

Alternative Report Concerning Italy

For Consideration by the Human Rights Committee at its 119th Session

Submitted by:

Center for Family and Human Rights (C-Fam),

and

Centro Studi Rosario Livatino

Center for Family and Human Rights
805 3rd Avenue, Suite 1440
New York, NY 10022
Phone: +1 (212) 754-5948
Fax: +1 (212) 754-9291
Email: info@c-fam.org

Centro Studi Rosario Livatino
Via del Teatro Valle, 51
00186 Roma (RM)
Tel. 0039 329 4105375
Email: info@centrostudilivatino.it

INTRODUCTION

Center for Family and Human Rights (C-Fam)¹, a New York based organization that researches and publishes on international law and policy, and Centro Studi Rosario Livatino² (Centro Studi), an Italian legal think tank based in Rome, jointly submit this alternative report.

C-Fam and the Centro Studi are grateful for the opportunity to participate in the dialogue between the State Party and the Human Rights Committee (“the committee”). In particular, they are grateful since the International Covenant on Civil and Political Rights (“the Covenant”) does not foresee any civil society participation or other non-governmental involvement in the State Parties’ reporting process to the committee established in article 40 of the Covenant.

As a matter of law, once their reports are submitted to the committee, State Parties fulfill their obligation to report under article 40. Because of this, C-Fam and the Centro Studi welcome the decision of the State Party to engage the committee beyond what the Convention foresees. In addition, they are grateful for the opportunity created by the committee for this submission and for the gesture of the State Party in permitting civil society participation in the dialogue.

Because of their specific nature and competence, C-Fam and the Centro Studi wish to highlight some of the elements included in the committee’s document titled “List of Issues” (UNDOC: CCPR/C/ITA/Q/6). Additionally, this report will highlight the developments in the State Party pertaining to these elements.

The Vienna Convention on the Law of Treaties (VCLT)—the most authoritative interpretative canon of international law considered widely a part of customary international law—guides our interpretation of the treaty. According to the VCLT (Article 31), treaties must be interpreted in “good faith” according to its overall “object and purpose” and the “ordinary” meaning of the treaty’s terms at the time it was negotiated. This report also interprets the Covenant so that its obligations are consistent with the State Party’s obligations in other human rights treaties and the Universal Declaration of Human Rights.

SUMMARY

Specifically, this report hopes to highlight legislative and judicial actions that undermine the Covenant’s presumption in favor of protecting human life in the womb enshrined in the Covenant, the right to freedom of conscience, thought, and religion, the definition of the family as “natural and fundamental group unit of society” across binding human rights instruments, as well as the rights of children to know and be cared for by their mother and father that is implied in the provisions of the Covenant and spelled out in detail in the Convention on the Rights of the Child.

Free, confidential, and unrestricted access to abortion, homosexual marriage, and adoption for relations between individuals of the same sex who identify as lesbian, gay, bisexual, transsexual, or otherwise (LGBT) are matters that are not addressed in the Covenant’s text or contemplated by the framers of the Covenant.

Such matters were not part of any domestic legal framework at the time the Covenant was negotiated. The *travaux préparatoire* of the Covenant do not contain any traces that States wished

¹ Website: <https://c-fam.org>; contact: info@c-fam.org.

² Website: <http://centrostudilivatino.it/>; contact: info@centrostudilivatino.it

to establish any obligations on such matters. Therefore, States cannot be presumed to have any positive obligations to sanction or permit abortion under any circumstance, homosexual relations or adoptions for such relations. Moreover, the State Party—and derivatively also the committee—should ensure that laws and policies pertaining to such matters are consistent with the obligations outlined in the Covenant, as well as other binding human rights instruments.

Covenant provisions that are not consistent with such developments include: the right to life (art. 6), freedom from inhumane or degrading treatment (art. 7), freedom from any form of slavery or human-trade (art.8), the right to personhood (art. 16) and to privacy (art. 17), freedom of thought, conscience, and religion (art. 18), freedom of expression (art. 19), the rights of the family composed by a man and a woman (art. 23), and those of children (art. 24).

I. THE RIGHT TO LIFE

The committee expressed concern in the “List of Issues” document that “women continue to face significant difficulties in obtaining an abortion owing to an overwhelmingly large number of gynecologists refusing to perform abortions for reasons of conscientious objection” (CCPR/C/ITA/Q/6, par. 11).

a. The Covenant contains a presumption in favor of the right to life for children in the womb, despite the lack of specification regarding the State Party’s positive implementation of this right.

From a literal reading, the Covenant does not exclude the embryo, the fetus, the child in the womb, the child after birth, the adult, or the elderly from the protections of the Covenant. The Covenant affirms in its Preamble the “inherent dignity” and the “equal and inalienable rights of all members of the human family.” The use of the phrase “all members of the human family” was deliberately chosen to be as inclusive as possible. If dignity is “inherent”, it cannot depend upon characteristics such as the developmental stage or health of a child in the womb.

