



# Convention on the Elimination of All Forms of Discrimination against Women

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## Committee on the Elimination of Discrimination against Women Seventy-fifth session

### Decision adopted by the Committee under article 4 (2) (c) of the Optional Protocol, concerning communication No. 138/2018\*\*\*

<i>Communication submitted by:</i>	S.F.M. (represented by counsel, Francisca Fernández Guillén)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	30 October 2018
<i>References:</i>	Decision taken pursuant to rule 69 of the Committee's rules of procedure, transmitted to the State party on 6 December 2018 (not issued in document form)
<i>Date of adoption of decision:</i>	28 February 2020
<i>Subject matter:</i>	Obstetric violence
<i>Procedural issues:</i>	Exhaustion of domestic remedies; abuse of rights
<i>Articles of the Convention:</i>	2, 3, 5 and 12
<i>Articles of the Optional Protocol:</i>	4 (1) and 2 (c) and (d)

\* Adopted by the Committee at its seventy-fifth session (10 to 28 February 2020).

\*\* The following members of the Committee participated in the consideration of the present communication: Gladys Acosta Vargas, Hiroko Akizuki, Tamader Al-Rammah, Nicole Ameline, Gunnar Bergby, Marion Bethel, Esther Eghobamien-Mshelia, Naéla Gabr, Hilary Gbedemah, Nahla Haidar, Dalia Leinarte, Rosario G. Manalo, Lia Nadaraia, Aruna Devi Narain, Bandana Rana, Rhoda Reddock, Elgun Safarov, Wenyan Song, Genoveva Tisheva, Franceline Toé Bouda and Aicha Vall Verges. In accordance with article 60 (c) of the Committee's regulations, Ana Peláez Narváez did not participate in the consideration of the present communication.



**Background**

1. The author of the communication is S.M.F., a Spanish national born on 25 June 1976. The author maintains that Spain violated her rights under articles 2, 3, 5 and 12 of the Convention through the obstetric violence of which she was a victim in hospital during childbirth. The Convention and the Optional Protocol thereto entered into force for the State party on 4 February 1984 and 6 October 2001, respectively. The author is represented by counsel, Francisca Fernández Guillén.

**Facts as submitted by the author***The author's pregnancy, delivery and post-partum period*

2.1 In December 2008, the author became pregnant. Her pregnancy was normal and well-monitored, and reached full term without problems. On 26 September 2009, when the author was 39 weeks and six days pregnant and having prodromal contractions,<sup>1</sup> she went to a public hospital at 1.45 p.m. simply to receive guidance, as she was not in the active phase of labour. When she arrived at the hospital, however, she was subjected to a series of interventions, all of which were unnecessary and were carried out without providing her with information or obtaining her consent. These interventions had a significant adverse effect on her physical and mental health, her psychological integrity and the health of her baby. She was admitted and a first digital vaginal examination was carried out immediately.<sup>2</sup> She was then moved to another room that contained six other women and that her partner was not allowed to enter. An hour later, she underwent a second vaginal examination; subsequently, at 5.20 p.m., a third vaginal examination was performed, without her consent being sought.

2.2 In the early hours of the morning of 27 September 2009, a fourth digital vaginal examination was performed. A fifth examination was carried out at 10.15 p.m. that day, and a sixth less than an hour later.

2.3 At 1.40 a.m. on 28 September 2009, the author underwent a seventh digital vaginal examination, which indicated that she was entering the active phase of labour. According to the author, this would have been the right time for her to be admitted to hospital. However, she had at this point been in hospital for 36 hours and had already undergone seven digital vaginal examinations, putting her at risk of infection.<sup>3</sup>

2.4 Around an hour later she underwent an eighth vaginal examination, and after a further 25 minutes she was given intravenous oxytocin to induce, stimulate or bring forward labour without her consent being requested and, therefore, without being informed of oxytocin's adverse effects. The oxytocin led to an increase in pain and to convulsions, frequent dark vomiting, shivering and fever, and the fetal monitoring recordings became worrying. At 5.15 a.m., a ninth vaginal examination was performed while she continued to suffer from vomiting and fever. Lastly, just before 6 a.m., she was transferred to the delivery room, where she underwent a tenth vaginal examination.

2.5 The author asked to sit up to give birth but was not allowed to do so. Without explanation or information, the medical staff made a cut in her vagina with a pair of scissors and extracted her daughter with a ventouse.

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<sup>1</sup> Before labour itself begins, there is a stage at which women may have mild, irregular contractions that are not part of labour but prepare the body for labour. Some women do not even notice them.

<sup>2</sup> A digital vaginal examination consists in the insertion of one or more fingers into a pregnant woman's vagina to measure the parameters of the dilation phase.

<sup>3</sup> See Ministry of Health and Social Policy, *Guía de práctica clínica sobre la atención al parto normal*, p. 63.

