex where succession to noble titles is concerned, it positively requires it. There is, in my opinion, no doubt that this provision is incompatible with article 26 of the Covenant.

6. For the above reasons I consider that the Committee ought to have found communication No 1008/2001 admissible, since it raises issues under article 26, not declare it incompatible *ratione materiae* with the provisions of the Covenant.

[*Signed*] Rafael Rivas Posada
16 April 2004

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion by Committee Member, Mr. Hipólito Solari-Yrigoyen (dissenting)

I should like to express the following dissenting views with regard to the communication under consideration.

The communication is admissible

The Committee takes note of the State party's affirmation that, in its opinion, the rules of succession to titles of nobility embody three elements of discrimination: the first element stipulates that only a descendant can succeed to the title; the second element upholds the right of primogeniture; and the third deals with sex. At the same the time, the Committee also takes note of the author's claims that the State party is endeavouring to introduce new elements in the domestic judicial proceedings; that primogeniture does not constitute discrimination but is based on the indivisible nature of the title and that, moreover, it constitutes an allegation other than that raised in the present communication; and, lastly, that the subject of the debate should be restricted to ascertaining whether male primacy, applied as the sole and exclusive argument in the author's case, is or is not consistent with the provisions of the Covenant. The Committee observes that, in the present communication, the title is being disputed between collateral relations and that the claim deals exclusively to discrimination on the ground of sex.

The Committee notes that, for the purposes of admissibility, the author has duly substantiated her claim of discrimination by reason of her sex, which could raise issues under articles 3, 17 and 26 of the Covenant. Consequently, the Committee is of the view that the communication is admissible and proceeds to consider the merits of the communication in accordance with article 5, paragraph 1, of the Optional Protocol.

Consideration on the merits

The *ratio decidendi*, or the grounds for the decision as to the merits, is limited to determining whether or not the author was discriminated against by reason of her sex, in violation of article 26 of the Covenant. The Committee could not include in its decisions issues that had not been submitted to it because, if it did so, it would be exceeding its authority by taking decisions *ultra petitio*. Consequently, the Committee refrains from considering the form of government (parliamentary monarchy) adopted by the State party in article 3 of its Constitution, and the nature and scope of titles of nobility since these issues are extraneous to the subject of the communication under consideration; however, the Committee notes that such titles are governed by law and are subject to regulation and protection by the authorities at the highest level, since they are awarded by the King himself who, under the Spanish Constitution, is the head of State (art. 56) and the sole person authorized to grant such honours in accordance with the law (art. 62 (f)).

The Committee would be seriously renouncing its specific responsibilities if it proceeded in the abstract to exclude from the scope of the Covenant, in the manner of an *actio popularis*, sectors or institutions of society, whatever they may be, instead of examining the situation of each individual case that is submitted to it for consideration for a possible specific violation of the Covenant (article 41 of the Covenant and article 1 of the Optional Protocol). If it adopted such a procedure, it would be granting a kind of immunity from

considering possible cases of discrimination prohibited by article 26 of the Covenant, since members of such excluded sectors or institutions would be unprotected.

In the specific case of the present communication the Committee should not make a blanket pronouncement against the State party’s institution of hereditary titles of nobility and the law by which that institution is governed, in order to exclude them from the Covenant and, in particular, from the scope of article 26, invoking incompatibility *ratione materiae*, because this would mean that it was turning a blind eye to the issue of sex-based discrimination raised in the complaint. The Committee has also noted that equality before the law and equal protection of the law without discrimination are not implicit but are expressly recognized and protected by article 26 of the Covenant with the broad scope that the Committee has given it, both in its comments on the norm and in its jurisprudence. This scope, moreover, is based on the clarity of a text that does not admit restrictive interpretations.

In addition to recognizing the right to non-discrimination on the ground of sex, article 26 requires States parties to ensure that their laws prohibit all discrimination in this regard and guarantee all persons equal and effective protection against such discrimination. The Spanish law on titles of nobility not only does not recognize the right to non-discrimination on the ground of sex and does not provide any guarantee for enjoying that right but imposes de jure discrimination against women, in blatant violation of article 26 of the Covenant.

