Opinion

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Ethical Reflections on a Proposed Law: Australia as an Accessory to Assault through *Migration Legislation Amendment Bill 1995 (No. 4)*

By Anthony Krohn

Introduction

Australia, along with many other nations, is a party to International Convention and Protocol Relating to the Status of Refugees ("the Convention"), according to which we have voluntarily agreed not to return any person to his or her own country if that would mean returning to persecution.

There are, however, limits on the protection given by the Convention. Persecution from which protection is granted must be for reasons of "race, religion, nationality, membership of a particular social group or political opinion". The question arises then of people, especially women, who flee from a country such as the People's Republic of China (PRC) because if they return they will face coerced abortion or coerced sterilisation, as part of the enforcement of the population policy of their country. Are these people who can claim protection because they face persecution for "membership of a particular social group"? And what about people who have already been sterilised against their will? This ethical and legal question is posed critically by two recent judgements of the Federal Court of Australia, and by two Bills introduced by the Commonwealth government into the Senate.

I: Background: The "One Child" Policy of the PRC

The PRC, along with some other countries, has a coercive fertility control programme. The Chinese version is sometimes called "the one child policy", under which permission is required for a child to be conceived and born, and the usual permitted quota of children per married couple is one child only.

To achieve the quota, women of child bearing age are monitored in the work place. They are supposed to be using contraception, preferably an IUD which may be fitted and removed only by an authorised doctor operating under the fertility control policies. They must produce evidence of menstruation to avoid a compulsory test for pregnancy. If a woman is pregnant with a second child without permission, her child is aborted; if she refuses, it is done anyway, although sometimes a lengthy period of forced "political study" - morning to night haranguing and threats - suffices to induce the woman to walk the last few steps to the abortionist's operating table. If the father objects, he is likely

to be imprisoned. If, through evasion, the pregnancy has gone to term, the child is killed while in the process of birth, or a live child is killed. The woman is then sterilised, with or without her consent. This level of violence and invasion of person is quite routine, well established, and well documented.(See John S. Aird, Ph.D., *"Foreign Assistance to Coercive Family Planning in China"*, tabled in the Australian Senate by Senator Brian Harradine, May, 1992. Also evidence of Stephen Mosher to the Senate Legal and Constitutional Legislation Committee.) One obstetrician was forced to do about 15,000 abortions over seven years, more than half of these against the will of the mother.

Lest it be thought that this coercion is "the rogue application of a reasonable policy", as some Australian government officials would have it, it should be noted that when the Chinese Central Government informs local officials of the population targets for those officials' areas, the local officials know that meeting the target is one of the key criteria against which their own performances are judged, and upon which their futures depend. It should be noted also that the central government does not punish local officials for the use of force in implementing the population policies, whereas some local officials have been executed for conniving at the circumventing of the policies in some areas.

II Applying the Convention to Coerced Abortion and Sterilisation

In the cases of people who fear coerced abortion or sterilisation, and who desire a "protection visa" to permit them to remain in Australia to escape this fate, the critical questions are, "Do you have well founded fear of persecution?", and, if so, "Is this for one of the five reasons mentioned in the Convention's definition of a refugee?"

A: Persecution - O'Loughlin J in DG 9, 10, 11 & 12 of 1994.

It is generally established in Australian law that coerced sterilisation or abortion is so serious a violation of human rights as to amount to persecution. Therefore the attitude of counsel for the Australian Department of Immigration and Ethnic Affairs in a recent case before Justice Maurice O'Loughlin of the Federal Court is disturbing. (Cases are *DG 9, 10, 11 & 12 of 1994,* respectively being brought by applicants *C, L, J & Z v. Minister for Immigration and Ethnic Affairs, first Respondent, and the Presiding Officers of the Refugee Review Tribunal in each case, Second Respondents,* as yet unreported.)

These were cases, heard together, where four coercively sterilised Chinese women were seeking judicial review of the decision of the Refugee Review Tribunal to refuse them refugee status. Mr Tracey QC., was reported by AAP and by the Melbourne "*Age*":

Mr Richard Tracy, Q.C., for the Immigration Department, said he did "not want to commit the (Immigration) Minister to the view that in all circumstances it (sterilisation) would amount to persecution, particularly with the fourth estate (the media) present"....

Judge Maurice O'Loughlin in the Federal Court said forced sterilisation was "as persecutory an act as I can imagine".