2.6 Within seconds of the birth, the author's daughter was taken away and the author was told that she would not be able to see her until noon the next day. The daughter was taken to the neonatal unit with a temperature of 38.8°C, caused by E. coli bacteria. As has been emphasized by scientific studies that warn against excessive digital vaginal examinations, contamination of this kind was probably the result of the 10 examinations to which the author was subjected, which carried bacteria from her vagina into the amniotic sac. The author was in a state of shock while her episiotomy was stitched up and the placenta was removed. Manual removal of the placenta can damage the mother's pelvic floor and internal organs, and should therefore be performed no less than 30 minutes after birth, and only when the placenta is not delivered naturally and after assistive measures have been attempted. In the author's case, the required 30 minutes had not elapsed and assistive measures had not been tried.

2.7 The daughter remained in the neonatal unit for seven days to receive antibiotics that could have been administered without her being separated from her mother. During this time, the author was allowed to be with her daughter for only 15 minutes every three hours, and the father was allowed to be with the baby for only two 30-minute periods per day. In addition, the baby was bottle-fed without the permission of the mother, who wanted to breastfeed her daughter but was not allowed to do so because "mothers ringing the bell are a nuisance".

2.8 These events gave the author post-traumatic stress disorder, for which she has had to have psychological therapy. In particular, her separation from her daughter after the birth severely damaged the relationship between the baby and her parents. The father declared during the hearing that "after eight days, we arrived home with our daughter, and she and the two of us were strangers. We hadn't bonded". As the author stated in court, "going into hospital was like going into a car wash or onto an assembly line; everyone does things to you in a mechanical way. The woman does nothing, but she comes out of the car wash with a baby. Although the same thing happens in other types of medical assistance, like, for example, a heart operation, where the patient doesn't have to do anything and is prepared for passivity, in childbirth a woman is physically and psychologically prepared to give birth, not for others to deliver the baby for her. I felt disempowered, with no self-esteem. I had to create the bond with my daughter the hard way, rationally, without the help of the complex natural neurological and hormonal mechanisms that make mothers fall in love with their newborn children." The psychological report states that it took the parents a year to work through the feeling of not having bonded with their daughter at birth. The events that occurred interfere with and impair the author's ability to function in all areas of her life, as she suffers from anxiety, insomnia and repeated memories of scenes experienced during labour.

2.9 The author also needed specialized physiotherapy to rehabilitate her pelvic floor and repair the damage caused by the episiotomy, which made it impossible for her to have sexual relations for two years.

2.10 The author characterizes the events described as "obstetric violence". She defines obstetric violence as the serious human rights violations suffered by women

at the hands of reproductive health service providers and the neglect, mistreatment and physical and verbal abuse that they may receive during and after childbirth.<sup>4</sup>

*Exhaustion of domestic remedies*

2.11 The author maintains that she has exhausted all domestic remedies available to her to seek redress for the poor obstetric care she received during childbirth.

2.12 On 24 June 2010, the author filed complaints with the Xeral-Calde Hospital in Lugo and with the quality and patient services unit of the Galician Health Service. She received no response to either. On 10 October 2010, the author filed a complaint with the hospital's ethics committee, but this complaint also went unanswered.

2.13 On 21 December 2011, the author submitted a claim invoking the financial responsibility of the public administration for the functioning of health services. In her statement of claim, she described the events that had occurred since her admission to hospital, as well as the various shortcomings in the obstetric care she received, which included the administration of synthetic intravenous oxytocin without indication, information or consent; the over-frequent digital vaginal examinations; the fact that her partner was not allowed to be with her even though constant emotional support during labour is considered a fundamental women's right; the fact that she was not allowed to move about, even though the World Health Organization (WHO) recommends that women walk around during dilation and be allowed to decide freely which position to adopt during delivery; the fact that she was forced to remain in the lithotomy position despite her request to sit up; the instrumental delivery with the ventouse and the episiotomy, which were performed without explanation or information; the manual removal of the placenta without the necessary preparations; her daughter's admission to the neonatal unit for seven days; and the interference with breastfeeding.

2.14 On 18 September 2013, the Ministry of Health of the regional government of Galicia rejected the claim invoking the financial responsibility of the public administration.

2.15 On 8 January 2014, the author submitted an appeal to the administrative courts.

2.16 On 5 November 2015, Administrative Court No. 1 of Santiago de Compostela dismissed the appeal. The Court observed that the technical reports provided by the

