



Faculty of Law

Lund University

**Master of International Human Rights Law  
programme**

Master thesis

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**Where are the Women?  
- a Gender Approach to Refugee Law**

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International Law

Autumn 2001

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## Introduction

***"The Magna Charta of international refugee law...did not deliberately omit persecution on gender...it was not even considered."*<sup>1</sup>**

In 1989, Cynthia Enloe asked the subversive question: "*Where are the women?*" in her groundbreaking work on gender and international relations.<sup>2</sup> Her work forms part of an attempt at a reconstruction by feminist scholars who seek to make visible both "women" and different kinds of masculinity and femininity necessary "*to make the world go round*".<sup>3</sup> The question has become known as "*the woman question*" and has continued to be asked in many other areas where women have been invisible for too long.<sup>4</sup>

This paper applies the same feminist methodology, i.e. it consciously seeks to place women and their experiences into the framework of human rights law and refugee law. Refugee law is especially interesting from a gendered perspective, as women constitute a majority of the refugees in the world.<sup>5</sup> However, as most refugees are fleeing hunger and poverty, they are disqualified from the definition in the 1951 Refugee Convention<sup>6</sup>, which limits the notion to specific cases of persecution. Some would argue that the historical focus on civil and political rights in international law is a consequence of the gender bias that flows through the historical development of human rights.<sup>7</sup>

There are circumstances which give rise to women's fear of persecution, that are unique to women. However, the existing bank of jurisprudence on the meaning of persecution is based on, for the most part, the experiences of male claimants. Aside from a few cases of rape, the definition has not widely been applied to

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<sup>1</sup> Judith Kumin, commenting on the fact that gender is not enumerated among the grounds of persecution in the 1951 Refugee Convention, cited on UNHCR's webpage <<http://www.unhcr.org>> (2000-11-23).

<sup>2</sup> Cynthia Enloe, "Bananas, Beaches and Bases", University of California Press, Berkeley and Los Angeles, California, 1989, at 7.

<sup>3</sup> Jan Jindy Pettman, "Worlding Women, a Feminist International Politics, Routledge, Australia, 1996, at ix.

<sup>4</sup> That it is still a highly relevant question can be illustrated with the following sample. In 2001, a female Swedish journalist wrote a book describing her experiences during the wars in the Balkans. Commenting the book, a high ranking (male) Swedish military writes " ... *It feels a bit strange for an officer, that it is a woman that describes this world, the most male of worlds, the every-day-life of war, so thoroughly and with such insight*" (author's translation). Apparently, this man has over-looked the fact that women are very much involved in the every-day-life, in particular as part of the civilian population.

<sup>5</sup> UNHCR Executive Committee Conclusion No. 39 (XXXVI) on Refugee Women and International Protection. UN Doc. HRC/IP/2/Rev. 1986 (July 8, 1985).

<sup>6</sup> Convention relating to the Status of Refugees, 28 July 1951:189 UNTS 137.

<sup>7</sup> E.g. Charlotte Bunch, "Transforming Human Rights from a Feminist perspective", Women's Rights, Human Rights, Julie Peters and Andrea Wolper, 1995 Routledge, Great Britain, at 14.

such female-specific experiences, as genital mutilation, bride-burning, forced marriages, domestic violence, forced abortion, or compulsory sterilisation.<sup>8</sup>

As Maja Kirilova Eriksson has pointed out, the division of international law in human rights, humanitarian law and refugee law can be classified as a result of traditional fragmentary thinking. As a consequence, certain “grey” zones have appeared in the international legal framework to the disadvantage of women.<sup>9</sup> A feminist methodology must, therefore, strive for a more holistic approach, which this paper tries to by using ideas and concepts from a number of different disciplines, ranging from international relations and international law to philosophy and psychology.

The paper is divided into three parts,

- The first part describes the feminist methodology and to some degree also different forms of feminism. It describes certain terms and areas that have been and continue to be vital to the feminist legal discourse. This approach aims to give a fuller picture and understanding to the mechanisms behind the issues that are being treated in the other two parts.
- The second part looks closer at international refugee law, making use of the feminist methodology as described in the first part. In particular, it examines the fact that gender is absent from the enumerated grounds of persecution in the 1951 Refugee Convention and the consequences of this omission.
- Finally, the third part studies refugee law and practice at the domestic level, where the example of Sweden serves as a case study. In 1997, a new article was introduced in the Swedish Aliens Act, which aimed to *inter alia* encompass cases of gender-based persecution as a basis for granting asylum. The third part applies the methodology and the theories elaborated in the preceding parts, to the Swedish legislation and its practical application.

