

# REFUGEES: THE UNFREE AND OPPRESSED

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## NORMATIVE FOUNDATIONS OF REFUGEEHOOD AND RIGHTS IN DISPLACEMENT

By

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## Declaration

I hereby declare that this dissertation contains no materials accepted for any other degrees, in any other institutions. The dissertation contains no materials previously written and/or published by any other person, except where appropriate acknowledgement is made in the form of bibliographical reference.

Budapest, 26 April 2020

Felix E.H. Bender

*To Magda*

# Abstract

Who should be recognized as refugees? What are the normative foundations for their claims, and which are the rights refugees should receive in displacement? This thesis addresses these questions. It argues that neither persecution for specific or for any discriminatory reasons, nor a fear of harm should ground a right to refugee status. Refugees are not those persecuted or those fearing harm, but those politically oppressed and unfree. They are those who lack the legal and political means to seek recourse to their specific situations, to control the conditions that govern their lives. It is this condition of political unfreedom of refugees that extends into their displacement. Refugees are oppressed in refugee camps, unfree in liberal democracies. I argue that this should change. Refugees should govern refugee camps and receive political rights on a national level in liberal democracies.

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# Table of Contents

Abstract .....	iv
Acknowledgements .....	v
Introduction .....	1
I. The Normative Foundations of Refugeehood .....	13
1. Normative Foundations: Legal and Philosophical Understandings of Refugeehood .....	15
1.1 Introduction .....	15
1.2 The Classical Approach.....	18
1.2.1 What is persecution?.....	19
1.2.2 The Nexus Clause.....	26
1.3 The Human Rights Approach.....	37
1.4 The Humanitarian Approach .....	48
2. A Novel Normative Foundation for Refugeehood: Political Oppression and Unfreedom .....	63
2.1 Introduction .....	63
2.2 What is Political Oppression? Public Autonomy and Legal Political Status .....	64
2.3 Why Political Oppression?.....	75
2.4.1 Qualifying Harm: When political oppression causes harm .....	78
2.4.2 Qualifying Harm: When harm causes unfreedom .....	94
2.4.3 Refugeehood in the absence of harm.....	101
2.5 Conclusion.....	110
II. Political Rights in Displacement? .....	113
3. Should Refugees Govern Refugee Camps? .....	116
3.1 Introduction .....	116
3.2 Democratic justification: the all-subjected principle and autonomy .....	120
3.3 The Conditions of the All-Subjected Principle: Do They Hold for Refugee Camps? .....	124
3.3.1 Markets: the distinct economic systems of refugee camps.....	127
3.3.2 The law: the distinct legal systems of refugee camps .....	129
3.3.3 Power: the distinct political systems of refugee camps .....	133
3.3.4 A Summary.....	136
3.4 Why Should Refugee Camps Govern Themselves?.....	138
3.4.1 Safeguarding personal autonomy .....	138
3.4.2 Defining limits and informing on violations of personal autonomy .....	141
3.5 Conclusion.....	145
4. Should Refugees Receive Political Rights in Liberal Democracies?.....	148
4.1 Introduction .....	148
4.2 The All-Subjected Principle Revisited .....	153
4.3 Excluding Transients From the Demos: Are Refugees Transients?.....	157
4.4 Political Rights and Citizenship: Do They Necessitate Each Other? .....	168
4.6 Urgent and National Enfranchisement: The Special Case of Refugees .....	173
4.7 Conclusion.....	184
Conclusion .....	186
Annex 1 .....	191
Bibliography .....	208
Case law cited .....	222

# Introduction

Let me begin this thesis with the story of a refugee's journey. This refugee, who shall remain unnamed not because she is nobody but because she could be anybody, left her country of origin feeling powerless and lacking any hope for being able to change the conditions that governed her life. The regime she left behind did not allow for political change from below. It suppressed all the voices expressing grievances and limited the unfolding of ideas and initiation for change. Those who opposed it publicly were not seen again, locked away in prisons or punished otherwise. She was not one of these people, even though she would have wanted to publicly voice what bothered her, why she could not live the life she wanted and how it would be possible if the right people were in charge. But she stayed quiet. She was afraid, knowing that the risk of exposing herself would be too great for her to bear. Confronted with the choice between a life in oppression and the chance of a life in freedom elsewhere, she decided to set off on what she imagined would be a long journey. The Global North had cordoned off, imposing travelling restrictions that made it impossible for her to travel as she would have previously. She was relegated to a human being whose money was suddenly tainted and would no longer buy her the transport nor the comfort other human beings enjoyed.

