

CHARRON ET MERLE-MONTET V. FRANCE
APPLICATION NO. 22612/15

**WRITTEN COMMENTS ON BEHALF OF THE CENTER FOR
REPRODUCTIVE RIGHTS**

INTERVENER

Pursuant to registrar's notification on 16 May 2017 that the President of the Fifth Section had granted permission to intervene in accordance with Rule 44 § 3 of the Rules of the European Court of Human Rights

12 June 2017

I. INTRODUCTION

- 1 These comments will set forth international and comparative human rights standards and jurisprudence related to women's access to assisted reproductive technologies (ART), in particular in vitro fertilisation (IVF). They will outline the ways in which international, regional and domestic Courts and human rights mechanisms have recognized that certain restrictions on IVF engage women's rights to private and family life and may have a disproportionate impact on women in general, and on women who are not in marital or heterosexual relationships, in contravention of the international prohibition of discrimination against women on grounds of sex, marital status and sexual orientation. Particular reference will be made to the Convention on the Elimination of All Forms of Discrimination Against Women¹ and to the jurisprudence and recommendations of the Committee on the Elimination of Discrimination Against Women, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Inter-American Court of Human Rights, and national Courts in Australia and Spain.
- 2 Section II will present a concise overview of the general content of women's equal rights to respect for private and family life as enshrined in international law and standards and will demonstrate that these rights are inclusive of and closely interconnected with the rights to decide on the number and spacing of children, to access legal reproductive health services, and to benefit from scientific progress. Section III will briefly outline the contours of the international prohibition on discrimination against women in the enjoyment of human rights, on grounds of sex, marital status and sexual orientation. Section IV will describe in some detail the manner in which international, regional and domestic Courts and human rights mechanisms have applied these rights and requirements to IVF services and have found that certain restrictions on access to these services may contravene women's right to respect for private and family life free from discrimination on grounds of sex, marital status or sexual orientation.
- 3 These comments do not set forth the jurisprudence of this Court. Instead they provide the Court with information regarding international and comparative law and standards from the international, Inter-American and domestic legal systems, in recognition that this body of jurisprudence can inform the Court's interpretation and application of Articles 8 and 14 of the European Convention in this case.
- 4 In line with international medical standards and definitions, these comments refer to ART, including IVF, as a category of medical treatments intended to overcome an individual or couple's incapacity to conceive through sexual intercourse. This inability may be caused by an underlying medical condition, or it may be the result of social or family circumstances, as in the case, for example, of women in same-sex relationships and single women. The World Medical Association has recognized that assisted conception "differs from the treatment of illness in that the inability to become a parent without medical intervention is not always regarded as an illness."²

II. THE CONTENT OF WOMEN'S EQUAL RIGHTS TO PRIVATE AND FAMILY LIFE AS ENSHRINED IN INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS

- 5 As outlined in the following paragraphs, women's equal rights to respect for private and family life find reflection in a range of international and regional human rights treaties and their content has been interpreted broadly by relevant international and regional Courts and monitoring bodies.

¹ France ratified the CEDAW Convention in 1983 and the ICESCR and the ICCPR in 1980.

² The World Medical Association, Statement on Assisted Reproductive Technologies, adopted by the WMA General Assembly, Pilanesberg, South Africa, October 2006, <http://www.wma.net/e/policy/r3.htm>, para 6, See also IACHR *Murillo v. Costa Rica*, para. 288.

6 Among other things, they have been held to encompass equal rights to personal and reproductive autonomy, to decide on the number and spacing of children and to access the information and means necessary to exercise this right, including reproductive health services. They have also been deemed to be closely related to the right to benefit from scientific progress and advances in medical technology.

(a) American Convention & Inter-American Court Interpretation

7 Together Articles 11, 1(1) and 24 of the American Convention on Human Rights (American Convention) enshrine women's equal rights to privacy and respect for family life.

