
UNIVERSITY OF CONNECTICUT
1881

WOMEN AND CASE LAW
SOME LOOSE AND COMPARATIVE WANDERINGS

Laurence Burgorgue-Larsen[*]

[*] Professor at the Sorbonne Law School, Justice of then Constitutional Court of Andorra, and Member of the *Sorbonne Research Institute for International and European Studies* (IREDIES). Laurence.Burgorgue-Larsen@univ-paris1.fr

CONNECTICUT JOURNAL
OF INTERNATIONAL LAW

TABLE OF CONTENTS

INTRODUCTION

Contribution, protection, promotion, such is the analytical triptych chosen to present some thoughts on the interactions between Women and Case law. This triptych will constitute the guiding compass of these few lines in order to invite the reader to an entirely free journey, without any kind of flange, particularly that of academic conformism. Breaking free from codes, from time to time, is a good thing. This journey will lead us to faraway lands, to different ages. Back and forth over time and space will be constant. France will be intentionally pushed aside in this comparative peregrination[1] in order to open wide a window onto the world.

I. THE CONTRIBUTION OF WOMEN TO CASE LAW

Women make a very specific contribution to case law: they trigger it as litigants and guide it at the same time as lawyers; they comment on and teach it critically as legal scholars; and, last but not least, they create it as judges.

As *litigants*, the main obstacle that we can observe, in domestic legal systems and at the international judicial scale, concerns the multiple barriers women face in obtaining access to justice; especially when they are poor, and/or detained, and/or ostracized by their circle or community of origin. While we are inclined to think about indigenous women who, on the Latin American continent, are excluded from national mechanisms related to access to justice,[2] many reports established at the international,[3] as well as the European,[4] level demonstrate that, in fact, women are the ones who generally—particularly when compared to men—suffer from a lack of access to justice.

Beyond these structural obstacles, one fact is common to all judicial systems (both national and international)—female litigants cannot act alone. In order to bring "major causes" before the judges, women need to be supported, assisted, and represented by women and feminist associations, combining the expertise of many different types of legal experts, especially men and women lawyers. Activism is essential in this respect. Fight, again and again. Let us travel for a moment to a pair of countries at opposite ends in terms of geography and culture, South Korea and Senegal, to recognize the extent of the mobilization.

In South Korea, an emblematic example is the abolition of the *Hojuje*.[5] Introduced during the Japanese colonization and later enshrined in the country's Civil Code, the *Hojuje* (which could be translated as "family head system") grants an exclusive power to the man (father and son) at the expense of the woman (mother and daughter) through a sophisticated set of legal provisions that anchor the patriarchal nature of Korean society and subordinate women to men.

---

[1] Even though some specific elements concerning France will be present, they will not constitute the core of the developments. For an impressive analysis of the judicial diversity issue in France that considers race, ethnicity and sexual orientation, *see* Mathilde Cohen, *Judicial Diversity in France: The Unspoken and the Unspeakable*, 43 L. & SOC. INQUIRY 1542 (2018).

[2] Inter-American Comm'n Human Rights [IACHR], *Access to Information, Violence against Women, and the Administration of Justice*, OAS/Ser.L/V/II.154 Doc. 19 (Mar. 27, 2015).

[3] U.N. Dev. Program, *Gender Equality and Justice Programming: Equitable Access to Justice for Women* (2007); Comm. on the Elimination of Discrimination Against Women, *General Recommendation on women's access to justice*, at 24, CEDAW/C/GC/33 (Aug. 3, 2015).

[4] Gender Equal. Comm'n, *Towards Guaranteeing Equal Access to Justice for Women*, 5 (2016).

[5] Eun-sil Yim et. al., *Les mobilisations d'expertes juristes dans la construction d'une cause féministe: L'abolition du Hojuje en Corée du Sud,* 29 NOUVELLES QUESTIONS FEMINISTES 61 (2010) (Fr.).