Setting off by bus and then by foot, her journey, however, lasted only a few days at first. She arrived, exhausted, in a refugee camp, close to the borders of her home country. Registering with the UNHCR, receiving her share of humanitarian aid and a roof to sleep under, she wanted to move on soon. The journey onwards, however, was dangerous. News of those who had already left

confirmed the images of people crossing deserts, crammed into dinghies, and abused by traffickers and border guards that flashed over the TV screens and internet pages nearly every day. Life in the confines of the camp allowed her to busy her mind and suppress what laid ahead of her, but it also enabled her to keep alive a far distant hope of returning home if circumstances surprisingly changed. The camp authorities promised an enticing alternative to the horror stories she heard: travel by airplane, comfort and security implied in the resettlement programs that lead to the Global North. As many of us would, she decided to wait, hoping to travel on in safety but ultimately making the squalid shelter in the middle of nowhere that was the refugee camp her home. The temporariness with which the camp was run meant little to her at first. After all, they all endured with the thought of travelling further or back very soon. Soon, however, she met those who fled conflicts she already forgotten about and realized that the temporariness of the camp was an indefinite one. They told stories that were eerily similar to hers, but the end she had hoped for was never mentioned. They were all stuck between the promise of moving on and the hope of moving back. The camp suddenly appeared to her in a much different light. The mode of emergency in which it was run turned into authoritarian rule, the UNHCR from a helper in need to a sovereign in control, and the confines of the camp from offering security to fences securing others from them. Little was gained here, she thought. Leaving one life in oppression for another seemed to her to make little sense, and she decided to take on the dangers of onwards travel once again.

Arriving in the Global North, she was not quite sure what to expect. From the stories she had heard others tell, it was supposed to be a place in which one could begin anew, make one's own choices and live in freedom. Whether this picture was accurate or not, she was not certain. After all, she too tried to picture the destination of her arduous journey in the best possible light both to be able to endure its difficulties and to justify her departure to the friends and family she had left behind.

At first, the picture of a new beginning seemed to line up neatly with what she encountered. The bureaucratic mills of her new home quickly spat out documents officially recognizing her as a refugee: she would be able to stay. She was ready to begin making her own choices and a life that her textbooks called a life in freedom. Yet, very soon after her arrival, the state separated her from the few friends and acquaintances she had made during her journey. She was forced to move one time after another, first placed into an overcrowded reception center with facilities so poor it reminded her of the refugee camp she had just left, and then relocated again to live in a remote part of the country in which she knew no one and nothing about. The documents she received, though allowing her to stay, allowed her little else. In fact, they seemed to be the source of a fundamental difference between her and the people she lived amongst. This difference did not only appear in her chances to secure a job, education or housing, but seemed to be more fundamental in character. She realized that living amongst equals, she was not afforded the same freedoms. These seemed to belong only to locals. She realized that though generous at times, the policies that were made specifically for her kind were not made by her kind. They catered to the interests of others. It was refugees like her who had to feel the consequences. The laws and regulations specifically concerning her made life much harder than it needed to be, introducing many bureaucratic hurdles and a great deal of insecurity about her future. Such a life, she was surprised to find, was not a life in which she was in charge. Though different from what she knew before, she was still trapped in a life of unfreedom.

Why, though, do I begin with a fictional story? The reason is that it exists only as a (non-)ideal type of the journey of refugees. No one story told by a refugee can encapsulate the entirety of the plight of refugees, stretching from the conditions they leave to the conditions pertaining in refugee camps and in liberal democracies.

