

## Few remarks on the application of the right to asylum according to Constitution of Slovak republic<sup>124</sup>

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**Abstract:** Article aims to briefly clarify the concept of asylum and its place in international law. It describes criteria which clearly distinguish the concept of asylum and refugee concept. It concentrates on questions related to the absence of a subjective right to asylum in the international legal context and the questions of the application of the constitutionally guaranteed right of asylum. There are fundamental differences in the legal regulation of the conditions for granting of asylum and those for granting of a refugee status. Finally, the article highlights some problems with the application and interpretation of the constitutionally granted right to asylum.

**Key words:** Asylum, refugee, constitution, human rights, international protection, asylum protection

### Introductory remarks

The Constitution of the Slovak Republic (further referred to only as "Constitution") in its article 53 states that the Slovak Republic grants asylum to foreigners persecuted for exercising political rights and freedoms, while asylum may be denied to those who acted in violation of fundamental human rights and freedoms. Law is entrusted to regulate further details on the right to asylum. This - rather short provision of Constitution has been so far not complexly examined and interpreted by the Constitutional Court of Slovak republic.

There is no doubt that asylum is a complicated legal institute. Its complexity stems primarily from the fact that there is no clear and universal definition of asylum. To some extent it also mingles with the definition of refugee which is clearly established in international law. But again, international law enshrines the right to seek and enjoy asylum to everyone but does not define the concept of asylum as such. With regards to the law of European Union, we are from 1990s witnessing the process of harmonization of asylum policies of the Member States of the European Union - therefore fundamental and continuing undermining of the sovereignty of the state in this area.

Latin and Greek origin of the word asylum shows us that already in the ancient history it referred to such a place where persecuted person was beyond the reach of the actor of this persecution<sup>125</sup>, hence a place where person protected by asylum was guaranteed safety from violence. Most authors who deal with the presence, as well as the history of asylum agree that the mere practice of granting asylum is as old as mankind itself. Paradoxically, they also agree on the fact that, despite such a long and rich history asylum is not yet clearly and universally defined<sup>126</sup>.

In contrast with the absence of a generally accepted definition of asylum we have a clear definition of a refugee. Its source is Article 1A of the Convention relating to the Status of Refugees of 1951 and its Protocol of 1967 (hereinafter referred to as "the Geneva Convention on the Status of Refugees"), pursuant to which the refugee is a person who is outside their country of origin, has a well-founded fear of persecution for reasons of race, religion, ethnicity, membership of a particular social group or for reasons of political opinion and is unable or, owing to such fears refuses to avail to protection from country of origin, and is unable or unwilling to return to that country. The Charter of Fundamental Rights of the European Union, in Article 18 declares the right of asylum in such a way that it ensures compliance with the rules of the Geneva Convention on the Status of Refugees<sup>127</sup>. Hence,

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<sup>125</sup> S.Prakash Sinha: Asylum and International Law, Hague: Springer, 1971.

<sup>126</sup> Alte Grahl – Madsen: The Land Beyond: Collected Essays on Refugee Law and Policy, Hague: Kluwer Law International, 2001.

<sup>127</sup> Article 18 of European Union Charter of Fundamental rights: „The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January

even at level of the European law regulating issues related to international protection, we do not find any definition of asylum.

### **Right to asylum in international law**

Despite such an absence of universal and unambiguous definition of asylum, if we focus on identifying the contents of a person's right to asylum, we can determine the elements of which it is logically composed. As such, it can be divided into three separate rights - the right to grant asylum, the right to seek asylum and the right to be granted asylum<sup>128</sup>.