The *travaux préparatoire* of the Covenant show that a positive obligation to permit abortion in cases of rape, fetal disability, or for therapeutic reasons was rejected by the drafters of the Covenant in 1947 during the earliest stages of drafting. At that time, member states complained that this would violate the right to life.³ The rejected proposal did not exclude the unborn from the right to life, but rather carved out a derogation from the right to life for children in limited circumstances.

A proposal to include a positive obligation to protect children in the womb from the moment of conception, as is the case with the Inter-American Convention on Human Rights, was excluded from a draft of article 6 ten years later in 1957. However, this cannot be interpreted as excluding children in the womb from the right to life, since at the same time there was universal agreement to forbid the application of the death penalty to pregnant women.⁴ Delegations likely rejected the proposal because of the technical difficulty of articulating the right to life in the prenatal phase, in light of the diverse derogations that some negotiating delegations allowed at the time.⁵ This omission did not exclude children in the womb from the right to life. It left the application of the right to life in the prenatal phase to domestic legislation, given the divergence of views at the time the Covenant was negotiated.

³ Finegan, Thomas, *International Human Rights Law and the "Unborn": Texts and Travaux Préparatoires*, Tulane Journal of International & Comparative Law, Winter 2016, Vol. 25 Issue 1, at p. 13.

⁴ *Ibid.*, p. 14-23 (on the *travaux préparatoire* for the Covenant).

⁵ *Ibid.*, at p. 15.

In fact, while many delegates expressed that the right to life applied to children in the womb during negotiations, not a single delegation at any stage in the discussions of article 6 denied that the child in the womb should be entitled to the Covenant's protections.⁶

Finally, the Covenant's provisions should be read in a way that is consistent with the obligations of the State Party under the Convention on the Rights of the Child, which recognizes the right of the child to protection "before as well as after birth" (Preamble).

Experts in international law and health reject claims that abortion is a human right under any circumstance. This is demonstrated in the expert document "The San José Articles," which describes UN entities' actions to present abortion as a right as unlawful and *ultra vires*.⁷

b. Italian law protects the right to life of children in the womb.

Since 1978, abortion has been permitted in Italy in limited specified circumstances (Act No. 194/1978). However, well before 1978, abortion was not punishable as a crime in Italy if the termination of the child's life was intended to save the life of the mother. Such action was justified by article 54 of the Criminal Code, which provided a "necessity/duress" defense to murder ("stato di necessità"⁸).

Notwithstanding the adoption of Act 194/1978, abortion remains a crime in Italy, implicitly affirming the right to life of the child in the womb (Articles 17-20, particularly article 19). Abortion is decriminalized under limited and specified conditions set out by the same bill. Abortion cannot be considered a right under this legal provision but merely non-punishable.

Act 194/1978, titled "*Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza*" ("Norms for the social protection of motherhood and on the voluntary interruption of pregnancy"), clearly specifies what can be considered a lawful "termination of pregnancy." The bill outlines three different legal regimes to be applied to different gestational periods.

⁶ Ibid. at p. 20 (explaining that no delegate objected to the paragraph excluding the application of the death penalty to pregnant mothers on the ground that it protected children in the womb).

⁷ "San José Articles. Abortion and the Unborn Child in International Law". The first five articles are especially relevant in this context: "As a matter of scientific fact a new human life begins at conception." (Article 1); "Each human life is a continuum that begins at conception and advances in stages until death. Science gives different names to these stages, including zygote, blastocyst, embryo, fetus, infant, child, adolescent and adult. This does not change the scientific consensus that at all points of development each individual is a living member of the human species." (Article 2); "From conception each unborn child is by nature a human being." (Article 3); "All human beings, as members of the human family, are entitled to recognition of their inherent dignity and to protection of their inalienable human rights. This is recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other international instruments." (Article 4). Finally, "There exists no right to abortion under international law, either by way of treaty obligation or under customary international law. No United Nations treaty can accurately be cited as establishing or recognizing a right to abortion." (Article 5). Each article is accompanied by an explanatory footnote. The articles and footnotes are available in their entirety at: <http://sanjosearticles.com/>

⁸ Italian Criminal Code, art. 54 "Stato di necessità": "Non è punibile chi ha commesso il fatto per esservi stato costretto dalla necessità di salvare sé od altri dal pericolo attuale di un danno grave alla persona, pericolo da lui non volontariamente causato, né altrimenti evitabile, sempre che il fatto sia proporzionato al pericolo. Questa disposizione non si applica a chi ha un particolare dovere giuridico di esporsi al pericolo. La disposizione della prima parte di questo articolo si applica anche se lo stato di necessità è determinato dall'altrui minaccia; ma, in tal caso, del fatto commesso dalla persona minacciata risponde chi l'ha costretta a commetterlo." Available at: <http://www.altalex.com/documents/news/2014/12/09/del-reato>.