In its general comment No. 18 on non-discrimination, the Human Rights Committee stated:

- “While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.”

At the same time, in its general comment No. 28 on equality of rights between men and women, the Committee stated:

- “Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.”

With regard to the prohibition of discrimination against women contained in article 26, the same general comment does not exclude in its application any field or any area, as is made clear by the following statements contained in paragraph 31:

- “The right to equality before the law and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields.”

- “States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields.”

The Human Rights Committee’s clear and unambiguous position in favour of equal rights between men and women, which requires States parties to amend their legislation and practices, should cause no surprise in a United Nations treaty body, since the Organization’s Charter, signed in San Francisco on 26 June 1945, reaffirms in its preamble faith in the equal rights of men and women as one of its fundamental objectives. However, history has shown that, in spite of the efforts that the recognition of rights requires, the most arduous task is to put them into practice, and that ongoing measures must be taken to ensure their effective implementation.

In the case under consideration, the disputed title was awarded to the author’s younger brother, Isidoro de Hoyos y Martínez de Irujo, by the “*Ilustrísima Señora Jefa de Armas de Títulos Nobiliarios* on behalf of His Majesty the King, upon payment of the relevant tax, without prejudice to third parties with better rights” (Order 11489 of 30 April 1995). Considering that she had a greater right to the title, Isabel de Hoyos y Martínez de Irujo instituted legal proceedings against her brother Isidoro in Majadahonda Court of First Instance, which dismissed her claim on the basis of the binding jurisprudence of the Constitutional Court which, in a divided judgement issued on 3 July 1997, ruled by majority that, the better rights that the law grants to men over women of equal lineage and kinship in the normal order of transfer *mortis causa* of titles of nobility are not discriminatory or in violation of article 14 of the Spanish Constitution of 27 December 1978, which is still in force, “since it declares that historical rights are applicable”. The aforementioned article of the Constitution provides that Spaniards are equal before the law.

The same judge that ruled against the author pointed out that the jurisprudence on equality between the sexes in the matter of titles of nobility that was established by the Supreme Court over the course of a decade (from 1986 to 1997) and which was later set aside by the Constitutional Court seemed “more in keeping with the social reality of the time in which we live and which this court shares”. She also added she “sympathizes with the author’s position” and she encourages the author and other women of noble birth who are discriminated against to “continue to institute proceedings in defence of their rights and to make use of every available instance with a view to modifying the position of the Constitutional Court or even obtaining an amendment of the legislation on this subject”. The judge also exempted the author from court costs in recognition of “the existence of [her] legitimate right to bring an action and discuss the disputed issue on which perhaps not everything has yet been said”, as stated in her ruling.

Although the right to titles of nobility is not a human right protected by the Covenant, as the State party rightly contends, the legislation of States parties must not deviate from article 26. It is true that, as the Committee has pointed out in its jurisprudence, a difference in treatment based on arguments, including sex, of relevance to the purposes of article 26 does not constitute prohibited discrimination provided that it is based on reasonable and objective criteria. However, the establishment of the superiority of men over women, which is tantamount to saying that women are inferior to men, in matters of succession to titles of nobility governed by Spanish law and implemented by its courts, would not only deviate from such criteria but would be going to the opposite extreme. While States are allowed to grant legal protection to their historical traditions and institutions, they must do so in conformity with the requirements of article 26 of the Covenant.

The Committee is of the view that, in ruling legally that a particular honour should be granted principally to men and only accessorily to women, the State party is taking a discriminatory position vis-à-vis women of noble families that cannot be justified by reference to historical traditions or historical rights or on any other grounds. The Committee therefore concludes that the ban on sexual discrimination established by virtue of article 26 of the Covenant has been violated in the author's case. This being so, it is unnecessary to consider whether there may have been a violation of article 17 in conjunction with article 3 of the Covenant.