It is international law which gives the right to state governments to provide asylum. It is based primarily on the principle that state has the exclusive control over its territory, and therefore over the people that reside on that territory. Universal Declaration of Human Rights of 1948 recognizes in its Article 14.1 that everyone has right to seek and to enjoy in other countries asylum from persecution<sup>129</sup>. Some authors argue this right is to be interpreted also as the right of every state to offer refuge to persecuted persons and not to be requested from other states to release such person. Even the UN Declaration on Territorial Asylum of 1967 in its Article 1.1 states that the State's decision to grant asylum to persecuted persons under Article 14 of Universal Declaration of Human Rights of 1948 should be respected by all other States<sup>130</sup>. In addition, Article 1.3 of UN Declaration on Territorial Asylum of 1967 gives the state of asylum competency to assess compliance with the conditions for the granting of asylum<sup>131</sup>. Finally, the Council of Europe in 1977 adopted the Declaration on Territorial Asylum, where Article 2 affirms the right of Member States of the Council of Europe to award asylum to persons who meet the conditions under the Geneva Convention on the status of refugees, and other persons who will be declared to be "worthy" granted asylum<sup>132</sup>.

Right to seek asylum is the second component of the right to asylum. It is an individual right of a person *vis - a - vis* the state. It is connected with the right to leave country of origin, which is enshrined in several international and regional conventions. Article 13.2 of Universal Declaration of Human Rights of 1948 states that everyone has the right to leave any country, including his/her own. Similarly, the International Covenant on Civil and Political Rights in its Article 12.2 again declares an individual's right to leave any country, including their country of origin.

The third component of the right to asylum is the right of person to be granted asylum, if the conditions are met. Legal philosophy (for example Hugo Grotious or Francisco Suárez) considers the right of asylum as the natural right of the individual, which corresponds to obligation of the state to grant the asylum to asylum seeker who meets requirements. This natural right tendency to the right of asylum, however, has no adequate support and reflection in international law. Article 14.1 of the Universal Declaration of Human Rights of 1948 proclaims the individual's right to seek and enjoy asylum in other countries, however, this provision does not guarantee the asylum seeker the right to be granted asylum. At this point it is interesting to note that the originally proposed wording of this article

1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”.

<sup>128</sup> Tom Clark: Human Rights and Expulsion: Giving Content to the Concept of Asylum, *International Journal of Refugee Law* (1992) 4 (2), p.189-204.

<sup>129</sup> „Everyone has the right to seek and to enjoy in other countries asylum from persecution.”.

<sup>130</sup> „Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.”;

<sup>131</sup> “It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.”

<sup>132</sup> „The member states of the Council of Europe, parties to the 1951 Convention relating to the Status of Refugees, reaffirm their right to grant asylum to any person who, having a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, also fulfils the other conditions of eligibility for the benefits of that convention, as well as to any other person they consider worthy of receiving asylum for humanitarian reasons. “

included not only the individual's right to seek and enjoy asylum, but also the individual's right to be granted asylum from persecution. Such "more generous" wording would therefore give individuals the right to be granted asylum by the state which declares its intention and commitment to provide asylum to those - persecuted. Similar scenario was repeated in the drafting and adoption of the text of the International Covenant on Civil and Political Rights, which contains no specific provision concerning the right to asylum. International Covenant on Economic, Social and Cultural Rights remains silent about it, too<sup>133</sup>. Finally, neither the main source of international legal protection of refugees - Geneva Convention on the Status of Refugees doesn't provide individuals with the right to be granted asylum, but only defines who is a refugee<sup>134</sup> and sets individual rights of refugees<sup>135</sup>.

#### **Right to asylum in constitutional law**

The absence of international instrument establishing the individual's right to be granted asylum, does not preclude the practice of individual states to create such a right - thus to declare will and commitment to offer asylum to persons persecuted if conditions given by law are met. Such legal regulation of the right to asylum then necessarily coexists alongside with the commitments of the state derived from the provisions of international law.

Slovak Republic is one of the few European countries (like the Czech Republic, Germany, Italy, Spain, Portugal, France and Estonia), whose constitution includes the right to asylum by defining the basic framework for conditions, whose fulfillment should be a prerequisite for the granting of asylum to persons claiming for asylum.