The first trials pertaining to this discriminatory system began in 2000 in the county courts of Seoul, going all the way to the Constitutional Court that declared, in 2005, the unconstitutionality of the system. The analysis demonstrates over and over again that such a victory resulted from the synergy between 'field' legal experts (lawyers and activists), through the *Korea Legal Aid Center for Family Aid*, and "academic" ones (influential law professors at the *Korean Society of Family Law*). It is symptomatic to see that in the case of these two associations, pioneer women have thrown in their lot in deconstructing the traditional arguments raised to maintain the *Hojuje* system.

In Senegal, it is again in the area of family law that women jurists organized themselves in the early 1970's to combat some provisions of the 1973 Senegalese Civil Code, imbued with various provisions taken from Muslim tradition as well as the Napoleonic Code and disadvantaging women (such as polygamy as a marital choice, the requirement that the husband be the head of family and have the paternal authority, and unequal inheritance rules). The *Senegalese Association of Women Jurists*—created thanks to the sound advice of Kéba Mbaye, one of Senegal's greatest jurists of the 20th century, who spent a lifetime serving justice as president of the Supreme Court of Senegal, member of the International Court of Justice and then of the Court for Arbitration of Sport[6]—developed into one of the most respected associations of jurists in the country of President-Poet-Academic Léopold Sedar Senghor. In 1989, the Association succeeded in amending some of the more problematic provisions: for example, the power of the husband to oppose his wife's occupational choices or the fact that a married girl—even though she was too young to be so—could not obtain a marriage annulment.[7]

Do litigants, following their successful access to the courtroom, always find a judicial system inclined to take their claims seriously and analyze them without stereotypes or prejudices, *a priori*?[8] Here arises the eternal and crucial issue of women's representation in *university faculty positions*, to *teach law* and to nurture vocations among women who will in turn picture themselves as *lawyers* or *judges* and study to become so.

In both domains—academic and judicial—the presence of women has never been self-evident. Everything has always been about a struggle, regardless of the latitudes, the countries, "developed" or not, democratic or not. How, then, can women contribute to the jurisprudence if they cannot readily become leading professors, lawyers, and judges, reputed within prestigious courts?

Enabling women to access positions of responsibility in universities and in the professional world of law has always entailed fighting to bring about legal change.

This was the case in France when opening the doors to women in the legal profession. Jeanne Chauvin, for example, waged an exceptional campaign in the

---

[6] For a moving tribute by F. Ouguergouz to K. Mbaye, *see* Fatsah Ouguergouz, *Kéba Mbaye, Homme de loi, Homme de foi*, 6 DROITS FONDAMENTAUX 1 (2006) (Fr.).

[7] Judy Scales-Trent, *Women Lawyers, Women's Rights in Senegal: The Association of Senegalese Women Lawyers*, 32 HUM. RTS. Q. 115 (2010).

[8] While European and Inter-American human rights mechanisms have been building, for some years now, the jurisprudence taking women's rights into account, it is quite interesting to note, has not always been the case. In the Americas, it is common knowledge that the first great cases brought by women to the Inter-American Commission were not immediately referred to the Inter-American Court. Laurence Burgogue-Larsen, *La lutte contre la 'violence de genre' dans le système interaméricain des droits de l'homme. Décodage d'une évolution politique et juridique d'envergure, in* FEMINISME(S) ET DROIT INTERNATIONAL: ETUDES DU RESEAU OLYMPE 113 (2016) (Fr.).

late 19th century for women to be allowed to access the bar. In 1897, she tabled a legislative proposal to this end and, despite an initial refusal, succeeded in gaining support from Léon Bourgeois, Paul Deschanel and Raymond Poincaré.[9] She paved the way for the iconic Suzanne Grinberg, Agathe Thévenin or Maria Verone.[10] Such was also the case in the United States' academic world. More specifically, the enactment of measures of affirmative action, pioneering and genuinely transformative, fundamentally changed the situation. In a 1980 article published in the *American Bar Foundation Research Journal*, an American jurist—Donna Fossum—demonstrated, on the basis of particularly thorough empirical research, that the number of women professors in American universities had significantly increased since a decree issued by President Johnson in 1967 (*Executive order* 11,375). Not only did the text prohibit gender-based discrimination with regard to professional relations, it also promoted policies of affirmative action with regard to recruitment. Such a legislative act transformed considerably the American academic landscape and enabled women not only to access more easily higher education within the most prestigious law schools, but also to excel in the so-called noble subjects, until then traditionally reserved for men.[11] Nowadays, every country is looking at how to close the gap between men and women in professional life. We need only think of the Canadian system of gender-based analysis (GBA), which attempts to put an end to systemic discriminations in the workplace.[12]

