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HUMAN RIGHTS COMMITTEE
Eightieth session
15 March- 2 April 2004

DECISION

Communication No. 1019/2001

Submitted by:	Ms. Mercedes Carrión Barcaiztegui (represented by Mr. Carlos Texidor Nachón and Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	8 March 2001 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 19 October 2001 (not issued in document form)
Date of decision:	30 March 2004

[ANNEX]

* Made public by decision of the Human Rights Committee.

Annex

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

Eightieth session concerning

Communication No. 1019/2001[**]

Submitted by:	Ms. Mercedes Carrión Barcaiztegui (represented by Mr. Carlos Texidor Nachón and Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	8 March 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,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 8 March 2001, is Mercedes Carrión Barcaiztegui, 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. She 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 Ms. María de la Concepción Barcaiztegui Uhagón[1] - the author's aunt - held the title of *Marquise of Tabalosos*. By a notarized deed of 20 June 1989, she provided that on her

[**] 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.

death, her brother Iñigo Barcaiztegui Uhagón should succeed her as holder of the title. She died on 4 April 1993 without issue.

2.2 In February 1994 the author initiated a legal action against her uncle, Iñigo Barcaiztegui Uhagón, and her cousin, Javier Barcaiztegui Rezola, claiming the noble title of Marquis of Talabasos.[2] The author claimed the greater right, since she occupied by representation the place of her mother, Mercedes Barcaiztegui - deceased on 7 September 1990 - who was the younger sister of Concepción Barcaiztegui y Uhagón and the older sister of Iñigo Barcaiztegui Uhagón. The author also claims that renunciation of the title in favour of her uncle supposes a modification of the line of succession to the noble title and a contravention of the inalienable nature of titles of nobility.

2.3 In response, counsel for the defendants cited, among other arguments, the fact that regardless of the validity of the transfer, the principle of male succession remained the preferential criterion for succession to the Marquisate of Tabalosos, which was governed not by a general norm, but by a specific act, at the royal prerogative, which did not constitute part of the legal order.

2.4 In a judgement of 25 November 1998, the Madrid Court of First Instance dismissed the author's action, finding that the suit concerned a situation involving collateral relatives of the last holder of the title; the court abided by the judgement of the Constitutional Court of 3 July 1997,[3] which declared the historical preferential criteria for the transmission of titles of nobility to be constitutional. These criteria are: firstly, the degree of kinship; next, sex - precedence of male descendants over female; and, thirdly, age. With regard to transfer of the title, the Madrid court determined that it did not represent a modification of the order of succession to titles of nobility.

2.5 The author claims that she has exhausted all remedies, since by virtue of the judgement of the Constitutional Court of 3 July 1997 no remedy is available to her.[4] However, on 10 December 1998, she appealed before the National High Court. In her communication she states that despite the manifest futility of such an appeal, she submitted it with the aim of preventing her case from becoming *res judicata*, thereby ensuring the right to an effective remedy, as provided for in article 2, paragraph 3 (a), of the Covenant. According to the author, if the Committee decides to accept her claims, the National High Court could ultimately find in her favour in her appeal.

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[1] Concepción Barcáiztegui Uhagón was the firstborn daughter of José Barcaíztegui y Manso, the third Marquis of Tabalosos. María Mercedes Barcáiztegui Uhagón, the author's mother, was his second daughter and Iñigo Barcaíztegui Uhagón's elder sister. According to the author, Iñigo conceded the title to his son, Javier Barcaiztegui Uhagón.

[2] The author relates that she asked her cousin why her uncle had conceded the title to him.

[3] This judgement prompted the Supreme Court to modify its jurisprudence, which had departed from historical precedent with regard to equality of men and women.

[4] 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 subsequent appeal on the issue by either of these two means based on the same violation of the same constitutional precept".

The complaint

3.1 The author claims that the facts submitted to the Committee for its consideration constitute a violation of article 26 of the Covenant, in that male descendants are given preference as heirs to the detriment of women, thereby placing women in a situation of unjustified inequality. She argues that preference for males in succession to titles of nobility is not a mere custom of a private group, but a precept established in legal norms, regulated by Spanish laws of 4 May 1948, 11 October 1820 and *Partidas* II.XV.II. The author reminds the Committee that Economic and Social Council resolution 884 (XXXIV) recommends that States ensure that men and women, in the same degree of relationship to a deceased person, are entitled to equal shares in the estate and have equal rank in the order of succession. She maintains that in this case the estate comprises a specific item, namely the title of nobility, which can be transmitted to one person only, selected on the basis of the status of firstborn. The author claims that even if article 2 of the Covenant limits its scope to protection against discrimination of the rights set forth in the Covenant itself, the Committee, in its general comment No. 18, has taken the view that article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right, prohibiting discrimination in law or in fact in any field regulated by public authorities and imposing a duty of protection on them in that regard.

3.2 The author claims that the facts constitute a violation of article 3 of the Covenant, in conjunction with articles 17 and 26. She reminds the Committee that in its general comment No. 28 of March 2000, on article 3, it drew attention to the fact that inequality in the enjoyment of rights by women was deeply embedded in tradition, history and culture, including religious attitudes.