8 When interpreting these provisions the Inter-American Court has held that the protection of private life encompasses rights to personal autonomy, personal development and self-determination. For example it has outlined that, "*the protection of private life encompasses [...] the dignity of the individual including the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships. The concept of private life encompasses aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world.*"³

9 As a result, the Court has outlined that the right to private life includes rights to reproductive autonomy and access to reproductive health services, which also encompasses the right to access the medical technology necessary to exercise this right.⁴ It has explicitly linked the right to private life with Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) on the right to decide on the number and spacing of children and has considered that this right is violated when the means by which a woman can exercise the right to control her fertility are restricted.⁵

10 The Court has held that, "*motherhood,*" may be, "*an essential part of the free development of a woman's personality,*"⁶ and has specified that, "*the decision of whether or not to become a parent is part of the right to private life,*" and includes the decision whether or not to have genetic or biological children.⁷

11 It has also held that the scope of the rights to private life, reproductive autonomy and to found a family, as enshrined in the American Convention, extend to the right of everyone to benefit from scientific progress. In this regard the Court has outlined that, "*the right to have access to scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, de iure or de facto, to exercise the reproductive decisions that correspond to each individual.*"⁸

³ Inter-American Court of Human Rights, Case of Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, Judgment of November 28, 2012 (Preliminary objections, merits, reparations and costs), para. 143. See also Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs. Judgment of August 31, 2010. Series C No. 216, para. 119, and Case of Atala Riffo and daughters v. Chile, para. 162.

⁴ Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, para. 146.

⁵ Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, para. 146.

⁶ Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, para. 143; Gelman v. Uruguay. Merits and reparations, Judgment of February 24, 2011 Series C No. 221, para. 97.

⁷ Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, para. 143.

⁸ Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, para. 150.

(b) CEDAW Convention & Committee Interpretation

- 12 The CEDAW Convention prohibits all forms of discrimination against women in the enjoyment of their human rights. Articles 1 and 2 of the CEDAW Convention outline the general content of these obligations and clearly delineate that the obligation on States parties to ensure equality and non-discrimination in the enjoyment of human rights applies to all internationally guaranteed civil and political rights, including respect for private and family life. Article 16(e) of the Convention enshrines women's equal "rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." Article 12 of the Convention provides that States parties are obliged to eliminate discrimination against women in health care, including in access to health care services related to family planning.
- 13 When interpreting these provisions the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) has held that the CEDAW Convention "*requires States parties to provide for substantive as well as formal equality [...] Substantive equality can be achieved only when the States parties examine the application and effects of laws and policies.*"⁹
- 14 The CEDAW Committee has applied this requirement to women's access to reproductive health services and has held that in the domain of health services and medical treatment States parties are obliged to ensure that, "*policies and measures on health care address the health rights of women from the perspective of women's needs and interests,*" and take account of the, "*distinctive features and factors that differ for women in comparison to men such as [...] biological factors that differ for women in comparison with men, such as [...] their reproductive function.*"¹⁰
- 15 It has held that States parties must, "*ensure the removal of all barriers to women's access to health services, education and information, including in the area of sexual and reproductive health,*"¹¹ and deems that it is, "*discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women.*"¹² It has held that States parties, "*must ensure that health services and policies are "consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice."*"¹³
- 16 The CEDAW Committee has also stated that women's reproductive decisions should not "*be limited by spouse, parent, partner or Government,*"¹⁴ and has held that a fundamental principle of the CEDAW Convention is that women must be free to make choices in all aspects of their lives, "*without the limitations set by stereotypes, rigid gender roles and prejudices.*"¹⁵

(c) ICCPR & Human Rights Committee Interpretation

- 17 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the right to privacy and respect for family life, and States parties' obligations to ensure women's equal enjoyment of these rights are outlined in Articles 3, 2(1) and 26 of the Covenant.

⁹ CEDAW Committee, General Recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women Economic consequences of marriage, family relations and their dissolution, 2013, para. 8.

¹⁰ CEDAW Committee, General Recommendation No. 24 on the right to health, para. 12(a).

¹¹ CEDAW Committee, General Recommendation No. 24 on the right to health, para. 31(a)

¹² CEDAW Committee, General Recommendation No. 24 on the right to health, para. 11.

¹³ CEDAW Committee, General Recommendation No. 24 on the right to health, para. 31(e).

¹⁴ CEDAW Committee, General Recommendation No. 21 on Equality in marriage and family relations (1994), para. 22.