It is fictional not the least because many of them will never have left their homeland. Most will continue to endure oppression and unfreedom in the countries in which they live without ever leaving. Their decision to stay is often multifaceted. They do not want to leave their family and friends behind or cannot imagine life elsewhere. Yet, we should not discount another factor in their decision to stay. The international refugee regime would not recognize them as refugees. Political oppression does not count as a ground for claiming refugee status. Even if they would leave, they would be rejected at the borders of states that claim to value both liberalism and democracy. Of those who ultimately decide to leave, most will never make it to one of the liberal democracies of the Global North. Many will arrive in refugee camps to stay there indefinitely or return back home as a result of the poor conditions pertaining in the camps. The reality of the stories of refugees is thus much more fragmented, broken up into bits and pieces that sometimes fit our general narrative and sometimes not. Yet, all of the individual elements of our story are true. The right to refugee status should not be tied to persecution or harm only, but to unfreedom and political oppression. Along their journey, wherever they may end up eventually, refugees face a continuous condition of unfreedom. Refugee camps are governed in near autocratic fashion, often perpetuating and causing dangers and threats to the lives of their inhabitants. Liberal democracies, though promising personal and political freedoms to their own citizens, do not extend such rights to refugees. There, too, refugees live in a condition of unfreedom. This thesis will try to explain each element of the story. It will argue that refugees are the politically oppressed and unfree, show that such condition often reaches deep into their displacement, and that they should receive political rights both in refugee camps and in liberal democracies.

The thesis thus asks who should be recognized as a refugee and which rights refugees should receive in displacement. It is divided into two main parts. The first part discusses whether the normative

foundations of our legal and philosophical conceptualization of refugeehood are sound. It argues that neither persecution, nor a fear of harm make for a solid foundation on which to construct a theory of refugeehood. Rather, I argue, it is political oppression and unfreedom understood as a lack of public autonomy and formally expressed through a lack of legal-political status that makes for a solid normative foundation for understanding refugeehood. This understanding of who is a refugee undoubtedly has consequences for which rights I believe refugees should hold in displacement. Consequently, the second part of this thesis deals with the question whether refugees should receive political rights in different locations in displacements. I ask not only whether they should receive political rights in liberal democracies, but whether the conditions in refugee camps allow refugees to govern them. Finally, I offer a brief conclusion to this thesis. In the following, I would like to break down the different chapters of my thesis in greater detail, provide a general overview of the questions, their relevance and the arguments I put forward.

In the first chapter (*Normative Foundations: Legal and Philosophical Understandings of Refugeehood*), I ask about the normative foundations of legal and philosophical concepts of refugeehood. What are the normative foundations for recognizing individuals as refugees? I distinguish between two legal interpretations of international refugee law and their differing core normative arguments and a third approach that is rooted in the philosophical literature on refugeehood. These approaches are the Classical Approach, the Human Rights Approach, and the Humanitarian Approach.

The chapter begins with the Classical Approach and asks whether persecution for specific reasons and thus a traditional interpretation of international refugee law can function as a solid normative foundation for understanding refugeehood. I separately analyze both the condition of “persecution” and the so-called Nexus Clause. These form the normative bedrock for determining

who should be recognized as a refugee. The Classical Approach faces several normative shortcomings. Not only does it exclude all forms of persecution that do not occur on the ground of its rigid “closed list” approach and that thus do not occur for reasons of race, religion, nationality, political opinion or membership in a particular social group. It is also incapable of accounting for indiscriminate violence as a possible source of refugeehood. The Classical Approach thus treats ethically similar cases differently. From an ethical perspective, no difference exists between being persecuted for one of the specific reasons stipulated in the Geneva Convention Relating to the Status of Refugees and experiencing harm for another non-listed reason or as a consequence of general violence not targeting anyone specifically. The chapter then moves to the second approach of interpreting international refugee law. It asks whether the “Human Rights Approach” can accommodate the criticism issued against the Classical Approach. It argues that instead of basing our understanding of refugeehood only on persecution for specific reasons, we should understand persecution more widely as a denial of human rights. It also seeks to re-interpret the Nexus Clause. Rather than arguing that refugees are those persons fleeing from persecution for specific reasons, it holds that we should understand the Nexus Clause as a non-discrimination clause. In other words, a refugee is someone who is persecuted for any discriminatory reasons. While this approach is undoubtedly more open to different scenarios, it is not significantly improved compared to the Classical Approach. The call for modest change may originate in its attempt to legally re-interpret international refugee law, rather than seeking out different normative roots. A project that seeks to do just that is not confronted with the same analytic conditions and constrictions. It does not require searching for the most morally acceptable account that can still be situated within the framework of existing international refugee law, but rather searching for normative foundations that are themselves satisfactory. I show that the Human Rights Approach struggles with indiscriminatory