State party's observations on admissibility and the merits

4.1 The State party, in its written submission of 14 December 2001, argues that the communication is inadmissible by virtue of article 2 and article 5, paragraph 2 (b) of the Optional Protocol, since domestic remedies have not been exhausted. The State party asserts that the complaint embodies a contradiction, since the author claims on the one hand that she has exhausted all domestic remedies, since the judgement by the plenary Constitutional Court rules out any resubmission of the issue before domestic courts, yet, on the other hand, states that she filed an appeal with the aim of rendering effective possible views by the Committee.

4.2 The State party observes that proceedings and the successive appeals possible are regulated under the Spanish legal regime. In the present case, after the judgement by the court of first instance, it was possible to appeal before the Provincial High Court, whose decision could be set aside on appeal by the Supreme Court; if it was considered that some fundamental right had been violated, an appeal for protection could be made before the Constitutional Court. The State party argues that the author is seeking to incorporate the Committee as an intermediate judicial body between those existing under Spanish law, thus violating its subsidiary nature and the legality of domestic proceedings. The State party contends that it is contrary to law to submit a case before a domestic court and before the Committee simultaneously, and in this connection refers to the United Nations Basic Principles on the Independence of the Judiciary, arguing that to make simultaneous submissions of the complaint is to seek undue interference by the Committee with a domestic court.

4.3 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 a *nomen honoris*, devoid of legal or material content, and that, furthermore, the author does not argue a possible inequality before the law or that there is a violation of articles 3 and 17 of the Covenant, in view of which the State party contests the admissibility of the communication *ratione materiae* in accordance with article 3 of the Optional Protocol.

4.4 The State party refers to the decision by the European Court of Human Rights of 28 October 1999 that the use of noble titles does not fall within the scope of article 8 of the European Convention. It argues that while the name of the applicant does not appear in that decision, the case concerned the same subject, in view of which it requests the Committee to find the complaint inadmissible in accordance with article 5, paragraph 2 (a), of the Optional Protocol.

4.5 In its written submission of 15 April 2002 the State party reiterates its arguments on inadmissibility, and on the merits recalls that when the title of nobility in question was granted to the first Marquis of Talabasos, in 1775, it was not the case that men and women were considered to be born equal in dignity and rights. The State party argues that nobility is a historical institution, defined by inequality in rank and rights owing to the "divine design" of birth, and claims that a title of nobility is not property, but simply an honour of which use may be made but over 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 of nobility does not succeed to the holder most recently deceased, but to the first holder, the person who attained the honour, with the result that the applicable rules of succession to use of the title are those existing in 1775.

4.6 The State party points out to the Committee that the author is disputing use of the noble title of Marquis of Talabasos, not with a younger brother, but with her uncle and her first cousin; that she is not the firstborn daughter of the person who held the title before, but the daughter of the sister of the deceased holder, who was indeed the "firstborn female descendant" according to the genealogical tree provided by the author herself; the State party also notes that her sex did not prevent the deceased holder from succeeding to the title before her younger brother.

4.7 The State party affirms that the rules of succession for use of the title of nobility in question are those established in Law 2 of title XV of part II of the so-called *Código de las partidas* (legal code) of 1265, to which all subsequent laws dealing with the institution of the nobility and the transfer of the use of noble titles refer. According to the State party these rules 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.

4.8 The State party asserts 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 content, and cites the Constitutional Court to the effect that if use of a title of nobility 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", and argues that, admitting the

continued existence of a historical institution, discriminatory but lacking material content, there is no cause to update it by applying constitutional principles.[5] According to the State party, only 11 judgements of the Supreme Court - not adopted unanimously - have departed from the ancient doctrine of the historical rules of succession to titles of nobility, 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 to titles of nobility, in view of which there can be no violation of article 26 of the Covenant.

4.9 The State party contends that use of a title of nobility is not a human right, or one of the civil and political rights set forth in the Covenant, and that it cannot therefore be considered part of the right to privacy, since being part 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 lead to various questions, such as whether those who do not use titles of nobility 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. According to the State party, inclusion of the use of a title of nobility in the human right to privacy and to a family would undermine equality of human beings and the universality of human rights.

Author's comments on the State party's observations

5.1 In her written submission of 1 April 2002 the author reiterates that, in her case, 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. She 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. She argues that if the Committee found in her favour, for example, before the Supreme Court concluded its consideration of her appeal for annulment, she could enter the decision as evidence with sufficient effect that it would lead to a return to the former jurisprudence of equality of men and women in succession to titles of nobility, thereby obtaining effective redress for the harm suffered to her fundamental right to non-discrimination, that is, recovery of the title. The author further affirms that in accordance with the Committee's often stated jurisprudence the victim is not obliged to use remedies that are futile.

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

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

Court of Human Rights.[6] The author recalls the Committee's decision in *Antonio Sánchez López v. Spain* that the concept of "the same case" should be understood as including the same claim and the same person.

5.3 The author alleges a violation of article 3 of the Covenant, in conjunction with articles 26 and 17, since the sex of a person is an element in privacy and to accord unfavourable treatment solely by virtue of belonging to 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 an element of the life of the family to which she belongs.