With regard to women *judges*, political will is again crucial to promote a better representation, both domestically and internationally, specifically when the appointing authorities are elected through constituted powers. Things can then move on. However, history has shown that changes happen slowly, North America being a classic example. Out of the nine United States (US) Supreme Court judges, the three women currently sitting on the bench—Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan—were all appointed by Democrat Presidents, the first by Bill Clinton (in 1993) and the two others by Barack Obama (appointed respectively in 2009 and 2010). It is obvious that it has been above all a clearly assumed political endeavor aimed at promoting women of outstanding career paths.[13] It should be noted that the first woman to enter this prestigious institution was Sandra Day O'Connor, appointed by Ronald Reagan in 1981 (where she remained until 2005, the year of her resignation). In other words, created in 1789 and settled in 1790, after 227 operating years there have only been four women judges on the US Supreme Court.

The issue of representation is especially relevant with regard to international judicial bodies. Their number has kept growing in the post-war period so that they have become *major players* in various areas—from criminal to economic law, and finally to human rights. The importance of their decisions on economic and political life calls now more than ever for a better representation of women within these institutions, for their legitimacy is at stake. In 1991, in an article published in the *American Journal of International Law*, which has since become a cult article in the legal literature at the international level, three women

---

[9] The law was passed on June 30, 1899, and the Senate ratified it on November 13, 1900.

[10] Anne-Laure Catinat, *Les premières avocates du barreau de Paris*, 16 MIL NEUF CENT 43, 44 (1998) (identifying the figures d'intellectuelles) (Fr.).

[11] Donna Fossum, *Women Law Professors*, 5 AM. B. FOUND. RES. J. 903 (1980).

[12] Louise Langevin, *Réflexions sur la nécessité d'une loi imposant l'analyse comparative entre les sexes au Canada*, 42 CAN. J. POL. SCI. 139 (2009) (Fr).

[13] The book by Sonia Sotomayor–*My Beloved World*–is a fascinating testimony of how to rise to the top of the US judiciary world as a Hispanic woman in the United States.

academics—Hillary Charlesworth, Christine Chinkin and Shelley Wright—considered the structure of international law as favoring men.[14] In a recent study published in 2016, a young American woman academic, Nienke Grossman, decided to assess the observation made 25 years earlier, by undertaking an evaluation of possible changes in trend in the international judicial field. [15] By looking at the composition, since their creation, of 12 international courts,[16] she painted a fairly appalling picture.[17] She succeeded brilliantly in deconstructing the justification – used by some States – consisting in the affirmation of the lack of qualified women. However, is it reasonable to sustain such a claim nowadays, when the number of women within law schools has been increasing dramatically, in both developed and developing countries? Amongst the many examples she gave, one cannot ignore France's foreign legal policy. No woman has ever been appointed to any of the international courts whose jurisdiction was accepted by France: not to International Court of Justice (5 men), neither to the European Court of Human Rights (5 men), nor to the European Court of Justice (7 men), nor to the ICTY (3 men), nor to the Appeals Chambers of ICTY and ICTR, nor finally to the ICC (3 men)[18] . . . What can be said? How do we justify the unjustifiable?

However, beyond the issue of legitimacy, questions regarding international law obligations must clearly arise. We know that several international human rights conventions, of general type, require States to prohibit any kind of discrimination based on sex. [19] However, beyond this strictly egalitarian approach, several instruments on women's rights deepen the scope of States'

---

[14] Hilary Charlesworth et. al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

[15] Nienke Grossman, *Achieving Sex-Representative International Court Benches*, 110 AM. J. INT'L L. 82 (2016).