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<sup>8</sup> Audrey Macklin, “Refugee Women and the Imperative of Categories”, *Human Rights Quarterly* 17 (1995) 213-277, at 225.

<sup>9</sup> Maja Kirilova Eriksson, ”Att gå på två ben eller ett, betraktelsesätt på mänskliga rättigheter”, *Feministiskt perspektiv* 1/00, 5 –12, at 9.

## **PART 1 METHODOLOGY AND NOTIONS**

### **1.1. Feminist jurisprudence**

The appearance of autonomy in law is maintained by a methodological framework called “legal reasoning”, which purports to derive objective rules and principles. However, as this “objectivity” is based on a presumption in which the male role has been taken as a norm for society as a whole, there is a gender bias embedded in the policies and structures that stem out from traditional legal thinking. For this reason, feminist critiques of law have centred on how legal discourse through its expertise and organisation has served to silence voices of experience of women.<sup>10</sup> Feminist jurisprudence has focused on the ways law legitimises, maintains, and serves the distribution of power in society. Catherine MacKinnon has defined it as “...an examination of the relationship between law and society from the point of view of all women.”<sup>11</sup> Some feminists have adopted the metaphor “gender lenses” to describe an approach to feminist analysis which brings into view the different dimensions of power and gender inequality.<sup>12</sup> In that regard it has links to “critical legal studies”.<sup>13</sup>

Feminist jurisprudence thus consists of two discrete projects;

- The first is to unmask and critique the patriarchy behind purportedly ungendered law.
- The second step consists of what can be called “*reconstructive jurisprudence*”.

For strategic reasons, many feministic law reforms during the last twenty years, have often been achieved by categorising women’s injuries as analogous to, if not identical with, injuries men suffer. This can, however, be seen as a misconceptualisation as it maintains the original presumptions and does not challenge the basis for these presumptions. Instead, reconstructive feminist jurisprudence should set itself the task of reconceptualising new rights in such a way as to reveal, rather than conceal their origin in women’s distinctive existential and material state of being.<sup>14</sup> With regards to refugee law, this may translate into the discussion concerning the scope of the five grounds for persecution in the 1951 Refugee Convention. The fundamental question here is

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<sup>10</sup> Celina Romany “State Responsibility goes Private” in Human Rights of Women, National and International Perspectives, ed. Rebecca J.Cook, University of Pennsylvania Press, 1994, 85-115, at 88.

<sup>11</sup> Quoted in Heather Ruth Wishik, “To Question Everything: The Inquiries of Feminist Jurisprudence” in Feminist Legal Theory, Foundations, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia, 1993, 22-31, at 22.

<sup>12</sup> Jill Steans, “Gender and International Relations”, Polity Press, 1998, at 4.

<sup>13</sup> Wishik, supra note 11, at 22.

<sup>14</sup> Robin West, “Jurisprudence and Gender”, in Feminist Legal Theory, Foundations, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia, 1993, 75-98, at 88.

whether women's experiences can be interpreted so that they may be included into the already existing grounds or whether it is necessary to add a sixth ground (gender), in order to encompass all forms of gender-based persecution.

Heather Ruth Wishik has expressed the purpose of feminist jurisprudence as:

*“We risk promoting women’s oppression if we attempt only to change the law and its impacts on women’s lives and neglect to ask the questions suggested by feminist jurisprudence. Without such inquiries, reforms which may appear positive due to their short-term availability to ameliorate women’s oppression may strengthen patriarchy in the long run. Feminist jurisprudence can help enable women to see such dual effects and to make conscious decisions about whether or which way to proceed.”<sup>15</sup>*

This insight has gained ground also beyond the feminist circles as the Council of Europe has stated that:

*“There is a growing awareness that gender has to be considered also at a political and institutional level....Gender is not only a socially constructed definition of women and men, it is a socially constructed definition of the relationship between the sexes. This construction contains an unequal power relationship with male domination and female subordination in most spheres of life. Men and their tasks, roles, functions and values contributed to them are valued—in many aspects—higher than women and what is associated with them. It is increasingly recognised that society is characterised by this male bias. Policies and structures often unintentionally reproduce gender inequality.”<sup>16</sup>*

In order to avoid continuing existing bias it is necessary to question the reality behind the presumptions. For the purpose of a feminist inquiry into the relationship between law and society, the following questions may be asked:

- What have been and what are now all women's experiences of the “life situation” addressed by the doctrine, process, or area of law under examination?<sup>17</sup>
- What assumptions, descriptions, assertions and/or definitions of experience – male, female, or ostensibly gender neutral – does the law make in this area?