<sup>4</sup> The author mentions that the non-governmental organization Médecins du Monde defines obstetric violence as actions and behaviours that dehumanize and diminish women during pregnancy, childbirth and the post-partum period, as manifest through physical and verbal mistreatment, humiliation, lack of information and consent, the abuse of medicalization and the pathologization of natural processes, and that lead to loss of freedom, autonomy and the ability to make decisions concerning their body and sexuality freely. The author also mentions that the Observatorio de la Violencia Obstétrica en España (the Spanish Centre for Monitoring Obstetric Violence) has concluded that obstetric violence is a form of psychological torture. The author also mentions the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment ([A/HRC/31/57](#), para. 47) as well as reports from the World Health Organization (WHO/RHR/14.23) and the Human Rights Council ([A/HRC/32/44](#), para. 106 (h)). Lastly, the authors refer to academic publications such as Eugenia Álvarez Matteazzi and Pilar Russo, *Violencia obstétrica: Naturalización del modelo de atención médico hegemónico durante el proceso de parto*, Universidad Nacional de Córdoba, 2016; Laura Belli, *La violencia obstétrica: otra forma de violación a los derechos humanos*, Revista Redbioética/ UNESCO, year 4, vol. 1, No. 7, January–June 2013, pp. 25–32; Marbella Camaraco, *Patologizando lo natural, naturalizando lo patológico. Improntas de la praxis obstétrica*, Revista Venezolana de estudios de la mujer, vol. 14, No. 32, 2009; Cristina Medina Pradas and Paz Ferrer Ispizua, *Prevalence of obstetric violence in Spain*, infographic, 2017, available at <https://mamacapaz.com/wp-content/uploads/VO.pdf>; Adela Recio Alcaide, *La atención al parto en España: cifras para reflexionar sobre un problema*, Dilemata, year 7, No. 18, 2015, pp. 13–26.

parties<sup>5</sup> were contradictory, “with the result that, because those with technical knowledge offer different conclusions, the doubts and difficulties have been passed on to the judge.” The Court also emphasized that “the psychologist’s conclusions are based on details provided by her patient, whereas the doctor’s conclusions are based on the clinical documentation that she examined”; that “it is the doctor who decides whether or not to perform an episiotomy, after seeing the perineum and the baby’s head”; that there was no medical malpractice “since it is proven that all the required measures were taken in view of the events that unfolded, irrespective of whether the result for the mother (rather than the daughter) was entirely satisfactory; and that the degree of satisfaction will, in part, depend on the woman’s own perception or nature.”

2.17 On 27 November 2015, the author appealed against the previous decision, considering that the court of first instance had not fulfilled its duty to explain the reasons for the judicial decisions and had completely failed to assess the documentary and expert evidence related to obstetrics and neonatal care, instead accepting uncritically and unquestioningly the premises of the expert who had produced the report for the insurance company and of the head of obstetrics and gynaecology at the hospital in Lugo, disregarding the scientific documentary evidence and the author’s medical history.

2.18 On 23 March 2016, the appeal was dismissed by the first section of the Galician High Court of Justice. The Court recognized that “there is no doubt that the judge perhaps made insufficient mention of the reports provided by the plaintiff and failed to give them due weight for purposes of comparison against the reports included in the case file and against others submitted during the proceedings”, and that “it would have been preferable for the judge’s first assessment to be less general and generic”. The Court also noted that “the lack of a report by a legal expert makes analysis and assessment difficult, because the expert reports produced for each party emphasize the factors that support their respective arguments, whereas a technical determination must be clear, unquestionable, indisputable, undeniable and irrefutable in order to prove medical malpractice”. However, the Court concluded that the episiotomy had been justified, that “it seemed unlikely that the mother would have been able to give her consent under such conditions and in the middle of labour”, and that, therefore, the rules on informed consent had not been violated. It also considered, without explaining why, that it was “perfectly understandable” that the father was not allowed to be present during the instrumental delivery.

2.19 On 25 April 2016, the author lodged an application for *amparo*\* before the Constitutional Court. On 21 February 2017, the application was dismissed on the grounds that the case did not have “special constitutional significance”.

## Complaint

3.1 The author maintains that the pathologization of her labour through abuse of medication and medical interventionism (including early admission to hospital, numerous unnecessary vaginal examinations, administration of oxytocin without information or consent, the fact that she was not allowed to move around and was forced to give birth in the lithotomy position, the instrumental extraction and episiotomy performed without information or consent and the separation from her daughter) violated her rights under articles 2, 3, 5 and 12 of the Convention in that she did not have access to high-quality health-care services free from violence and

\* The writ of *amparo* is a remedy for the protection of constitutional rights.

<sup>5</sup> These technical reports are the author’s medical history, the additional reports of the head of the hospital’s obstetrics and gynaecology service, and the expert reports produced for the plaintiff and for the insurance company that was a co-defendant.

discrimination and could not exercise her personal autonomy, and that her physical and psychological integrity were compromised.