The Human Rights Committee, acting in accordance with article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant with respect to Isabel Hoyos y Martínez de Irujo.

(*Signed*): Hipólito Solari-Yrigoyen

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual Opinion by Committee member, Ms. Ruth Wedgwood

In its review of country reports, as well as in its views on individual communications, the Human Rights Committee has upheld the rights of women to equal protection of the law, even in circumstances where compliance will require significant changes in local practice. It is thus troubling to see the Committee dismiss so cavalierly the communication of Isabel Hoyos Martinez de Irujo.

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 Boletin Oficial del Estado. The order of succession 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, see statute of 4 June 1948, would seem to be a public act of discrimination.

The Committee's stated reasons for dismissing the communication of Ms. Hoyos Martínez de Iraujo, in her claim to inheritance of the title of the Duchy of Almodovar de Rio, can give no comfort to the state party. In rejecting her petition, as inadmissible ratione materiae, the Committee writes that hereditary titles of nobility are "an institution that … lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26." This cryptic sentence could be read to suggest that the continuation of hereditary titles is itself incompatible with the Covenant. One hopes that the future jurisprudence of the Committee will give appropriate weight to the desire of many countries to preserve the memory of individuals and families who figured prominently in the building of the national state.

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.)

In its accession to modern human rights treaties, Spain recognized the difficulties posed by automatic male preference. Spain ratified the International Covenant on Civil and Political Rights on 27 July 1977. Spain also approved the Convention on the Elimination of All Forms of Discrimination Against Women on 16 December 1983. In the latter accession, Spain made a single reservation that has importance here. Spain noted that the Convention shall not affect the constitutional provisions concerning succession to the Spanish crown. This unique protection for royal succession was not accompanied by any other similar reservation concerning lesser titles.

Spain did not take any similar reservation to the International Covenant on Civil and Political Rights in 1977. Still, good practice would suggest that Spain should be given the benefit of the same reservation in the application of the Covenant, in light of the Committee's later interpretation of Article 26 as an independent guarantee of equal protection of the law. But the bottom line is that, even with this reservation, Spain did not attempt to carve out any special protection to perpetuate gender discrimination in the distribution of other aristocratic titles.

It is not surprising that a state party should see the inheritance of the throne as posing a unique question, without intending to perpetuate any broader practice of placing women last in line. Indeed, we have been reminded by the incumbent King of Spain that even a singular and traditional institution such as royalty may be adapted to norms of equality. King Juan Carlos recently suggested that succession to the throne of Spain should be recast. Under Juan Carlos' proposal, after his eldest son completes his reign, the son's first child would succeed to the throne, regardless of whether the child is a male or a female. In an age when many women have served as heads of state, this suggestion should seem commendable and unremarkable.

In its judgement of 20 June 1987, upholding the equal claim of female heirs to non-royal titles, the Supreme Court of Spain referenced the Convention on the Elimination of All Forms of Discrimination Against Women, as well as Article 14 of the 1978 Spanish Constitution. In its future deliberations, Spain may also wish to reference General Comment No. 18 of the Human Rights Committee, which states that Article 2 of the Covenant "prohibits discrimination in law or in fact in any field regulated and protected by public authorities." And it is worth recalling that under the rules of the Committee, the disposition of any particular communication does not constitute a formal precedent in regard to any other communication or review of country reports.

The hereditary title in question here has been represented by the state party as "devoid of any material or legal content" and purely nomen honoris (see paragraphs 4.4 and 4.8 supra). * Thus, it is important to note the limits of the Committee's instant decision. The Committee's views should not be taken as sheltering any discriminatory rules of inheritance where real or chattel property is at stake. In addition, these views do not protect discrimination concerning traditional heritable offices that may, in some societies, still carry significant powers of political or judicial decision-making. We sit as a monitoring committee for an international covenant, and cannot settle broad rules in disregard of these local facts.

[*Signed*] Ruth Wedgwood

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]