violence as a possible scenario that warrants refugee status. The chapter then turns to an approach that has gained traction in the philosophy of migration and refugeehood. I call this approach the “Humanitarian Approach”. It argues that the basis for understanding who a refugee is should be a fear of serious harm. I show that this way of understanding refugeehood accommodates the biggest criticisms of the previous two approaches. It allows for considering indiscriminate harm as reasons for leading to refugee status. While this is, indeed, an advantage, I show that a fear of harm cannot itself function as the normative foundation on which a solid understanding of refugeehood can be built. Such an approach does not allow for qualifying harm. It does not allow for distinguishing cases that are normatively different. The Humanitarian Approach cannot distinguish between cases in which individuals fear harm but possess ways to avoid threats, tackle them, or demand compensation and cases in which individuals fear harm and possess no way to avoid or combat the threats they face. In other words, there must be another, deeper clause for understanding which harm should lead to refugee status and which does not. Indeed, some of the Humanitarian Approaches hint at the existence of such a qualifier – the existence or lack of recourse to the specific situations refugees face.

While the first chapter offers a critique of the normative arguments of legal and philosophical approaches to refugeehood, the second chapter (*A Novel Normative Foundation for Refugeehood: Political Oppression and Unfreedom*) offers a positive account for a novel normative foundation for refugeehood. It argues that instead of basing our understanding of refugeehood on persecution or on a fear of harm, it should be based on political oppression and unfreedom. Political oppression and unfreedom can be understood as a lack of public autonomy which is formally expressed through a lack of legal-political status - a status that legally expresses the recognition of individuals as moral equals in law and politics. I will show that political oppression and unfreedom should

matter for a claim to refugee status because those oppressed and unfree ultimately lack the political and legal recourse necessary to 1. safeguard their personal autonomy, 2. define the boundaries of what constitutes personal autonomy and, 3. inform decision makers about threats to and violations of their personal autonomy. What matters for a claim to refugee status is ultimately the lack of recourse and thus the inability to control the situation one faces, avoiding threats, adapting to combat them or demand compensation for harm suffered. Such an approach avoids the problems of under- and overinclusion that the other three approaches face. It is capable of accounting for indiscriminate harm while also offering a qualifying clause that allows for not including any form of harm as relevant to refugee status. This approach is better suited in dealing with scenarios that do involve harm and such scenarios that do not. I demonstrate this by turning to the example of threats of famine and ecological disruptions and disasters. Political oppression and unfreedom functions as a better normative foundation for assessing such scenarios. It does not only help us in distinguishing when situations involving harm should lead to refugee status and when they should not. I also show that it helps us identifying when persons should receive refugee status even if harm is absent.

This understanding of refugeehood would undoubtedly lead to many more people being able to successfully claim refugee status than currently do. It may lead to rejecting far less people at our borders. Yet, questions of scale do not in themselves turn rights into wrongs. They do not matter in determining a normatively correct foundation for claims to refugeehood. This does not mean that they may not matter for a very different question: the question regarding the duties of liberal democratic states to refugees. I treat these two questions – the question about who should be recognized as a refugee and the question regarding the scope of the duties of states towards refugees – as analytically different. Much has been written on the latter, and this thesis will not

unfold and examine the many different questions that are involved in such an inquiry. Yet, each such theory depends and departs from an understanding of who should be recognized as a refugee. They do so sometimes implicitly, assuming the legal understanding of refugeehood as normatively valid, and sometimes consciously, bracketing the question of normative validity and assuming the legal framework as a non-ideal starting point for another normative inquiry.

The first part of my thesis offers a novel foundation for such theories. To that end, an inquiry into the normative foundations of refugeehood may not only lead us to reassess our assumptions on who should be recognized as a refugee, but may also have consequences for thinking about what liberal democracies owe to whom.

Chapter 3 (*Should Refugees Govern Refugee Camps?*) begins the second part of this thesis. It turns to the question which rights refugees should receive in displacement. Specifically, it asks whether refugees should receive political rights in various situations of displacement. One specific case of displacement is analyzed here: the situation of protracted refugee situations in refugee camps. I ask whether refugees should govern refugee camps. I argue that they should. The chapter employs what political theorists call the “all-subjected principle”. In a nutshell, the principle states that all those subjected to rule in a political unit should have a say in such rule. The chapter asks whether the conditions for this principle to apply hold in the case of refugee camps, too. What is required for the principle to apply is the existence of a political unit understood as a distinct governance structure and subjection to political rule of individuals within it. These conditions hold in the case of refugee camps. Host states have retreated nearly completely from the camps. In their absence, the camps have developed distinct economic systems, functioning according to their own rules and regulations; they have developed their own legal systems in which refugees adjudicate their own crimes, even operate prisons and security forces; they have developed their own political systems

