BRIDGING THE DIVIDE

Women’s Access to Justice
Coordinated by

Federación de Planificación Familiar de España

Project

women's link worldwide

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Introduction

This publication arises out of a project entitled Women's Link Worldwide, coordinated in Europe by the Federación de Planificación Familiar de España, and funded by the Daphne Programme of the European Commission. Women's Link Worldwide works with lawyers and non-governmental organizations in three European countries, Denmark, Spain and Ireland, as well as in Latin America, to promote and protect women's human rights through the use of international law. In its first year, Women's Link produced an on-line database containing judicial decisions affecting women's rights from the countries in which it works and from international human rights tribunals. Marking the end of the first phase of the project, this publication aims to provide additional information to lawyers and advocates interested in exploring the use of international law, and more specifically litigation, as a tool for asserting human rights.
Given the importance that I attach to the law and legal actions as a mechanism for gaining and asserting rights, I enthusiastically welcome the new project Women’s Link Worldwide (WLW).

My own experience endorses WLW’s methodology. In 1975, I set up a law office in Madrid to defend women’s rights, and to reform those laws that were flagrantly discriminatory.

My office participated in the preparatory work for the Spanish Constitution, which was approved in December 1978, and in the reform of civil, penal and labor laws, which was necessary due to the Constitution’s prohibition of any form of discrimination based on sex.

The situation for women in Spain has changed significantly since then. First, the Civil Code was reformed, establishing the equality of both partners in marriage, and introducing divorce into our legislation. Later came reform in labor law that worked towards eliminating prior inequalities. Today’s law is marked by a theoretical equality of opportunities between men and women, and by the development of measures for positive action, correcting continuing inequalities derived from an age-old patriarchal system.

As a member of the European Union since 1986, Spain has been able to incorporate the acerbic tone of EU legislation into its own legal code, and to apply the notable advances that have been made within the European Union on the subject of gender.
Spain's active participation in the United Nations’ World Summits for the advancement of women have also been important. This is particularly true for the 1995 Summit in Beijing where, as Minister of Social Affairs for Spain, I had the honor of being the spokeswoman for the European Union. Since Spain, at that time, was taking its turn as community president.

Thus, we are at a point in Spain where we are ready to focus on the importance of information, international contacts and international legal mechanisms to obtain and assert our rights.

To conclude these brief comments, I would like to highlight the importance of this project and its enormous utility for those legal professionals who work on the subject of equality between men and women, and in general, for all those persons interested in understanding the law and its application.
Over the last quarter century, awareness about women’s social inequality has grown exponentially. In 1995, the Fourth World Conference on Women in Beijing drew unprecedented international attention to women’s human rights. Prior and subsequent world conferences have integrated women’s concerns into discussions on a range of issues, from racism to development and the environment. A basic appreciation of the discrimination and violence that women face in all aspects of their lives, both as women and as members of diverse social and racial groups, such as indigenous women, immigrants and poor women, has entered and unmistakably altered public discourse in a vast number of societies. Unfortunately, such positive developments have not changed the reality for far too many women. Women continue to face discrimination in receipt of basic social services, such as health care, and are the victims of violence, physical and psychological, in their public and private lives.

Advocates at every level, from the international to the grassroots, are employing a diverse array of strategies to address these issues—political organizing and lobbying, the establishment of hot-lines and shelters for victims of domestic violence, media campaigns and litigation—all of them essential. Too often, however, the noble goals articulated in international documents bear little in common with the realities confronted by individual women and their advocates at the grassroots level. Women’s Link World-
wide was developed to address this disconnect, to concretize the aspirations of international conventions and treaties in terms which reflect the realities of women’s lives.

**Linking laws protecting women around the world**

Litigation is a critical means of ensuring and vindicating individual rights. It is also used to assert the rights and interests of entire groups of people, often referred to as impact litigation. Through litigation, which remains an under-utilized legal strategy in many countries, Women’s Link Worldwide seeks to promote the use of international law within national legal systems, and to make international tribunals more accessible to women’s rights advocates working at the local level. To that end, Women’s Link has developed a central clearinghouse of judicial decisions on women’s rights from international, regional and national courts, accessible over the Internet (www.womenslinkworldwide.org). The database enables women’s rights advocates to draw from a diverse array of legal precedent and creative argumentation from around the world for use in their own legal systems. Through its inclusion of cases from international courts, such as the Inter-American and European Courts of Human Rights, the database encourages the use of both international law and tribunals. By partnering with women’s rights advocates in every country in which it works, Women’s Link also fosters collaboration among
advocates across regions to address issues that transcend national borders.

Women’s Link provides what is often difficult for advocates to obtain: access to law-related information, and case law itself. Commercial databases are prohibitively expensive for advocates working in the public sector, and as a result, case law from multiple jurisdictions is often unobtainable. In cases where women are represented by lawyers without an expertise in gender, or by public interest attorneys limited by time and financial constraints, a central clearinghouse of annotated case law and background information can be an invaluable tool in assisting individuals with their claims. In addition, by putting information on-line, such as how particular rights are articulated across diverse regions, Women’s Link hopes to successfully bolster existing legal argumentation as
well as to develop novel legal strategies to advance women's rights. Initially focusing on rights essential to women's physical integrity—violence against women, reproductive health and rights and gender discrimination—the database currently contains cases that address these issues from tribunals in Europe and Latin America.

**Using the courts to produce social change: Impact litigation**

One of the ways in which Women's Link works to promote women's human rights is by encouraging strategic litigation in diverse countries to advance women's rights. Impact litigation is a term used to describe lawsuits that have a broader effect than simply resolving a dispute between the parties to any one case. Single cases, especially when decided by a high court or involving constitutional interpretation, may shape the law for generations to come. Particularly in controversial areas of social policy, such as the rights of homosexuals or immigrants, when it is difficult or close to impossible to achieve legislative consensus on an issue, litigation can be a powerful means for protecting the rights of vulnerable groups. Impact litigation is thus a tool that advocates use consciously to bring cases that will have far-reaching influence.