[16] The International Courts ("IC") are: the African Court on Human and People's Rights; the Andean Tribunal of Justice; the Appellate Body of the World Trade Organization; the Court of Justice for the Economic Community of West African States; the European Court of Human Rights; the European Court of Justice; the Inter-American Court of Human Rights ;the International Court of Justice; the International Criminal Court; the International Criminal Tribunal for the Former Yugoslavia; the International Criminal Tribunal for Rwanda; the International Tribunal for the Law of the Sea.

[17] We discovered, among others elements, that four IC were required by statute to take sex into account when nominating of voting for judges: International Criminal Court ("ICC"), European Court of Human Rights ("ECtHR"), African Court of Human and People's Rights ("ACtHPR"), and *ad litem* bench for International Criminal Tribunal for Rwanda ("ICTR") and International Criminal Tribunal for Yugoslavia ("ICTY"). A higher percentage of women sat on the bench in mid 2015—32% of the judges on these courts were women. Where a "fair representation" of the sexes was not aspired to or required, women made up only 15% of the bench. *See* Grossman, *supra* note 15, at 82.

[18] To be absolutely specific and accurate, it should be noted that only one woman (Michèle Picard) was appointed judge *ad litem* at the ICTY and an another was appointed as an *ad hoc* Judge at the International Court of Justice (Suzanne Bastid). It is important to highlight that Suzanne Bastid has been an outstanding figure within the French legal landscape in International law. For more details about her personality and her career, *see* Alain Pellet, *Susanne Bastid*, FRENCH SOC'Y FOR INT'L L. http://www.sfdi.org/internationalistes/bastid/ (last visited Oct. 12, 2019); Daniel Vignes, *In memoriam: Madame Bastid. 1906-1995*, 40 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 7 (1994) (Fr.). It is noteworthy that she was appointed as a judge at the United Nations Administrative Tribunal for 32 years (1950–1982). The example of Suzanne Bastid is *the exception* which confirms the rule.

[19] *See, e.g.*, International Covenant on Civil and Political Rights art. 3, Mar. 23, 1976, S. Treaty Doc. No 95-20, 999 U.N.T.S. 171; European Convention on Human Rights art. 1, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights art. 23, Nov. 21, 1969, 1144 U.N.T.S. 143, S. Treaty Doc. No. 95-21; African Charter on Human and Peoples' Rights art. 13, June 27, 1981, OAU Doc. CAB/LEG/67/3.

obligations. For the first time in 1979,[20] the Convention on the Elimination of All Forms of Discrimination against Women laid the cornerstone in the field, while the African continent built on that effort through the adoption of the so-called "Maputo Protocol" in 2003.[21] Article 9, §1 of the African text—in line with article 7 of the CEDAW[22]—invites Member States to take "specific positive actions" to promote participative governance and the equal participation of women in the political life of their countries, while paragraph 2 of it is a useful instrument aimed at promoting women's role "at all levels of decision-making."[23] Beyond the promotion of women in the domestic political realm, article 8 of the CEDAW goes further by imposing the same process at the international level: "States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations." However, while "international organizations" certainly refer to universal (UN) and regional (the European Union, the Council of Europe, the Organization of American States, the African Union) organizations, they also refer to their affiliated institutions, such as judicial bodies like the ICJ, the ECJ, the ECtHR, the IACom.HR and IACtHR, the African Commission and the African Court.[24] In other words, when a State such as France does not have any judge within international judicial bodies, one must seriously ask whether this State is taking "all appropriate measures" under article 8 of the CEDAW.

However, judicial bodies, both domestic and international, consisting of an equal number of men and women are indeed essential, especially when cases which highlight structural discrimination against women, resulting from

---

[20] Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") was adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 on 18 December 1979. It entered into force on September 3, 1981, after the deposit of the 20th instrument of ratification, in accordance with article 27 §1.

[21] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol"), July 11, 2003, AU, MIN/WOM/PROT II, rev.5, *adopted by* the Conference of Heads of State and Government of the African Union on March 28, 2003 and *entered into force* on November 25, 2005.