5.4 In a further written submission of 12 June 2002 the author reiterates her comments on the admissibility of her complaint and argues in addition that consideration of her appeal has been unduly delayed, since five years have elapsed. As to the merits, the author asserts that the Spanish legal system regulates the use, possession and enjoyment of titles of nobility as a genuine individual right. While succession to the title occurs with respect to the founder, succession to concessions of nobility does not arise until the death of the last holder, and that as a result the laws current at that time are applicable. The author maintains that while titles of nobility are governed by special civil norms based on bloodline, that is, outside the Civil Code with regard to succession, that does not mean that succession to titles falls outside the law of inheritance by blood relatives.

5.5 The author affirms that, with regard to the rules of succession to titles of nobility referred to by the State party, in the view of many theorists and the Supreme Court's own jurisprudence, the rule applies only to succession to the crown of Spain.

5.6 As for use of a title of nobility not being a human right, as contended by the State party, the author claims that article 26 of the Covenant establishes equality of persons before the law and that the State party violates the article in according, on the one hand, legal recognition of succession to titles of nobility 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. The author asserts that the title of Marquis of Tabalosos is part of the private life of the Carrión Barcaiztegui family, from which she is descended, and that even if certain family assets may not be heirlooms owing to being indivisible or having little financial value, they should enjoy protection from arbitrary interference. Accordingly she maintains that she is entitled to the protection established under article 3, in conjunction with article 17, of the Covenant, inasmuch as those provisions prevent discrimination in enjoyment of the rights protected by the Covenant. The author notes that between 1986 and 1997 the Supreme Court held that passing over women in the matter of succession to titles of nobility infringed article 14 of the Constitution, guarantee of equality before the law, a precedent that was overturned by the Constitutional Court judgement of 1997.

5.7 The author asserts that the reference by the State party to discrimination by birth with respect to titles of nobility is erroneous, since this view would hold that inheritance as a general concept was discriminatory, and that allegation of discrimination in terms of descendants was also erroneous, since that allegation referred to a situation other than that

[6] Case No. 777/1997, decision dated 25 November 1999, para. 6.2.

raised by the communication. She adds that consideration of progeniture in awarding a singular hereditary asset, such as a title of nobility, is a criterion that does not discriminate against men or women, or create unjust inequality, given the indivisible and essentially emotional nature of the inherited asset.

5.8 As for 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 have no formal legal recognition, as they do in Spain, and that as a result any disputes that may arise in other States are different from that in the present case. What is at stake is not recognition of titles of nobility, but only an aspect of such recognition already existing in legislative provisions in Spain, namely discrimination against women with regard to succession. The author claims that for the State party the "immaterial" aspect of the title justifies discrimination against women in terms of succession, without taking account of the symbolic value of the title and the great emotional value, and that the precedence of males is an affront to the dignity of women.

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 claims that the author's communication should be 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. Nevertheless the Committee notes the author's argument with respect to her case that any resubmission before domestic courts would be futile, since article 38, paragraph 2, and article 40, paragraph 2, of the Constitutional Court Organization Act rule out reopening of consideration of the constitutionality of the Spanish legal system governing succession to titles of nobility. Accordingly, the Committee recalls its often stated view that for a remedy to be exhausted, the possibility of a successful outcome must exist.

6.4 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

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

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.

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 1019/2001 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 6.4 of the decision, 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". 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 male descendants are given preference as heirs to the detriment of women, thereby placing women in a situation of unjustified inequality. Her application thus 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 "underlying values behind" (*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. 1019/2001 admissible, since it raises issues under article 26, not declare it incompatible *ratione materiae* with the provisions of the Covenant.

[*Signed*] Rafael Rivas Posada

[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
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 time, the Committee also takes note of the author's claims that the State party refers to situations different from those mentioned in the communication; that primogeniture is based on the indivisible nature of the title and does not constitute discrimination because it does not favour men over women; and, lastly, that the issue at hand is not recognition of titles of nobility but only an aspect of such recognition, namely discrimination against women, since Spanish legislation and a judgement of the Constitutional Court uphold the precedence of males, which is an affront to the dignity of women. The Committee observes that, in the present communication, the title is being disputed between collateral relations: the author as the representative of her deceased mother, and her mother's younger brother, and that the claim deals exclusively with 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, in its observations concerning a communication, 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 could 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 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 communication under consideration, María de la Concepción Barcaiztegui Uhagón, the previous holder of the disputed title of marquis, transferred her hereditary title of nobility to her brother Íñigo and, without entering into a consideration of the validity of the transfer, the Committee notes that, when María de la Concepción Barcaiztegui Uhagón died on 4 April 1993 without issue, the author, as the representative of her deceased mother, met the criterion of primogeniture. Believing that she had the better right, she initiated a legal action against her uncle, claiming the noble title of Marquis of Talabasos. Madrid Court of First Instance No. 18 dismissed the author's 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.

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 Mercedes Carrión Barcaiztegui.

(*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 Mercedes Carrión Barcaiztegui.

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. Carrión Barcaiztegui, in her claim to inheritance of the title of the Marquise of Tabalosos, 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

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