Although sometimes individual clients come to them in need of assistance with an issue of wide-spread importance, lawyers
also seek out the victims of inequalities who may not have been able to afford legal assistance. Given the costs as well as the time and energy required to bring a lawsuit, individual clients and lawyers often request support from non-governmental organizations, attorney associations or even private law firms. Furthermore, lawyers can magnify the impact of a case by presenting it to the media, fostering widespread public debate about an important social issue. Whether or not the case is won, public attention presents an added opportunity to assert pressure for political change.

Impact litigation always bears a tension between the interests of the individuals involved in the litigation and its broader social purpose. In such cases, lawyers must be vigilant about protecting their client’s interests and privacy. In addition, any lawsuit carries the risk of losing the case. While any one decision can have a positive impact, expanding human rights, a losing decision does not simply affect one client, but may restrict the rights of a large number of people.

One such landmark case was brought in Ireland in 1974, challenging a 1935 legislative Act that prohibited the importation, sale or advertising of contraceptives. Under the Act, the authorities confiscated a packet of contraceptive jelly that Mary McGee had imported from England for her personal use. Ms. McGee and her attorneys brought the case to the Irish Supreme Court, clearly seeking more than reimbursement for her confis-
cated contraceptives. Rather, they used litigation as a means to liberalize restrictions on contraception. On the basis of Ms. McGee's claims, the Court held that the authorities had violated the constitutional protection of privacy in marital affairs, and struck the ban on the importation of contraceptives.

Protecting a fundamental right: Physical integrity

To date, Women's Link has focused on one fundamental aspect of women's human rights, the right to physical integrity. Physical integrity is protected by both national and international laws and encompasses a number of topics including violence against women in all its forms and sexual and reproductive rights.

Violence against women is one of the most tangible manifestations of women's economic, social, political and cultural inequality. Violence against women takes numerous forms, public and private, and occurs throughout women's lives. It exists within the family and workplace, and in public institutions such as schools, health care facilities and prisons. As children, girls are subject to sexual abuse, inadequate attention to their dietary and health concerns and genital mutilation; adolescents remain subject to sexual abuse, rape, commercial sexual exploitation and forced matrimony. Adult and elderly women continue to face sexual and emotional abuse, marital rape, physical abuse during pregnancy and confinement to the home. Whether it is physical violence or
emotional abuse in the form of threats and insults, violence against women causes grave physical and psychological damage.

The right to live free from violence is a cornerstone of sexual and reproductive rights. Violence, especially sexual violence, violates a woman’s right to have control over her sexuality and reproduction. It deprives women of the right to enjoy a healthy and satisfactory sexual life, an integral part of well-being and healthy personal relationships. Sexual violence also deprives women of the right to voluntary motherhood when it forces them into unwanted pregnancies. In addition to violence, women face numerous other threats to their physical and sexual integrity. Violations of women’s sexual and reproductive rights range from their being forcibly sterilized, trafficked for sexual exploitation, genitally mutilated, and their lacking access to quality health care, sex education, diverse forms of contraception and abortion.

Broadly, sexual and reproductive rights is a term that refers to the right of women and men to decide freely and responsibly on matters related to their sexuality and reproductive health. Reproductive rights also include: the right to decide on the number and spacing of one’s children, and to have the resources to do so; the right to the highest standards of health care; and, the right to make decisions concerning reproduction free from discrimination, coercion and violence.
Although some reproductive rights are recognized nationally, international human rights law provides an additional and a more fully developed framework for addressing violations of these fundamental rights. For example, the right to health is protected through both national legislation and constitutions. Although modern European constitutions generally provide an equal right to health, they fail to mention sexual and reproductive health specifically. Furthermore, national laws often guarantee rights to citizens, leaving out whole classes of people such as refugees or immigrants. Finally, and often the most important reason for using international law, governments do not always implement their obligations under national law. For these reasons, international human rights law becomes increasingly relevant, even critical, to ensuring the protection of these fundamental human rights.

**Applying an international human rights framework**

Sexual and reproductive rights are protected by a number of international laws, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. These legal documents guarantee basic and fundamental human rights such as: the right to bodily integrity and the right to life, health, privacy, and non-discrimination. As explained above, the right to bodily
Integrity assures women a life free from violence, and protects them from unwanted physical invasions or non-consensual restrictions on their physical autonomy. The right to privacy guarantees women the personal autonomy to make decisions that affect their bodies, such as their sexual orientation, whether to obtain an abortion and the use of contraception.

The European Union provides an important regional framework for establishing and securing human rights. For example, the European Social Charter contains a number of provisions that are highly relevant to women’s sexual and reproductive health. For instance, Article 8 of that document requires member states to provide women with paid maternity leave before and after childbirth for up to twelve weeks. It also protects women from being required to engage in dangerous, unhealthy and extremely arduous work while pregnant. Article 11 provides the right to the protection of one’s health, requiring governments to ensure the provision of adequate medical care for whole communities, including disease prevention. For example, it obligates states to take appropriate measures to prevent the spread of HIV/AIDS. Likewise, it requires health and sex education. Although the European Social Charter is not legally binding, it has been ratified by twenty-four states and has set important standards throughout Europe.

The European Convention on Human Rights, which has been ratified by forty-one member states, has been incorporated into
national law in many countries, making its provisions legally binding. In both Spain and Denmark, the Convention has been incorporated into national law. Although Ireland has signed the Convention, it has not yet implemented its provisions into national law.

Many of the rights articulated in the European Convention provide protection for women’s reproductive rights and right to live free from violence. For example, it provides for the right to life (Article 2), to liberty and security (Article 5), the right to respect for private and family life (Article 8) and prohibits discrimination on grounds of sex, race, colour or national origin (Article 14). Similarly, Optional Protocol No. 7 to the Convention ensures equality of rights and responsibilities between spouses in relation to marriage and children.

