UN Human Rights Committee Draft General Comment on Article 6

of the International Covenant on Civil and Political Rights

***A Critique of Proposed Paragraph 9***

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The proposed Paragraph 9 endorses abortion rights in various open-ended ways, including this phrase: “Nor should States parties introduce humiliating or unreasonably burdensome requirements on women seeking to undergo abortion.”  It would be easy to construe this phrase to forbid pro-birth counselling about fetal and maternal rights, followed by a deliberative waiting period, prior to any abortion, as is constitutionally required today in Germany, for example.

Any such endorsement of abortion rights in the draft Paragraph 9 would be a mistake, for three reasons: Endorsing abortion rights causes further harm to already oppressed women, particularly in the developing world. Endorsing abortion rights hurts the Committee’s important work for human rights in general. And, finally, the nature of human gestation may well permanently preclude any international settlement of the ongoing controversy surrounding abortion, making it unwise for this Committee to take a position on the matter at this time.

***(1) If a woman is dominated by others, the freedoms she is given will be exercised against her by those who dominate her*.**

Abortion rights may well be liberating for some powerful women whose careers cannot easily accommodate children, because these independent women are truly free to choose without outside pressures and for them the opportunity costs of children are very great. Polls indeed show that such women overwhelmingly support a right to abortion.

Unfortunately, many other women are currently unable to effectively negotiate the terms and conditions of their sexual interactions and reproductive choices due to pervasive discrimination, coercion, and violence against them. But the legalization of abortion does nothing to reduce this oppression. Indeed, it provides those coercers with another weapon that they can use against the women they dominate.

Poorer women, even in the United States of America, are the group most hostile to legalized abortion. Why would they want abortion available if it’s only going to result in a boyfriend, a parent, a husband, or an employer coercing them (even by violence) to forego one of the few satisfactions they have in their oppressed lives, the love of a child? (Consult the great feminist thinker Catherine MacKinnon for more on the effect of making abortion a “privacy” right. She points out that it is precisely in women’s private lives that male dominance is most extreme.)

The developing world is much worse for most women. Except for a tiny elite of powerful women (who unfortunately may be the only non-male presence at international conferences) abortion hurts women because it empowers abusive and controlling males to use them with impunity. Those who make real-life abortion choices for women *de facto* possess those abortion rights that have been nominally accorded to women.

In creating rights to choose abortion, the draft Paragraph 9 hands new weapons to those who choose for women. In particular, by precluding intervention by third-party counselors, followed by a waiting period, it cuts off an important lifeline to help for oppressed pregnant women.

***(2) No organization can proclaim complete support for human rights if it endorses abortion.***

The human rights movement has long had one clear foundation: human dignity. We have proclaimed that rights are not just for the strong, nor just for citizens, nor just for non-criminals, nor just for adults. We have always said that simply being a human is all one needs in order to have human dignity and human rights. Proposed paragraphs 2, 3, 4, 6, 22, 63, and 64 beautifully continue this tradition of support for the right to life of every human being.

No one can seriously doubt that humans engender only humans, and that an entity moving and growing in the womb is quite alive. Therefore, if the Committee endorses a right to abortion, it is saying that merely being a human and being alive is no longer sufficient for human dignity and rights. It thereby abandons its own foundation in the recognition of the dignity of all humankind, and makes the Committee vulnerable to charges of discrimination or even hypocrisy when it speaks out against human rights violations.

***(3) At the root of the abortion controversy are two competing understandings of the nature of human gestation, neither of which is likely to be completely victorious in the near future. The Committee should not attempt to adjudicate and solve this intractable dispute.***

For much of human history, a constructionist view of gestation was dominant, and it still has some intuitive appeal. In this view, the unborn child is thought to be gradually brought into being by some outside force. During the early months of pregnancy the child is thought not yet present, because the construction process is still incomplete, and so early abortion is not thought to take a human life.

But since the mid-19th century a developmentalist view has become dominant. Science now teaches that from the very beginning an individual human life is present, directing its own development and providing continuity of individual identity from conception to birth and beyond. With the increasing use of sonograms, it is now quite normal for people to point to an ultrasound photograph and say something like “This was me at eight weeks after conception” (the point at which many manual abortions occur). And none of us likes being told that we had no human dignity (and so could have been legally killed) during the early stages of our development.

It is in the Committee’s interest that members take the trouble to evaluate more carefully the developmental model of gestation before prematurely insisting that all States parties must accept the constructionist model that has tended to be favored in the Committee’s own Observations. I would urge you to read my paper “Construction versus Development: Polarizing Models of Human Gestation”, *Kennedy Institute of Ethics Journal*, Volume 24, Number 4, December 2014, pp. 345-384, on the current state of the debate:

<http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1423&context=law_fac_pubs>

It is a comprehensive and fully annotated analysis of the historical and contemporary clash of these two enduring gestational models, and of relevant contemporary law, showing that modern science makes it nearly impossible for constructionism ever to regain the pre-19th century hold it once had on public opinion.

Therefore, the Committee’s authority would be significantly undercut if it were to adopt a constructionist denial of the continuity and identity of each human individual from conception to post-birth infancy.

***Conclusion***

The salutary aspects of Paragraph 9 should be preserved, but it should be rewritten more or less as follows in order to protect both mother and child:

(BEGIN TEXT) States parties should ensure the availability and accessibility by pregnant women of adequate pre-natal and post-natal or post-abortion health care and nutritional support, as well as housing as needed. States parties may adopt measures to protect the lives and right to life of unborn children, provided that such legislation also protects the lives and right to life of pregnant women. The law should therefore include a provision authorizing medical intervention necessary to preserve the life of the mother, even when such intervention could foreseeably cause the death of her unborn child. An unmarried woman should not face criminal sanctions for becoming pregnant, and a woman should not be subject to criminal sanctions for seeking or undergoing abortion. (END TEXT)

Thank you for your kind consideration.

Sincerely,

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