Application No. 22612/15, *Charron & Merle-Montet* v. *France*
European Court of Human Rights

WRITTEN COMMENTS OF FIDH, ILGA-EUROPE, NELFA, ECSOL, LDH, ADHEOS, AND ADFH, submitted on 12 June 2017

1. Prof. Robert Wintemute, School of Law, King's College London, respectfully submits these Written Comments on behalf of FIDH (*Fédération Internationale des ligues des Droits de l'Homme*), ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), NELFA (Network of European LGBTIQ* Families Associations), ECSOL (European Commission on Sexual Orientation Law), LDH (*Ligue des Droits de l'Homme*), ADHEOS (*association d'Aide, de Défense Homosexuelle, pour l'Egalité des Orientations Sexuelles*), ADFH (*Association Des Familles Homoparentales*). Their interest and expertise are set out in their "Application for leave" of 10 April 2017, granted by the President of the Court on 16 May 2017 (Rule 44(3), Rules of Court).

I. Donor insemination is legal in France and has been available, since at least 1994,[1] to unmarried different-sex couples.

2. This application concerns a single technique of medically assisted procreation (*assistance médicale à la procréation*): insemination of a woman with the sperm of an anonymous male donor ("donor insemination"). Unlike surrogacy (*gestation pour autrui*), which is prohibited to all couples in France (different-sex or same-sex), donor insemination is a legally available technique that is frequently used, but is restricted to different-sex couples, whether they are married or living in a civil solidarity pact (*pacte civil de solidarité*) or cohabiting without any formal registration (*concubinage*). All lesbian couples (couples consisting of two women) are excluded, whether they are married or living in a civil solidarity pact (*pacte civil de solidarité*) or cohabiting without any formal registration (*concubinage*).

3. This application is therefore very different from *S.H. & Others* v. *Austria* (Grand Chamber, 3 November 2011), which concerned two techniques of medically assisted procreation which were prohibited to all couples in Austria: (i) egg donation, and (ii) *in vitro* fertilisation using donor sperm. It more closely resembles *Dickson* v. *United Kingdom* (Grand Chamber, 4 December 2007), in which a prisoner was allowed neither to inseminate his wife through sexual intercourse, nor to export his sperm from the prison so that his wife could be inseminated medically (a technique that was legal in the United Kingdom).

4. The decision to apply for a legally available opportunity to become a genetic parent clearly falls within the ambit of Article 8 (respect for private and family life), whether taken on its own or in conjunction with Article 14 (non-discrimination): *Evans* v. *United Kingdom* (Grand Chamber, 10 April 2007), paras. 71-72; *Dickson* v. *United Kingdom* (Grand Chamber, 4 December 2007), para. 66; *S.H. & Others* v. *Austria* (Grand Chamber, 3 November 2011), para. 82 ("the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8, as such a choice is an expression of private and family life").

[1] *Loi n°94-654 du 29 juillet 1994 relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal.*

II. The Court's consistent case law prohibits differences in treatment between same-sex couples and unmarried different-sex couples.

5. The Court has made it clear that differences in treatment based on sexual orientation are analogous to differences in treatment based on race (*Smith & Grady* v. *United Kingdom*, 27 September 1999, para. 97), religion (*Mouta* v. *Portugal*, 21 December 1999, para. 36), and sex (*L. & V.* v. *Austria*, 9 January 2003, para. 45), and can only be justified by "particularly serious reasons" or "particularly convincing and weighty reasons" (*X & Others* v. *Austria*, Grand Chamber, 19 February 2013, para. 99). When justifying differences in treatment based on sexual orientation, "the margin of appreciation afforded to States is narrow ... It must ... be shown that it was necessary in order to achieve [the State's] aim to exclude certain categories of people ..." (*Karner* v. *Austria*, 24 July 2003, para. 41).