[22] Article 7 of CEDAW reads as follow: "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country[,]" and Article 8 states "Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations." Convention on the Elimination of All Forms of Discrimination against Women art. 7, Dec. 18, 1979, 1249 U.N.T.S. 13.

[23] Article 9 of the Maputo Protocol reads as follow: "(1) States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that: (a) women participate without any discrimination in all elections; (b) women are represented equally at all levels with men in all electoral processes; (c) women are equal partners with men at all levels of development and implementation of State policies and development programmes. (2) States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making". Protocol to The African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) art. 9, July 11, 2003, AU, MIN/WOM/PROT II, rev.5.

[24] THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, A COMMENTARY 224 (Marsha A. Freeman et al. eds., 2012).

stereotypes deeply rooted in our ways of thinking and cultural habits, are brought before them. In such conditions, can jurisprudence truly protect women?

II. THE PROTECTION OF WOMEN THROUGH CASE LAW

It is well known that feminism has experienced several waves. However, *equality feminism*, aimed at ensuring rights for women beyond factual considerations by separating legal qualifications from social and especially natural characteristics, appears to be no longer sufficient to many scholars. Domestic rights, frontrunners of this egalitarian approach thanks to the influence of international human rights law, are experiencing some jolts due to the new feminist waves, sometimes to value women's difference (*cultural feminism*), sometimes to acknowledge the oppression of women by men (*radical feminism*).[25] With regard to these last two points, the evolution is difficult. Jurisprudence has not been consistent, as every country around the world is irrevocably rooted in a history and a culture that does not readily lend itself to much needed developments.

Various forms of stereotypes, as well as violence against women, are still well enshrined in many societies, regardless of their developed or democratic nature.[26] However, thanks to the virtues of using comparative law which arise from the free movement of judicial decisions, [27] the jurisprudence of international human rights mechanisms remains a touchstone, a connecting and harmonizing factor, that further develops jurisprudential policies bearing the stamp of convergence. Hence, with regard to the protection against domestic violence, it is a relief to observe the convergence between the jurisprudence of the CEDAW and of the Inter-American and European Courts of Human Rights which, in harmony, consider that gender-based violence "constitutes a form of discrimination."[28] Thus, in light of this movement towards coherence at the

---

[25] Françoise Tulkens, *La Convention Européenne des droits de L'Hommes et les droits des enfants*, 272 JOURNAL DU DROIT DES JEUNES 29 (2008) (Fr.); *Les requérantes devant la Cour européenne des droits de l'homme*, *in* LIBER AMICORUM LUZIUS WILDHABE: HUMAN RIGHTS-STRASBOURG VIEWS : DROITS DE L'HOMME-REGARDS DE STRASBOURG 423–45 (L. Caflisch et al. eds, 2007) (Fr.).

[26] With regard to France, we refer to the opinion of the Commission Consultative des Droits de l'Homme. *Avis sur les violences contre les femmes et les féminicides,* JORF (Fr.), June 7, 2016. With regard to the European Union, see the survey conducted by the Fundamental Rights Agency of the European Union is enlightening, if not terrifying. European Union Agency for Fundamental Rights, Violence against women: an EU-wide survey: Main result report (2014).

[27] *See* Laurence Burgorgue-Larsen, "*Decompartmentalization": The Key Technique for Interpreting Regional Human Treaties*, 16 INT'L. J. CONST. L. 187 (2018).

[28] Since 1992, the CEDAW Committee has clearly affirmed that domestic violence, a particular form of gender-based, constitutes a form of discrimination as it "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions." U.N. Comm. on the Elimination of Discrimination of Women, *Gen. Recommendation no. 19: Violence against women*, art.7, 1992, CEDAW/C/1992/L.1/ADD.15. Such an approach was reiterated by the Inter-American Commission in *Maria da Penha v. Brazil* (April 16, 2001), the Inter-American Court in *Cotton Field v. Mexico* (November 16, 2009), and then by the European Court in *Opuz v. Turkey* (June 9, 2009). These elements were incorporated in the Council of Europe Convention on preventing and combating violence against women and domestic violence, the so-called "Istanbul Convention," which was adopted May 11, 2011. Dubravka Šimonović, *Global and Regional Standards on Violence Against Women: The Evolution and Synergy of the CEDAW and Istanbul Convention*, 36 HUM. RTS. Q. 590 (2014).