Mr Tracy responded that the department's position was that it was "not necessarily persecution in cases where the woman did not want to be sterilised but later did not mind being sterilised, ***or in cases where local authorities acted illegally by forcing a woman to be sterilised."*** (Emphasis added.) (*The Age,* Friday, 10th March, 1995)

In his judgement in this case, delivered 30th March, 1995, 1995, O'Loughlin J. cites the High Court in *Marion's* case ((1992) 175 C.L.R., 218) as conclusive authority for the law in Australia being that forced sterilisation is as grave and unjustifiable an act as can be performed on a person, and therefore sufficiently grave in all cases to amount to persecution for the purposes of the Convention.

Now it is also fortunately well established that the issue is not whether an act of violence amounting to persecution is done legally by a government, but whether it is done for Convention reasons, without the protection of the authorities being available *in fact.* Many acts of persecution for Convention reasons are illegal according to the law of the State in which they occur, and many of them are done directly by the State authorities. The Australian government violates its obligations under the Convention if it refuses to protect people and instead seeks to return them to a country where, whatever fine words are in the legal code, the authorities do nothing to protect against acts of persecution performed for a Convention reason. It is irrelevant whether the persecuting agent is an official of the State, and it is irrelevant whether the failure of the State to protect against persecution is the result of malice, negligence, incompetence or inability. **It is the purpose of the Convention to protect against persecution; it is accordingly monstrous, absurd and incorrect to assert that it does not apply if the persecution is the work of local State officials who are acting *ultra vires* and otherwise illegally.** It is the primary duty of the State of nationality to protect against persecution, but if it does not do this, and there is a real chance of persecution being inflicted, without the protection of that State, **the duty of a Convention country is clearly not to return people to the persecuting State**, in accordance with Article 33 of the Convention.

This principle is clearly upheld by O'Loughlin J. in his judgement (pp. 31-33, unreported).

B: Social Group: Sackville J's decision in NG 327 of 1994

An applicant for protection in Australia under the Convention must show not only that she or he has well founded fear of persecution, but that this is for reasons of *"race, religion, nationality, membership of a particular social group, or political opinion."* In the case of many who fear coerced abortion or sterilisation in the PRC, they do not allege any fear of persecution on grounds of race, religion, nationality or political opinion" and so must argue that they fear persecution for membership of a particular social group. What is a "particular social group"?

The judgement of **Sackville J** in the Federal Court in NG 327 of 1994 lays down general principles for interpretation of the term "particular social group". Applying these principles, the court found that a married couple who feared coerced abortion or coerced sterilisation as part of a programme of population control in the PRC could claim protection as refugees by virtue of fearing persecution for reason of their membership of a particular social group, which can be described as:

> "'those who having only one child do not accept the limitations placed on them or who are susceptible to being coerced or forced into being sterilised"'

The reason why this class is a particular social group is that the interaction between members of the class and the society at large, especially through the authorities, marks the classes out as distinct in society. So, people with one child are a particular social group in the PRC; they would not be so in Australia.

III Migration Legislation Amendment Bills (No. 3) & (No. 4) 1995

After the judgement of Sackville J., the Australian government believing that the grounds of applying for refugee status had been greatly widened, introduced *Migration Legislation Amendment Bills (No. 3) & (No. 4) 1995.* The government seems to have thought that following this case anyone who disagreed with the fertility control policies of the PRC would be able to get refugee status. In fact any applicant would still have to be outside his or her country of nationality, in Australia, and with well founded fear of persecution, as well as showing that the persecution would be because of membership of a particular social group, and there is no evidence presented by anyone to show that there has been a spate of applications on the grounds of the one child policy since the Sackville decision.

Nonetheless, the government introduced the Bill (No. 3), since replaced by Bill (No. 4), both of which prohibit a person deciding an application for refugee status from having any regard to "the fertility control policies of the government of a foreign country" in determining whether a class of persons is a particular social group. **This means that one can no longer assert a fear of persecution because of being a person with one child, and in danger of sterilisation, because the only reason such a class of persons would be a social group is the fertility control policy of the PRC.** In other words, if one fears coerced abortion or sterilisation under the one child policy of the PRC, one is excluded by these Bills from showing that one belongs to precisely that particular social group membership of which renders one liable to persecution. Therefore, the Bills exclude such people from the protection of refugee status, and renders them liable to repatriation, to coerced abortion, sterilisation and other grave penalties.

The government maintains that such a person could seek protection under the Bill by maintaining membership of a "pre-existing social group" such as "people with one child from the village of X", but such a class is not a particular social group if one is not allowed to consider the fertility control policies of the PRC, nor is anyone persecuted because of their membership of a particular village community.

Conclusion

Unless the Bill is dropped or amended to make the government's professed intent clear, people in real danger of forced sterilisation and forced abortion will not be permitted to get protection as refugees in Australia, and will be liable to deportation to the country where they will suffer such fate.

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