6. In *Karner* and at least six subsequent judgments, *Kozak* v. *Poland* (2 March 2010), *P.B. & J.S.* v. *Austria* (22 July 2010), *J.M.* v. *United Kingdom* (28 Sept. 2010), *X & Others* v. *Austria* (Grand Chamber, 19 February 2013), *Vallianatos & Others* v. *Greece* (Grand Chamber, 7 November 2013), *Pajić* v. *Croatia* (23 February 2016), the Court has found discrimination, violating Article 14 combined with another Convention right, where a same-sex couple was denied a right or opportunity granted to unmarried different-sex couples. These Written Comments will demonstrate that there is no reason for the Court not to apply *Karner* and the subsequent judgments, especially *X & Others* (which concerned the legal impossibility of the adoption of a child by his mother's female partner), to a difference in treatment based on sexual orientation that results in exclusion from a legally available technique of medically assisted procreation, such as donor insemination.

7. This application concerns an obvious difference in treatment based on sexual orientation. The reference in Article L. 2141-1 of the Public Health Code (*Code de la santé publique*) to "the man and the woman forming the couple" ("*[l]'homme et la femme formant le couple*") expressly excludes lesbian couples (couples consisting of two women). The difference in treatment is much clearer than in *X & Others*, in which an analysis of the complex wording of the Austrian legislation was required to expose the difference in treatment based on sexual orientation (paras. 113-131).

III. The situation of a lesbian couple is relevantly similar (or comparable) to the situation of an unmarried different-sex couple who request donor insemination, so that the female (but not the male) partner can become the genetic parent of a child.

8. According to Article L. 2141-1 of the Public Health Code (*Code de la santé publique*), donor insemination seeks to "remedy the infertility of a couple" ("*remédier l'infertilité d'un couple*"). The Article therefore requires that "the pathological character of the infertility must be medically diagnosed" ("*[l]e caractère pathologique de l'infertilité doit être médicalement diagnostiqué*").

9. This use of the words "remedy" and "pathological" is misleading. Although the male member of an unmarried different-sex couple might have a "pathology", in that he cannot produce fertile sperm in the same way as the majority of men, donor insemination is not a medical "remedy" for his condition, which remains unchanged after the donor insemination. It is rather a social expression of

sympathy for the couple's situation. French legislation respects the couple's commitment to each other, and does not insist that the female partner end their relationship and find another man who produces fertile sperm. Their desire that the female partner (but not the male partner) should become the genetic parent of a child is considered "normal" and "natural". French legislation facilitates their desire by granting them access to donor insemination, instead of insisting that their only option is to apply to adopt a child, of which neither partner would be a genetic parent.

10. In the case of a lesbian couple,[2] French legislation does not respect their commitment to each other, and considers their desire that one of the female partners should become the genetic parent of a child to be "abnormal" and "unnatural". By excluding them from donor insemination, French legislation insists that their only options are: (i) to end their relationship and pursue genetic parenthood through relationships with men who produce fertile sperm; (ii) to risk a sexually transmitted infection by inseminating themselves with the untested sperm of a known male donor; (iii) to incur financial costs and forego continuity of care by seeking donor insemination in another European country, where lesbian women have access as individuals or as couples; or (iv) to abandon their wish to conceive a child, and instead apply to adopt a child from within or outside Europe, which might be very difficult, because many countries will not place a child with a same-sex couple.

11. In *X & Others* v. *Austria* (Grand Chamber, 19 February 2013), para. 112, the Court accepted that "the applicants [a lesbian couple] … were in a relevantly similar situation to [an unmarried] different-sex couple in which one partner wished to adopt the other partner's child". Likewise, the situation of a lesbian couple who request donor insemination, so that one of the female partners can become the genetic parent of a child, is relevantly similar (or comparable) to the situation of an unmarried different-sex couple who request donor insemination, so that the female (but not the male) partner can become the genetic parent of a child.

IV. Particularly serious reasons, or particularly convincing and weighty reasons, do not exist for the difference in treatment between lesbian couples and unmarried different-sex couples.

A. The burden of providing particularly serious reasons is on the Government.

12. In *X & Others* v. *Austria* (Grand Chamber, 19 February 2013), para. 141, the Court noted that "the burden of proof is on the Government. It is for the Government to show that the protection of the family in the traditional sense and, more specifically, the protection of the child's interests require the exclusion of same-sex couples from second-parent adoption, which is open to unmarried heterosexual couples". Consequently, it is for the Government to show that the achievement of a legitimate aim requires the exclusion of lesbian couples from donor insemination, which is open to unmarried different-sex couples.

