

Political and moral contemporary migration based on the example of persecution of women (gender as a condition for obtaining refugee status)

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“Wrong or onerous laws, high taxes, unattractive climate, inappropriate social background, or even enforcement (slave trade and transport), it all created and still creates migration flows, but none of these flows can be equal to the one formatting from the desire present with all people to improving standards of living (...).”

E.G. Ravenstein, *The Laws of Migration*,

Journal of the Royal Statistical Society No. 52(2)/1889, p. 286.

Abstract

Subject of research: Among refugees all over the world who seek asylum in foreign countries women and girls constitute almost a half. This statistical data is based on the United Nations High Commissioner for Refugees. The reasons why women more often than ever wish to obtain refugee status are very varied, ranging from social, political, religious or moral persecutions to human trafficking or transplant aims. These are not, however, the reasons that may be categorized as a cumulative catalogue. Unfortunately, the development of the contemporary world implies more and more reasons as well as new forms of violating women's rights, who are forced to leave their countries of origin.

Purpose of research: On the basis of these crucial problems, the following article has been devoted to this problem. Its main is to characterize what the UNHCR process of creating standard for implementing gender presumption to refugee procedures looked like. Even though over 65 years have passed since the adoption of the Convention on the Status of Refugees of 1951, one should still conduct theoretical practices and practical actions that shall sanction persecution of women, in this case providing the international protection, i.e. granting refugee status.

Methods: In the following dissertation the methods of analyzing legal acts and documents, mainly international ones, have been used. Additionally, the study included the positions of legal doctrine as well as statistical data.

Keywords: refugees, persecution, gender.

Introduction

As Cwerner points out: “Time and migrations have become fundamental issues on the contemporary debates on modernity, globalisation, and mobility (...)” [Cwerner, 2001, 7]. For the first time since World War II, Europe is experiencing a massive movement of refugees and migrants, women, girls, men and boys of all ages, fleeing armed conflicts, mass killings, persecution and pervasive sexual and gender – based violence [United Nations Refugee Agency, United Nations Population Fund and Women’s Refugee Commission, 2016, 3]. Among all the challenges of XXI century, migration seems to be a particularly important phenomena. Certainly, it is not a new phenomena for the European countries. What gives its special character is its ongoing intensity and yet unknown impact on politics and socio-economic situation of particular European countries. The article presents a very small fraction of the problem of contemporary migration connected with granting refugee status to migrants, but to women only as an effect of their persecution in the countries from which they live. Considerations in actual fact relate primarily to the recognition of gender as a condition, because of which there are specific forms of persecution, appropriate or typical in most cases only for women, and justifying granting refugee status on the basis of the Geneva Convention relating to the Status of Refugees of 1951 (Hereinafter: the Geneva Convention or the Convention of 1951). [OJ 1991 No. 119, item. 516].

In the following dissertation the methods of analyzing legal acts and documents, mainly international ones, have been used. In addition, the study included the positions of legal doctrine and statistical data. The article draws attention to the fact that the subject concerning refugees in legal literature has been present for a long time and has been a major concern to both the representatives of science and practitioners. However, the gender aspect as a condition in which people – especially women – can base proposals for gaining refugee status does not constitute a broad legal analysis, especially in Polish literature.

1. The definition of migration and its reasons

Migration is characterized as a movement of people among different population centers, e.g. among countries or cities, among various geographical or state areas. Migration can be divided into forced one (i.e. a person due to certain circumstances is forced to flee from their countries of origin, e.g.

because of the military conflict) or voluntary one (i.e. people want but do not have to leave their countries of origin, e.g. departure for economic reasons). In addition, the division of migration can also be based on the criteria of legality, the so called legal migrations, when the movement of people between countries is based on legitimate, legally required documents and entry permissions (e.g. visas) and illegal migrations, when a person does not have the legally required travel documents. If the basis for the division will take the issue of coming back to the country of origin of a migrant, migration is divided into permanent (i.e. irreversible) and temporary (i.e. return).