¹⁵ CEDAW Committee, General Recommendation No. 28, para 22.

18 The Human Rights Committee has interpreted Article 17 as inclusive of women’s rights to sexual and reproductive health and autonomy.¹⁶ It has outlined that prohibited interferences with women’s equal rights to privacy may occur where a woman’s sexual life is taken into account in determining the scope of her legal rights and protections, or where laws and policies undermine women’s ability to make free and informed decisions regarding reproduction.¹⁷ In one case it has held that a State party’s laws and policies, which prohibited certain reproductive health services, violated a woman’s right to privacy.¹⁸ The Committee has also stated that policies on family planning must not be discriminatory,¹⁹ and has observed that States parties must, “*accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children*” and must “*ensure the equal treatment of women in these contexts.*”²⁰

(d) ICESCR & Right to Benefit from Scientific Progress

19 As noted above the Inter-American Court has held that the rights to privacy and family life are inextricably linked with the right to benefit from scientific progress. This right is explicitly enshrined in Article 15.1(b) of the International Covenant on Civil and Political Rights (ICESCR) while States parties obligations to ensure women’s equal enjoyment of this right are enshrined in Articles 2(2) and 3 of the Covenant. Interpreting these provisions the Committee on Economic, Social and Cultural Rights (CESCR Committee) has stated that the Covenant requires States parties to address “*the ways in which gender roles affect access to determinants of health,*” including through the elimination of obstacles to women’s enjoyment of the benefits of scientific progress, including those based on cultural and religious traditions.²¹

III. THE INTERNATIONAL PROHIBITION ON DISCRIMINATION AGAINST WOMEN ON GROUNDS OF SEX, MARITAL STATUS AND SEXUAL ORIENTATION

20 International human rights treaties explicitly prohibit discrimination against women in the enjoyment of human rights.²² As outlined in the following paragraphs this prohibition extends to discrimination against women that is based not only on sex, but also on marital status or sexual orientation. Moreover, it encompasses both *de jure* and *de facto*, direct and indirect, discrimination against women and is contravened when apparently neutral laws and policies fail to take account of distinctive features and factors that differ for women in comparison to men, disproportionately affect women or apply particularly to goods or services which are predominantly used by, or applicable to, women.

(a) Discrimination against Women on Grounds of Sex

¹⁶ Human Rights Committee, General Comment No. 28, Article 3 (The equality of rights between men and women), para. 20.

¹⁷ Human Rights Committee, General Comment No. 28 on Equality between men and women, para. 20.

¹⁸ Human Rights Committee, *Mellet v. Ireland*, Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016), para. 5.6.

¹⁹ Human Rights Committee, General Comment No. 19, Article 23 (Protection of the family, the right to marriage and equality of the spouses), para. 5.

²⁰ HRC, General Comment No. 28 on Equality between men and women, para. 27

²¹ CESCR Committee, General Comment 16, Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights, U.N. Doc. E/C.12/2005/3 (2005), para. 29.

²² ACHR Article 1; ICCPR Articles 2, 3 and 26; ICESCR Article 2 and 3; CEDAW Articles 1, 2 and 3.

- 21 Every international and regional human rights treaty prohibits discrimination on grounds of sex in the enjoyment of human rights.²³ This prohibition is enshrined in Articles 2(1) of the ICCPR and ICESCR and Article 1(1) of the American Convention and is interrelated with the prohibition of inequality before the law enshrined in Article 26 of the ICCPR and Article 24 of the American Convention.²⁴ Moreover Articles 3 of both the ICCPR and ICESCR explicitly require States parties to ensure women’s equal enjoyment of the full range of rights enshrined in each treaty.²⁵
- 22 Additionally, as noted in the preceding section, the prohibition on discrimination against women on grounds of sex is the sole focus of the CEDAW Convention which prohibits, “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.”²⁶
- 23 As a result of its focus on discrimination against women in the sphere of human rights the CEDAW Committee’s jurisprudence contains the most detailed description of what discrimination against women on ground of sex entails and what States parties correlative international obligations to eliminate such discrimination encompass.
- 24 The CEDAW Committee has specified in detail that the CEDAW Convention prohibits both *de jure* and *de facto* and both direct and indirect forms of discrimination against women on grounds of sex.²⁷ As a result, laws and policies, which on their face may appear neutral, will contravene the prohibition of discrimination if they have disproportionate impacts on women, or fail to take account of women’s distinct and different circumstances and needs, or apply disproportionately to goods or services used by women.²⁸ In addition, Article 5 of the CEDAW Convention requires States parties to modify laws and policies that reflect stereotyped gender roles and norms.²⁹
- 25 Against this backdrop the CEDAW Committee has outlined that States parties are obliged to ensure that laws and policies take account of the, “*distinctive features and factors that differ for women in comparison to men such as [...] biological factors that differ for women in comparison with men, such as [...] their reproductive function.*”³⁰ States parties must take account of women’s, “*biologically determined permanent needs and experiences,*” and must ensure that, “*biological as well as socially and culturally constructed differences between women and men,*” are taken into account.³¹