13. In *X & Others*, para. 136, the Court also noted that "there is no obligation under Article 8 of the Convention to extend the right to second-parent adoption to unmarried couples … Nonetheless, Austrian law allows second-parent adoption in unmarried different-sex couples. The Court therefore has to examine whether refusing

[2] In the case of gay couples, ie, couples consisting of two (non-transgender) men, pregnancy through donor insemination is of course not physically possible.

that right to (unmarried) same-sex couples serves a legitimate aim and is proportionate to that aim". Similarly, there might be no obligation under Article 8 to extend the right to donor insemination to unmarried couples, but French legislation grants unmarried different-sex couples access to donor insemination.

B. There is no justification for discrimination against families composed of a same-sex couple and the children they are raising together, including lesbian couples who have had (or wish to have) children through donor insemination.

14. The strongest and most persistent prejudice against the lesbian and gay minority in Europe is that they represent a threat to the well-being of children. This prejudice, held by many members of the heterosexual majority, is reflected in decisions of national courts denying lesbian women and gay men custody of their own children, or the possibility of adopting a child as an unmarried individual. It also appears in national legislation that fails to provide for the reality that, despite the legal obstacles and social prejudice they face, same-sex couples are raising children. Families composed of a same-sex couple and their children exist across Europe, but often face unnecessary problems in their daily lives, or anxieties about their futures, because their children are denied the same possibilities as the children of different-sex couples to establish a legal relationship with the two adults who are raising them. The Grand Chamber's judgment in *X & Others* v. *Austria* (19 February 2013) has helped to increase the availability of second-parent adoption to same-sex couples.

15. In three judgments since 1999, the Court has confronted the social prejudice against lesbian women and gay men raising children, and responded with clear legal principles rejecting this prejudice. In *Mouta* v. *Portugal* (21 December 1999), the Court considered a national court's decision to transfer custody of a girl from her gay father to her heterosexual mother. The national court found it unnecessary "to determine whether homosexuality is ... an illness" because, in any case, "it is an abnormality" (para. 34). The Court unanimously found a violation of Article 14 combined with Article 8, because the national court "36. ... made a distinction based on considerations regarding the applicant's sexual orientation, ... which is not acceptable under the Convention". In *E.B.* v. *France* (22 January 2008), the Court extended *Mouta* to the blanket exclusion of lesbian women and gay men from the possibility of adopting a child as an unmarried individual (in countries where it exists for unmarried heterosexual individuals).

16. It is implicit in *Mouta* and *E.B.* that the Court saw no reason why a child should not be raised by a lesbian or gay individual living with their same-sex partner (as Mr. Mouta and Ms. E.B. were doing), because lesbian and gay individuals and same-sex couples are just as capable as heterosexual individuals and different-sex couples of providing the care and upbringing a child needs.[3] It is also implicit that the

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[3] For the scientific studies, and statements by professional bodies and child welfare organisations, cited to the Court in *E.B.*, see the third-party interveners' Written Comments, submitted on 3 June 2005, http://ilga-europe.org/sites/default/files/Attachments/written_comments_on_e.b._v._france.pdf. See also "*Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften*" (2009), https://www.bmjv.de/SharedDocs/Archiv/Downloads/Forschungsbericht_Die_Lebenssituation_von_Kindern_in_gleichgeschlechtlichen_Lebenspartnerschaften.pdf?__blob=publicationFile&v=3; "Same-Sex and Different-Sex Parent Households and Child Health Outcomes: Findings from the National Survey of Children's Health", (2016) 37 *Journal of Developmental & Behavioral Pediatrics* 179; "A Population-Based Comparison of Female and Male Same-Sex Parent and Different-Sex Parent Households", (2017) Family Process, http://onlinelibrary.wiley.com/doi/10.1111/famp.12278/full.

Court rejected the concerns that are most often raised regarding the well-being of the children of lesbian and gay parents. But, unlike the Inter-American Court of Human Rights, the Court did not expressly reject these concerns.