3.2 In particular, the author maintains that, as stated in the clinical obstetrical and gynaecological report that she provided during the domestic administrative and judicial proceedings, the number of digital vaginal examinations performed should be kept to a minimum: “the reason for avoiding excessive vaginal examinations during labour is that they are intrusive and painful for the woman and can carry germs from the outside environment into the cervix, where they can cause greater damage, especially if they are drug-resistant germs of the kind common in hospitals”. The author points out that, according to WHO, excessive vaginal examinations are a direct cause of possible infections.<sup>6</sup> Moreover, the clinical documentation contains no medical justification for the use of oxytocin, one of the so-called high-risk drugs that has a high potential to harm the mother and the fetus.<sup>7</sup> Since episiotomy is an invasive surgical procedure that involves risks and drawbacks, the author’s consent should have been sought and confirmed in writing, in accordance with the Patient Autonomy Act,<sup>8</sup> but this did not happen in her case. Ultimately, as stated in the clinical obstetrical and gynaecological report, the medical personnel did not comply with *lex artis*, since they disregarded the recommendations and protocols for childbirth services issued by the most reputable public health institutions and scientific organizations and societies. It is also stated in the report that the various analgesic methods and body positions that could have prevented the episiotomy and use of the ventouse and allowed a labour that was progressing perfectly well to be concluded in an appropriate manner were not exhausted. Thus, according to the report, after a normal, low-risk, unproblematic pregnancy and labour, the author found herself in an operating room undergoing surgery and her daughter was admitted to the neonatal unit.<sup>9</sup> The author also maintains that, by not allowing her husband to be present at the birth, the hospital violated her dignity, family intimacy and right to privacy and autonomy. She recalls that the emotional support of the chosen companion reduces the need for painkillers and helps labour take its normal course, and that WHO has therefore stated that “for the well-being of the mother a chosen member of her family must have unrestricted access during the birth and throughout the postnatal period”.<sup>10</sup> Lastly, mother and daughter were unjustifiably separated immediately after the birth, in violation of the right to personal and family privacy and to adequate health services. The author notes that the moments following birth are crucial to attachment, since, at birth, the brains of the baby and the mother are flooded with hormones that profoundly affect the bond. Indeed, the European Charter for Children in Hospital states that the admission of a newborn to hospital for observation does not justify separation.<sup>11</sup>

3.3 The author maintains that obstetric violence is a type of violence that can only be exercised against women and constitutes one of the most serious forms of discrimination. Discrimination is based on gender stereotypes, the purpose of which is to perpetuate stigmas related to women’s bodies and women’s traditional roles in society with regard to sexuality and reproduction.

<sup>6</sup> WHO, *Recommendations for augmentation of labour*, document WHO/RHR/15.05.

<sup>7</sup> See Instituto para el Uso Seguro de los Medicamentos (Spanish branch of the Institute for Safe Medication Practices), *Lista de medicamentos de alto riesgo*, infographic, September 2012.

<sup>8</sup> Basic Act No. 41, of 14 November 2002, regulating patients’ autonomy and rights and obligations in the area of clinical information and documentation.

<sup>9</sup> See the expert report attached to the communication [annex 12].

<sup>10</sup> See WHO, *Recommendations on childbirth (Fortaleza Declaration)*, 1985, available at [www.ncbi.nlm.nih.gov/pubmed/2863457?report=abstract](http://www.ncbi.nlm.nih.gov/pubmed/2863457?report=abstract); and WHO, *Care in normal birth: a practical guide*, 1996, available at [www.ncbi.nlm.nih.gov/pubmed/9271979](http://www.ncbi.nlm.nih.gov/pubmed/9271979).

<sup>11</sup> European charter for children in hospital, 13 May 1986 (resolution of the European Parliament, Doc. A2-25/86, Official Journal of the European Communities No. C148/37, 16 June 1986).

3.4 With regard to the right to give consent, the Committee states, in its general recommendation No. 24 (1999) on women and health, that the only acceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. The Committee also emphasizes the importance of access to information to ensuring full enjoyment of the right to sexual and reproductive health. The author notes that, according to the European Court of Human Rights, restrictions on the adequate and effective provision of information jeopardize women's right to physical and psychological health, with harmful effects in sensitive situations such as pregnancy,<sup>12</sup> and that access to information about a person's state of health must be provided immediately in order to ensure protection in situations where rapid developments in the individual's condition occur and his or her capacity to take relevant decisions is thereby reduced,<sup>13</sup> for example during a pregnancy or labour with complications. Lastly, the Committee on Economic, Social and Cultural Rights states, in its general comment No. 14 (2000), on the right to the highest attainable standard of health, and its general comment No. 22 (2016), on the right to sexual and reproductive health, that a lack of information on issues related to the sexual and reproductive health of women prevents them from effectively exercising their human rights.

3.5 The author claims that the State party has violated articles 2 (b), (c), (d) and (f) and 12 of the Convention because of the inappropriate treatment she received during and after childbirth and because the judicial remedies she sought subsequently were ineffective. When the author decided to bring her case to court, a long process began that was imbued with stereotypes regarding the behaviour expected of her as a submissive, obedient woman without the capacity to discern what was best for her and make the right decisions. In spite of all the evidence and reports provided by the author, which demonstrated the cause-and-effect relationship between the health service's actions and the harmful outcome, the administrative and judicial authorities gave credence only to the reports provided by the hospital, taking the view that the psychological harm suffered by the author was a matter of mere perception. She maintains that these stereotypes distorted the judge's discernment and resulted in a decision based on preconceived beliefs and myths rather than facts. She further maintains that the State party's failure to implement health policies effectively is perpetuating gender stereotypes and discrimination against women,<sup>14</sup> highlighting also that the State party has not yet criminalized obstetric violence, as various other countries have done. She notes that, in its general recommendation No. 24 and its general recommendation No. 28, on the core obligations of States parties under article 2 of the Convention, the Committee on the Elimination of Discrimination against Women emphasizes States parties' obligation to respect, protect and fulfil women's rights and take appropriate legislative, judicial, administrative, budgetary, economic and other measures to ensure that women realize their rights to health care.