²³ ACHR Article 1; ICCPR Articles 2 and 3; ICESCR Article 2 and 3; CEDAW Articles 1, 2 and 3.

²⁴ Human Rights Committee, General Comment No. 18: Non discrimination, paras. 2 and 12; CESCR Committee, General comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), para. 5.

²⁵ Human Rights Committee, General Comment No. 28, Article 3 (The equality of rights between men and women), paras. 4 and 6; CESCR Committee, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), paras. 2 and 20.

²⁶ CEDAW Article 1.

²⁷ CEDAW Committee, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, paras. 9, 16, 20 and 35.

²⁸ CEDAW Committee, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, paras. 5 and 16.

²⁹ CEDAW Article 2(f); CEDAW Committee, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, paras. 5 and 9.

³⁰ CEDAW Committee, General Recommendation No. 24 on the right to health, para. 12(a).

³¹ CEDAW Committee, General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures), paras. 8 and 11.

26 As noted above, the CEDAW Committee has held that States must, “ensure the removal of all barriers to women's access to health services, education and information, including in the area of sexual and reproductive health,”³² and has underlined that it is, “discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women.”³³

27 Other international and regional Courts and monitoring bodies have echoed this approach.³⁴

(b) Discrimination against Women on Grounds of Marital Status or Sexual Orientation

28 Article 1 of the CEDAW Convention also clearly enshrines an explicit prohibition of discrimination against women on grounds of marital status.³⁵ As a result States parties to the CEDAW Convention may not discriminate against women in the enjoyment of human rights on the basis of their marital status. The CEDAW Committee has applied this prohibition explicitly in the domain of health-care, specifying that States parties may not restrict women's access to health services on grounds that they are not authorized for such services, “because they are unmarried.”³⁶

29 Similarly, although marital or family status does not appear as an explicit ground of prohibited discrimination in other human rights treaties treaty monitoring bodies and regional Courts have affirmed that discrimination against women on grounds of marital or family status is encompassed as a prohibited ground under ‘other status,’ and as such is prohibited.³⁷

30 Additionally it is clear that international human rights law prohibits discrimination against women on grounds of sexual orientation.³⁸ There is now extensive jurisprudence confirming that the ground of ‘other status’ enshrined in international human rights treaties as a prohibited ground of discrimination includes sexual orientation.³⁹

(c) Intersectional Discrimination

31 Human rights mechanisms have also recognized that discrimination against women on grounds of sex can intersect with discrimination on other grounds, such as marital status or sexual orientation,

³² CEDAW Committee, General Recommendation No. 24 on the right to health, para. 31(a).

³³ CEDAW Committee, General Recommendation No. 24 on the right to health, para. 11.

³⁴ See e.g. CESCR Committee, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), paras. 25, 28, 40, 41; Human Rights Committee, General Comment No. 28, Article 3 (The equality of rights between men and women), paras. 10 and 20; Inter-American Court, *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, para. 146.

³⁵ CEDAW Article 1; CEDAW Committee, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 4.