In addition to whatever protections are provided under state laws, violations of rights protected under the European Convention can be brought to the European Court of Human Rights (ECHR). The development of human rights jurisprudence from the ECHR has set important precedent for national and international courts throughout Europe and beyond. Because they are removed from the political repercussions that influence national-level actors, international courts like the ECHR can often be crucial in enforcing human rights protections. Although it is sometimes difficult to enforce decisions by international tribunals, their statements fre-
ently set human rights standards above those afforded at the national level, and can pressure governments into both changing laws and protecting individuals' human rights. International cases often achieve widespread media attention, sparking public debate.

One important example is the development of case law related to Article 8 of the European Convention. Article 8 has much relevance for women's rights because the concept of «private life» has been interpreted to cover a person's physical and moral integrity, including their sexual life. It thus includes the right not to be sexually assaulted, and the freedom to determine one's sexual orientation. Two decisions from the European Court of Human Rights interpreting Article 8 demonstrate both how international law can be interpreted to advance women's rights, and the utility of using international tribunals to advance national human rights standards.

The Case of X and Y v. The Netherlands addresses a father's complaint that a gap in the laws of the Netherlands prevented him from initiating a lawsuit on behalf of his daughter, X, a mentally-disabled adolescent who was raped in the home for disabled children where she lived. Due to her age, disability and the effects of the traumatic experience, X was not competent to file a complaint on her own. In this case, the European Court of Human Rights found that the impossibility of instituting criminal proceedings on behalf of his daughter constituted a violation of
her rights under Article 8. Subsequent to the Court’s decision, the Netherlands Ministry of Justice modified the criminal code, creating an offense for making sexual advances on a mentally disabled person. Thus, the Court’s decision led directly to necessary legislative changes at the national level.

In the Case of Norris v. Ireland, the European Court of Human Rights held that Article 8 protects an individual’s right to privacy regarding their sexual orientation. In that case, the applicant was a homosexual man, active in the gay rights movement in Ireland. He asserted before the European Court of Human Rights that Irish laws criminalizing homosexual behavior constituted unjustified interference with his right to privacy under Article 8. The Court agreed, finding the breadth and absolute character of the statute in question to be disproportionate to the aims sought, which was to protect the country’s morals. The Court found that in cases such as this, which concern such an intimate aspect of one’s private life, serious reasons must exist to justify interference by public authorities. Importantly, in reaching its decision, the Court looked to the laws and customs of other European Union states, finding both greater tolerance and understanding regarding homosexuality, and that other states did not criminalize homosexuality.

However, the impact of the Court’s decision on Irish national law remains ambiguous. Although the Court found these statutes
on homosexuality to be in violation of Article 8 of the Convention, the Irish Supreme Court had earlier found them to be in accordance with the Irish Constitution. The Court’s decision is not binding in Ireland, because it has not yet incorporated the European Convention into its national legislation. However, the case continues to set important precedent regarding privacy rights throughout Europe.

Conclusion

With the increased visibility of human rights violations around the world, and the development and strengthening of international and regional systems, the use of international law and tribunals remains a crucial aspect of human rights work. It is critical that women’s rights be at the forefront of advances in the use of these international instruments. By creating a clearinghouse of information on women’s rights cases from both national and international courts, Women’s Link Worldwide hopes to become a reference point in providing legal support for women’s rights advocates interested in the use of international law and litigation as a means of pressing for change.
United Nations High Commissioner for Human Rights, Mary Robinson has had a long and distinguished career. As High Commissioner, she oversees the UN’s response to human rights violations as well as their prevention. Prior to her appointment, she served in the Upper House of Parliament and for seven years as President of Ireland. As a young barrister there, Ms. Robinson brought precedent-setting cases on issues of women’s rights to both the Irish Supreme Court and the European Court of Human Rights. This interview explores her background as a women’s rights attorney, and her wide range of experience using international human rights law.

**Question:** As someone who has succeeded in advancing women’s rights while a practicing lawyer and later in the political sphere, how do you view the differing roles of litigation versus the political arena as methods for advancing women’s rights?

**Answer:** While the role of litigation in the struggle for human and women’s rights has been and remains crucial, we must not lose sight of the fact that the formal legal system remains inaccessible to the vast majority of the world’s women. Law and legal institutions are important in affecting change, but should not be the exclusive focus of our efforts. The struggle for human rights is as much a battle for hearts and minds as it is for laws. This is particularly true in the area of women’s rights. So we should embrace a wide range of approaches or tactics in order to
both reach all sectors of society and make change work for all sectors.

Litigators should bear in mind the potential impact of their work for other arenas. For example, litigation and engagement in the political arena are autonomous, but also mutually supportive in efforts to advance the rights of women. Indeed simply invoking the language of law and of rights to a cause can advance that cause. Similarly, judicial decisions often serve as a trigger for a more open debate in the political arena as well wider discourse involving the wider society. In this way, the law can be profoundly political in a manner that is perhaps not always recognized. The emergence of the term «cause-lawyering» in the United States reflects this idea. What is involved, essentially, is public interest litigation, which the attorneys in question see as more than simply taking an isolated case, but rather as a method by which to provoke change and push the political process forward.

The bottom line, however, is that neither litigation nor politics may by themselves advance or ensure protection of women’s or human rights. In efforts to advance protection, we should not overlook any avenue by which both official and public understanding and gender sensitivity can be increased as well as opportunities to reform structures and practices that exclude women.
**Question:** What in your opinion are the current priorities for the women's rights movement internationally? In Ireland? What role can the international human rights community play to advance women's rights at the domestic level?

**Answer:** Priorities for the women's movement internationally must be driven by the practical experiences and difficulties faced by women and women's groups on the ground. The issues addressed by Women's Link Worldwide—violence against women, sexual and reproductive rights, trafficking, and so on—are a high priority for women in many of the countries I have visited as High Commissioner. For many activists, these are considered to be the most pressing and most visible human rights issues affecting women today. And it is truly heartening to note the increased attention that is being accorded to them at the international level.
However, we must remain aware of the manner in which other basic rights issues—such as housing, property, inheritance, nationality, health care, education—whilst perhaps not as high profile, have a direct and immediate importance for millions of women throughout the world. It is essential that we increase the visibility of these issues and bring greater recognition to the effect that violations of these rights have on women.