Owing to the fact that migration is a complex and multidimensional issue as well as the object of interest of various studies, one would not expect a detailed and satisfactory theory, or a theoretical concept explaining the reasons for modern migration [Górny, Kaczmarczyk, 2003, 4]. The reasons for migration are varied and the most important ones are: economic reasons, where migration takes place to a country with better economic status; scientific reasons, arrivals to the country, where one can obtain education, e.g. foreign students; business reasons, arrivals to the country in which it is better to do business; the reasons that ensure security, when, for example in the country of origin of a migrant there is a conflict or persecution to population and at the same time human rights are violated; environmental reasons, when leaving the country of origin of a migrant occurs as a result of natural dangers, e.g. natural disasters, the absence or deficiency of drinking water.

Contemporary world and all the changes in it have caused the necessity to modify a lot of notions and phenomena and their analyses in the face of contemporary international events, social as well as political conditions. One problem is migration of people to Europe, mainly from Africa. Today migration is a phenomenon characterized by ongoing growth and the problem of migration and its determinants and effects has long been the subject of research and analysis of both a legal doctrine as well as other science [Degani, 2007, 23]. It is also in the interest of practitioners, government bodies and international organizations both governmental and non-governmental ones. Today, however, as everyone points out, both representatives of the doctrine as well as others who deal with the migration issue – the situation in Europe is unique in comparison with previous experiences. The events of the first and the second decade of the XXI century involving the influx of hundreds of thousands of people to Europe highlight a pivotal issue of persecution

in African countries, and the role of the international protection of the individual in the form of refugee status is being activated to a much greater extent than before. It is commonplace that Europe has for many centuries been and still is a place of the beginning and often the end of migration “wandering” for seekers of legal protection in the form of refugee status in other countries fleeing from persecution, which is a violation of basic human rights. Population migration to Europe in the last years of the XXI century arises curiosity, or even fascination; on the other hand, it arises worries and astonishment both for researchers and ordinary inhabitants who observe their society.

2. Definition of the term “refugee”

Grounded in Article 14 of the Universal Declaration of human rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries, the United Nations Convention relating to the Status of Refugees, adopted in 1951, is the centrepiece of international refugee protection today [Dz.U. 1991 nr 119 poz. 516]. The Convention entered into force on 22 April 1954, and it has been subject to only one amendment in the form of a 1967 Protocol, which removed the geographic and temporal limits of the 1951 Convention¹.

The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention universal coverage. It has since been supplemented by refugee and subsidiary protection regimes in several regions² as well as via the progressive development of international human rights law.

The countries that have adopted Geneva Convention use the international law and grant refugee status on the basis of its definition:

„(...) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

As can be seen from the face of the text, the refugee definition applies to all persons without distinction as to sex, age, disability, sexual orientation, marital status, family status, race, religious belief, ethnic or national origins, political opinion, or any other status or characteristic. The only categories of persons who are not included in the definition are those described in the cessation provisions of Article 1C and the exclusion provisions of Articles 1D, 1E, and 1F. Even then, none of these provisions makes any distinction between individuals on the basis, for example, of their sex, age, disability, sexual orientation, marital or family status, race, political opinion, or religious or ethical belief. The intention to provide universal access to the refugee regime is expressly affirmed by the first and second recitals in the Preamble to the 1951 Convention:

*Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms(...)*

Every person who tries to obtain refugee status should before government bodies of a particular country state his/her worries of persecution from the above mentioned reasons. Therefore, a refugee mustn't be a person leaving their country of origin due to all reasons, e.g. economic ones or due to natural disasters.

