

Gender and Asylum: A Critical Reassessment of the Case Law of the European Court of Human Right and of United States Courts Concerning Gender-Based Asylum Claims

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Abstract : While there is a common understanding that a person's sex, gender, gender identity, and sexual orientation shape every stage of the migration experience, theories of international migration had until recently not been focused on exploring and incorporating a gender perspective in their analysis. In a similar vein, refugee law has long been the object of criticisms for failing to recognize and respond appropriately to women's and sexual minorities' experiences of persecution. The present analysis attempts to depict the challenges faced by the European Court of Human Rights (ECtHR) and U.S. courts when adjudicating in cases involving asylum claims with a gendered perspective. By providing a comparison between adjudicating strategies of international and national jurisdictions, the article aims to identify common or distinctive approaches in addressing gendered based claims. The paper argues that, despite the different nature of the judicial bodies and the different legal instruments applied respectively, judges face similar challenges in this context and often fail to qualify and address the gendered dimensions of asylum claims properly. The ECtHR plays a fundamental role in safeguarding human rights protection in Europe not only for European citizens but also for people fleeing violence, war, and dire living conditions. However, this role becomes more difficult to fulfill, not only because of the obvious institutional constraints but also because cases related to claims of asylum seekers concern a domain closely linked to State sovereignty. Amid the current "refugee crisis," risk assessment performed by national authorities, like in the process of asylum determination, is shaped by wider geopolitical and economic considerations. The failure to recognize and duly address the gendered dimension of non-refoulement claims, one of the many shortcomings of these processes, is reflected in the decisions of the ECtHR. As regards U.S. case law, the study argues that U.S. courts either fail to apply any connection between asylum claims and their gendered dimension or tend to approach gendered based claims through the lens of the "political opinion" or "membership of a particular social group" reasons of fear of persecution. This exercise becomes even more difficult, taking into account that the U.S. asylum law inappropriately qualifies gendered-based claims. The paper calls for more sociologically informed decision-making practices and for a more contextualized and relational approach in the assessment of the risk of ill-treatment and persecution. Such an approach is essential for unearthing the gendered patterns of persecution and addressing effectively related claims, thus securing the human rights of asylum seekers.

Keywords : asylum, European court of human rights, gender, human rights, U.S. courts

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