17. On 20 March 2012, the Inter-American Court of Human Rights published its judgment of 24 February 2012 in *Atala* v. *Chile*.[4] The Inter-American Court (by 6 votes to 0) found multiple violations of the American Convention on Human Rights in a case very similar to *Mouta*: the Supreme Court of Chile had transferred custody of three girls from their lesbian mother to their heterosexual father, because she and her daughters were living with her female partner. Most importantly, the Inter-American Court provided an express and detailed rejection of common concerns regarding the well-being of the children of lesbian and gay parents: (a) "alleged social discrimination" against them; (b) "alleged confusion of sexual roles"; and (c) a "right to a 'normal and traditional' family".

18. With regard to "alleged social discrimination" by third parties against the children (eg, at school or in the neighbourhood), the Inter-American Court ruled that: "119. ... to justify a distinction in treatment ..., based on the alleged possibility of social discrimination ... that the minors might face due to their parents' situation cannot be used as legal grounds for a decision. While it is true that certain societies can be intolerant toward a person because of their race, gender, nationality, or sexual orientation, States cannot use this as justification to perpetuate discriminatory treatments. ... 121. ... [W]ith regard to the argument that the child's best interest might be affected by the risk of rejection by society, ... potential social stigma due to the mother or father's sexual orientation cannot be considered as a valid 'harm' for the purposes of determining the child's best interest."

19. At para. 120, the Inter-American Court cited *Palmore* v. *Sidoti*, 466 U.S. 429 at 433 (1984), in which the U.S. Supreme Court found unconstitutional racial discrimination where a court had transferred custody of a child to her white father, because her white mother had remarried a black man rather than a white man: "There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin. The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

20. With regard to "alleged confusion of sexual roles", the Inter-American Court found that: "124. ... the determination of harm must be supported by ... reports from experts and researchers in order to reach conclusions that do not result in discriminatory decisions. 125. Indeed, the burden of proof here falls on the State, which must demonstrate that the judicial decision ... has been based on the existence of clear, specific and real harm to the children's development. ... Otherwise, there is a risk of basing the decision on stereotypes ... exclusively associated with the unfounded preconception that children raised by homosexual couples would necessarily have difficulties in defining gender or sexual roles. ... 128. ... [A] number of scientific reports considered representative and authoritative in the field of social sciences ... conclude that living with homosexual parents *per se* does not affect a

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[4] See http://www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf (paras. 115-146).

child's emotional and psychological development. These studies agree that: ... ii) the psychological development and emotional well-being of girls or boys raised by gay fathers or lesbian mothers are comparable to those of girls or boys raised by heterosexual parents; ... iv) the sexual orientation of the mother or father does not affect children's development in terms of ... their sense of themselves as male or female, their gender role, behavior and/or sexual orientation ... 129. The Court notes that the American Psychological Association ... has stated that existing studies on this matter are 'impressively consistent in their failure to identify any deficits in the development of children raised in a lesbian or gay household … [T]he abilities of gay and lesbian persons as parents and the positive outcome for their children are not areas where credible scientific researchers disagree'."

21. With regard to a "right to a 'normal and traditional' family", the Inter-American Court observed, citing *Mouta* and *Karner*: "142. ... the American Convention does not define a limited concept of family, nor does it only protect a 'traditional' model of the family. 145. ... the [Chilean court's] language ... regarding the girls' alleged need to grow up in a 'normally structured family ... appreciated within its social environment', ... not in an 'exceptional family', reflects a limited, stereotyped perception of the concept of family, [with] no basis in the Convention ..." The Inter-American Court therefore concluded: "146. ... although [the Chilean courts] sought to protect the best interests of the girls ... , it was not demonstrated that the grounds stated in the decisions were appropriate to achieve said purpose, since the [Chilean courts] did not prove ... that Ms. Atala's cohabitation with her partner had a negative effect on the girls' best interest ... On the contrary they used abstract, stereotyped, and/or discriminating arguments to justify their decisions ... , for which reason said decisions constitute discriminatory treatment against Ms. Atala. ..."