3. Gender vs. refugee status

Gender discrimination is the unequal form of treatment of women and men with their belonging to a particular sex, which is not determined by an objective condition. The reason for this type of discrimination lies in stereotypes connected to social roles for a particular sex in a particular culture [Niżyńska A., 2014]. Cultural archetypes of womanhood and manhood in most societies are explicitly outlined. It means that behaviour incompatible with expectations and predictions for a particular model norms may affect in negative consequences for a person breaking the norms

[Niżyńska A., 2014]. Gender-specific forms of persecution against women include, but are not limited to: marriage-related harm, violence within the family or community, domestic slavery, forced abortion, forced sterilisation, trafficking, female genital mutilation, sexual violence and abuse and rape. 'Gender-based violence' and 'violence against women' are terms that are often used interchangeably as most gender-based violence is inflicted by men on women and girls. However, it is important to retain the 'gender-based' aspect of the concept as this highlights the fact that violence against women is an expression of power inequalities between women and men. The terms are used interchangeably in doctrine but is usually understood that gender-based violence means violence against women. Gender-based violence is an umbrella term that can be defined as violence directed against a person because of that person's gender (including gender identity/expression) or as violence that affects persons of a particular gender disproportionately. Women and girls, of all ages and backgrounds, are most affected by gender-based violence. It can be physical, sexual, and/or psychological. As professor Heaven Crawley indicates, women are often refugees for such political or ethnic reasons as men, but the causes for which they seek for help are somewhat different:

- ⇒ women hide persecutors, forward messages, provide food, clothing and medical aid,
- ⇒ the authorities of many countries use family relationships to intensify the pain,
- ⇒ women who do not meet the moral or ethical standards of the community experience a cruel and inhuman treatment,
- ⇒ women are often targeted by the authorities because they are more prone to injury, especially if they are pregnant or are very young,
- ⇒ women may experience harassment on from their own family or community, not just the state authorities [Crawley, 2016].

More than a million refugees arrived in Europe in 2015, and despite misguided deterrence policies, the migration continues [Women at risk, 2016, 1]. Currently, 55 percent of those en route are women and children, many attempting to reunite with husbands and fathers who went ahead. The international legal protection of women who try to obtain refugee status is, therefore, a very important issue. However, among the conditions in granting refugee status, there is no clear *expressis verbis* persecution indicator based

on gender as a condition justifying the granting of refugee status to women. However, as 65-year practice of the Geneva Convention showed, persecution on basis of sex enters the scope of the possibility of obtaining refugee status was based on this criterion. The broad spectrum of standards of conduct for the recognition of sex, especially for women, as a condition justifying in certain circumstances refugee status has been developed in the Office of the High Commissioner Refugees (hereinafter: UNHCR). UNHCR's works on the standard inclusion of context – gender as a condition justifying the granting of refugee status under the Geneva Convention began back in the 80's. Since then, there have been a number of important documents relating to the issue of sex (mainly women) in refugee proceedings. In 1985, UNHCR's Executive Committee adopted Recommendation No. 39 of 1985. "Refugee Women and International Protection of Refugee Women and International Protection" [Refugee Women and International Protection, 1985]. The document was one of the first official UNHCR positions where Executive Committee stressed out that women and girls refugees represent statistically the majority of the world's refugee population. Women face particular problems in the field of international protection because of the legal and social conditions in the countries of origin – they are often exposed to physical violence, sexual violence and other forms of discrimination that may justify obtaining refugee status. Moreover, Recommendation of 1985 stated that women wishing to obtain refugee status, and who are treated inhumanly or degradingly due to a violation of their moral standards in the society in which they live, can be considered a 'particular social group' within the Article 1 A (2) of the Convention on the status of refugees of 1951.

In the 90's of the XX century there were other important UNCHR recommendations: *Refugee Protection and Sexual Violence Refugee Protection and Sexual Violence* (No. 73, 1993) and *General Conclusions on International Protection General Conclusion on International Protection* (No. 77/1995, No. 79/1996, No. 81/1997, No. 87/1999). References to the gender condition, especially women on the basis of human trafficking are also found in *Guidelines on international protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked* of 7 April 2006 [Guidelines on international protection, 2006]. In the above mentioned documents UNCHR stressed the necessity to make practices by the State aimed at addressing the

gender perspective – in relation to women, in law and practice concerning national refugee procedure [Refugee Protection in 1993, General Conclusion 1995, 1996, 1997, 1999]. These documents also emphasize that the important issue is to develop and implement guidelines, codes of conduct and training programs related to the promotion of knowledge on refugee procedures taking into account the gender perspective – including women.