Up to the first ninety days, termination of pregnancy is permitted, but it requires a physical or psychological health reason. This requirement proves that the legislative intent of the drafters was not to establish a right to abortion, but an exception. From the fourth month to the viability of the fetus, only eugenic and therapeutic abortions are permitted (Act 194/1978, articles 6, 7). From viability to birth, abortion is permitted only to save the mother's life.

In a recent report on the national implementation of Act 194/1978 to the Italian Parliament, the Ministry of Health declared that in 2015 the number of "legal" abortions in Italy was 87.639⁹. The number of abortions has decreased significantly since 1983, notwithstanding the legalization of the practice because of the decreasing number of fertile women, rising infertility, and most significantly, the de-medicalization of abortion. According to the same ministerial report, the number of abortions caused by the use of the mifepristone-based pill "RU486" amounted to 11,134 in 2015¹⁰.

In-Vitro Fertilization poses a new challenge to the right to life.

A special challenge to the right to life before birth comes from the State Party's 2004 adoption of Act No. 40, which regulates in vitro fertilization¹¹. Part. VI of Act No. 40/2004 is titled "Measures for the protection of the embryo."

Since 2004, the original text of the law, which provided protections for the child in its embryonic stage of development, was dramatically altered by a series of interventions of the Italian Constitutional Court to allow third party reproduction,¹² and to eliminate the prohibition of prenatal diagnosis of disabilities¹³. Such changes have resulted in the commercialization of sperm, eggs, and babies. The consequent implications this has for the rights of the child are very grave (see section below on the Rights of the Child).

II. THE FAMILY

At paragraph three of the "List of Issues" document,¹⁴ the Human Rights Committee asks the State Party to provide information on the steps that it will take to "*recognize the adoption rights of same-sex couples and to protect the rights of children living in same-sex parent families, which are not covered by the recently adopted civil union laws.*"

State Parties to the Covenant can choose to sanction, or not to sanction, relations between individuals of the same-sex. However, domestic sanction for such relations does not result in any entitlement to the singular protections that international human rights law reserves for the family. Moreover, State Parties must ensure that the legal regime they adopt does not infringe or undermine the rights of the family or the rights of the child.

⁹ "Relazione Ministro Salute attuazione Legge 194/78 tutela sociale maternità e interruzione volontaria di gravidanza - dati definitivi 2014 e 2015". The full report is available at:

http://www.salute.gov.it/portale/documentazione/p6_2_2_1.jsp?lingua=italiano&id=2552

¹⁰ See, in particular, the table at page 42 of the report, available at:

http://www.salute.gov.it/imgs/C_17_pubblicazioni_2552_allegato.pdf.

¹¹ Act No. 40/2004, titled "Norme in materia di procreazione medicalmente assistita" (*Norms regarding medically assisted procreation*). Full text available at: <http://www.camera.it/parlam/leggi/040401.htm>.

¹² Corte Costituzionale, Judgement No. 162/2014. Full text available at:

<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=162>.

¹³ Corte Costituzionale, Judgement No. 96/2015. Full text available at:

<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2015&numero=96>.

¹⁴ CCPR/C/ITA/Q/6, Par. 3.

a. International law reserves singular protections for the natural family to which relations between individuals of the same sex are not entitled.

As the civil society platform “The Family Articles” states¹⁵, international law and policy defines family as “the natural and fundamental group unit of society.” As such, it is “entitled to protection by society and the State” and it is a proper subject of human rights. The family is a pre-judicial entity.¹⁶ That is why it is “entitled” to protection by society and the state.¹⁷

Article 23 of the Covenant establishes that the family is formed through the union of a man and a woman who exercise their right to freely “marry and found a family.” Article 23 of the Covenant defines the family as the union of a man and a woman in marriage. This only applies to relations between men and women. It does not apply to relations between individuals of the same sex and other social and legal arrangements between adults that are not equivalent or analogous to the family.

These relations and arrangements are incapable of constituting a family under the Covenant, therefore, they are not entitled to the protections reserved for the family in international law and policy.

The original meaning of the provisions of the Covenant and other international instruments, regarding the right to marry and found a family, is unambiguous. They do not apply to relations between individuals of the same sex because they explicitly refer to men and women and their equality before, during, and after marriage.

It is impossible that UN member states intended these provisions to apply to relations between individuals of the same sex. At the time when all UN treaties were negotiated, with the single exception of the Convention on the Rights of Persons with Disabilities (CRPD), so-called same-sex “marriage”, unions, or legal status of same-sex relations did not exist in the world. The first country to ever enact so-called same-sex “marriage” was the Netherlands in 2001. The first country to give any type of legal status to relations between individuals of the same-sex was Denmark in 1989.