22. A year after *Atala*, in *X & Others* v. *Austria* (Grand Chamber, 19 February 2013), it was implicit again, as in *Mouta* and *E.B.*, that the Court saw no reason why a child should not be raised by a lesbian or gay individual living with their same-sex partner (as the applicants in all three cases were doing), because lesbian and gay individuals and same-sex couples are just as capable as heterosexual individuals and different-sex couples of providing the care and upbringing a child needs.

23. The Grand Chamber observed (para. 142) that "[t]he Government did not adduce any specific argument, any scientific studies or any other item of evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs. On the contrary, they conceded that, in personal terms, same-sex couples could be as suitable or unsuitable as different-sex couples when it came to adopting children." The Grand Chamber also referred (para. 146) to "the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes."

C. As in *X & Others* v. *Austria*, French legislation is incoherent.

24. In *X & Others* v. *Austria* (19 February 2013), the Grand Chamber noted that "the Austrian legislation appears to lack coherence. Adoption by one person, including one homosexual, is possible. If he or she has a registered partner, the latter has to consent … The legislature therefore accepts that a child may grow up in a family based on a same-sex couple, thus accepting that this is not detrimental to the child. Nevertheless, Austrian law insists that a child should not have two mothers or two fathers". French legislation is similarly incoherent, if not spiteful, in making it as

difficult as possible for a lesbian couple to have a child. A lesbian couple may marry in France, request donor insemination in Belgium, England or Spain, give birth in France, and then seek permission for the wife of the birth mother to adopt the child and become her or his second legal mother. But under no circumstances may the donor insemination that led to the child's birth take place on French soil.

25. Of the 13 Council of Europe member states that allow same-sex couples to marry and adopt children as a couple (Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom), only France excludes lesbian women from donor insemination, both as individuals and as couples. Like France, Portugal restricted donor insemination to different-sex couples (married and unmarried) until 2016. But its legislation now grants access to lesbian couples and to women without a partner (whether male or female), and does not require a diagnosis of infertility:[5]

"*Artigo 4.º*

3 - As técnicas de PMA podem ainda ser utilizadas por todas as mulheres independentemente do diagnóstico de infertilidade [Techniques of medically assisted procreation (MAP) may be used by any woman with or without a diagnosis of infertility].

Artigo 6.º

1 - Podem recorrer às técnicas de PMA os casais de sexo diferente ou os casais de mulheres, respetivamente casados ou casadas ou que vivam em condições análogas às dos cônjuges, bem como todas as mulheres independentemente do estado civil e da respetiva orientação sexual [Techniques of MAP may be used by different-sex or female-female couples, married or cohabiting, as they may be used by any woman without regard to her marital status or her sexual orientation.]"

D. Developments in other Council of Europe member states support a narrow margin of appreciation.

26. In addition to the Opinions of the *Haut Conseil à l'Egalité entre les femmes et les hommes* (26 May 2015) and the *Défenseur des droits* (3 July 2015), the Court should also be aware of the Opinion of the Austrian Bioethics Commission of 2 July 2012 on "Reform of the Reproductive Medicine Act".[6] An earlier version of this Opinion (16 April 2012) was followed by the Austrian Constitutional Court in its judgment of 10 December 2013, which struck down legislation granting access to donor insemination to unmarried different-sex couples, but excluding lesbian couples, similar to the existing legislation in France and the former legislation in Portugal.[7]

27. By 15 votes to 6, the Austrian Bioethics Commission recommended (at page 108) that: "Access to reproductive medicine should be made available to ... lesbian couples." The Commission reasoned (pages 93-97) as follows:

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[5] *Lei n.º 17/2016 de 20 de junho, Alarga o âmbito dos beneficiários das técnicas de procriação medicamente assistida*, https://dre.pt/home/-/dre/74738646/details/maximized?p_auth=57fsVbIR.
[6] http://www.bka.gv.at/DocView.axd?CobId=51083 (published in German and English).
[7] VfGH 10.12.2013, http://www.menschenrechte.ac.at/dokumentation/2013/VfGH/VfGH_10_12_2013.pdf.