international level, the task of national jurisdictions is proving to be easier,[29] especially when States have established the relevant legal instruments.[30]

With regard to combating stereotypes, it will be a bitter fight.[31] Indeed, judicial structures, like any other type of bodies, are not immune to cultural biases rooted in societies and/or some corporations. While reading a 2017 decision of the European Court—*Carvalho Pinto de Sousa Morais* [32]—we find out, astounded, about the way the Portuguese Supreme Court had addressed the analysis of a case involving compensation for damages suffered following a failed surgical operation on a 50-year-old woman, which resulted in chronic pain as well as in a permanent incapacity to have sexual intercourse.[33]

The Supreme Court had indeed significantly reduced the amount of damages awarded to the applicant, owing to her age and to her family situation: in a nutshell, she was "old"—sexual intercourse no longer matters at 50—and her role as a mother had already been fulfilled, her children being now grown and no longer requiring her care. The European Court had the courage to establish a new methodology which could not be the classic one originating from the principle of non-discrimination. The first stage consists in *naming* the stereotypes, indicative of prejudice. As well as affirming that they arise from "a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfillment of women as people."[34] The fact that the Portuguese Supreme Court judge had failed to take into account "other dimensions of women's sexuality" by making "a general assumption" without verifying its application in this specific case was regarded by the Court, not as an unfortunate turn of phrase, but as introducing an actual discrimination on the grounds of sex and age.[35] The harmful effect of the stereotype in question, the second phase of the methodology—the *contestation* one—thus came into play. What matters here, according to the Court, no longer involves the notorious "comparability" test, as used in "classic" discrimination cases, but the contextualization, aimed at demonstrating the prejudicial effect of a stereotype in a specific case.

Such a methodology will not be easily pursued by national judges, may they be from developed or developing countries, while it has already been decrypted and promoted by academic communities.[36] It disrupts entrenched habits, and involves, above all, an understanding of its implementation, as the method to establish is innovative; it entails a fresh look on the law and its biases. This new method and fresh look are far from eliciting unanimity, even within the European Court: one need only look at the dissent in the *Carvalho Pinto da Sousa* case of *messieurs* of the judges from Luxembourg (Ravarani) and Slovenia (Bosniak) to

---

[29] As an illustrative example, it is worth mentioning the judgement of December 19, 2016 of Administrative Litigation Division of the High Court of Justice of Andalusia.
[30] In Spain, the Organic Act 1/2004 of 28 December 2004 on Integrated Protection Measures against Gender Violence is a model for best practice.
[31] This is despite the fact that the Committee responsible for monitoring the application of the CEDAW has long delivered a specialised and subtle doctrine on how to combat stereotypes. Lucie Lamarche, *Diane Roman (dir.), La Convention pour l'élimination des discriminations à l'égard des femmes*, *in* 28 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL 132 (2015).
[32] Carvalho Pinto de Sousa Morais v. Portugal, 17484/15 Eur. Ct. H.R. (2017).
[33] Laurence Burgorgue-Larsen, *Actualité de la Convention européenne des droits de l'homme*, ACTUALITE JURIDIQUE DE DROIT ADMINISTRATIF 1768 (2017) (Fr.).
[34] Carvalho Pinto de Sousa Morais, 17484/15 Eur. Ct. H.R.
[35] *Id.*
[36] *See* REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 288 (2010).

appreciate it. Clearly, we still have a long and challenging road ahead in this area.

