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Conscientious objection as a crime against humanity

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The new 'rights' language

When the National Association for the Repeal of Abortion Laws opened its doors in the United States in 1969, the claim that abortion was a 'right' was directed only at the repeal of laws against the procedure, so that women would be free to seek abortions and, as the *Globe and Mail* put it, so that physicians would be able "to perform their duties according to their conscience and their calling."[2] At that time, Canadians were repeatedly assured that "nobody would be forcing abortion procedures on anyone else."[3]

Current rights claims must be distinguished from this early period. Contrary to early activist promises, current rights claims are meant to force health care workers and institutions to provide or at least facilitate abortion, contraception, and artificial reproduction, all of which remain morally controversial. A major 'mover and shaker' in this project is the Center for Reproductive Rights (CRR),[4] an American advocacy group described in internal documents as an organization "comprised largely of economically advantaged white women."[5] The Center's agenda includes, among other things, the legal enforcement of what it describes as inalienable sexual rights.[6]

The ultimate goal of the CRR is to establish what it calls "hard norms" - treaty-based international laws[7] - that recognize access to abortion as a fundamental human right.[8] It plans to develop a "culture of enforcement" that will compel governments to respect this 'right'[9] and enforce it against third parties - physicians and other health care workers.[10] Even as it works toward this end, it is cultivating "soft norms" in the form of statements by international, regional, and intergovernmental bodies.[11]

Canadian Health Law and Policy

Canadian Professor Bernard M. Dickens appears to follow this strategy in a standard text, *Canadian Health Law and Policy.* In his chapter on Informed Consent, addressing the topic of conscientious objection and disclosure of relevant information to a patient, he notes that Canada has ratified the 1998 *Treaty of Rome* constituting the International Criminal Court. Within the context of a discussion of the refusal of physicians or institutions to advise women about the availability of the morning after pill "in order to oblige continuation of any pregnancy that may occur," he continues:

> Articles 7 and 8 of the treaty characterize forced pregnancy following rape as a crime against humanity and as analogous to torture. Human rights commissions may share this view, reinforcing their concerns about non-disclosure constituting both discrimination against women and inhuman and degrading treatment. Accordingly, the right to object to perform or immediately participate in medical procedures on grounds of conscience carries no parallel right to refuse to inform those eligible to receive these procedures where or how they are practically accessible.[12]

The goal here is clear enough. Readers of *Canadian Health Law and Policy* are to be persuaded that a health care worker who declines, for reasons of conscience, to direct a patient to the morning after pill or abortion commits the offence of "forced pregnancy." The passage is meant to convince them that, if this is not actually a crime against humanity analogous to torture, it is at least a gross violation of human rights that ought to be prosecuted by human rights commissions.

Dickens here glosses over the distinction between "forced pregnancy following rape" (the subject of the *Treaty*) and his broader claim concerning a "medically indicated procedure" (the subject of his essay). Moreover, while he asserts only a duty of disclosure, the logic of his argument implies (as he argues elsewhere) that there is a similar duty to refer or otherwise facilitate the procedure.[13]

The *Treaty of Rome*: "forced pregnancy" and "torture"

What first attracts critical attention is that Dickens refers to the *Treaty of Rome* in his text, but actually cites a different document as authority for his claim that "forced pregnancy following rape" is "a crime against humanity. . . analogous to torture."[14] Why cite a secondary source rather than the *Treaty* itself?

A review of the *Treaty* suggests one possible answer.[15] The *Treaty* does not support Dickens' claims. Specifically:

- In order to constitute a crime against humanity or war crime, the offence of "forced pregnancy" must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" [Art. 7(1)], or during war [Art. 8(2)b]
- Pregnancy is only "forced" within the meaning of the *Treaty* if a woman is unlawfully confined after having been raped "with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law." [Art. 7(2)f; Art. 8(2)b(xxii)]
- The definition of "forced pregnancy" must not "in any way be interpreted as affecting national laws relating to pregnancy," which include laws restricting or prohibiting abortion [Art. 7(2)f]
- "Torture" is not, at any point in the *Treaty*, associated with pregnancy, whether forced or not. It is specifically defined as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused." [Art 7(2)e]

The Elements of Crimes: "forced pregnancy" and "torture"

The Elements of Crimes simply confirms the provisions of the *Treaty*, both with respect to torture

and "forced pregnancy." The document adds nothing that even remotely suggests that conscientious objection to medical procedures or services could be a crime against humanity, or that it is analogous to torture. Again: why cite this document in preference to the *Treaty of Rome*?

Perhaps the answer lies, not in what *The Elements of Crimes* includes, but in what it leaves out. It leaves out reference to the *Treaty* provision that recognizes the right of states to restrict or prohibit abortion by law, which is not relevant to the purpose of the document [Art. 7(2)f]. But the provision is highly relevant to Dickens' claim that delaying access to abortion is a violation of human 'rights,' since it flatly contradicts the notion that abortion is a human 'right.'