in which the UNHCR and contracting NGO's have replaced the host states as sovereigns, ruling without checks and balances. Within such distinct governance structures, refugees are subjected to political rule by international organizations. The chapter then shows in what ways the democratization of refugee camps could be beneficial for its inhabitants. With regards to different aspects of the camp life, it shows that possessing public autonomy will allow refugees to 1. Safeguard their personal autonomy through being in control of the conditions that govern their everyday lives, 2. define what violates their personal autonomy and what could tentatively amount to legitimate restrictions and 3. inform decision-makers of threats and violations of their autonomy. While most of the literature on the ethics of migration and refugeehood has focused on the ethics of admission and the duties of liberal democracies towards refugees, this chapter seeks to ask which ethical guidelines we should follow in the case that refugees never make it to liberal democracies. It departs from a standpoint of non-ideal theory in assuming that protracted refugee situations are just that: protracted, and that they will hence not change in the foreseeable future. It hopes to show that this must not mean that we disregard the situation of those living in refugee camps, but that political philosophy has something to say with regards to their situation, too. I hope to show that it is the democratization of refugee camps that makes life in them more bearable.

The second part of this thesis is completed with chapter 4 (*Should Refugees Receive Political Rights in Liberal Democracies?*). It turns to the question whether refugees should receive political rights if, and once, they enter liberal democracies. It, too, employs the all-subjected principle, but focuses on different aspects of the principle. The question of whether refugees should govern refugee camps demands a deeper look into the basics of the principle, in evaluating whether the camps qualify as political units and whether refugees are indeed subjected to rule within them. In the case of liberal democracies these aspects are of less interest. States make for the paradigm

cases of political units and the subjection to rule of their inhabitants seem equally undisputed. In order to answer the question that guides this chapter, I thus turn to two conditions for the all-subjected principle to apply to refugees in liberal democracies. Conventionally, transients are excluded from the purview of the principle. I ask why transients should be excluded and whether a robust justification of this condition can justify excluding refugees, too. I show that the condition of excluding transients is based on the all-subjected principle being forward, not backward looking. Time spent in a state is taken as a proxy for future residence in the country and not in itself relevant for a right to political participation. I show that refugee status can function as such a proxy, and that refugees are thus not transients as are tourists or visiting students. The second aspect that we need to deal with is the question of membership. Does the all-subjected principle even apply to those who are not citizens of a country? I show that citizenship and political rights do not necessitate each other. They can be had independently of each other. All that matters, I show, is the political relation between the political unit and those subjected to rule. I thus take citizenship to denominate a specific legal, rather than a specific political status, that provides its holders with many rights other than and beyond political rights. Citizens do possess the right to vote only because they are also subjected to political rule. The all-subjected principle thus applies to refugees in liberal democracies, too. In the last section of the chapter, I show how exactly refugees are subjected to rule in liberal democracies, other and beyond the ways its citizens are. The aim is to show that enfranchisement is a matter of urgency for refugees, that it should occur on a national level, and that it would have immediate positive and significant impacts on their lives. Liberal democracies determine the reception conditions of refugees, govern their everyday lives during their stay and even decide the conditions for their repatriation. All these occur without the participation of refugees. The chapter argues that in all three stages, the participation of refugees

may lead to beneficial outcomes. The chapter thus not only seeks to build on the rich literature on non-citizen voting but poses a previously unaddressed question: whether refugees should receive political rights as soon as they receive refugee status. Doing so, I hope to have also contributed to the understanding why time matters for a right to political participation and to the distinction between citizenship as a legal category and subjection to rule as a political factor.

The dissertation ends with a concluding section that seeks to briefly summarize what I have done throughout. What I hope to show is that the normative core of the contemporary international refugee regime and dominant philosophical interpretations of who a refugee should be are normatively flawed. The understanding of refugeehood leaves unseen a large part of what distinguishes it normatively: the political oppression and unfreedom of individuals. I wish to show that it is political oppression and unfreedom rather than persecution or a threat of harm that makes for a solid basis for understanding refugeehood. This will shed some light also on the conditions that refugees face in displacement. The lack of political freedom follows them throughout. They are not only politically unfree in refugee camps, but also in liberal democracies. This thesis hopes to demonstrate the importance of their conditions and advocates for change: for political freedom for those disenfranchised; political freedom for refugees.