

IS THERE REFUGE FOR PEOPLE WITH DISABILITIES WITHIN THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES?

Y-A-T-IL UN REFUGE POSSIBLE POUR LES PERSONNES AYANT DES INCAPACITÉS DANS LA CONVENTION DE 1951 RELATIVE AU STATUT DES RÉUGIÉS A LA PROTECTION DES PERSONNES AYANT DES INCAPACITÉS

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Abstract

Forms of oppression affecting specific social groups such as women and people with disabilities are demanding international address and rights protection for those deemed persecuted and oppressed. In 1951, the United Nations developed the Refugee Convention, which has remained largely unchanged since its inception and has neglected to incorporate protection of newly recognized social groups. Recently, Canadian immigration and refugee laws have begun to develop legislation to address these issues, specifically in regards to gender-related persecution. By examining Canadian federal amendments to refugee and immigration law and United Nations documents developed by the Office of the United Nations High Commissioner for Refugees, this paper will argue that an amendment protecting persons facing disability-related oppression is in keeping with current Canadian values and means. Supportive documents emphasize the legal benefits of people with disabilities identifying as members of a unique social group that would then require the recognition of the widespread international incidence of disability-specific oppression and persecution. Implementation of a disability-related amendment to the 1951 Refugee Convention would not only create asylum opportunities for those fleeing regimes that practise or propagate disability persecution and oppression, but would create further awareness of the international community's intolerance of such practices.

Keywords: disability, refugees, immigration, Canadian policy 1951 Refugee Convention

Résumé

Les formes d'oppression affectant différents groupes sociaux comme les femmes et les personnes ayant des incapacités demandent une attention internationale particulière ainsi qu'une protection de leurs droits. En 1951, l'Organisation des Nations Unies a développé la Convention relative au statut des réfugiés laquelle est demeurée pratiquement la même depuis sa création. Des groupes sociaux nouvellement reconnus n'ont jamais été inclus à la Convention. Récemment, les lois canadiennes relatives à l'immigration et aux réfugiés ont commencées à développer un cadre législatif pour répondre à ces problématiques, tout particulièrement en ce qui a trait à la persécution basée sur le genre. En analysant les amendements fédéraux à la Loi canadienne sur l'immigration et la protection des réfugiés et les documents onusiens développés par le Haut Commissariat des Nations Unies pour les réfugiés (UNHCR), cet article démontrera qu'un amendement visant à protéger les

personnes vivant de l'oppression basée sur l'incapacité serait en accord avec les valeurs canadiennes actuelles. Une littérature substantive met l'emphase sur les bénéfices de reconnaître les personnes ayant des incapacités comme un groupe social unique ce qui témoigne de la nécessité de reconnaître internationalement l'oppression et la persécution auxquelles ces personnes font face. L'ajout d'un amendement porté sur l'incapacité à la Convention relative au statut des réfugiés de 1951 créerait une opportunité d'asile pour celles et ceux fuyant les régimes pratiquant la persécution et l'oppression fondées sur l'incapacité. De plus, cela favoriserait une plus grande sensibilisation en ce qui concerne l'intolérance de telles pratiques de la part de la communauté internationale.

Mots-clés: handicap, incapacité, oppression, persécution, droits humains, réfugié, Canada, Organisation des Nations Unies

Introduction

The United Nations' (UN) new division dedicated to representing the rights and freedoms of refugees first approved the Convention Relating to the Status of Refugees in 1951. The Convention Relating to the Status of Refugees (henceforth referred to as 'the Refugee Convention') has now become the prevailing international authority on the question of who is eligible to claim refugee status and what rights they are to be afforded. Since its inception 57 years ago, only one minor amendment (regarding time and geographical relevance) has been made. In spite of its age, the United Nations High Commissioner for Refugees (UNHCR) still claims that the Convention remains relevant to the world's ever-evolving occurrences of conflict and persecution. However, over the last few decades, new social groups have emerged claiming victimization and persecution specific to their identity. The woman's movement has brought considerable and global recognition of gender-specific oppression and persecution. The disability movement is also striving for acknowledgement and action to counter widespread disability-related human rights violations. In 1951, the prospect of women and people with disabilities identifying as

social groups facing specific challenges was inconceivable, but today the concept proves to be a critical designation.