What else has been left out

Neither the *Treaty of Rome* nor *The Elements of Crimes* associates "forced pregnancy," even as it is defined by the *Treaty*, with torture. It is grouped with "rape, sexual slavery, enforced prostitution . . . enforced sterilization, or any other form of sexual violence of comparable gravity," but not with torture [Art. 7(1)g]. Nonetheless, Professor Dickens somehow manages to conclude that the documents "characterize forced pregnancy following rape . . .as analogous to torture."

The only possible explanation for this is that Professor Dickens considers "forced pregnancy" analogous to torture because both are included among the crimes against humanity listed in Article 7(1) of the *Treaty*. On this basis, then, every crime in the list is analogous to all of the others, so that "forced pregnancy" is analogous not only to torture, but to murder, forcible transfers of population, enforced disappearance of persons and apartheid, while murder is analogous to unlawful imprisonment, deportation, etc. If this is how Professor Dickens arrived at his singular conclusion, it is an open question whether his reasoning does a greater disservice to the law or to the English language.

In any case, the *Treaty* itself has something to say about analogy:

> The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. [Art. 22(2)]

Thus, the kind of extension of meaning advocated by Professor Dickens is expressly prohibited by the *Treaty*. This, too, Professor Dickens leaves out of his essay.

Summary

Professor Dickens very selectively borrows terms from the *Treaty of Rome*. He arranges his material to make it appear that conscientious objection that delays access to the morning after pill or abortion is actually or very nearly a crime against humanity analogous to torture, or, at least, an egregious violation of human rights.

In addition to selective borrowing, Dickens leaves out everything necessary for a proper understanding of the *Treaty of Rome*, which, incidentally, includes everything that might cause a reader to question his claims. Finally, he directs the reader not to the *Treaty*, which includes a provision that is arguably fatal to his thesis, but to a document that omits the provision.

Professor Dickens' polemic seamlessly weaves the agenda of the Center for Reproductive Rights into a standard Canadian reference work. There is no doubt that this is advantageous to the Center

and its allies, but it brings into question the reliability of *Canadian Health Law and Policy*. Perhaps it is time for a third and more carefully revised edition of the book.

Notes

1. Protection of Conscience Project, *Submission to the College of Physicians and Surgeons of Alberta Re: CPSA Draft Standards of Practice* (8 October, 2008)

2. "Free the Doctor," *Globe and Mail*, 18 May, 1965. Quoted in de Valk, Alphonse, *Morality and Law in Canadian Politics: The Abortion Controversy*. Dorval, Quebec: Palm Publishers, 1974, p. 18]. Two years later the *Globe* argued that, in the case of abortion, "where religious moralities conflict, the State should support none, but leave the choice to individual conscience."["Now the job is to be done, let it be done right", *Globe and Mail*, 21 December, 1967. Quoted in de Valk, Alphonse, *Morality and Law in Canadian Politics: The Abortion Controversy*. Dorval, Quebec: Palm Publishers, 1974, p. 56]

3. The assurance given by a Canadian M.P. to a parliamentary committee studying her private member's bill to legalize abortion. [Quoted in de Valk, Alphonse, *Morality and Law in Canadian Politics: The Abortion Controversy*. Dorval, Quebec: Palm Publishers, 1974, p. 44-45]

Similar assurances came from the Canadian Welfare Council: "At the risk of labouring the obvious, no woman will be required to undergo an abortion, no hospital will be required to provide the facilities for abortion, no doctor or nurse will be required to participate in abortion."[*Standing Committee on Health and Welfare, Minutes of Proceedings and Evidence, Appendix "SS": Canadian Welfare Council Statement on Abortion to the House of Commons Standing Committee on Health and Welfare*. February, 1968, p. 707].

Nor was the Catholic Hospital Association concerned: "We note that there is no question of [our hospitals] being obliged to change their present norms of conduct. On the contrary, proponents of a 'liberalized' abortion law admit that it should exempt those who object to being involved in procuring abortions." [*Standing Committee on Health and Welfare, Minutes of Proceedings and Evidence, Appendix "QQ": Brief submitted by the Catholic Hospital Association of Canada . . . on the Matter of Abortion*. February, 1968, p. 8058-8059]

Canadian Justice Minister John Turner rejected a protection of conscience amendment to the government bill legalizing abortion because, he said, the proposed law imposed no duty on hospitals to set up committees, imposed no duty on doctors to perform abortions, and did not even impose a duty on doctors to initiate an application for an abortion. [*Hansard- Commons Debates*, 28 April, 1969, p. 8069]

4. CRR documents obtained by the Catholic Family and Human Rights Institute (CFAM) were entered in the United States Congressional Record (p. E2535 to E2547) on 8 December, 2003, to forestall efforts by the Center to suppress dissemination of the documents through litigation. They are available on the Project website. (http://www.consciencelaws.org/Conscience-Archive/Documents/CRRSecretStrategy.pdf)

The documents cited herein are:

International Legal Program Summary of Strategic Planning: Through October 31, 2003 (E2535)
ILPS Memo # 1- International Reproductive Rights Norms: Current Assessment (E2535-E2538);
ILPS Memo #2- Establishing International Reproductive Rights Norms: Theory of Change (E2538-E2539).