The Constitution of the Slovak Republic and in its Article 53 states that the Slovak Republic grants asylum to foreigners persecuted for exercising political rights and freedoms. Asylum may be denied to those who acted in violation of fundamental human rights and freedoms. It is therefore clear that granting of asylum is bound to fulfillment of two cumulative conditions. The first is the existence of persecution and the second is the exercise of political rights and freedoms. Between persecution and the exercise of political rights and freedoms must be a causal link<sup>136</sup>. Hence, political rights and freedoms are the only ones of the fundamental right which are to be protected by Article 53 of the Constitution by the right of asylum. Interpretation of this article should hence take into account the purpose of the right to asylum and thus instead of a literal interpretation, which would mean association with the right to asylum only with a person who is persecuted for exercising more political rights and freedoms, reasonable interpretation is that the persecution is sufficient if it was based on exercise of even one political right or freedom. Meeting the negative condition, that person acted contrary to fundamental human rights and freedoms, allows the Slovak Republic to withhold the granting of asylum. But if the person who applied for asylum to the Slovak Republic didn't act in violation of fundamental human rights and freedoms, such person cannot be denied asylum. Even if asylum applicant would meet those negative conditions it does not exclude the possibility of Slovak republic to grant him/her asylum. Hence, if negative conditions of Article 53 of the Constitution of the Slovak Republic are fulfilled, Slovak Republic has accorded the possibility and not the obligation to deny asylum.

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<sup>133</sup> Alfred de Zayas: Human rights and refugees, UNHCR: UN Treaty Based mechanisms and Refugee Issues, 2001.

<sup>134</sup> Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UNHCR, 1979 (Reedited in January 1992), bod 25: "Although there are references to asylum in the Final Act of the Conference of Plenipotentiaries as well as in the Preamble to the Convention, the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol. The High Commissioner has always pleaded for a generous asylum policy in the spirit of the Universal Declaration of Human Rights and the Declaration on Territorial Asylum, adopted by the General Assembly of the United Nations on 10 December 1948 and on 14 December 1967 respectively.";

<sup>135</sup> David. A. Martin: Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, University of Pennsylvania Law Review, vol. 138, no. 5 (1997).

<sup>136</sup> Ján Drgonec: Ústava Slovenskej republiky, Heuréka, 2012, p. 883.

The Constitutional Court of the Slovak Republic yet in its decision-making activities on the right to asylum only dealt with it in a minimalist range. In its decision from 1998, however it stated with regards to the right to asylum following<sup>137</sup>: "The provision of Article 53 of the Constitution cannot be inferred that the foreigner has absolute and unrestricted right to be granted asylum, as granting of asylum may be denied to those who acted in violation of fundamental human rights and freedoms. Each foreigner has, however, in Slovakia the right to claim the asylum in manner, within the time limits and to the authorities designated by law, the existence of which is enshrined in Article 53 of the Constitution by phrase 'the details provided by law. "

#### **Law on asylum**

Law no. 480/2002 Coll. On Asylum in its paragraph 8 governs the conditions under which the Slovak Republic shall grant asylum to those applying for it. Conditions for granting of asylum as they are defined in paragraph 8 point a) fully correspond to the definition of refugee under the aforementioned Article 1A of the Geneva Convention relating to the Status of Refugees. In contrast, the text of paragraph 8 point b) is a clear reflection of the right to asylum guaranteed by the Constitution of the Slovak Republic in its Article 53. Hence, under paragraph 8 point b) the Slovak Republic grants asylum to the asylum seeker who is in the country of origin persecuted for exercising of political rights and freedoms.

Even at the first sight there are obvious differences between the conditions for the granting of asylum based on the definition within the aforementioned two provisions. This difference is primarily the difference between the situations whether the asylum seeker has a reasonable fear of persecution, or he/she is in country of origin already being persecuted and within the reasons for such persecution happens. Another difference lies in the different setting for conditions for refusal to grant asylum to such an asylum seeker who otherwise qualifies for granting of asylum.