This paper explores the Refugee Convention's application to the protection of people with disabilities, and does so by examining the original wording of the document. It also looks at the struggles and successes that international women's movements have gained in the area of refugee law as an example of potential change regarding issues concerning people with disabilities. To say the least, international immigration policies have been relentless in their efforts to exclude people with disabilities from entering host countries due to fears of their "excessive demand" on national, social, and medical systems (Council of Canadians with Disabilities, 2009). However, exercising the already established rights afforded to all citizens under the Refugee Convention may prove to be an invaluable tool for people with disabilities seeking refuge.

The Refugee Convention is written with highly ambiguous language. There are three terms in the original wording of the Convention that have drawn extensive debate regarding how they might be interpreted and applied. The debatable terms are *persecution*, *well-founded fear*, and *social group*. Some would argue that the reason the Convention is still relevant today is due to the ambiguity of its language and its broad, inclusive interpretation. The convention was not written to be exclusive, yet because it has remained static, elements of our current social understanding of persecution, fear, and social groupings stretch beyond the scope of what was originally intended when the document was written in 1951. What continues to be sticking points is not only the UNHCR's insistence on a demonstrable level of fear of persecution, but also its lack of

acknowledgement of disability as a unique social group (Hathaway & Hicks, 2004). Until disability is identified legally as a unique social group, the Convention will not apply to persons fleeing disability-related persecution.

The Refugee Convention

The Language of the Convention

Options for those who face or fear oppression are often limited. If the oppressive force permeates a society through the actions of a supported regime, militia, or government, often the only available course of action is to flee, cross national borders, and seek the security of a host country. Who, though, qualifies for asylum?

According to the Refugee Convention written in 1951, a fugitive seeking asylum must meet the following criteria:

A person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion; and is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution (UNHCR, 1951).

It appears that the authors of the Refugee Convention aimed to be inclusive in their overall definition of who can identify as a refugee, except definition does not apply well to this disability.

History of the Convention

In 1951, Europe was reeling from the massive displacement of people seeking asylum following World War II. Europeans had scattered across the continent looking for

refuge from the violence and uncertainty that had overwhelmed their homelands. Countries offering asylum were swarmed with anxious arrivals seeking to gain refugee status without the chance of deportation. The UNHCR was a new division in the UN and had only been up and running since the January 1, 1951 (UNHCR, 2006a). The UNHCR recognized the need for establishing an international guideline to protect those who had been displaced and were then living in a foreign country.

On July 28, 1951, the Refugee Convention was approved, at which point thousands of displaced Europeans were brought under its protection and afforded citizen rights from their host governments. In 1967, the UNHCR looked beyond the boundaries of Europe and observed that the issue of displacement due to war and persecution was a global crisis. The Convention was amended to broaden its time and geographic scope so that it would cover all international persecutory situations (UNHCR, 2006a).

In the last 41 years, global conflict and persecution have not abated. At the same time, new social groups have emerged claiming they are distressed. The UNHCR supports the Convention's continued relevance by saying "though the nature of conflict and migration patterns have changed in the intervening decades, the Convention has proved remarkably resilient in helping to protect more than 50 million people in all types of situations" (UNHCR, 2006a). Nonetheless, in light of its failure to recognize new social groups, the Convention may be failing.

Interpreting the Convention

Persecution

To better understand how disability-related persecution might fit within the convention's criteria, it is important to explore how the UNHCR intended the term *persecution* to be interpreted. In 1979, a handbook was created (re-edited in 1992) in an effort to define the more subjective terms of the Convention. The handbook was circulated by the UNHCR to help government officials assess the myriad circumstances surrounding each new refugee arriving in their jurisdiction.

According to article 51, “[t]here is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success” (UNHCR, 1992, article 51). The handbook remains subjective as it withholds from its readers a clear and measurable definition of persecution—one of its key criteria for claiming refugee status. It states that “threat to life...to freedom [and] serious violations of human rights” (UNHCR, 1992, article 51) are possible, but not exclusive forms of persecution. For example, psychological states of individuals, a potentially dangerous environment, and the cumulative effects of discrimination could also be considered persecution according to articles 52 to 53 (UNHCR, 1992).

As defined in articles 54 to 55 of the handbook, discrimination is not necessarily persecution unless it has culminated in substantial prejudice, which may include as examples “serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities” (UNHCR, 1992, article 54). However, article 55 alludes to cases in which discrimination, though not overt, could also be considered persecution if it raises question or fear in the mind of an individual regarding their “future existence” (UNHCR, 1992, article 55).