Domestic Legal Progam Summary of Strategic Planning Through October 31, 2003 (E2539)
DLPS Memo #1- Future of Traditional Abortion Litigation (E2539-2540);
DLPS Memo #2- Report to Strategic Planning Participants From Systematic Approach Subgroup (E2540-E2541).
DLPS Memo #3- Report to Strategic Planning Participants From "Other Litigation" Subgroup (E2541-E2542).

Program Strategies and Accomplishments (E2543)
The Center for Reproductive Rights: Summary and Synthesis of Interviews (E2543-2546)
The Center for Reproductive Rights Board of Directors - Primary Affiliation Information (E2547)

5. Which the "Other Litigation Subgroup" believed undermined the credibility of the CRR with respect to the interests of "women of colour." DLPS Memo #3, E2541) One of the Center's trustees also expressed concern that much of the funding from individuals was coming from donors over 60 years old (The Center for Reproductive Rights: Summary and Synthesis of Interviews, E2546)

6. ". . .both the ICPD Programme of Action and the Beijing PFA reflect an international consensus recognizing the inalienable nature of sexual rights." ILPS Memo # 1, 2537

7. "Legally binding or ''hard'' norms are norms codified in binding treaties such as the International Covenant on Civil and Political Rights (ICCPR) or the Convention on the limination of All Forms of Discrimination Against Women (CEDAW)" ILPS Memo # 1, E2535

8. ". . . there is no binding hard norm that recognizes women's right to terminate a pregnancy. To argue that such a right exists, we have focused on interpretations of three categories of hard norms: the rights to life and health; the right to be free from discrimination; those rights that protect individual decision-making on private matters." ILPS Memo #1, E2536

9. "The ILP's overarching goal is to ensure that governments worldwide guarantee reproductive rights out of an understanding that they are legally bound to do so." International Legal Program Summary of Strategic Planning: Through October 31, 2003 (E2535)

"Our goal is to see governments worldwide guarantee women's reproductive rights out of recognition that they are bound to do so." ILPS Memo #1, E2537; ILPS Memo # 2, E2538.

"The Center needs to continue its advocacy to ensure that women's ability to choose to terminate

a pregnancy is recognized as a human right." ILPS Memo # 2, E2539

"Advocates use of enforcement mechanisms can help cultivate a "culture" of enforcement . . ." ILPS Memo #2, E2539

Pursuing the notion that abortion is part of "the fundamental rights strand of equal protection" is one of the suggestions in the report of the "Other Litigation" Subgroup, DLPS Memo #3, E2540. To establish abortion as a "fundamental" right would give it precedence over less "fundamental" rights in cases of conflict.

10. The norms offer "a firm basis for the government's duties, including its own compliance and its enforcement against third parties." ILPS Memo #2, E2538

11. "Supplementing . . .binding treaty-based standards and often contributing to the development of future hard norms are a variety of 'soft norms.' These norms result from interpretations of human rights treaty committees, rulings of international tribunals, resolutions of inter-governmental political bodies, agreed conclusions in international conferences and reports of special rapporteurs. (Sources of soft norms include: the European Court of Human Rights, the CEDAW Committee, provisions from the Platform for Action of the Beijing Fourth World Conference on Women, and reports from the Special Rapporteur on the Right to Health.)." ILPS Memo # 1, E2535

12. See Dickens, Bernard M. "Informed Consent": Chapter 5 in Downie, Joceyln, Caulfield, Timothy and Flood, Colleen (Eds.) *Canadian Health Law and Policy* (2nd Ed.). Toronto: Butterworths, 2002, p. 149.

13. Cook RJ, Dickens BM, Access to emergency contraception. J. Obstet Gynaecol Can 2003;25 (11):914-6; Cook RJ, Dickens BM, "In Response". J.Obstet Gyanecol Can, February, 2004; 26(2)112

14. Report of the Preparatory Commission for the International Criminal Court, Addendum: *Finalized draft text of the Elements of Crimes*. New York: 2000. (http://www.derechos.org/nizkor/impu/tpi/elements.html) Accessed 2008-09-30

15. *Rome Statute of the International Criminal Court*, (http://untreaty.un.org/cod/icc/STATUTE/99_corr/cstatute.htm) Accessed 2008-09-30