3.6 The author also alleges a violation of article 3 of the Convention in that she was not allowed her to give birth in a manner consistent with respect for her human rights. She recalls that, since 1985, WHO has been urging Governments to promote obstetric care services that reflect critical attitudes towards technology and that respect the emotional, psychological and social aspects of birth.<sup>15</sup>

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<sup>12</sup> See European Court of Human Rights, *Open Door and Dublin Well Woman v. Ireland*, Application No. 14234/88; and Application No. 14235/88, Judgment of 29 October 1992, para. 77.

<sup>13</sup> See European Court of Human Rights, *R.R. v. Poland*, Application No. 27617/04, Judgment of 26 May 2011, para. 197.

<sup>14</sup> See [A/55/38](#), para. 60.

<sup>15</sup> WHO, "Appropriate technology for birth", *The Lancet*, vol. 326, issue 8452, 24 August 1985.

3.7 Lastly, the author claims a violation of article 5 of the Convention. The Committee has stated in various concluding observations that persistent stereotypical attitudes about women's roles, skills and responsibilities prevent them from fully enjoying all their rights and that this situation constitutes discriminatory treatment and is thus a violation of the rights to equality and non-discrimination.<sup>16</sup> The author maintains that she received the poor care that is the subject of the present complaint precisely because of the persistent gender stereotypes related to motherhood and childbirth: first the health personnel and then the judges took the view that women should follow doctors' orders because they are incapable of making their own decisions. The medical history of the birth, the medical history of the post-partum period, the physiotherapy for the rehabilitation of the pelvic floor, the report by an expert in psychology and the two reports by experts in obstetrics that were available in this case all attest to the unnecessary nature of the actions carried out and the failure to provide information and obtain consent. The judge, however, merely referred to the report of the head of the hospital's obstetrics and gynaecology service, accepting the premises of a person who had a direct interest in the outcome of the dispute without taking into account the absence of documents related to informed consent, and questioning the author's account of the events by describing the injuries and consequences she suffered as a mere matter of perception, thereby presenting a gender-stereotyped depiction of women as hysterical, mad and prone to exaggeration and whining. The author's request that the head of the hospital's obstetrics and gynaecology service be disqualified as an expert witness on the grounds of lack of objectivity was ignored by the court, which based its conclusions on his report.

3.8 The above attitude contrasts with the empathy shown by the judge to the author's husband when he stated in court that he had been deprived of sexual relations with his wife for two years. This reflects a stereotypical view of men's and women's sexual roles, in which women are merely passive subjects with a reproductive role.

3.9 The author recalls that the Committee has held States responsible for the use of gender stereotypes which violate women's rights and prevent them from accessing justice on equal terms.<sup>17</sup> She maintains that stereotypes were applied in her case by both the health workers and the judicial officers, in violation of article 5 of the Convention.

3.10 The author requests individual reparation for the violations suffered as a measure of redress. Given that the attitudes and practices that perpetuate obstetric violence are a structural problem whereby obstetricians abandon the principles, obligations and duties that govern doctor-patient relations in any other field of medicine, the author also requests, as a measure of non-repetition, that the State party be ordered to produce studies and statistics and raise awareness of the issue among health professionals and legal officers in order to put an end to gender bias and violence against women in the area of obstetrics. The author also requests the Committee to draw up a general recommendation on obstetric violence, since it is a practice from which women are systematically suffering worldwide.

#### **State party's observations on admissibility and the merits**

4.1 On 6 June 2019, the State party submitted its observations, contesting the admissibility of the communication and the fact that it reveals a violation of the Convention.

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<sup>16</sup> See *A/55/38* and *CEDAW/C/PRK/CO/1*, para. 35.

<sup>17</sup> See *A.T. v. Hungary* (*A/60/38*, part one, annex III), *V.K. v. Bulgaria* (*CEDAW/C/49/D/20/2008*), *González Carreño v. Spain* (*CEDAW/C/58/D/47/2012*), *Tayag Vertido v. Philippines* (*CEDAW/C/46/D/18/2008*), *Abramova v. Belarus* (*CEDAW/C/49/D/23/2009*) and *R.K.B. v. Turkey* (*CEDAW/C/51/D/28/2010*).



4.2 The State party submits that the communication is inadmissible on the grounds of insufficient substantiation and abuse of rights, as the author is seeking a review of the evidence even though the domestic courts' assessment of this evidence was exhaustive.