³⁶ CEDAW Committee, General Recommendation No. 24 on the right to health, para. 14

³⁷ See e.g. Human Rights Committee, General Comment No. 28, para. 19; Human Rights Committee, Communication No. 180/1984, *L. G. Danning v. The Netherlands*, U.N. Doc. CCPR/C/OP/2 (1990); CESCR Committee, General Comment No. 21: Non Discrimination in Economic, Social and Cultural Rights, para. 31; CESCR, General Comment 22: The Right to Sexual and Reproductive Health (Article 12), UN Doc. E/C.12/GC/22 (2016), footnote 26.

³⁸ CEDAW Committee, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 18.

³⁹ CEDAW Committee, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 18; Human Rights Committee, *Toonen v. Australia* (488/1992), CCPR/C/50/D/488/1992 (1994), para. 8.7; *Young v. Australia* (941/2000), CCPR/C/78/D/941/2000 (2003), para. 10.4.; *X v. Colombia* (1361/2005), CCPR/C/89/D/1361/2005 (2007), para. 7.2; CESCR Committee, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), para. 32; Inter-American Court of Human Rights, *Case of Atala Riffo and daughters*, Judgment of February 24, 2012; *Case of Duque v. Colombia*, Judgment of February 26, 2016.

thus resulting in compounded and exacerbated forms of discrimination.⁴⁰ For example the **CEDAW Committee** has stated that, “*intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women [...] Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences.*”⁴¹

IV. INTERNATIONAL, REGIONAL AND DOMESTIC JURISPRUDENCE ON WOMEN’S RIGHT TO ACCESS IVF SERVICES FREE FROM DISCRIMINATION ON GROUNDS OF SEX, MARITAL STATUS AND SEXUAL ORIENTATION

32 In a number of decisions and recommendations international, regional and domestic Courts and human rights mechanisms have directly specified that the principles and rights outlined in Sections II and III above apply to women’s access to IVF services and have held that restrictions on access to IVF services, including those that, in law or effect, confine access to married women or women in heterosexual relationships, may contravene the prohibition on discrimination against women on grounds of sex, marital status or sexual orientation.

(a) Inter-American Court of Human Rights

33 The Inter-American Court of Human Rights has addressed the question of restrictions on access to IVF services in its 2012 decision in the *Case of Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*.⁴² In that case, which concerned a total ban on IVF under Costa Rican law, the Court considered whether access to IVF services was protected by the rights to private and family life and whether restrictions on access to IVF were discriminatory due to disproportionate impacts on women. The Court found that restrictions on access to IVF contravened the rights to private and family life and discriminated against women.⁴³

34 The applicants in that case before the Inter-American Court were different-sex couples in marital relationships. However the Court’s reasoning as to the manner in which restrictions on access to IVF services contravene the rights to private and family life and the prohibition of discrimination against women on grounds of sex is not confined to the circumstances before the Court. Rather the Court articulated a broad reasoning and series of broad principles that can be applied to all women who seek access to IVF services, regardless of their marital or family status.

35 First the Court addressed the content of the rights to privacy and family life as enshrined in the American Convention. It held that, “*private life includes the way in which individual views himself and how he decides to project this view towards others, and is an essential condition for the free development of the personality [...] Furthermore, the Court has indicated that motherhood is an essential part of the free development of a woman’s personality [...] Based on the foregoing, the*

⁴⁰ CEDAW General Recommendation No. 28, para. 18. See also: CESCR, General comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), para. 17; CESCR, General Comment No. 22, paras. 5, 23 and 30; Inter American Court of Human Rights, Case of Gonzales Lluy et al v. Ecuador, Judgment of September 1, 2015, para. 290.

⁴¹ CEDAW General Recommendation No. 28, para. 18.

⁴² Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica.

⁴³ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, para. 317.