Turning to Ireland, in common with many other countries there are still struggles to be won with some basic women’s rights issues. There have been great gains of course, especially in legal reform. But although the law guarantees equality, and discrimination on grounds of gender is prohibited by law, equality between men and women in practice has still not been attained in a number of fields.

In the world of work, equal pay for equal work remains for many a goal to be achieved. This is a time of welcome economic prosperity in Ireland. Women are entering the workforce in unprecedented numbers. I understand that married women were the single biggest group in the employment increase during 2001. But issues remain, such as the terms and conditions of work, including family-friendly working environments. The shortage of childcare facilities and the ongoing equation of family responsibilities with «female» responsibilities remain concerns.
Good news on the work front has to be balanced by less visibility of women in the political process. The extent of women's participation in the political arena is not impressive in Ireland. I was honored to be elected as a member of the Irish Senate and later as President. We have another woman President and we have high profile women as ministers. But this experience is not representative of the role of women in the Irish political process. Although Ireland has a strong tradition to draw upon in these terms: in fact an Irishwoman—Countess Markievicz—was the first female government minister in Europe, this has not translated into adequate numbers of female members in the national Parliament or Senate. A similar point may be made in relation to the persistence of a substantial gender imbalance in the judges of the superior courts, and senior counsel.

The issue of reproductive rights is also a matter of relevance to women in Ireland. Abortion remains a divisive issue in Ireland, as in many countries, while thousands of Irish women seek abortions in Britain each year. I might mention here that the need for decriminalization of women having abortions was highlighted by the Committee on the Elimination of Discrimination against Women (CEDAW) in a past General Comment on the right to health.

Efforts to mainstream a gender-perspective into policy-making are very welcome, in particular the systematic testing of government measures for their impact on women. However, more
priority should be given to improving the gender sensitivity of public officials including the judiciary in Ireland. This was an issue picked up by CEDAW in its consideration of Ireland's report under the Convention. The Committee recommended the «continuing and ongoing training» of legal professionals and the judiciary on gender issues. Systematic incorporation of the gender dimension, something we seek to do here in the UN, is indispensable to the protection of women's rights in the long-term.

**Question:** You have argued cases before the European Court of Human Rights both representing an individual client, as in the *Case of Norris v. Ireland*, and representing the European Commission on Human Rights, as in the *Case of Airey v. Ireland*, were the experiences significantly different?

**Answer:** These cases were all some time ago. I am glad to say that a new generation is busy bringing new issues from all over Europe to the European Court. But to answer your question, the *Airey* case was heard in 1979, under the old Rules of Court. At that time, strictly speaking only states—not the applicant nor the Commission—could be parties to a case before the Court. The Commission however defended the interests of the individual applicant.

So, when the Commission referred the *Airey* case to the Court, lawyers, including myself, appeared alongside the Commission—essentially arguing the applicant's corner—against the Irish government.
Revision of the Rules of Court in 1982 introduced separate legal representation for the applicant before the Court for the first time. The *Norris* case was argued and decided by the Court under these revised procedural rules, and so the government, the Commission and the applicant were all represented. Basically, in both cases I was in the position of defending the interests of the applicant—however the only difference was that the option to formally represent the applicant was not available in *Airey*. But the distinction is more one of terminology than of reality.

Now following the procedural reforms that are a result of the coming into effect of Protocol 11 in 1999, the individual is given full procedural rights before the European Court. It is both logical and just that victims of alleged violations be afforded the right to be a party in their own case, with the opportunity to present their case as they see fit. It is a great advance that individuals may now take part in proceedings at Strasbourg on an equal footing with the government complained against.

**Question:** As UN High Commissioner for Human Rights, what do you see as the benefits and drawbacks of utilizing international mechanisms to secure human rights?

**Answer:** The international human rights system is proving to be a catalyst for fundamental change in the way in which governments, societies and individuals view and approach human
It has been fascinating to watch and indeed encourage this interlocking of the international and national protection regimes. However, we should also be realistic about the limitations of the international protection system. In the end, individual rights and freedoms will be protected or violated because of the protections that exist or are lacking within a given domestic order, and not because of what is said or done at the international level. That is why as High Commissioner I put so much emphasis on building national capacities and national human rights institutions. Human rights begin and end at home.

In this thinking we should measure the value of the United Nations human rights treaty system by reference to its ability to encourage and cultivate national implementation of, and compliance with, international human rights standards. One of the major benefits of resort to the use of international judicial or quasi-judicial mechanisms is the extent to which victories can contribute to consistency in national practice, or to building an international jurisprudence by which to measure and mould domestic performance. It should not be forgotten, and it is an argument for invoking international remedies, that international accountability brought about through peer scrutiny by states can really produce results on the ground. So for me, the basic role of the international system is to promote and facilitate positive change at the national level.
From the standpoint of the individual victim, there are a number of drawbacks to the international human rights system. Seeking redress at the international level is not speedy or simple and indeed can be expensive. Leaving aside the regional Courts in San Jose and Strasbourg, international decisions and recommendations are mostly non-binding. States are of course expected to honor decisions and recommendations of the UN treaty bodies. But it has to be admitted that there is limited possibility for actual redress for the individual victim. Of course, there is often no alternative to an international complaint especially where people face systematic violations or persecution. Then it is really crucial that there are possibilities of raising the alarm at the international level.

**Question:** What in your opinion are the potential advantages and disadvantages between bringing cases to the European Court of Human Rights and the U.N. Human Rights Committee, given their differences as judicial and quasi-judicial bodies, respectively?

**Answer:** Well first we should recognize the tremendous importance and the achievements of these two complimentary systems. Which body is more appropriate to any particular case or complaint depends very much on the specific context and facts at issue. A decision to address one or the other will require consideration of a range of factors including the identity of the state
party concerned, the nature of the complaint and the objectives of the action. I would emphasize the fact that, in practice, access to both mechanisms is highly restricted. It is important to accept that the UN Human Rights Committee and the European Court can only ever deal with a small fraction of complaints about human rights. The primacy of national procedures for protection of human rights must not be forgotten. In a sense, the entire international structure exists as a supplementary backstop to the national process.