The above mentioned conclusions were adopted by the General Assembly and the Executive Committee of the UNHCR in San Remo, where on 6–8 September 2001 the so called Expert Round Table³ took place organized by UNHCR and the International Institute of Humanitarian Law, where the problem of persecution on the basis of gender in the context of 1951 Convention was discussed [Global Consultations, 2001].

Very important are *Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (hereinafter: Guidelines 2002) [Guidelines on international protection, 2002]. This document is a kind of summary of UNHCR's achievements in the creating of the standard perception of gender in refugee procedures. Guidelines of 2002 clearly indicate that gender may be an influencing or even decisive condition, because of the category of persecution, on granting refugee status to women. UNHCR underlines that “even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims. As such, there is no need to add an additional ground to the 1951 Convention definition (...). It is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. This approach has been endorsed by the General Assembly, as well as the Executive Committee of UNHCR's Programme” [Guidelines on international protection, 2002, 2,3].

Guidelines of 2002 in the standards that take into account gender as a condition for granting refugee status distinguish “social gender” and “biological gender”. The notion of “socio-cultural gender” refers to the relation between men and women on the basis of status, roles and responsibilities for either of gender that are defined and interpreted

socially and culturally. Socio-cultural gender does not have statistical or inborn character, but gains social and cultural meaning over time. According to Heaven Crawley and others: "The term 'gender' (...) refers to the social construction of power relations between women and men, and the implications of these relations for women's (and men's) identity, status, roles and responsibilities (in other words, the social organization of sexual difference). Gender is not static or innate but acquires socially and culturally constructed meaning because it is a primary way of signifying relations of power. Gender relations and gender differences are therefore historically, geographically and culturally specific, so that what it is to be a 'woman' or 'man' varies through space and over time. Any analysis of the way in which gender (as opposed to biological sex) shapes the experiences of asylum-seeking women must therefore contextualise those experiences" [Crawley, 2001; Anker, 1999, 252-266, 365-93; Goldberg, 2000, 309]. In the case of the so called "biological gender" differentiation between men and women is mainly based on the strictly biological criteria (natural from a medical point of view). Taking into account that the concept of socio-cultural gender entered the customs of social and legal culture of countries in the 50's of the XX century, it also appeared as a natural result of the development of civilization in the interpretation of 1951 Convention. The adoption of the socio-cultural gender does not mean, however, that refugee status is entitled automatically to all women [Bernier, 1997, 167-168]. An applicant for refugee status must meet conditions resulting from 1951 Convention. He/she should prove that has a 'well-founded' fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. The requirement that the refugee claimant hold a 'well-founded' fear of being persecuted if returned to the country of origin requires a forward-looking assessment of the prospective risk of harm [Kälin, 1992, 21]. That assessment must be made by the decision maker at the date of the decision on the refugee claim [Jackman, 1992, 37]. Persecution is most appropriately defined as the sustained or systemic failure of State protection in relation to one of the core entitlements recognized by the international community [Hathaway, 1991, 104-5, 112].

Secondly, it is obligatory to point out the link between the fear of persecution and one of the reasons of persecution. The practice in the

national refugee procedures is very varied. Some countries use less restricted procedures – it is enough to meet at least one of the reasons persecution as a contributor, and not even a decisive factor. In other countries, it is required that causality has been established unequivocally. It is often dependent on the category of persecution that affect women, for example when violation of women's rights relate to the so called women trafficking; it is enough to qualify women as a social group, which is formed based on gender. Both UNHCR guidelines of 2002 and the states in national procedures claim that women are an example of a social subclass of people defined by inborn and constant characteristics.