In paragraph 8 point a) in accordance with the definition of a refugee under the Geneva Convention relating to the Status of Refugees for granting of asylum it is required to proof of well-founded fear of asylum seeker from persecution in country of origin. Such a (well-founded) fear may yet have an asylum seeker without being previously exposed to real persecution. In contrast, one of the conditions for granting asylum required by the Constitution of the Slovak Republic and subsequently by paragraph 8 point b) is proof of actual persecution of the asylum seeker in country of origin.

Differences are apparent even in the setting of a causal link between the persecution and the reasons for it. Paragraph 8 point a) requires persecution for racial, ethnic, and religious reasons, for holding political opinion or for membership of a particular social group. Slovak Constitution and paragraph 8 point b) of the act on asylum requires persecution caused by the exercise of political rights and freedoms. Exercise of political rights and freedoms has to be logically interpreted considerably broader than holding of a political opinion within the meaning of the Geneva Convention relating to the Status of Refugees and paragraph 8 point a) of the act on asylum. In the context of the Constitution of the Slovak Republic this will include also the exercise of the rights under Article 26 to 32 of the Slovak Constitution - freedom of expression, right to information, right to petition, right of assembly, freedom of association, the right to participate in public affairs, the right to free competition of political forces as well as the right to resistance.

Regarding the possibility of refusing asylum to such an asylum seeker who otherwise meets the conditions for its granting, act on asylum does not regulate these differently due to different reasons for granting asylum under paragraph 8 point a) and point b). Reasons for denial of asylum are set in paragraph 13. These reasons primarily reflect the reasons for exclusion from international refugee protection under the Geneva Convention relating to the Status of Refugees and they are based on the so-called supportive nature of international protection in the form of refugee status. Given the fact that the Law on Asylum

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<sup>137</sup> Decision of Constitutional Court of Slovak republic num. US 12/98.

does not reflect the second sentence of Article 53 of the Constitution of the Slovak Republic, according to which asylum can be denied only to those who acted in violation of fundamental human rights and freedoms, it is necessary to encourage competent authorities for such an application of paragraph 13, which will not exceed constitutional framework of options to refuse asylum. Finally, the Constitution of the Slovak Republic in its Article 53 refers only to the possibility to deny asylum to those who acted contrary to the fundamental rights and freedoms. And even meeting of such conditions does not exclude the possibility of granting of asylum. The burden of proof of showing that the asylum seeker has acted in violation of fundamental human rights and freedoms lies on the Slovak Republic. Even if there is evidence that those conditions are met, Slovak Republic according to its Constitution has still only the opportunity and not the obligation to deny asylum.

### **Conclusion**

The right to asylum under Article 53 of the Constitution of the Slovak Republic, respectively according to paragraph 8 point b) of the act to asylum has not been so far the subject of a separate survey or interpretation by the courts of the Slovak Republic. Theory and practice of assessing applications for asylum is therefore missing a judicial interpretation of the differences between the institutes of refugee status and asylum, or the difference between the fear of being persecuted for holding political views and persecution resulting from the actual exercise of political rights and freedoms. Even the practice of administrative authorities competent for assessing and deciding on applications for asylum doesn't while evaluating the conditions for granting asylum strictly distinguish between the two different reasons for granting asylum, which the law on asylum defines differently in paragraph 8 point a) and point b).

However, should the theory and practice of international protection of refugees come to conclusion that the definition of a refugee under the Geneva Convention on the Status of Refugees is sufficiently flexible and wide enough to absorb also the protection from persecution under Article 53 of the Constitution of the Slovak Republic, it is appropriate to start to discuss possible obsolete nature of such and provision of Constitution of the Slovak Republic. Finally, such discussions within the European Union are already underway - for example in the Federal Republic of Germany and in France<sup>138</sup>. The national constitutional courts, however, so far successfully defended the role and importance of the constitutional right to asylum.

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<sup>138</sup> Helene Lambert, Francesco Messineo and Paul Tiedemann: Comparative perspectives of constitutional asylum in France, Italy, and Germany: requiescat in pace?, *Refugee Survey Quarterly*, 2008, 27/3, p. 16 – 32.