*Court considers that the decision of whether or not to become a parent is part of the right to private life and includes, in this case, the decision of whether or not to become a mother or father in the genetic or biological sense.*⁴⁴

36 The Court also specified that, *“the right to private life is related to: (i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right. The right to reproductive autonomy is also recognized in Article 16(e) of the Convention for the Elimination of All Forms of Discrimination against Women [...] This right is violated when the means by which a woman can exercise the right to control her fertility are restricted.”*⁴⁵

37 The Court then went on to establish that access to IVF as a means to have biological children falls within this right: *“the right to reproductive health entails the rights of men and women to be informed and to have free choice of and access to methods to regulate fertility, that are safe, effective, easily accessible and acceptable. [...] Finally, the right to private life and reproductive freedom is related to the right to have access to the medical technology necessary to exercise that right. The right to enjoy the benefits of scientific progress has been internationally recognized [...] The right to have access to scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, de jure or de facto, to exercise the reproductive decisions that correspond to each individual[...] The Court has indicated that the decision to have biological children using assisted reproduction techniques forms part of the sphere of the right to personal integrity and to private and family life. In addition, the way in which this decision is arrived at is part of the autonomy and identity of a person [...].”*⁴⁶

38 The Court then considered whether restrictions on IVF have disproportionate impacts on women and found that they can give rise to discrimination against women based on sex: *“The Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, and the Committee on Economic, Social and Cultural have all recognized the concept of indirect discrimination. This concept implies that a law or practice that appears to be neutral has particularly negative repercussions on a person or group with specific characteristics. It is possible that whoever established this law or practice was unaware of these practical consequences and, in that case, the intention to discriminate is not essential [...] the Court considers that the ban on IVF can affect both men and women and may have differentiated disproportionate impacts owing to the existence of stereotypes and prejudices in society. In addition [...] the use of assisted reproduction technologies is especially related to a woman’s body. Even though the ban on IVF is not expressly addressed at women, and thus appears neutral, it has a disproportionately negative impact on women.”*⁴⁷

39 Although the applicants in the case were married male and female couples, the Court explicitly recognized that its reasoning had broader implications and that restrictions on access to IVF could violate the rights of women who are not married or in different-sex relationships: *“Moreover, women may resort to IVF without the need for a partner. The Court concurs with CEDAW when it*

⁴⁴ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, para. 143.

⁴⁵ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, para. 146.

⁴⁶ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, paras. 149-150 and 272.

⁴⁷ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, paras. 286, 294, and 299.

has emphasized that it is necessary to consider “the health rights of women from the perspective of women’s needs and interests in view of the distinctive features and factors that differentiate women from men, namely: (a) biological factors [...], such as [...] their reproductive function.”⁴⁸

(b) International Human Rights Mechanisms

- 40 In a number of concluding observations treaty-monitoring bodies have expressed concerns about restrictions on IVF that *de facto* or *de jure* restrict access to services to women who are married or in a relationship with a man:
- The **CEDAW Committee** has expressed concerns about laws and policies that prevent single women or women in same sex relationships from accessing IVF services and has called on a State to, “adopt legislative measures aimed at facilitating and expanding women’s right to decide freely and responsibly on the number of their children in accordance with article 16(e) of the Convention, and ensure access to assisted reproductive services, including in vitro fertilization, for all women without any restrictions.”⁴⁹
 - The **Human Rights Committee** has called on States parties to remove restrictions on access to IVF in order to allow individuals wishing to access such services to enjoy their right to privacy.⁵⁰ It has expressed concern at legal restrictions on access to IVF that affect same-sex couples and lesbian, gay, bisexual, transgender and intersex persons⁵¹ and has specified that “equal access to in vitro fertilization,” should be provided to lesbian, gay, bisexual, transsexual and intersex persons.⁵²
 - The **CESCR Committee** has outlined that, “the failure or refusal to incorporate technological advances and innovations in the provision of sexual and reproductive health services, such as [...] assisted reproductive technologies [...], jeopardizes the quality of care,” which States have an obligation under the ICESCR to ensure.⁵³

(c) National Courts in Australia and Spain

- 41 Courts in Australia and Spain have also held that legal restrictions on access to IVF that in law or effect limit access to women who are in marital or different-sex relationships are discriminatory and violate women’s rights.
- 42 In the case of *McBain v State of Victoria* the **Federal Court of Australia** found that the Constitution of Australia, national legislation and CEDAW required that women be permitted to access ART treatments, including IVF, without regard to their marital status or whether they have a partner.⁵⁴ Prior to the judgment the effect of domestic law on access to ART meant that in order to qualify for access a woman had to be in a marital or cohabiting relationship with a man. The Court found that this requirement was discriminatory on grounds of marital status, which it defined as *de jure* or *de facto* partnership status. The Court stressed that international human rights law protects women’s rights to self-determination, including the right to freely determine one’s social and cultural development, and guarantees the freedom to exercise these rights without

⁴⁸ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, para. 300.