¹⁵ This section reflects verbatim the civil society platform, THE FAMILY ARTICLES, sponsored by C-Fam, available at www.civilsocietyforthefamily.org.

¹⁶ See Girgis, Sherif and George, Robert and Anderson, Ryan T., What is Marriage? (November 23, 2012). Harvard Journal of Law and Public Policy, Vol. 34, No. 1, pp. 245-287, Winter 2010. Available at SSRN: <http://ssrn.com/abstract=1722155>.

¹⁷ The Universal Declaration of Human Rights (UDHR) defines the family as “the natural and fundamental group unit of society” and declares that it is “entitled to protection by society and the State” UDHR 16. The International Covenant on Civil and Political Rights (ICCPR 23), the International Covenant on Economic, Social, and Cultural Rights (ICESCR 10.1), and the Convention on the Rights of the Child (CRC, Preamble) reflect the UDHR verbatim in their provisions. These binding international norms have not gone unheeded. At least 111 countries have constitutional provisions that echo Article 16 of the UDHR. See World Family Declaration, available at <http://worldfamilydeclaration.org/WFD>. By virtue of these provisions in international law the family is a proper subject of human rights and is a bearer of rights in international human rights law. See Charter of the Rights of the Family, (October 22, 1983), available at: http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html. See also The Family and Human Rights (December 16, 1998), available at: http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html. The outcomes of United Nations conferences have recognized as much. The Programme of Action of the 1994 International Conference on Population and Development, for example, referred to the “rights of families” (UN document A/CONF.171/13, paragraph 5.4). Similarly, the Programme of Action of the 1995 World Summit for Social Development recognized that the family is “entitled to receive comprehensive protection and support” (UN document A/CONF.166/9, paragraph 80).

International law recognizes and protects the fundamental human right to marry and found a family. The UDHR (Article 16) ties the founding of the family to marriage and affirms that “men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. *They are entitled to equal rights* as to marriage, during marriage, and at its dissolution (emphasis added).”

The UDHR 16 language on the *equal right* to marry and found a family of men and women is written verbatim in the ICCPR (Article 23) and the ICESCR (Article 10). It is also reflected in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW 16), which refers to equality within marriage as between “men and women” and “husband and wife” in the context of the family. The European Convention on Human Rights (ECHR 12) and the Inter-American Convention on Human Rights (IACHR 17) also reflect the language of the UDHR on the right to marry and found a family verbatim.¹⁸

Granting social and legal status to relations between individuals of the same-sex does not alter the obligations of the State towards the family under the Covenant. It does not entitle such relations to the same benefits and privileges as the family.

b. There is no right to adopt for heterosexual or homosexual relations under the Covenant.

The fact that the State Party decided to introduce a controversial¹⁹ regime granting certain social and legal benefits to relations between individuals of the same-sex, providing them with some form of recognition, does not entail a right for the individuals who enter such relations to adopt children.

Adults do not have a *right* to adopt children under the Covenant. This applies equally to individuals who identify as lesbian, gay, bisexual, transsexual, or otherwise (LGBT). The legal sanction of relations between individuals of the same sex is not relevant. Adoption cannot be considered a benefit bestowed by the government to which all individuals are equally entitled.

A right to adopt for individuals in same sex relations is not an international human rights obligation of the State Party. It is not consistent with the Covenant and the State Party’s obligations under the Convention on the Rights of the Child and other binding human rights instruments.

Because of the specific needs and vulnerabilities of children, governments should discriminate between those that are suited, or not suited, to care for the health and wellbeing of children and lead them to integral human development.

¹⁸ The European Court of Human Rights has interpreted its provisions on marriage and family—which are identical to those contained in the Universal Declaration of Human Rights and the Covenant—as referring only to the union of a man and a woman. Even though the Court has repeated more than once that relations between individuals of the same sex are entitled to some form of legal recognition it has also specified that States are not required to sanction relations between individuals of the same-sex as if they can constitute a family. *See* ECHR, *Chapin and Charpentier v. France*, no. 40183/07 (Judgment (Merits and Just Satisfaction), 9 June 2016. Available at: <http://hudoc.echr.coe.int/fre#%22itemid%22:%22001-163436%22>}. *See also*: von Krempach J.C., “There will be no “Obergefell” Decision at the European Human Rights Court”, June 14, 2016, *Turtle Bay and Beyond*, available online: https://c-fam.org/turtle_bay/will-no-obergefell-decision-european-human-rights-court/. *See also* *Hämäläinen v. Finland*, no. 37359/09, § 71, ECHR 2014; *Schalk and Kopf v. Austria*, no. 30141/04, § 101, ECHR 2010; *Rees v. UK*, no. 9532/81, § 49, ECHR 1986).