III. THE PROMOTION OF WOMEN THOUGH CASE LAW

The promotion of women in professional life has also been a lengthy and challenging process. While in France women's access to the profession of lawyer was the result of a woman's struggle—Jeanne Chauvin's—which finally convinced the legislature to move forwards; in the US, the *turning point* originated from a judicial decision. It is now difficult to imagine how a national Court could—as the US Supreme Court did in 1873 in *Bradwell v. Illinois*[37]—legitimize prohibiting a woman access to the Illinois Bar and prevent her from exercising her profession as a lawyer. At the time, her counsel's argument had fallen on deaf ears even though it was based on the *Cummings v. Missouri* case,[38] according to which professions were open to all, building on the idea that if the first clause of the 14th Amendment protected black citizens then it also had to protect citizens without distinction on the basis of race or sex.[39] In contrast, the Court—following the opinion of Judge Miller—distinguished between two types of citizenship: a State citizenship and a national one and, with a view to preserving States' sovereignty, recognized the latter's discretionary power to define the scope of the rights and privileges enjoyed by their respective citizens.

As a result, the Court affirmed the legitimacy of Illinois to establish admission rules to the Bar of the State and held that exercising a profession was by no means included in citizenship rights. Some judges added to this main argument the need to distinguish between the responsibilities of public and professional life, belonging to men, and the responsibilities of family life, belonging to women. Progress in the US has been slow, chaotic, full of unexpected twists, and it was not until the vote on the Civil Rights Act of 1964—whose Title VII prohibits employment discrimination on the basis of sex—and the mobilization of women alongside racial minorities with regard to this vote, as well as their growing political awareness (which gave rise to feminist movements and to their outstanding entry into the labor market) that the situation finally began to change and that the Supreme Court reversed its sexist jurisprudence.

In Europe, it is well known that the Union law and the jurisprudence of the Court of Justice played a key role in promoting gender equality in professional life. Equality between men and women, with regard to wages, access and working conditions, became the object of liberating regulations and jurisprudence. The Court of Justice, by handling the concept of indirect discrimination in an interesting way, which it literally manufactured through its decisions and finally took form in the notorious anti-discrimination directives, was able to significantly contribute to the career advancement of women by shedding light on the numerous instances of discriminations occurring under certain contractual conditions, such as part-time or agency work. It is worth noting that European Constitutional and Supreme Courts have captured this *summa divisio* between direct and indirect discrimination.[40] But to go as far as

---

[37] Bradwell v. Illinois, 83 U.S. 130 (1873).
[38] Cummings v. Missouri, 71 U.S. 277 (1867).
[39] Élisabeth Boulot, *La Cour suprême, les droits des femmes et l'égalité des sexes*, 87 REVUE FRANÇAISE D'ÉTUDES AMÉRICAINES 87 (2001) (Fr.).
[40] It is however important to recall, at this stage that the French Council of State still does not share the vision developed by the Court of Justice whose aim is the promotion of a real equality, beyond a mere formal one.

to say that discrimination against women has altogether ceased in daily life, particularly wage discrimination, would be a grossly deceptive shortcut. Reality still defies the law.[41]

WHAT SHALL WE THINK AT THIS STAGE OF OUR DISORDERLY AND COMPREHENSIVE WANDERING?

First of all, while much has been achieved, changes happen in an uneven manner at the global level, as in countries facing enormous challenges to democratic governance and development, blatant discrimination with regard to marriage, succession, or property rights—just to name few of the most emblematic examples—are still commonplace.[42]

Next, while much has been achieved, we know too well how these gains can suffer a backlash in the form of blatant or insidious regressions at any time within societies, including democratic ones, which we thought immune from setbacks, recessions and regressions. These comforting times are gone. As cultural recessions are numerous, they can at any time result in jurisprudential and/or legislative setbacks.

Thus, regardless of the areas and angles of approach to the issue of women and jurisprudence—and on a broader level to women and law—we must acknowledge a crucial point: we cannot perpetuate the myth that women have already achieved equality, as it will be tantamount to justifying the *status quo*. Worse, we would sometimes justify the setbacks.

[41] S. Darrigrand, Rémunération et égalité professionnelle femme-homme dans l'Economie sociale et solidaire (ESS), *Juris associations* 2017, n. 568, 28.

[42] Josette Nguebou Toukam, *Les droits des femmes dans les pays de tradition juridique française*, 53 L'ANNÉE SOCIOLOGIQUE 89 (2003) (FR.).