I should add that the same consideration applies to the other regional system—the Inter-American Court when compared with UN machinery. Indeed I hope there will soon be a new regional international human rights court for Africa. That will happen when an optional protocol to the African Charter, setting up the new Court, gets the ratifications to bring it into operation. And focusing on the Human Rights Committee should not lead us to forget the other complaint mechanisms under the Convention against Racism for example and the new complaint scheme for the Women’s Convention (CEDAW).

A pointer towards the maturity of the human rights protection system is the extent to which we are seeing exchange of experience between regional and international human rights courts, tribunals and monitoring committees. In spite of differences in formal structure or status, it is now possible to track a growing
interchange of jurisprudence and precedent between these bodies. We are creating a global pool of authority on human rights. Think here also for example of the jurisprudence of the ad hoc war crimes tribunals in Arusha and The Hague. But there remains plenty of work to be done to bring this expertise and precedent back into national legal systems. That is no less important a task for women’s rights than any other field. I warmly welcome the project for a database of judicial decisions to be maintained by Women’s Link Worldwide. This is precisely the kind of tool that can make a difference in national campaigning and lawyering. It is a great innovation.

**Question:** What do you see as the practical obstacles in bringing cases before international tribunals? Do you have advice for lawyers seeking to overcome these difficulties?

**Answer:** I have mentioned that access to international mechanisms is quite restricted. Applicants must strictly conform to admissibility requirements such as time limits, exhaustion of domestic remedies and so on. Money can be a problem for example for outlay costs, assembling evidence, and so on. Then there is the length of time litigation can take at the international level. But in the right case these obstacles can be overcome and most lawyers will find a way to get over the obstacles. One thing today that was not always the case is that there are good guides to international practice for lawyers and often practical courses on
practice and procedure. I think we can say that no lawyer for hu-
man rights in general, or women's rights in particular, can afford
to ignore the international law of human rights.

**Question:** What are your thoughts on the use of litigation
as an effective means to get governments to implement the In-
ternational Covenant on Economic, Social and Cultural Rights
(ICESCR)?

**Answer:** Litigation at the national level—or in other words,
using the national judiciary to implement and enforce interna-
tional human rights obligations, including the ICESCR—is one of
the primary ways of giving «teeth» to international instruments.
Irrespective of the structure of domestic legal systems, govern-
ments should ensure that international human rights instru-
ments they have ratified could be directly invoked and argued
before national courts. The Economic Social and Cultural Rights
Committee, in considering its domestic application, has empha-
sised the primacy of national remedies and the importance of
allowing individuals to seek enforcement of their rights before
domestic courts. To quote the Committee, «the existence and
further development of international procedures for the pursuit
of individual claims is important, but such procedures are ulti-
mately only supplementary to effective national remedies.» So
it is gratifying to note that there is a definite increase in the
number of cases at the national level that concern economic,
social and cultural rights. Any number of examples could be cited. For example, despite the fact that South Africa has not yet ratified the ICESCR, the Constitutional Court considered the General Comments of the Committee on ESCR in its examination of two cases on the right to adequate housing and to health. (The Soobramoney v. Minister of Health CCR 32/97 (26 Nov. 1997), and Grooboom (2001) 1 SA 46 (CC) cases.) India is perhaps the prime example. The courts there have been creative in implying a whole range of economic, social and cultural rights into the right to life under the Constitution. That jurisprudence could usefully be examined by lawyers in many countries.

I should also note the beginnings of adjudication of the Council of Europe, European Social Charter, through the new collective complaint procedure. There is a new situation undoubtedly of recognition of economic social and cultural rights, but its full possibilities in litigation will take a long time to work out. The important thing is that we have made a start. As a footnote and perhaps unnecessary to add but campaigners for women’s rights have a big investment in ensuring that there is justiciability of these categories of rights. As you will know the CEDAW, despite the climate in which it was drafted, when economic and social rights were very much second class rights at the international level, includes protection against discrimination and exclusion of women across all human rights.
**Question:** As an Irish attorney, you were involved in a number of precedent-setting cases expanding women’s rights, such as *DeBurca v. Attorney General* and *SPUC v. Grogan*. Can you comment on the role of the judiciary in expanding human rights, and more specifically women’s rights, in Ireland? Were these cases litigated as part of a concerted strategy to use litigation to advance women’s rights or human rights generally?

**Answer:** Well you will allow me to say again that these cases were some while ago! There are new precedent setting cases, new young lawyers, women and men, active on women’s rights litigation.

There is a phrase from the theorist Richard Abel, I might recall, on the effect and purpose of public interest litigation—that it is the process of «speaking law to power.» What precedent-setting cases such as *De Burca* do, is allow the application of this principle to the advancement of human and women’s rights.

I think particularly in common law countries, the judiciary and the legal profession have great opportunities to effect changes in society. Litigation can be more than a technical resolution of individual disputes on formal grounds, it can also be a medium of social change and advancement of social justice in the widest sense. It can help to shed light on discrimination and inequalities—of power and material terms—in our society, and
provide an access route to power for the disadvantaged or the oppressed.

Ireland does have a strong tradition to draw upon in terms of legal innovation and judicial activism in advancing all human rights—not simply women’s rights. It really all flows from the coming of age of the Constitution in the 1960’s, and judges such as Seamus Henchy, Brian Walsh, John Kenny and others. These judges prompted by an equally able generation of lawyers, developed for example the constitutional doctrine of unenumerated rights, which allows the courts some scope to analyze claims from a social justice perspective. It might be going too far to say that there was an elaborate strategy to advance women’s and human rights, but there was certainly a belief shared by the Bench and the Bar that the potential of the constitutional language had not been really used to advance rights and to challenge all kinds of practices that contradicted the theory of rights guaranteed in the Constitution, not least as regards women.

**Question:** What role do you think case law from foreign jurisdictions and/or international courts can play in expanding domestic human rights? How can lawyers use case law from other countries to make persuasive women’s rights arguments?