¹⁹ Millions of Italian citizens gathered in Rome last January, to manifest their opposition to the new bill. English coverage of the peaceful protest available at: <http://www.cnn.com/2016/01/30/europe/italy-same-sex-marriage-debate/>; <https://www.nytimes.com/2016/01/25/world/europe/italy-divided-over-effort-to-legalize-civil-unions-for-gays.html?action=click&contentCollection=Europe&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>

Law No.184 of 1983, according to which only heterosexual couples who have been married for at least three years are able to adopt, regulates adoption in Italy. This is consistent with the explicit provision in the Convention on the Rights of the Child that the family as “natural environment for the growth and well-being of all its members and particularly children” should be protected and assisted by the State.²⁰ By limiting adoption to proven marriages, the State Party is taking care to ensure vulnerable children are not thrust into further instable situations.

The self-evident truth of the benefit of the family, intended as the union between a man and a woman, to its individual members and society at large enshrined in international law is validated by the best available social science and research, which make use of the most reliable data and widest possible samples particularly in the case of children. Children thrive in families formed by the marriage of a man and a woman in a stable and enduring relationship. No other structure or institution delivers the same quality outcomes for children.²¹ The likelihood of child experiencing school failure, lower levels of education, behavioral problems, drug use, and loneliness increases if a he/she is not raised by their biological parents in a stable family environment. In addition other negative outcomes for the child include physical, sexual, and emotional abuse.²²

The benefits of the family for individuals and communities are repeated across borders and all segments of society regardless of social and economic status, including among minorities²³.

c. Legal recognition for relations between individuals of the same sex or other social and legal arrangements that are neither equivalent nor analogous to the family threaten the right of the child.

Children have a fundamental human right to know and be cared for by their mother and father under international law. It is the basis for rights of the child in the context of family reunification and adoption (ICCPR, 23, 24, CRC 2, 3, 5, especially 7, 8, 9, 10, 18, 27). It is also tied to the “prior” right of parents to educate children in line with their convictions and the right of the child to a cultural and religious identity (UDHR 26.3, ICCPR 18, CRC 2, 3, 5, 14, 20, 29, 30).

When adoption and stepchild adoption laws give legal guardianship of a child to persons to whom they are not biologically related in the context of so-called same-sex marriages and homosexual unions, or other social and legal arrangements that are not equivalent or analogous to the family, children are thrust into situations where their very biological identity is questioned. In the case of third party assisted reproduction, a similar violation of children’s rights occurs.

This kind of legal regimen directly threatens and undermines the right of the child to know his/her mother and father. Children are particularly vulnerable physically, intellectually, and emotionally.

²⁰ THE FAMILY ARTICLES, available at www.civilsocietyforthefamily.org.

²¹ (Regnerus M., “How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study”. Soc Sci Res. 2012 Jul;41(4):752-70. Findings of this research are also observable at the website: <http://www.familystructurestudies.com>).

²² Ibid. Regnerus, M.; *see also* Sullins, Donald Paul, Emotional Problems among Children with Same-Sex Parents: Difference by Definition (January 25, 2015). British Journal of Education, Society and Behavioural Science 7(2):99-120, 2015. Available at SSRN: <http://ssrn.com/abstract=2500537>; and Sullins, Donald Paul, Child Attention-Deficit Hyperactivity Disorder (ADHD) in Same-Sex Parent Families in the United States: Prevalence and Comorbidities (January 21, 2015). British Journal of Medicine & Medical Research 6(10): 987-998, 2015, Article no. BJMMR.2015.275, ISSN: 2231-061. Available at SSRN: <http://ssrn.com/abstract=2558745>.

²³ See: Fernando Pliego Carrasco, Tipos de familia y bienestar de niños y adultos: El debate cultural del siglo XXI en 13 países democráticos, Universidad Nacional Autónoma de México, Instituto de Investigaciones Sociales 2013. Findings of this research are also observable at the website: <http://www.tiposdefamilia.com/libro>.

Such legal regimes may also threaten the health and wellbeing of children because of the well-known health risks that result from the lifestyles of individuals who identify themselves as LGBT.

d. Relations between individuals of the same sex are not entitled to family rights by virtue of children who happen to be present in the lives of these individuals.

The Universal Declaration of Human Rights and binding international human rights treaties recognize that many children are deprived of their family and must be provided with adequate protection, by providing that “[m]otherhood and childhood are entitled to special care and assistance” and that “all children, whether born in or out of wedlock, shall enjoy the same social protection” (UDHR, Article 25).

International law protects all children equally, even when they are deprived of family. It does not require sovereign states to extend the specific protections reserved for the family in international law and policy to social and legal arrangements that are neither equivalent nor analogous to the family. This would threaten and undermine children’s fundamental human right to know and be cared for by their mother and father. Additionally, it may jeopardize their health and wellbeing.