Many of the above examples apply to discrimination experienced by people with disabilities. Across cultures, barriers to participating in the workforce or to the acquisition of education are two common struggles experienced by people with disabilities. According to the convention, these examples of discrimination fit the criteria for persecution.

Recognition of gender-related persecution is becoming more widespread. In 2006, the UNHCR published a document detailing sexual and gender-related persecution and discrimination. It discusses in depth the gender-specific hardships and violence faced by women and girls in events such as conflict and displacement. The document relates specifically to the refugee population already displaced by war or natural disaster and does not discuss the possibility of women being afforded refugee status on the sole basis of fleeing gender-related persecution or violence (UNHCR, 2006b).

However, a set of guidelines has been established by Canada's Immigration and Refugee Board (IRB), recognizing and validating the fear of gender-related persecution as a reasonable claim for refugee status. The government of Canada has created a guideline entitled "Women Refugee Claimants Fearing Gender-Related Persecution". This document acknowledges that neither the Refugee Convention nor Canada's *Immigration Act* include gender as a defining characteristic to contribute to a well-founded fear of persecution. The guideline states, "[a]s a developing area of the law, it has been more widely recognized that gender-related persecution is a form of persecution which can and should be assessed by the Refugee Division panel hearing the claim" (IRB, 1996, p. 2). So long as a woman can establish a link between the persecution, her gender, and an element of the original definition, then she should be eligible to claim refugee status (IRB, 1996, p. 2).

L. Heise, author of “Crimes of Gender” (1989) wrote (as cited in IRB, 1996) explicitly regarding violence against women. She remarks that many women face beatings, rapes, assaults, and harassment. Heise brings to light the less recognized forms of violence whereby young girls die due to neglect, have their genitals mutilated, and women are murdered by their husbands when a dowry is insufficient. She argues, “In all these instances, women are targets of violence because of their sex. This is not random violence; the risk factor is being female” (IRB, 1996, p.15).

Like women, people with disabilities have a long history of persecution. Despite the growing global awareness of current disability issues, the pool of literature dedicated to disability oppression and resistance remains small (Charlton, 2000). As explored in “An Institutional History of Disability” by Braddock and Parish (2001), people with disabilities as a group have sustained the harshest expressions of human persecution. The group has been subjected to infanticide, executions, and forced segregation into colonies, labour camps, institutions, and imprisonment. They have been denied access to employment, education, and housing. People with disabilities have encountered pervasive humiliation and degradation through ineffective government policies and in the name of medical science.

One of the most horrendous incidences of abuse towards people with disabilities was executed during World War II—the outcome to which inspired the necessity of convention concerning the rights of refugees (Heberer, 2007; UNHCR, Refugee Survey Quarterly, 2000). Although the Refugee Convention does not address the issue of disability specifically, the war to which it is most often associated began with the systematic murder

and forced sterilization of hundreds of thousands of people with disabilities in Germany (Heberer, 2007). Implementing euthanasia policies and laws, Nazi officers rounded up people deemed “hereditarily unfit” for extermination. Beginning with children and then adults, Nazis systematically extinguished the lives of citizens with disabilities. The system of mass killing designed for Operation T4, the Nazi eugenics program was a dress rehearsal for the subsequent mass executions conducted in their concentration camps: “In all, some 200,000 individuals perished as a result of Operation T4 (‘euthanasia’) and its corollaries between 1939 and the end of World War II in Europe” (Heberer, 2007, p. 193).

Despite the persecution of people with disabilities during World War II, the writers of the Refugee Convention did not include disability-related persecution as a specific form of abuse. In addition, people with disabilities were not considered as a specific group vulnerable to unique and founded forms of severe persecution. There are many possible reasons for how the oversight occurred, but perhaps the root of the omission is the evolution of the understanding in which sphere (public or private) disability issues resided. Over 50 years ago, disability was often viewed as a personal, private matter that was to be managed within the family or through the reliance on medical professionals. However, as perspectives evolve, society’s involvement and perpetuation of disabling social structures are becoming more evident. In support of the transition from the private to the social locus of disability, a legal recognition of disability-specific persecution and the acknowledgement of disability as its own unique social group are required.