**Answer:** I do believe that we are increasingly seeing a willingness of courts and tribunals to look at the experience of other systems. It makes sense that in addressing matters of human
rights law, courts should be given the opportunity to benefit from
the analysis and innovations of other systems. As developments
in communication continue, this is becoming easier by the day.

On the simplest level, there can be great value in demon-
strating to a court through case law that there is convergence on
the principle or point that you seek to advance. Indeed, to draw
on foreign or international jurisprudence can be helpful in seek-
ing to devise new mechanisms for protection at home.

**Question:** How did you become interested in the law? What
gave you the courage to be such an outspoken rights advocate?
Do you have any general words of advice to lawyers who are
representing politically unpopular clients or issues in an effort to
expand women's rights?

**Answer:** In my early teens I discussed the meaning of
law with my grandfather, a retired lawyer. He treated me like
an adult—which was great—and spoke passionately about cas-
es he had taken for poor tenants, and how you could use law
to protect the weak. From the beginning I saw law as a poten-
tial instrument of social change. I also learned at an early
stage of my career, when I first introduced legislation to legal-
ize contraceptions in 1971, that if you really believe in some-
thing you must be prepared to pay the price and endure un-
popularity. My general advise is that if you have the courage to
take difficult and sensitive cases, do your homework particu-
larly well, make sure you are as well prepared as possible, and let the heaven fall!

I believe that a major function of the law, not only human rights law, is protecting the vulnerable who are often unpopular clients with unpopular causes. Simply by giving a public voice to the oppressed, or by using the language of rights to construct a claim, lawyers can add strength to social and political discourses on the experience of inequality. And not only lawyers. We should remember that other human rights defenders or advocates on behalf of victims throughout the world face enormous pressures. Indeed they are often direct victims because of their work. That includes women who fight against the violations of other women’s rights. I do not think I need give advice to those who do put themselves at risk of being vilified or worse because of their fight for human rights including women’s rights. They, like me, are motivated by the conviction that you cannot turn away from injustice where you are in a position to do something. What sustains them as it does me is that we need not only imagine a world where all men women and children enjoy human rights equally. We can in our time help it come about.
The proceeding interview with Carlos Texidor explores a lawyer’s practical experience in bringing cases to international tribunals. Mr. Texidor explains the basis for bringing his client’s gender discrimination claim to the European Court of Human Rights (ECHR): precedent set by Spain’s Constitutional Court rendered any claims before Spanish courts futile. Finding no success before the ECHR, Texidor subsequently brought his claims to the United Nations Human Rights Committee (HRC). These international bodies function differently in important ways. This brief introduction attempts to clarify some of the key procedural and substantive differences between these two international tribunals, and to illustrate their strategic significance for an attorney considering filing a claim.

Most international human rights tribunals have one thing in common: cases can only be brought against national governments. They are not a forum for private parties to assert claims against one another. Both the European Court of Human Rights and the UN Human Rights Committee permit states to file complaints against other states, which occurs rarely for political reasons, and for individuals and non-governmental organizations to file complaints against state governments for human rights violations. Complaints can only be asserted against states for violations of rights that are specifically protected by international human rights treaties, in this case the European Convention of
Human Rights and the International Covenant on Civil and Political Rights. This restriction had important implications for Mr. Texidor's claim, as explained in more detail below.

The European Convention of Human Rights was created in 1950 within the framework of the Council of Europe. In order to join the Council of Europe, states must ratify the Convention. There are currently forty-one state parties to the Convention. The UN Human Rights Committee was established by the International Covenant on Civil and Political Rights (ICCPR) in 1966. To date, the ICCPR has been signed by one hundred and forty-four states, and ninety-six states have accepted its jurisdiction.

The European Court of Human Rights, located in Strasbourg, France, functions as a traditional two-tiered court. In other words, it has a mechanism for appeal. Located in Geneva, Switzerland, the HRC functions as an independent expert body, which receives and comments upon periodic human rights reports by member-states, and performs quasi-judicial functions by receiving individual complaints of human rights violations. An individual complaint can be brought to the HRC only if it is not pending at the same time before another international tribunal. The HRC meets three times a year in either Geneva or New York City. After determining that a complaint is admissible, both tribunals first attempt to initiate a friendly settlement between the parties before addressing the legal merits of the case.
One of the most important differences between the two bodies is that decisions issued by the ECHR are binding on state parties; decisions by the HRC are not. Like the ECHR, the HRC's decisions are frequently made by majority, though the Committee generally operates by consensus. Its decisions include the Committee's conclusions about whether any of the provisions of the ICCPR were violated, its legal reasoning and steps that need to be taken to address the violations. Although its decisions are not binding, the HRC assigns a special rapporteur to follow up on the implementation of its decision in each case.

There are several other significant distinctions between the proceedings of the Court and the Committee. First, proceedings before the ECHR, which include oral arguments, are open to the public. In contrast, the HRC meets in private, and
makes provisions for oral argument only in cases between states, not those brought by individuals. While both tribunals admit evidence by experts and witnesses, the costs of which are borne by the parties, the ECHR offers financial assistance to individual complainants, and has the authority to allocate the costs of the proceedings between parties, including attorney’s fees. The HRC offers no financial assistance.

Language constitutes another important distinction between these tribunals. The HRC works in all of the official languages of the United Nations. While the official languages of the ECHR are French and English, all communications to the Court prior to a determination on admissibility can be made in any of the official languages of its member states. In addition, the Court provides translators, enabling experts and witnesses to testify in their own language.

Other procedural differences include the following: complaints before the ECHR must be filed six months after the exhaustion of domestic remedies; the HRC sets no limitations period for filing complaints, although domestic remedies must also be exhausted before initiating proceedings; and, the ECHR admits third-party intervention and amicus curiae, while the HRC does not.

As stated above, the ECHR and HRC only offer protection for those rights articulated in the European Convention on Human
Rights (the Convention) and the ICCPR, respectively. Occasionally, however, their decisions draw on other sources of law. Importantly, Mr. Texidor’s gender discrimination claims before the ECHR were unsuccessful due to the Convention’s limited protection against discrimination. Article 14 of the Convention reads:

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status* [Emphasis added].