Validating the choices of adults to live with individuals of the same sex, or in other social and legal arrangements that are not analogous to the family, and equating them to the family, is not necessary to prevent discrimination against children. International law requires the protection of children regardless of their situation in life. It does not require states to confer the special protections reserved for the family on relations between individuals of the same sex and other social and legal arrangements between adults.

This does not require states to elevate any social and legal arrangement where children may be situated as equivalent to the family. In fact, this norm enshrined in binding international human rights instruments, including the International Covenant on Civil and Political Rights (Article 24), the International Covenant on Economic, Social, and Cultural Rights (Article 10), and the Convention on the Rights of the Child (Articles 2, 7, 8, 20), underscores the obligation of member states to protect the family as the optimal environment for children.

It presumes that states will afford the family specific protections that are not available to any type of household arrangement. Precisely because of this it requires states to make special efforts to protect children in whatever situation they may be, and to protect mothers whether or not they are married.

III. FREEDOM OF EXPRESSION, THOUGHT, CONSCIENCE, AND RELIGION

a. The State Party must ensure that health professionals are able to exercise their fundamental right to freedom of thought, religion, and conscience by objecting to abortion and contraception.

The committee expressed concern in the “List of Issues” document about “gynecologists refusing to perform abortions for reasons of conscientious objection” (CCPR/C/ITA/Q/6, par. 11).

The Covenant and the Italian Constitution guarantee the fundamental freedom of thought, conscience, and religion. Further, the right to object to abortion is explicitly protected by Act. 194/1978.

It is true that many doctors in Italy, are objectors to abortion. However, it is also true that there is no “emergency” when it comes to accessing abortion, as has been declared by the Italian Minister of Health.²⁴ Contrary to the reports to which the committee has lent credence, it is increasingly difficult for doctors, pharmacist and other health practitioners in Italy to exercise their right of objection to their participation in abortion, their administering of contraceptive or abortifacient drugs, or their making of referrals for such. In the case of sometimes-abortifacient drugs, known as the morning-after-pill or emergency contraception, Italian pharmacists may face trial for refusing to prescribe them.²⁵

In any case, since abortion is not a right under the Covenant (See section I above), even if it were difficult for women to access abortion this would not be a violation of the Covenant. If abortion was a right, nothing in the Covenant suggests that freedom of conscience should be abridged where reproduction is concerned. Freedom of thought, religion, and conscience lies at the very foundation of human rights. The possibility to terminate another life does not seem to possess the same level of normative import.

The State Party should ensure that health professionals are able to exercise their fundamental right to freedom of thought, religion, and conscience by objecting to abortion and contraception. This is not controversial. The majority of religions hold moral objections to abortion and contraception.

The State Party must ensure that public officials and religious are able to object to solemnizing relations between individuals of the same sex.

The State Party recently enacted a law that offered legal recognition to relations between individuals of the same sex (Act. 76/2016). The text of the recent law does not include any exemption for public officials who wish to conscientiously object to solemnizing relations between individuals of the same sex. The bill states that it is the public officials’ duty to register the relations of two people of the same sex in the civil registry²⁶.

b. “Sexual orientation and gender identity” are not categories recognized in binding human instruments and States have no obligations to enshrine them as legal categories to prevent unjust discrimination.

In the “List of Issues” document, the committee also observed that “steps that have been or are being taken to adopt comprehensive anti-discrimination legislation that, inter alia, addresses discrimination in the private sphere [...] contains a comprehensive list of prohibited grounds of discrimination, including sexual orientation and gender identity ...”²⁷

State Parties to the Covenant have no obligation to enact laws that give individuals any special benefits or protections on the basis of their sexual preferences and behavior or to sanction an

²⁴ <http://www.ilfoglio.it/articoli/2013/09/14/news/lemergenza-obiezione-in-italia-non-ce-52514/>

²⁵ On a most recent case, where the pharmacist faced a criminal trial for refusing to sell the day-after pill: <http://www.rifday.it/2017/01/10/contraccettivi-demergenza-cresce-lattesale-motivazioni-della-sentenza-gorizia/>. On the Italian administrative jurisprudence that denies conscientious objection to contraception, see: <http://www.nextquotidiano.it/obiezione-coscienza-tar-respinge-ricorso-alcune-associazioni/>.

²⁶ For more on the absence of this right, see: Frigerio B., Fatte le unioni civili, resta un problema gigantesco: l’obiezione di coscienza, Tempi, May 12, 2016, Available at: <http://www.tempi.it/unioni-civili-problema-gigantesco-obiezione-di-coscienza#.WIIffn0ymAU>.