While overt forms of discrimination have been evidenced around the world, many scholars believe that more subtle marginalization can be equally detrimental to people with

disabilities: “Marginalization is perhaps the most dangerous form of oppression. A whole category of people is expelled from useful participation in social life and thus potentially subjected to severe material deprivation and even extermination” (Young, 1990, p. 53). Jennifer Harris (2003) offers insight through interviews with refugees with disabilities describing their escape from marginalizing social structures. The interviewees comment on their lack of security from the police and tyrannical governments that create a dangerous and volatile environment for people with disabilities. Due to the oppressive regime in power, they are powerless to gain employment or go to school, and are forced to work on the streets, where they are vulnerable to violence (Harris, 2003).

There is no clearer example of disability persecution and marginalization than that observed in the developing world. Evidence of marginalization is demonstrated in the pervasive link between disability and poverty. Approximately 300 to 400 million people with disabilities living in the developing world are required to live in abject poverty, where access to basic resources such as water, housing, clothing, food, and basic health and education services are limited or entirely denied: “These are the poorest and most powerless people on earth” (Charlton, p. 218, 2006). In reference to those living in such conditions, Einar Helander reports: “We have a catastrophic human rights situation...They [disabled people] are a group without power” (cited in Charlton, 2006, p. 217). As an example, the Child Rights Information Network (CRIN) statistically demonstrated that “[o]nly 2% of disabled children in developing countries receive an education: one third of the 115 million children out of school have a disability” (CRIN, 2006).

Denial of access to “development” alone has also been identified by the UN as a violation of human rights. Underdevelopment has been recognized as an element related to not only the creation of disability, but also to the intensification of disability (Despouy, 1988). Elements of persecution resulting from underdevelopment alone appear to be under the umbrella of human rights violations and could be deemed grounds for an individual or group seeking asylum. However, even widespread and internationally funded development initiatives aimed at poverty eradication, such as the Millennium Development Goals, do not include goals or targets that address the issue of disability and its inextricable relationship with poverty (Includeeverybody.org, n.d.).

Well-Founded Fear

The second controversial term written into the Refugee Convention is the criterion that those seeking asylum need to prove they have a well-founded fear of persecution. The concept of fear, being highly subjective, is a difficult element to judge. Can a third party truly be an authority on another’s experience of fear? Can disability alter the authenticity or demonstration of well-founded fear? The UNHCR handbook struggles to guide the assessment of well-founded fear and has dedicated articles 37 to 50 to exhausting the assessment factors used to prove well-founded fear, none of which apply to disability.

Recognizing the subjectivity of emotion, the handbook emphasizes that when evaluating fear there must also be an objective element to the claim of which the assessor is made aware. Articles 37 to 50 suggest specific indications that would validate the fear experience such as if the applicant, their friends, or family have experienced persecution

before (UNHCR, handbook, 1992). Other elements the handbook claims are essential in evaluating a claim are the applicant's psychological state, family affiliations, public image, religious and political beliefs, perceived influence, wealth, whether or not they carry a passport, whether or not they are willing to part with this passport, whether they would ever conceive going home, how they arrived, etc. (UNHCR, handbook, 1992).

The handbook fails to be definitive with the particulars listed above. Examples can be cited where the handbook accepts a tool of deduction and then rejects it in the following section. For instance, the handbook claims in article 47 that if the applicant has a passport, there is reason to question their sincerity. However, article 48 says there are circumstances when a passport is issued to help someone leave a country to which they cannot return. Therefore, the presence of a passport appears to be irrelevant. Article 49 supports that if a refugee does not want to part with their passport, there is reason for suspicion. Article 50 supports that there are circumstances why a refugee would want to maintain their passport and still meet the criteria of "well-founded fear of persecution" (UNHCR, handbook, 1992). Again, the desire to retain a passport also appears to be irrelevant, which calls into question whether the handbook can be considered definitive.

Despite the hesitation of international bodies to define critical terms relating to refugees, formal recognition and specific guidelines have been adopted by Canadian refugee law in relation to gender-related persecution (IRB, 1996). The Canadian guideline written specifically in regards to women fleeing from gender-related persecution asks that special considerations be made when assessing "feared harm" (IRB, 1996, p. 7). Like disability, abuses toward women have historically been a private matter handled within the

family, but as social awareness broadens on the issue of gender-related abuse, harm to women is being recognized as a legitimate form of persecution. Assessing fear of one's own family or spouse requires modified measures of evaluation. As most meanings of persecution have been based on the male experience, the guideline asks to have issues unique to women be considered, such as "infanticide, genital mutilation, bride-burning, forced marriage, domestic violence, forced abortion and compulsory sterilization" (IRB, 1996, p.7).

