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The hollowing out of the right to asylum for asylum seekers from El Salvador and Honduras

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ARTICLE SECTION

The hollowing out of the right to asylum for asylum seekers from El Salvador and Honduras

Abstract: This research focuses on making visible the situation of social injustice and helplessness to which thousands of applicants for international protection from El Salvador and Honduras are subjected. The ultimate aim of the present denunciation of the denaturalization of the right to asylum in Spain is not only to analyse the violation of the most fundamental legal issues in the field of international protection, but also to make recommendations to improve the living conditions of this vulnerable group. The research proposes a socio-legal methodology, aiming to interrelate the legal regulations with the factual reality. In this way, the legislative analysis converges with the qualitative research technique of the in-depth interview, capable of favoring an approach to the reality under study through the eyes of the protagonists. The results reveal a series of dysfunctions surrounding the non-recognition by the Spanish State of international protection on the grounds of gangs persecution, the main argument being the absence of sufficient evidence to prove the passivity of the Salvadoran and Honduran authorities in the face of the criminal organizations that reign in the Northern Triangle of Central America.

Key words: refugee; migration; Central American gangs; persecution agents.

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IDEAS CLAVE / HIGHLIGHTS / IDEES CLAU

1. España no reconoce la protección internacional por motivo de persecución a manos de las pandillas.
2. La víctima de las pandillas no es un migrante socioeconómico.
3. Las pandillas centroamericanas no son agentes delincuenciales comunes sino estructuras criminales de alcance internacional.

1. Spain does not recognise international protection on the grounds of persecution at the hands of gangs.
2. The victim of gangs is not a socio-economic migrant.
3. Central American gangs are not common criminal actors but criminal structures with international reach.

1. Espanya no reconeix la protecció internacional per motiu de persecució a les mans de les colles.
2. La víctima de les colles no és un migrant socioeconòmic.
3. Les colles centreamericanes no són agents delincuenciales comunes sinó estructures criminals d'abast internacional.

EXTENDED ABSTRACT¹

1. Introduction and justification

This research aims to make visible and bring to the attention of different sectors of Spanish society the situation of social injustice and helplessness to which thousands of people seeking international protection from El Salvador and Honduras are subjected. This paper is an effort to understand, interpret and describe a reality that appears silenced and seriously invisible to most political and social actors.

The Spanish State, through a rigid interpretation of some of the legal tools of international protection, has favored the hollowing out of the right to asylum as originally conceived in the Geneva Convention and its New York Protocol. According to the annual asylum statistics published by Eurostat (2022), the recognition rate of refugee status in Spain fell in 2021 to 7.5 %, well below the European average, which remains at 21.4 %. This places Spain as the fourth European country with the lowest figures for granting refugee status, followed by Bulgaria, Cyprus and Malta. The number of applications rejected on first stay reaches a 71.3 %, while the European average of rejected applications is 61.4 %. This situation has put a strain on the national asylum system, being of vital importance to deepen the analysis of the effectiveness and efficiency of public policies being implemented by the Spanish government to face this unique phenomenon of social emergency.

Unlike the main asylum-seeking nationalities in other European countries, the historical, linguistic and cultural proximity to Latin American countries is partly responsible for the origin of the main applicants for international protection in Spain. Based on the data published annually by the Asylum and Refuge Office of the Ministry of the Interior, the alarming number of applications for international protection denied to Honduran and Salvadoran nationals is of particular concern. This research focuses its analysis on these specific cases.

2. Objectives, methodology and sources

The general objective of this research is to draw attention to the denaturalization of the right to asylum and to analyze the violation of the most fundamental legal issues regarding international protection and to make recommendations that will result in the improvement of the living conditions of the Salvadoran and Honduran asylum-seeking population in Spain.

As for the methodological strategy developed, it was based on national and international normative sources as well as on jurisprudential ones. In order not to fall into a merely legal approach, which does not always take into consideration the social reality, the research uses a socio-legal analysis, with the purpose of interrelating the legal regulations with the factual reality. Thus, the legislative analysis converges with the qualitative research technique by means of 11 semi-structured interviews with key informants and 4 in-depth interviews with asylum seekers, favoring an approach to the reality under study. The perspective of the protagonists and the approach to the harshness of their life experiences is essential if the research findings are to propose solutions capable of guaranteeing the protection of their fundamental rights.