4.3 The State party also maintains that the communication is inadmissible because domestic remedies have not been exhausted, since, at the internal level, the author did not submit a claim on the grounds of a violation of her fundamental rights but rather a claim invoking financial responsibility followed by an administrative appeal and an application for *amparo*.<sup>18</sup>

4.4 The State party maintains that the Convention was not violated because the assessment of the evidence was not arbitrary, no manifest error was made and justice was not denied.

#### **Author's comments on the State party's observations on admissibility and the merits**

5.1 On 14 August 2019, the author submitted her comments on the State party's observations. She argues that the State party allowed gender stereotypes and discrimination against women to be perpetuated, both in the clinical process of childbirth and during the judicial proceedings, thereby violating her right not to be discriminated against on the basis of her gender. In support of these allegations, the author refers to *Ángela González Carreño v. Spain*, in which the Committee concluded that stereotypical and therefore discriminatory notions had been applied in the judicial decisions.<sup>19</sup>

5.2 With regard to the allegation that the procedure selected for the purpose of upholding the rights in question is inapposite, the author recalls that the purpose of the requirement that domestic remedies be exhausted is to ensure that States parties have the opportunity to remedy a violation of any of the rights recognized in the Convention through their legal systems before the Committee considers the violation, but that, as the Inter-American Commission on Human Rights has made clear, "the requirement to exhaust all remedies available under domestic law does not mean that the alleged victims are obliged to exhaust all the remedies at their disposal.[...] If the alleged victim endeavoured to resolve the matter by making use of a valid, adequate alternative judicial remedy available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled."<sup>20</sup> Similarly, the European Court of Human Rights has ruled that, if more than one possible effective remedy is available, the applicant is not required to pursue more than one, and can select the remedy she considers most appropriate for her case.<sup>21</sup> The author therefore submits that the route she took, namely, submitting a claim invoking financial responsibility, then lodging an appeal before the administrative courts and applying for *amparo*, is a legal and legitimate way of exhausting domestic remedies.

<sup>18</sup> The State acknowledges, however, that the author made domestic allegations of violations of the right to equality and discrimination on the grounds of gender, physical and psychological integrity, and personal and family privacy.

<sup>19</sup> See *González Carreño v. Spain* (CEDAW/C/58/D/47/2012), para. 9.7.

<sup>20</sup> Inter-American Commission on Human Rights, *Arley José Escher et al. v. Brazil*, Petition 12.353, Report No. 18/06, 2 March 2006, para. 28.

<sup>21</sup> European Court of Human Rights, *Moreira Barbosa v. Portugal*, Application No. 65681/01, Judgment of 29 April 2004; *Jeličić v. Bosnia and Herzegovina*, Application No. 41183/02, Judgment of 15 November 2005; *Karakó v. Hungary*, Application No. 39311/05, Judgment of 28 July 2009, para. 14; *Aquilina v. Malta*, Application No. 25642/94, Judgment of 29 April 1999, paras. 40 et seq.; and *Micallef v. Malta*, Application No. 17056/06, Judgment of 15 October 2009, para. 58.

5.3 With regard to the State party's argument that the communication is inadmissible because the violations referred to the Committee therein were not alleged during the domestic proceedings, the author recalls that the administrative procedure for holding the public administration accountable requires only that the facts that should give rise to responsibility be recounted; there is no need to invoke specific rights related to articles of laws or international treaties.<sup>22</sup> The author emphasizes, however, that in both the administrative claim and the subsequent appeals she expressly invoked the violation of the rights to physical and psychological integrity and personal and family privacy and to receive information and decide freely, and that, accordingly, the authorities could and should have expressed an opinion on the matter and had the opportunity to repair the damage.

5.4 The author observes that the State party does not refer to the merits of the communication, but expresses opposition to the reparations requested by her. In this regard, the author highlights that making transformative reparations that offer a guarantee of non-repetition is crucial, as established in the United Nations basic principles and guidelines that make up the international corpus juris on reparations. The author also mentions the case of *González et al. ("Cotton Field") v. Mexico*, in which the Inter-American Court of Human Rights to the notion of gender-based reparations with transformative potential and ordered the State to take steps to improve access to justice, to standardize protocols for combating violence against women, to organize search programmes with a view to locating missing women, to train officials on gender issues, and to offer medical and psychological rehabilitation programmes for victims' families. The author also emphasizes that the current legislation governing patient care is not sufficient to ensure that the State party fulfils its obligations to act with due diligence to protect the right of women to be free from discrimination and violence.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

6.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol.