²⁷ CCPR/C/ITA/Q/6, para. 3

individual's feeling about their gender identity. All human beings possess the same fundamental rights by virtue of their inherent dignity and worth.²⁸

Human rights by definition belong to all people because of their humanity. Individuals who identify as LGBT have no special additional human rights beyond those of other citizens.

To posit "sexual orientation and gender identity" as categories of non-discrimination would require that subjective sexual preference and their expression enjoy the same level of protection as freedom of religion in international law. This is simply not the case.

International law does not protect unfettered sexual autonomy in the same way it protects religious freedom. Sexual autonomy is only protected by international law in the context of the right to freely marry and found a family²⁹ and the equal right of men and women to decide freely and responsibly on the number and spacing of children.³⁰

Sovereign States are free to either permit sodomy as a legitimate exercise of sexual autonomy or prohibit it on moral, health, or other grounds. Today, more than seventy countries prohibit sodomy. The Convention does not enshrine any obligations in this regard or require States to enshrine the notions of "sexual orientation and gender identity" as legal categories of non-discrimination.

While the Covenant recognizes a right to be free of interference in one's privacy and family,³¹ this right cannot be understood to encompass unfettered sexual autonomy. At the time these instruments were negotiated and adopted by UN member states, many countries outlawed sodomy. Many countries also restricted or penalized other forms of sexual conduct between consenting adults, including adultery and fornication.

Therefore, the right to privacy and family life cannot include the right of consenting adults to engage in any kind of sexual conduct, and can only be understood to protect the exercise of the right of men and women to freely marry and found a family. There is no argument that these categories have been elevated as customary international norms.

There is no consensus among UN member states on the use of the term "sexual orientation and gender identity." UN declarations and resolutions that mention these categories are all non-binding in nature, and have never been adopted on a consensual basis.

While treaty bodies, including this committee, have stated their support for including "sexual orientation and gender identity" as categories of non-discrimination alongside race and religion, they do not have the power to alter the State Parties' obligations under the Covenant.

The State Party details in its report to the committee that it has taken steps to elevate the concepts of "sexual orientation and gender identity" to offer heightened protections for individuals who identify as lesbian, gay, bisexual, transsexual, or otherwise (LGBT) in its legal order and to campaign for social acceptance of individuals who identify as LGBT in schools.

At the same time the Italian Parliament has rejected attempts to criminalize "homophobia" as recently as 2013 because it was viewed as violating the Italian Constitution's protections for

²⁸ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Preamble and Article 1.

²⁹ UDHR 16, ICCPR 23 and 24, CESCR 10.

³⁰ CEDAW 16.

³¹ UDHR 17; ICCPR 17.

freedom of conscience and religion. Widely held bi-partisan protests against that law involving millions of Italian citizens contributed to its failure.³²

c. There is no scientific basis for the notions of “sexual orientation and gender identity,” let alone a legal one.

Experts find there is no single clinical or scientific definition on what constitutes a person to be lesbian, gay, or bisexual.

In 2016, a special report on sexuality and gender reviewed hundreds of scientific articles on lesbian, gay, bisexual, and transsexual (LGBT) health, and combined findings from the biological, psychological, and social sciences. This report found no scientific support for the widespread notion that persons who experience same-sex attraction or gender dysphoria are “born that way.”³³

“Some of the most widely held views about sexual orientation, such as the ‘born that way’ hypothesis, simply are not supported by science,” write the authors of the report, Lawrence S. Mayer and Paul R. McHugh of the Johns Hopkins University School of Medicine. McHugh was for twenty-five years the psychiatrist-in-chief at the Johns Hopkins Hospital.

The authors of the study highlighted how individuals who identify as LGBT, including those experiencing gender dysphoria, report that their perceived sexual orientation and gender identity can and often do change over time. Biological and genetic factors are widely recognized as unable to account for sexual orientation and gender identity.

Popular notions of sexual orientation and gender identity are constantly expanding, making it harder to define any discrete class of persons. In 2014, Facebook listed fifty-six gender identity categories for its users to choose from when creating their user profiles, including categories like “trans,” “gender fluid,” and “bigender.”³⁴ By 2015, the list reached seventy-one gender options.³⁵

Even pro-LGBT groups are unable to define “sexual orientation and gender identity” in an objective and meaningful way. The American Psychological Association (APA) states that sexual orientation and gender identity is a *continuum* of diverse factors like attraction, behavior, identity, and membership in a community. It recognizes that biology and genetics are unable to account for sexual orientation and gender identity.³⁶

³² The peaceful protests took place in all major Italian cities. They were organized under the name “Sentinelle in Piedi”. More information available at: <http://sentinelleinpiedi.it>.

³³ Lawrence S. Mayer, M.B., M.S., Ph.D. and Paul R. McHugh, M.D., “Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences,” The New Atlantis, Fall 2016.