⁴⁹ CEDAW Concluding Observations: Portugal, para. 45(c), CEDAW/C/PRT/CO/8-9 (2015).

⁵⁰ Human Rights Committee, Concluding Observations: Costa Rica, paras. 19-20, CCPR/C/CRI/CO/6 (2016).

⁵¹ Italy 2017 paras.10-11 (in its section on “Discrimination on the grounds of sexual orientation and gender identity”).

⁵² HRC, Concluding Observations: Italy (2017), paras. 10-11 (analyzing rights under, *inter alia*, Articles 2 and 23). The HRC has separately commented that legal standards that discriminated based on sexual orientation with regard to age of consent violated the right to equal protection of the right private life as well, reflecting the importance of sexual life and autonomy to Article 17 rights. See HRC, Concluding Observations: Austria, CCPR/C/79/Add.103 (1998), para. 13.

⁵³ CESCR, General Comment No. 22: The Right to sexual and reproductive health (article 12), UN Doc. E/C.12/GC/22 (2016), para. 21.

⁵⁴ *McBain v. State of Victoria* [2000] FCA 1009.

discrimination.⁵⁵ The Court determined that restrictions on access to ART had particular effects on women due to their unique reproductive function.⁵⁶ Considering both the biological and social aspects of assisted reproduction,⁵⁷ the Court concluded that *de facto* or *de jure* requirements that women have a partner in order to qualify for ART was not justifiable due to biological differences between the sexes and was discriminatory on grounds of marital status.⁵⁸

- 43 A court in **Spain** also addressed the impact, on single and lesbian women, of a Spanish regulation that required the presence of medical infertility⁵⁹ in order for women to qualify for ART treatment, including IVF. The Court ruled that such requirements which *de facto* preclude single or lesbian women from accessing ART services was impermissible discrimination.⁶⁰ The Court awarded a lesbian woman compensation for the moral damage she had suffered as a result of the regulation, ruling that the denial of treatment had infringed upon her dignity.⁶¹

V. CONCLUSION

- 44 As a result of biological realities, which determine women's ability to become pregnant, bear children and give birth, laws and policies that regulate reproduction, pregnancy and childbearing necessarily have particular and specific impacts on women. It follows that laws and policies that restrict access to services relevant to reproduction, pregnancy and childbirth must necessarily be suspect and subject to strict scrutiny. Where such restrictions, *de facto* or *de jure*, limit access to such services to women who are married or in different-sex relationships then they require even greater analysis, as they are likely to give rise to intersectional forms of discrimination on grounds of marital status or sexual orientation.
- 45 Since IVF is a procedure intended to assist reproduction and enable pregnancy and the carrying of children, and a procedure that is carried out on women's bodies, restrictions on access to IVF disproportionately impact women. Where access to IVF services is predicated, *de jure* or *de facto*, on a woman's marital or family status, this amounts to intersectional discrimination on the grounds of sex, marital status and/or sexual orientation.

⁵⁵ *Id.* at ¶ 12.

⁵⁶ *Id.* at ¶ 15.

⁵⁷ The Court reasoned that the ultimate objective of ART—to permit a person wishing to have a child to overcome “any one of a series of problems that may arise before, during or after intercourse, and which preclude fertilisation”—might pertain to either a man or a woman.*Id.* at ¶ 10.

⁵⁸ *Id.* at para. 20.

⁵⁹ The regulation specified a medical definition of infertility as the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse. This definition accords with the World Health Organization's (WHO) official definition of medical infertility. *See* WHO, “Multiple definitions of infertility,”

<http://www.who.int/reproductivehealth/topics/infertility/multiple-definitions/en/> (accessed 8 June 2017).

⁶⁰ Juzgado de lo Social nº 18 de Madrid, Sentencia Nº 319/15, para. QUINTO.

⁶¹ *Id.* at § SEPTIMO.