6.2 In accordance with article 4.2 (a) of the Optional Protocol, the Committee is satisfied that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.3 The Committee takes note of the State party's argument that the communication is inadmissible because domestic remedies have not been exhausted, since the author did not submit a claim on the grounds of violation of her fundamental rights but rather a claim invoking financial responsibility followed by an administrative appeal and an application for *amparo*. The Committee also takes into consideration the author's assertion that the route she took is a legal and legitimate means of exhausting domestic remedies, and that the requirement for domestic remedies to be exhausted does not mean that she must exhaust all available remedies but only that she must ensure that the State party has the opportunity to take cognizance of and, if necessary, remedy a violation of the rights recognized under the Convention before the Committee considers the communication. In this connection, the Committee recalls the case law of the European Court of Human Rights, which states that the authors of an individual communication are not obliged to exhaust all available remedies but

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<sup>22</sup> See articles 9.3 and 106.2 of the Spanish Constitution, Act No. 30/1992 of 26 November 1992 on the legal regime of public administrations and common administrative procedure, and the regulations on procedures of public administrations in relation to responsibility, approved by Royal Decree No. 429/1993 of 26 March 1993, which were in force when the administrative claim invoking financial responsibility was submitted.

must give the State party the opportunity, through a relevant chosen mechanism, to remedy the matter within its jurisdiction.<sup>23</sup> The Committee also observes that the author brought before the Constitutional Court all the issues that it has before it in relation to the alleged obstetric violence, including the high frequency of digital vaginal examinations, the administration of oxytocin without information or consent and the performance of an episiotomy without information or consent, alleging that her rights to physical and psychological integrity and personal and family privacy and to receive information and decide freely had been violated. Accordingly, the Committee considers that the issues raised in the communication have been exhausted at the domestic level and therefore does not consider itself precluded by the requirements of article 4.1 of the Optional Protocol from considering the merits.

6.4 The Committee also notes the State party's argument that the communication is inadmissible because the author is seeking a review of the domestic courts' assessment of the facts and evidence, and that these courts made an exhaustive assessment of the evidence. The Committee also notes the author's claim that the legal proceedings conducted in her case were imbued with gender stereotypes regarding motherhood and childbirth, which distorted the judge's discernment and resulted in a decision based on preconceived beliefs and myths rather than facts, which contrasted with the empathy that the judge showed towards the father. The Committee also notes the author's claim that the judicial authorities did not take into account the various pieces of expert evidence she provided throughout the legal proceedings. The Committee recalls that it is generally for the authorities of States parties to the Convention to evaluate the facts and evidence and the application of national law in a particular case, unless it can be established that the evaluation was conducted in a manner that was biased or based on gender stereotypes that constitute discrimination against women, was clearly arbitrary or amounted to a denial of justice.<sup>24</sup> In the present case, taking into account the fact that the author not only challenges the conclusion of the domestic authorities but also requests a review of the domestic proceedings on the grounds of an alleged denial of justice and gender-based discrimination resulting from stereotypes present in the society of the State party, the Committee considers that it is competent to examine the present communication and thus to determine whether there was any violation of the rights recognized under the Convention in the judicial process conducted in the domestic courts in relation to the obstetric violence alleged by the author.

6.5 The Committee considers that the author's allegations under articles 2, 3, 5 and 12 of the Convention have been sufficiently substantiated for the purposes of admissibility, and therefore declares the communication admissible under those articles and proceeds to examine it on the merits.

#### *Consideration of the merits*

7.1 The Committee has considered the present communication in the light of all the information placed at its disposal by the author and the State party, in accordance with the provisions of article 7.1 of the Optional Protocol.

7.2 The author maintains that the pathologization of her labour, through early admission, unnecessary digital vaginal examinations, the administration of oxytocin without information or consent, forcing her to give birth in the lithotomy position, performing an instrumental extraction and an episiotomy without information or consent, and, lastly, separating her from her daughter because of an infection probably

<sup>23</sup> European Court of Human Rights, *Airey v. Ireland*, Application No. 6289/73, Judgment of 9 October 1979; *Granger v. United Kingdom*, Application No. 11932/86, Judgment of 28 March 1990; and *Hilal v. United Kingdom*, Application No. 45276/99, Judgment of 6 March 2001.

<sup>24</sup> See *H.D. v. Denmark* (CEDAW/C/70/D/76/2014), 9 July 2018, para. 7.7.

caused by the medical interventions occasioned by the 10 vaginal examinations carried out in her case, was due to structural discrimination based on gender stereotypes regarding sexuality, maternity and childbirth. The author also maintains that these stereotypes were perpetuated in the administrative and judicial proceedings. The Committee notes that, according to the author, this situation constitutes a violation of her rights to high-quality health services free from violence and discrimination, to personal autonomy and to physical and psychological integrity, in violation of articles 2, 5 and 12 of the Convention.