"Just as an adoption creates a parent-child relationship that is not based on a biological relation, ... reproductive medicine, too, replaces a family relationship that is built on natural reproduction. The fact that—unlike with adoption—the legislator permits only heterosexual couples the use of reproductive medicine is therefore inappropriate.

The exclusion of homosexual couples from the use of reproductive medicine indeed raises constitutional concerns. With this ban, the Reproductive Medicine Act not only intervenes in the reproductive freedom of the affected couples guaranteed by Art 8 ECHR. An even more serious aspect is that this ban disadvantages people purely on the grounds of their sexual orientation; in other words, based on a characteristic that—similar to e.g. gender, skin colour or religion—significantly shapes a person's identity, that cannot reasonably be changed and that still prompts parts of society to the prejudiced allocation of specific characteristics. According to the Constitution, legal disadvantages based on such characteristics are subject to suspicion of discrimination and the legislator is only to allow them if such a disadvantage, from an unprejudiced viewpoint, is indispensable for attaining an objective of overriding importance. ... A number of reasons are given for the exclusion of homosexual couples from reproductive medicine. As the Bioethics Commission has already pointed out in its Opinion submitted to the Constitutional Court, however, they do not fulfil the requirements of the prohibition of discrimination:

... 3. The creation of 'unusual' relationships could, however, justify the exclusion of homosexual couples from the use of reproductive medicine if these relationships were to entail any real and grave risks to the well-being of the future children. While such risks have indeed sometimes been claimed, no scientific evidence exists to support these claims. On the contrary, as a number of representative studies based on observations made over a period of time have shown, children from homosexual partnerships are not categorically different from children who grow up with heterosexual couples. Here, mention should be made of just one example from the recent past: a study commissioned by the German Federal Ministry of Justice examined 693 children and young people, and 1,059 parents (interviews were partly carried out on the phone, and partly in person), as well as 119 children and young people and 29 experts who were not the parents (inter alia from teaching professions and counselling centres). The study came to the conclusion that children and young people brought up by same-sex parenting develop just as well as children who grow up in other family forms, and that what is important for the development of the children is not the structure of the family but the relationships between the family members. ...
In view of the broadly substantiated current state of research, albeit documented here only by some exemplary studies, the overall assumption that children of homosexual couples are hindered in their development, appears to be a prejudice, as long as such adverse effects have not been proved through any valid and representative counter-studies. Given this fact, objections of a developmental-psychological nature cannot be considered appropriate to justify the exclusion of homosexual couples from using reproductive medical treatments.

4. Children from homosexual life partnerships sometimes experience discrimination that may be emotionally distressing. Reactions from sectors of society that are based on prejudice and intolerance, however, provide no justification for preventing

homosexual couples from using reproductive medicine. Otherwise, everyone who, due to their migration background, skin colour, religion, or because of a disability, belongs to a discriminated group could be banned from medically assisted reproduction following the same rationale. Preventing procreation only because children could be exposed to social discrimination is unacceptable as a general principle.

... 9. Unfounded is also the concern that, in the interests of non-discrimination, if reproductive medicine were to be made available to lesbian couples, it would also have to be allowed for male homosexual couples, which would entail the approval of surrogacy. As long as the general ban on surrogacy as it (currently) stands is explicitly linked neither to sexual orientation nor to gender, it does not target homosexual male couples. ... the fact that homosexual male couples—unlike lesbian couples—can only reproduce with the help of a surrogate mother establishes a difference between them that is not based on prejudices but on biological conditions. Furthermore, this difference is significant for the objective of protecting women from the right inherent in surrogate motherhood of having to give away a child, as well as from possible exploitation. This significant difference justifies maintaining the ban on surrogacy and thus, in effect, excluding only homosexual male couples from the use of medically assisted reproduction. This ban would therefore not constitute any discrimination of homosexual male couples. ...
[emphasis added]
From an unprejudiced viewpoint, **the exclusion of homosexual [female] couples from the use of reproductive medicine can therefore not be justified** ..."