Another important issue is to demonstrate that gender-based discrimination is often enforced through law as well as through social practices [Crawley, 2001, 51]. A woman's claim to refugee status cannot be based solely on the fact that she is subject to a national policy or law to which she objects [Immigration and Refugee Board, 1996, 11]. The claimant will need to establish that: 1. the policy or law is inherently persecutory; or 2. the policy or law is used as a means of persecution for one of the Convention reasons; or 3. the policy or law, although having legitimate goals, is administered through persecutory means; or 4. the penalty for non-compliance with the policy or law is disproportionately severe [Crawley, 2001, 51]. UNHCR guidelines show in this aspect that still many countries have failed to establish or implement sufficient criminalising and preventing measures against persecution of women. If the State does not take the steps, which are necessary to prevent and combat persecution of women and does not provide protection to victims, therefore the fear of persecution in this situation is justified in the light of provisions of 1951 Geneva Convention. The existence of national law prohibiting persecution of women is not a sufficient condition to exclude persecution. If the law exists, but is not implemented in an effective manner, despite the existence of legal mechanisms to provide protection and assistance to victims for a person does not have access to such mechanisms, then the State may be unable to legally protect victims or potential victims, i.e. persecuted women. Therefore, the assessment of whether the national authorities of the country of origin of persecuted women are able to protect victims or potential victims shall depend on whether legal and administrative mechanisms established by the State for this purpose are properly carried out in practice.

Conclusion

Nowadays, Europe is experiencing a massive movement of displaced people fleeing armed conflicts, mass killings, persecution, and gender-based violence. For instance, in 2015 from January to November 950,469 have been the arrivals of displaced people and migrants in Europe through the Mediterranean routes, escaping from Syria (49%), Afghanistan (20%), Iraq (8%), Eritrea (4%), Nigeria (2%), Pakistan (2%), Somalia (2%), Sudan (1%), Gambia (1%), and Mali (1%). Approximately, 24% of the people who arrived in 2015 are children and 16% are women⁴. The international protection of persecuted women through accepting gender condition as a cause for granting refugee status is an important step in maximizing the standard of human rights. Presently, counteraction against persecution of women is placed top on UNCHR priorities. The UNHCR gender – relevant guidelines, including the UNHCR Gender Guidelines adopted in 2002, are key elements for the promotion of gender-sensitivity in refugee status determination systems [Cheikh Ali, Querton, Soulard, 2012, 31]. Their impact is, however, limited in practice due to their non-binding character. Although gender guidelines or instructions may significantly enhance gender awareness among national stakeholders, their implementation in practice is often lacking.

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Endnotes

¹ The Convention enabled States to make a declaration when becoming party, according to which the words “events occurring before 1 January 1951” are understood to mean “events occurring in Europe” prior to that date. This geographical limitation has been maintained by a very limited number of States, and with the adoption of the 1967 Protocol, has lost much of its significance. The Protocol of 1967 is attached to United Nations General Assembly resolution 2198 (XXI) of 16 December 1967, available at <http://www.unhcr.org/refworld/docid/3b00f1cc50.html>.

² See, for example, the Organization of African Unity (now African Union) Convention governing the Specific Aspects of Refugee Problems in Africa 1969, adopted in Addis Adaba, 10 September 1969; the European Union Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted,

Official Journal L 304 , 30/09/2004 P. 0012 – 0023. The Cartagena Declaration on Refugees, adopted at a colloquium held at Cartagena, Colombia, 19-22 November 1984, while non-binding, also sets out regional standards for refugees in Central America, Mexico and Panama.

- ³ Among all participants there were 33 experts from 23 countries representing governments, nongovernmental organizations, academic communities, the judiciary, and law professions. The meeting confirmed that 1951 Geneva Convention is based on a primary principle according to which people use primary laws and freedoms without being discriminated. Due to the fact that men, women and children may experience different persecutions adequate to their characteristics (sex or age), the Article 1a (2) must be interpreted by these different characteristics and individual circumstances that are a basis for gaining refugee status. The experts firmly stated that gender may be the particular circumstance. Summary Conclusions – Gender – Related Persecution of 2001 have been added to UNHCR guidelines of 2002.
- ⁴ Data available at: UNHCR, 2016 and <http://data.unhcr.org/mediterranean/regional.php>. Visited on 2 February 2016.