7.3 In this regard, the Committee notes not only the academic articles and reports on the subject of obstetric violence mentioned by the author<sup>4</sup> but also the recent report of the Special Rapporteur on violence against women, its causes and consequences submitted to the General Assembly on a human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence.<sup>25</sup> In her report, the Special Rapporteur defines “obstetric violence” as the violence experienced by women during facility-based childbirth and affirms that “this form of violence has been shown to be widespread and systematic in nature”.<sup>26</sup> The Special Rapporteur explains that the root cause of obstetric violence include labour conditions, resource limitations and power dynamics in the provider-patient relationship, which are compounded by gender stereotypes on the role of women.<sup>27</sup> Of particular relevance for the present communication is the Special Rapporteur’s assertion that an episiotomy “may have adverse physical and psychological effects on the mother, can lead to death and may amount to gender-based violence and torture and inhuman and degrading treatment”.<sup>28</sup>

7.4 The Committee notes that, in the context of an individual communication in which rights are alleged to have been violated following judicial decisions, its task is to examine such decisions in the light of the Convention and to determine whether the authorities of the State party complied with their obligations thereunder. Thus, in the present communication, the Committee must assess the State party’s compliance with its obligation to exercise due diligence in the administrative and judicial proceedings initiated because of the acts that are the subject of the author’s complaint and with a view to ending gender stereotypes. In this regard, the Committee notes that, according to the State party, the domestic courts carried out a thorough assessment of the evidence. The Committee also notes that, according to the author, in spite of the various items of evidence and reports that demonstrated the cause-and-effect relationship between the health service’s actions and the harmful outcome, the administrative and judicial authorities gave credence only to the hospital reports and made assumptions based on stereotypes. In this connection, the Committee notes that the Administrative Court observed that “because those with technical knowledge offer different conclusions, these doubts and difficulties have been passed on to the judge,” and that the High Court of Justice acknowledged not only that the judge had made little mention of the reports provided by the author and failed to give them due weight but also that the lack of a report by a legal expert made analysis difficult. The Committee also notes that, according to the clinical obstetrical and gynaecological report provided by the author, the actions of the health-care personnel did not comply with *lex artis*,<sup>29</sup> fewer vaginal examinations should have been performed, the clinical documentation did not justify the use of oxytocin and the author did not give consent for the episiotomy as required under the Patient Autonomy Act. The Committee notes that the information provided by the parties in the present case, as a whole,

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<sup>25</sup> [A/74/137](#).

<sup>26</sup> *Ibid.*, paras. 4 and 12.

<sup>27</sup> *Ibid.*, paras. 40 and 49.

<sup>28</sup> *Ibid.*, para. 25.

<sup>29</sup> Standard operating procedure for the application of a medical treatment.

demonstrates that the domestic judicial authorities did not perform an exhaustive analysis of the evidence presented by the author.

7.5 The Committee recalls that, under article 2 (a) of the Convention, States parties have an obligation to ensure the practical realization of the principle of equality of men and women, and that, under articles 2 (f) and 5, States parties have an obligation to take all appropriate measures to modify or abolish not only existing laws and regulations but also customs and practices that constitute discrimination against women.<sup>30</sup> The Committee considers that stereotyping affects the right of women to be protected against gender-based violence, in this case obstetric violence, and that the authorities responsible for analysing responsibility for such acts should exercise particular caution in order not to reproduce stereotypes. In the present case, the Committee observes that there was an alternative to the situation experienced by the author, given that her pregnancy had progressed normally and without complications and that there was no emergency when she arrived at the hospital but that, nevertheless, from the moment she was admitted, she was subjected to numerous interventions about which she received no explanation and was allowed to express no opinion. Furthermore, the Committee observes that the administrative and judicial authorities of the State party applied stereotypical and thus discriminatory notions by assuming that it is for the doctor to decide whether or not to perform an episiotomy, stating without explanation that it was “perfectly understandable” that the father was not allowed to be present during the instrumental delivery and taking the view that the psychological harm suffered by the author was a matter of “mere perception”, but that they did show empathy towards the father when he stated that he had been deprived of sexual relations for two years.

7.6 Consequently, acting under article 7 (3) of the Optional Protocol, the Committee is of the view that the facts before it reveal a violation of the rights of the author under articles 2 (b), (c), (d) and (f), 3, 5 and 12 of the Convention.

8. In the light of the above conclusions, the Committee makes the following recommendations to the State party:

(a) Concerning the author: provide appropriate reparation, including adequate financial compensation for the damage that she suffered to her physical and psychological health;

(b) General:

(i) Ensure women’s rights to safe motherhood and access to appropriate obstetric services, in accordance with general recommendation No. 24 (1999) on women and health; and, in particular, provide women with adequate information at each stage of childbirth and establish a requirement for their free, prior and informed consent to be obtained for any invasive treatment performed during childbirth, except in situations where the life of the mother and/or the baby is at risk, thereby respecting women’s autonomy and their capacity to make informed decisions about their reproductive health;

(ii) Conduct research into obstetric violence in the State party in order to shed light on the situation and thus provide guidance for public policies to combat such violence;

(iii) Provide obstetricians and other health workers with adequate professional training on women’s reproductive health rights;

<sup>30</sup> See *González Carreño v. Spain* (CEDAW/C/58/D/47/2012), para. 9.7.

(iv) Ensure access to effective remedies in cases in which women's reproductive health rights have been violated, including in cases of obstetric violence, and provide training to judicial and law enforcement personnel.

9. In accordance with article 7 (4) of the Optional Protocol, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them widely disseminated in order to reach all sectors of society.

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