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<sup>15</sup> Wishik, supra note 11, p 25.

<sup>16</sup> The Council of Europe (1998), “Gender Mainstreaming, Conceptual Framework; Methodology and Presentation of Good Practices” , Strasbourg, 1998.

<sup>17</sup> For more on the feminist debate on the concept of “woman”, see below, Chapter 1.4.

- What is the area of mismatch, distortion, or denial created by the differences between women's life experiences and the law's assumptions or imposed structures?
- What patriarchal interests are served by the mismatch?
- What reforms have been proposed in this area of law or women's life situation? How will these reform proposals, if adopted, affect women both practically and ideologically?
- In an ideal world, what would a woman's life situation look like, and what relationship, if any, would the law have to this future life situation?
- How do we get there from here?<sup>18</sup>

As the Council of Europe so rightly has pointed out, so called "gender neutral" texts often reproduce inequalities as it is the male that is taken as the format. In order to correct this inherited, discriminatory practice, it is rather unequal than equal treatment that is required.<sup>19</sup> It is, therefore, needed to apply a feminist methodology when looking at gender aspects of legislation and implementation. *"We will not have genuinely ungendered jurisprudence...until we have a legal doctrine that takes women's lives as serious as it has taken men's".*<sup>20</sup>

## **1.2. The public/private dichotomy**

Central to the gendered critique of international law, including refugee law, has been an analysis of the public/private dichotomy.<sup>21</sup> In domestic law the division can be seen between the public world of work and commerce, and the private world of home and family. These two spheres are based on different principles of association. Participation in the (male) public sphere is governed by universal and impersonal criteria such as rights, equality and property. Participation in the (female) private sphere is determined by ties of blood and affection, and by the status of inequality and vulnerability of women in the family.

The division between the public and private spheres clouds the fact that the domestic arena is itself created by the political realm where the state reserves the right to intervention.<sup>22</sup> When women are denied their human rights in private, their human rights in the public sphere also suffer, since what occurs in "private" shapes their ability to participate fully in the public arena.<sup>23</sup> Thus, the real questions are: Who defines legitimate human rights issues and who decides where the state should enter and for what purpose?

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<sup>18</sup> Wishik, *supra* note 11, at 26-29.

<sup>19</sup> The Council of Europe, *supra* note 16.

<sup>20</sup> West, *supra* note 14, at 88.

<sup>21</sup> Heaven Crawley, "Refugee and Gender, Law and Process", Jordan 2000, at 17.

<sup>22</sup> Romany, *supra* note 10, at 94.

<sup>23</sup> Bunch, *supra* note 7, at 14.



As a consequence from the public/private dichotomy, intimate violence remains on the margin: it is considered different, less severe and less deserving of international condemnation and sanction than officially inflicted violence. But when stripped of privatisation, sexism and sentimentalism, gender-based violence is no less grave than other forms of inhumane and subordinating official violence, which have been prohibited by treaty and customary law and recognised by the international community as *jus cogens*, or peremptory norms that bind universally and can never be violated.<sup>24</sup>

Feminist scholars have stressed that the very jurisdiction of international law is divided along these same public/private lines.<sup>25</sup> As international law evolved as a set of rules intended to regulate relations among states and as it remains centred on the state, women's experiences tend to get lost from the agenda. For instance,

- Many abuses against women have not been acknowledged as human rights violations because they are committed by private persons rather than by agents of the state.
- Civil and political rights hold a privileged position in human rights law despite formal recognition by the international community of their interdependence and indivisibility with economic, social and cultural rights.
- International norms concerning the life of the family call on states to protect the institution of the family and enshrine the right of privacy in the family.<sup>26</sup>

Refugee law suffers from the same defect. Whilst the refugee definition does not intrinsically exclude women's experiences, in practice the public/private distinction is used in such a way that what women do and what is done to them is often seen as irrelevant to refugee law. In order to include women's experiences into refugee law, it is necessary to move from conventional notions of the exercise of power as something that has to be within a formal institutional framework.<sup>27</sup>

### **1.3. Legal equality**

Much debate in the feminist discourse has focused on the concept of legal equality, and there are a number of different responses to this issue. One

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<sup>24</sup> Rhonda Copelon, "Intimate Terror: Understanding Domestic Violence as Torture", in "Human Rights of Women, National and International Perspectives", ed. Rebecca J. Cook, University of Pennsylvania Press, 1994, 116-152, at 117.