James C. Hathaway and William S. Hicks (2005) argue, "The Convention refugee definition requires only the demonstration of "fear" in the sense of a forward-looking expectation of risk" (p. 507). They go on to say that fear can be exhibited in a variety of ways due to uncontrollable influences such as culture and disability, and that third party assessment can lead to disingenuous conclusions.

For those who experience disability-related persecution, there are many reasons to feel well-founded fear. However, it is the requirement of the demonstration of a fearful response (demonstrable fear) that is troubling. Not all people with disabilities have the ability to experience or express fear in a way that is easily assessed. Results from several Refugee Board decisions suggest that if the element of fear is not inarguably demonstrated, one's claim for asylum will not be granted (Sadoway, 1996). These results pose enormous barriers to gaining refugee status for people with disabilities.

Social Group

According to article 77 in the UNHCR handbook, the term *social group* refers to persons who have “similar backgrounds, habits and social status” (UNHCR, 1992, article 77). The term is another example, though, of inconsistencies in the language and conditions of the Convention, for according to article 79, belonging to a specific social group is not always enough to claim refugee status: “Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution” (UNHCR, 1992, article 79).

Regarding national law, the Supreme Court of Canada as of 1993 “explicitly recognized women, children and sexual orientation as constituting the basis for particular social groups” (Shacter, 1997). Other scholars have also attempted to define what constitutes a social group; for example, Iris Marion Young (1990) who argues that membership to a social group entails “a collective of persons differentiated from at least one other group by cultural forms, practices, or way of life” (p. 43). Paul Farmer (1996) goes one step further by suggesting that “any distinguishing characteristic, whether social or biological, can serve as pretext for discrimination, and thus as a cause of suffering” (p. 279).

The UNHCR concluded in 1985 that asylum countries are entitled to the following:

to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention (UNHCR EXCOM, 1985, p. 2).

However, nothing has been established internationally to support a similar claim of social group membership for people with disabilities. Consistent with article 77 of the UNHCR handbook, people with disabilities often share the elements of “similar backgrounds, habits and social status” (UNHCR, 1992, article 77). Simi Linton (2006), a leader in the disability movement, supports this interpretation by arguing, “[w]hen disability is redefined a social/political category, people with a variety of conditions are identified as *people with disabilities or disabled people*, a group bound by common social and political experience” (p. 163, emphasis in the original).

There is reason to believe that we will get to the point where we legally recognize people with disabilities as a unique social group facing unique forms of oppression and struggles especially around immigration and refugee issues: “The particular social group category is proving to be a very versatile ground for recognizing claims arising from gender-based persecution and other non-enumerated grounds for according convention refugee status” (Adjin-Tettey, 1997, p. 22).

Conclusion

The Convention’s exclusion of disability-related criteria in both the assessment of well-founded fear and in the identification of social groups continues to uphold discriminatory barriers against people with disabilities seeking asylum. Creating a disability-specific guideline dedicated to issues involving disability-related persecution, modifying the assessment of well-founded fear, and outlining how disability functions and identifies as a unique social group would help to establish the international legitimacy of

disability-related refugee claims. Implementing disability-specific amendments to the Refugee Convention would emphasize the importance of acknowledging forms of persecution that are unique to people with disabilities and help gain an international union for a no-tolerance objective. Prior to the establishment of the Convention on the Rights of Persons with Disabilities in 2006, there was a cry to introduce such a disability-specific convention as it would “play a crucial role in ensuring that disability is recognized and accepted as a human rights issue” (Rioux & Samson, 2006, p. 123). Predictions of a similar outcome urge the UN to consider incorporating a disability-specific amendment into the 1951 Refugee Convention. As new developments in legislation around gender-related persecution begin to emerge, so must we begin to see the same consideration toward issues of disability in this context.

Nonetheless, the nagging question remains: if evidence of disability-related persecution were found to be a valid cause to grant refugee status, where would people with disabilities go? Even though there are extreme variances of degrees, is there any place on earth that claims to be free of disability oppression or persecution? Who would volunteer to host this exodus? The core values written into the Refugee Convention’s original form will continue to be relevant in the majority of situations, but modifications need to be made in order for it to provide protection to all members of society.

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