28. Access to donor insemination in the Council of Europe member states can be summarised as follows:[8]

(1) ACCESS FOR SINGLE WOMEN[9] OR LESBIAN COUPLES OR BOTH:
26 Council of Europe member states: Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, Georgia, Greece, Hungary, Iceland, Ireland, Latvia, Luxembourg, Moldova, Montenegro, Netherlands, Norway, Portugal, Russian Federation, Spain, Sweden, Ukraine, United Kingdom

(2) ACCESS FOR UNMARRIED DIFFERENT-SEX COUPLES BUT NOT LESBIAN COUPLES:
6 Council of Europe member states: Bosnia-Herzegovina, Czech Republic, France, Italy, Poland, Slovenia

(3) ACCESS FOR MARRIED DIFFERENT-SEX COUPLES ONLY[10]
14 Council of Europe member states: Andorra, Azerbaijan, Germany, Liechtenstein, Lithuania, Macedonia, Malta, Monaco, Romania, San Marino, Serbia, Slovakia, Switzerland, Turkey (the situation in Albania is not clear)

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[8] ILGA-Europe, Rainbow Europe Index 2017, http://www.ilga-europe.org/sites/default/files/Attachments/rainbow_europe_index_2017.pdf, as modified by a survey of members of ECSOL, http://www.sexualorientationlaw.eu/members, on 9 June 2017.

[9] In some member states where single women have access, a lesbian woman might have to conceal the fact that she is living with a female partner.

[10] No available information indicates that category (1) or (2) applies. In a few member states, it is possible that donor insemination is illegal for any woman, or that it does not exist in practice.

29. A judgment of the Court requiring that lesbian couples be granted the same access to donor insemination as unmarried different-sex couples would affect the legislation or practice relating to donor insemination in only a small number of member states (group (2) above).

E. Developments in other democratic societies support a narrow margin of appreciation.

30. In the United States, Canada, South Africa, Australia and New Zealand, donor insemination is generally available to lesbian couples. For example, in South Africa, the Constitutional Court ruled in 2003 that, to avoid discrimination based on sexual orientation against a lesbian couple, the words "or permanent same-sex life partner" had to be read into legislation on birth registration, which (after donor insemination) only allowed the birth mother's "husband" to be registered as the child's second legal parent.[11] Similarly, the Supreme Court of California ruled in 2008 that a private medical clinic's refusal to inseminate a lesbian woman was discrimination based on sexual orientation contrary to California legislation.[12]

31. It is likely that, if they were faced with a difference in treatment in legislation, excluding lesbian couples but not unmarried different-sex couples from donor insemination, all of the following courts would find discrimination: the Inter-American Court of Human Rights, the Supreme Court of the United States, the Supreme Court of Canada, the Constitutional Court of Colombia, and the Constitutional Court of South Africa.[13]

32. As for the incoherence of French legislation (lesbian couples have access to marriage and adoption but not donor insemination), it does not appear to exist in any country outside of Europe in which same-sex couples may marry and adopt children: Argentina, Brazil, Canada, Colombia, Mexico, New Zealand, South Africa, the United States, or Uruguay.

VI. Conclusion

33. In the majority of Council of Europe member states, and in other democratic societies, lesbian women have access to donor insemination, as individuals or as couples. It is the most common means for a lesbian woman to become a genetic parent, more common than adoption of a genetically unrelated child. Excluding a lesbian couple from the opportunity to request donor insemination amounts to saying that it is better for a child not to be born at all, and never to live, than to be born to a lesbian couple.

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[11] Case CCT 46/02, *J. & B.* v. *Director General: Department of Home Affairs* (28 March 2003), http://www.saflii.org/za/cases/ZACC/2003/3.rtf. The issue of automatic parenthood for the birth mother's female partner, without the need for a second-parent adoption, is not raised by this application. It was considered by the Court in *Boeckel* v. *Germany* (7 May 2013) (inadmissible).

[12] *North Coast Women's Care Medical Group* v. *San Diego Superior Court* (18 August 2008), http://scocal.stanford.edu/opinion/north-coast-womens-care-medical-group-v-san-diego-superior-court-33046.

[13] See *Atala* (n 4 above); *Obergefell* (Sup Ct US, 2015); *M.* v. *H.* (Sup Ct Can, 1999); *Sentencia* SU214/16 (Con Ct Colombia, 2016); *J. & B.* (n 11 above).