³⁴ Will Oremus, Here Are All the Different Genders You can Be on Facebook (Slate, Feb 13, 2014). The list includes: Agender, Androgyne, Androgynous, Bigender, Cis, Cisgender, Cis Female, Cis Male, Cis Man, Cis Woman, Cisgender Female, Cisgender Male, Cisgender Man, Cisgender Woman, Female to Male, FTM, Gender Fluid, Gender Nonconforming, Gender Questioning, Gender Variant, Genderqueer, Intersex, Male to Female, MTF, Neither, Neutrois, Non-binary, Other, Pangender, Trans, Trans*, Trans Female, Trans* Female, Trans Male, Trans* Male, Trans Man, Trans* Man, Trans Person, Trans* Person, Trans Woman, Trans* Woman, Transfeminine, Transgender, Transgender Female, Transgender Male, Transgender Man, Transgender Person, Transgender Woman, Transmasculine, Transsexual, Transsexual Female, Transsexual Male, Transsexual Man, Transsexual Person, Transsexual Woman, Two-Spirit. Full article available at:

http://www.slate.com/blogs/future_tense/2014/02/13/facebook_custom_gender_options_here_are_all_56_custom_options.html.

³⁵ “Facebook's 71 gender options come to UK users, Rhiannon Williams”, The Telegraph, June 2014, available at: <http://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html>.

³⁶ American Psychological Association, Sexual Orientation and Homosexuality: Answers to Your Questions for a Better Understanding, What Is Sexual Orientation?, <http://www.apa.org/topics/lgbt/orientation.pdf>

d. States have the sovereign prerogative to legislate on health and morals to protect their populations from such risks.

While few countries recognize the notion of sexual orientation and gender identity legally, several countries have laws that protect the health and morals of their populations from risks commonly associated with LGBT lifestyles. Such laws are within their domestic jurisdiction, and the United Nations, nor other international bodies, can claim that these laws abuse human rights simply because they address LGBT conduct. Such conduct is not protected by international law and therefore cannot trump sovereign prerogatives.³⁷

Men who have sex with men are eighteen times more likely to contract HIV/AIDS from sexual activity than the overall population.³⁸ While HIV infections and deaths in all other populations have been declining, they have increased or remained the same among men who have sex with men.³⁹ LGBT lifestyles are correlated with a host of other sexually transmitted infections (STI) and health risks, including substance abuse and depression.

The joint spread of HIV, syphilis, and other STIs among men who have sex with men has been labeled a “syndemic” of STI’s, sexual and physical abuse, depression, and substance abuse.⁴⁰ UN agencies and the development assistance community, including USAID, recognize these inherent risks of homosexual acts, and the homosexual lifestyle.⁴¹

CONCLUSIONS

1. The State Party continues to offer protections for children in the womb. The committee should welcome this as consistent with and encouraged by the Covenant. In addition, the State Party should be encouraged to offer further protections for children in the womb as a way to further implement the obligations it undertook when it acceded to the treaty. This should include ensuring that any laws and regulations pertaining to assisted reproduction is consistent with the obligations the State Party undertook to fulfill in the Covenant.

2. The State Party does not violate the Convention by limiting adoption to proven marriages. It should be commended for ensuring children are provided a stable family environment for their integral human development. The State Party should ensure that any legal recognition

³⁷ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 2.7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”).

³⁸ Office of the United Nations High Commissioner for Human Rights, *The Role of the United Nations in Combatting Discrimination and Violence against Individuals Based on Sexual Orientation and Gender Identity*, A Programmatic Overview, 12 November 2014, available at http://www.ohchr.org/Documents/Issues/Discrimination/LGBT_UN_SOGI_summary12Nov2014.pdf (listing over 34 dedicated personnel within UN agencies and funds as “focal points”).

³⁹ Report of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity, 4 May 2015, UN Document A/HRC/29/23; Report of the United Nations High Commissioner for Human Rights on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, 17 November 2011, UN Document A/HRC/19/41.

⁴⁰ Beyrer, Chris, et al. "Global epidemiology of HIV infection in men who have sex with men." *The Lancet* 380.9839 (2012): 367-377, available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3805037/>

⁴¹ O’Leary D, “The Syndemic of AIDS and STDS Among MSM”, *Linacre Quarterly*, Volume 81, Issue 1 (February, 2014), pp. 12-37, available at: <http://www.maneyonline.com/doi/full/10.1179/2050854913Y.0000000015>

of relations between individuals of the same sex and assisted reproduction regulations does not undermine the right of the child to a mother and a father or jeopardize their health and wellbeing.

3. The State Party must ensure that health professionals can exercise their fundamental right to freedom of thought, religion, and conscience by objecting to abortion and contraception. The State Party must also ensure that public officials and religious are able to object to solemnizing relations between individuals of the same sex.