¹ Traducción exclusiva de los autores / Authors' exclusive translation.

3. Results and discussion

In contrast to what happens in other European countries, the approval rate in Spain for asylum petitions filed by Salvadoran and Honduran citizens is less than 1 %. Having consulted the jurisprudence on this issue and analyzed the contributions of the interviewees, it can be concluded, on the one hand, that Spain does not recognize international protection on the grounds of persecution when the claimant lacks sufficient evidence of the facts described. The obstacle of proof leads the Spanish courts to reject the right to asylum on the grounds that the applicant does not adequately prove the inactivity of the country's authorities in the face of criminal actions. All this despite the fact that in all the judgments consulted, the appellants affirm that it is a notorious and accredited fact, not requiring proof, that the State is unable to deal with this widespread crime.

There are other Supreme Court rulings that allege as an additional reason for denial the fact that the phenomenon of citizen insecurity does not cover the entire geography of the country. Thus, in those cases in which the petitioner does not conveniently accredit the insecurity and threats suffered in other safer areas of the country, his request would be denied. All this despite the claims of the petitioners and the UNHCR in arguing that given the sophisticated coordination and existing networks between gangs, the possibility of displacement of the victims to safer areas of the country could not be understood, since their physical integrity would not be safeguarded in any case. Currently, gangs have extended their influence throughout the country, with a presence in both urban and rural areas, and territorial control is an essential prerequisite for the efficient conduct of their illicit operations, mainly extortion and drug dealing. This territorial control is exercised through an extensive network of members, collaborators and family members who have even persecuted Salvadorans and Hondurans who have crossed the border and fled to other countries such as Guatemala, Mexico or the United States.

Added to this is the victims' fear of denouncing their aggressors to the police, an argument corroborated by those interviewed as well as by the petitioners in the jurisprudence consulted. There is a widespread perception of corruption on the part of Salvadoran and Honduran citizens towards the police authorities, in addition to a very unfavorable opinion based on the inefficient response to crimes perpetrated by gangs, based on the high rates of impunity of the perpetrators.

On the other hand, the Spanish courts deny the right to asylum on the grounds that the gang victim is a socio-economic migrant fleeing from a situation of common crime. The criminal nature of the facts narrated tends to be defined as a phenomenon of citizen insecurity outside the causes that could be susceptible to provide international protection. This qualification is out of touch with the Central American reality if we take into account that gangs have the capacity to carry out activities that are proper to the State (territorial control, control of the transit of persons, suspension of public transportation, impediment of the exercise of religious freedom, control of economic activities, control of the penitentiary administration, etc.). It is a properly structured organization, where there is a hierarchy and permanence. They operate with high caliber weapons and have sufficient capacity to instill fear and generate permanent insecurity among the civilian population, being qualified by some Salvadoran judges and magistrates who have established jurisprudence in this regard as “terrorist groups” and “transnational criminal organizations”.

4. Conclusions

The comparison of the findings obtained makes it possible to highlight the shortcomings of the Spanish asylum system, which tends not to recognize international protection on the grounds of persecution of Salvadoran and Honduran victims of gang violence. Nor have the judgments of the Spanish courts been correct in defining the criminal nature of the acts described as a phenomenon of citizen insecurity and not as actions perpetrated by criminal organizations of international scope.

However, based on the Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from El Salvador and Honduras developed by UNHCR in 2016, the National Court began to position itself in favor of Salvadoran asylum seekers persecuted by the Mara Salvatrucha, a doctrine that was later extended to Honduran citizens affected by the same mara. Therefore, the main recommendations in this line revolve around recognizing the right to asylum in line with these rulings of the Audiencia Nacional, which represented a break with the arguments maintained to date. These publicly recognize that the existing violence confronts various armed actors and is of such intensity that the situation in the country can be described as an internal conflict, both because of the strength of the gangs and the insufficient police forces and the inefficiency of the criminal justice system, a situation of generalized violence that affects a large part of the Salvadoran and Honduran population.

We must not forget that the legal system is a frozen expression of a political time, which, as time goes by, becomes incongruent with the mutability of the current political context and events. Therefore, the asylum system is called to reformulate itself continuously to provide adequate protection to those who need it and to avoid the degradation and lag of this fundamental right.