Article 14 does not grant an independent right to be free from discrimination. It only prohibits discrimination with respect to other rights articulated in the Convention. Thus, the Court refused to admit Mr. Texidor’s case because his client’s gender discrimination claim for being denied her family’s noble title did not fall within the rights defined within the Convention. In other words, the Convention does not contain any right which could be interpreted to include titles of nobility, including the right to property.

Because of the limited right to gender equality provided for in the European Convention on Human Rights, Mr. Texidor decid-
ed to take his client’s case to the UN Human Rights Committee. In the following interview, he elaborates on his experiences before these two international judicial bodies.

Carlos Texidor is a Spanish lawyer with over twenty years of experience in the practice of law who represented four Spanish women in a case before the European Court of Human Rights. Mr. Texidor has also appeared as co-counsel with the Spanish lawyer José Luis Mazón in a case before the United Nations Human Rights Committee, representing Isabel Hoyos. These women have one thing in common: they are the eldest siblings of families holding titles of nobility. Because of a ruling by the Spanish Constitutional Court, which stated that men precede women in questions of noble succession, their titles were passed on to male family members.

Although he maintains a general legal practice, Texidor says that all his work as a lawyer pertains to human rights: «...it is all the same to me whether I’m involved in administrative, labor, civil, or criminal cases. Before starting the case, I study the application of human rights in these areas to ensure that the lawsuits are correctly presented; that they do not violate procedural rules, neither in a defense nor in an indictment; that human rights are respected. No rule can be justified if it runs counter to universal human rights texts.»

Texidor continues: «For me, the principles on which worldwide public order is based are human rights. All the world’s ju-
Article 14 of the Spanish Constitution: «All Spaniards are equal before the law, which does not discriminate in regard to birth, race, sex, religion, opinion, or other personal or social conditions or circumstances.»

Article 1.1 of the Spanish Constitution: «Spain constitutes a social and democratic state of rights, which holds liberty, justice, equality, and political pluralism above its juridical code.»

The international human rights codes have to be conceived, carried out and developed in accordance with the general principles of human rights, established by the International Covenant on Civil and Political Rights, the European Convention on Human Rights and by the European Union accession treaty. There is one human right that is above all others: equality. Whether of sex, race or nationality, equality is the first principle. If there is equality, it is difficult to violate other rights.

**Question:** Could you explain how you became involved in issues of gender equality?

**Answer:** Several years ago, my office was contacted by a number of women who believed that as eldest siblings they should be able to inherit their families’ noble titles. However, their brothers had been awarded the titles in accordance with laws established prior to the Spanish Constitution, (El Codigo de las Siete Partidas, and la Novísima Recopilacion). When the Constitution was promulgated, everything indicated that Article 14 would overturn existing legislation, which up until then had given men precedence over women in the inheritance of noble titles. Article 14 of our Constitution, which is, in my opinion, one of the world’s best constitutional articles, is very clear. It is derived from Article 1, which states that the principle of equality is superior to the legal code.

**Question:** These women are stating that they have rights as the first born?
**Answer:** That's right. But it is important to understand that [in Spain] age is not a category protected from discrimination, but an element that is employed in all legal codes to establish access to various civil entitlements: the capacity to work, to make a will, to marry. Age is not a bad criterion. Article 14 of the Spanish Constitution does not refer to age as an element of discrimination. One should not confuse age with birth, which in the Constitution refers to other things.

**Question:** When was the first lawsuit initiated?

**Answer:** We first went to court in 1984, where we gained a favorable verdict, which was later overturned on appeal. The Supreme Court upheld the first verdict, issuing eleven rulings in favor of equality of the sexes in regard to noble titles. In fact, at present there are five women in Spain who have gained their titles through this line of cases. And, in 1995, the Constitutional Court affirmed the Supreme Court’s decisions. Several months later, the Constitutional Court rejected an appeal from a Supreme Court case that sought to re-establish men’s absolute right to inherit noble titles.

**Question:** So why haven’t some of your clients been able to have their rights recognized?

**Answer:** Because, surprisingly, on July 3, 1997, the Constitutional Court issued another ruling, reversing its previous decision and that of the Supreme Court. This single decision by the
Constitutional Court destroyed all that had been gained, as it bound judges, courts, and other civil authorities. The Constitutional Court stated, among other things, that a noble title is not a fundamental right, and that prior legislation regarding titles remains applicable, as it does not contradict the equality provision of the Spanish Constitution. Of course, a noble title is not a fundamental right; neither is being a lawyer a fundamental right. However, what is fundamental is that upon entering the legal profession, male candidates are not given preference over female candidates. That is intolerable. What is important here is not noble titles but the violation of equality, indisputably consecrated by Spanish and international legislation. The international legislation, having been ratified and published in the Official Bulletin of state for Spain, has become part of our national legal code, by virtue of Article 96 of the Spanish Constitution.3

Question: Was the new line of jurisprudence the reason why the Isabel Hoyos case was lost in Spain?

Answer: Yes, as a result of the Constitutional Court ruling, we lost at the lower court in Spain. Because we were not ordered by the judge to pay court fees, we were encouraged to pursue the case in an international forum. Thus, without support from any group, association or organization, we went ahead.

Question: And so you went before the United Nations’ Human Rights Committee?
Answer: That’s right. We went before the European Court of Human Rights at Strasbourg after the first negative decision of the Spanish Constitutional Court (July 3, 1997). The Court rejected the claims of four women seeking their rights to their noble titles.

Question: What was your experience at the European Court of Human Rights?

Answer: The problem with this Court is that the European Convention on Human Rights is very complex. Article 14 states that the right to equality applies only with regard to the rights recognized in the thirteen previous articles, none of which are applicable to noble titles. Therefore, our petition was determined on the basis of the Court’s prior jurisprudence, stating that administrative awards are under no circumstances considered to be «property», but are rather «possessions.»

Question: What can you tell us about the United Nations Committee for Human Rights?

Answer: Thanks to the Isabel Hoyos case, the discussion on male primacy in the inheritance of noble titles has not died. Otherwise, the Spanish government would not have touched it. For that reason, once we had a firm ruling from the lower court in Spain, we lodged an appeal straight away before the United Nations Committee for Human Rights, which has two headquarters, New York and Geneva. This organization applies legisla-

4 Article 14 of the European Convention on Human Rights: «The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.»
tion that I love: the International Covenant on Civil and Political Rights (ICCPR). The earlier European Convention on Human Rights, where European human rights are found, does not contain an independent right to gender equality. On the other hand, Article 26 of the ICCPR provides the same autonomous right as Article 14 of our Spanish Constitution. Moreover, every three years each nation has to renew its adherence to the ICCPR.

**Question:** How does the United Nations Committee for Human Rights work?

**Answer:** Originally, it was established to address accusations among nations, and was later expanded to include individual complaints against governments. First, all domestic remedies have to be exhausted. This does not mean that one necessarily has to take the case as far as the Constitutional Court, unless of course an appeal might prove efficacious. However, when you have a ruling that does not permit review, as in our case, you can take the case before the United Nations after a ruling from a lower court. Not only is it useless to exhaust domestic appeals, it is also a cruel waste of time, as it could extend the case for up to fifteen years. One begins by presenting a preliminary communication stating, in this case, that the Kingdom of Spain, through its Constitutional Court, has violated Article 26 of the ICCPR. Then, one receives acknowledgment and a number. In contrast

5 Article 26 of the ICCPR: «All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.»
to the European Court of Human Rights, the United Nations Human Rights Committee does not have a fixed limitations period for presenting a petition. Nevertheless, we filed our case immediately, on September 1, 2000. The Human Rights Committee rejects on a prima facie basis around fifty percent of all applications. Our case was accepted, however. Once the process begins, the state is notified and is granted six months in which to appear and plead its case. It must address both issues of admissibility as well as substantive legal issues. Taking refuge in procedural processes, the state might only address issues of admissibility, and request an extension of time to address substantive issues of law, thereby holding up the process. This is where we find ourselves at the moment. After Spain has submitted its pleadings, we will be informed about them, and then we can really get down to business.

**Question:** How long does it normally take from the initiation of a case to the verdict?

**Answer:** These courts are slow. They have many claims, and a case can take between three and four years, provided that at an intermediary stage the Committee does not decide to discontinue the process. I'm referring to a second stage in the admissions procedure. For now, our case has been admitted, and that is very important.

**Question:** Do international tribunals usually hold hearings?
**Answer:** At the European Court of Human Rights, yes. The United Nations Committee for Human Rights does not normally have hearings. In general, the Committee is less formalistic than Spanish courts tend to be. I am in favor of hearings, and I ask for them often because oral and written expression are different. I like to formalize an appeal in writing and then explain it orally, because in that way you complete your performance. It tests a lawyer’s preparation.

**Question:** Will the Human Rights Committee's decision be binding in Spain?

**Answer:** The new Law of Civil Judgment in Spain does not make any reference to the execution of decisions from what I like to call «Spanish courts based abroad.» However, in this case, the Human Rights Committee would inform Spain that the Constitutional Court’s decision violates the ICCPR, and that it should be amended. Every six months it will inquire as to how Spain has repaired the injury. In the meantime, I continue bringing cases before national courts. If tomorrow the Human Rights Committee finds in our favor, a Spanish court would have to apply the Human Rights Committee’s decision, and not that of the Constitutional Court. This «Spanish court based abroad» is above the Constitutional Court, according to Spain’s domestic law.

**Question:** And what will happen to the original plaintiffs, those women who saw their rights rejected by the domestic courts?
**Answer**: The United Nations decision will apply to all those women who will file suits in the future. However, it will be difficult to apply the decision to earlier cases, because they have already been tried.

**Question**: What obstacles exist in going before an international tribunal like the Human Rights Committee? Language barriers? Costs?

**Answer**: I haven't found any practical difficulty. On the contrary, it is a very helpful office, which has very clearly worded documents, and which treats you in a kindly manner. The most important thing is to go before the Committee with a clear case that has substance. As regards language, far from being a problem, it is an advantage. I use Spanish, which the United Nations uses to work with the numerically most important Hispanic group, that found between Mexico and the Tierra del Fuego. On the other hand, before the European Court of Human Rights only English or French is used. And I say that this is a disadvantage, because legal translations are extraordinarily difficult. I have spent hours with translators discussing nuances. The difficulties are, if anything, economic ones. The process is quite costly. The ideal situation is to present your case before an international tribunal with the support of a non-governmental organization or other association. The support of the media can also be a great help. Another limitation is that in going before one international
court you are prohibited from taking your case before the others. That is to say that the same person is prohibited from going before other international courts with the same case. However, another person is not prohibited from going before the same or another international court with a similar case.

**Question:** Do you need long-standing or specific professional training to go before an international court?

**Answer:** Special experience, no. What an attorney needs is knowledge of the law. The lawyer has to be well-trained, to have a solid knowledge of the national legal system and laws, and to be able to compare this with an external code that is found in those conventions to which Spain subscribes. The forms and written petitions required to go before the Human Rights Committee or before the European Court of Human Rights are somewhat simpler than in Spain, which is more rigorous and formalistic.

**Question:** Finally, what advice would you give to those lawyers who are trying to vindicate equality rights before the courts?

**Answer:** In my opinion the international courts’ web pages are very useful for lawyers. Lawyers should familiarize themselves with the rules of these courts. It is important to be familiar with the European Convention on Human Rights, the ICCPR and with the Convention on the Elimination of all Forms of Dis-
crimination against Women (CEDAW), all of which are applicable in Spain. When, in formulating my lawsuits, I see a rule that might violate the principles of equality, I make a note to focus on that rule. Could it be in violation of Article 26 of the ICCPR, or of Article 1 of CEDAW, among others? I usually incorporate references to these international legal documents into my written petitions so that judges in domestic courts will then apply these rules. This technique produces good results.

6 Article 1 of the Convention on the Elimination of all Forms of Discrimination against Women: «For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.»