<sup>25</sup> Karen Knop, "Re/Statements: Feminism and State Sovereignty in International Law" (1993), *Transnational Law and Contemporary Problems* 293-344, at 330.

<sup>26</sup> Donna Sullivan, "The Public/Private Distinction in International Human Rights Law" in *Women's Rights, Human Rights*, Julie Peters and Andrea Wolper, Routledge, Great Britain, 1995, 126-134, at 126-127.

<sup>27</sup> Crawley, *supra* note 21, at 24.

response has been to attempt to equate legal treatment of sex with that of race and deny that there are in fact any significant natural differences between women and men. Christine A. Littleton calls this response the “*symmetrical*” approach. A competing “*asymmetrical*” approach rejects this analogy and instead holds that women and men are, or may be, different and that women and men are often asymmetrically located in society.

There are two models of the symmetrical vision;

- 1) “*Assimilation*” is based on the notion that women, given the chance, really are or could be just as men.
- 2) “*Androgyny*” also posits that women and men are, or at least could be, very much like each other, but argues that equality requires institutions to pick some golden mean between the two and treat both sexes as androgynous persons would be treated.

Asymmetrical approaches, on the other hand, take the position that differences should not be ignored or eradicated. Asymmetrical approaches include “*special rights*”, “*accommodation*”, and “*acceptance*”;

- 1) The “*special rights model*” affirms that men and women are different, and asserts that cultural differences, such as childrearing roles, are rooted in biological ones, such as reproduction. Therefore, it states that society must take account of these differences and ensure that women are not punished for them.
- 2) The “*accommodation model*”, even though it agrees that treating biological differences is necessary, argues that cultural and hard-to-classify differences should be treated under all-equal-treatment or the androgynous model.
- 3) A third asymmetrical model would be “*acceptance*”. It asserts that eliminating the unequal consequences of sex differences is more important than debating whether such differences are “real”, and even more important than trying to eliminate these differences altogether. It is thus the consequences of gendered difference, and not its source that equal acceptance addresses. The focus of equality as acceptance is not on the question of whether women are different, but rather on the question of how the social fact of gender asymmetry can be dealt with so as to create some symmetry in the lived out experience of all members of the community.<sup>28</sup>

However, at this stage it must be held that concepts of equality and non-discrimination can only partially explain gender subordination and may even risk

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<sup>28</sup> Based on Christine A. Littleton, “Reconstructing Sexual Equality”, in *Feminist Legal Theory, Foundations*, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia, 1993, 248-263.

to trap women's rights within legal confines that do not adequately capture the nature of such subordination.<sup>29</sup>

#### **1.4. The concepts of women and gender**

The definition of women and as well as the question whether it is possible to generalise the experience of women into one common, is crucial for the argument in this paper. The notion of a "woman", as she is presently constructed by male society, differs according to different schools in feminist theory. Liberal feminism sees "women" defined primarily as someone confined to the private sphere; Radical feminism sees her as a man's sexual object; Cultural feminism sees her as caring and connected to others; Postmodern feminism sees her so overly determined that she is an absence, not a presence.<sup>30</sup>

The definition of "woman" is, as stated above, crucial, but self-definition for women has not been explored enough yet. It is important that feminists are more explicit about their understanding of what "woman is" and what "woman should be". Patricia Cain suggests that in order to achieve this, consciousness can serve as a cornerstone in the feminist method. Consciousness is about giving a voice to the unknown in women's experience and it brings new understanding by making known the unknown. Feminist legal theories, which supports the telling of the individual truths should therefore be built, as well as theories that protect the space that is shared with others as women construct their identity.<sup>31</sup>

There has been an evolving recognition by most feminist scholars that women's lives can only be fully understood when studied in terms of prevailing gender relations.<sup>32</sup> Gender is a socially constructed definition of women and men. It is the social design of a biological sex, determined by a conception of tasks, functions and roles attributed to women and men in society and in public and private life. As it is a culturally specific definition of femininity and masculinity, it varies in time and space. The construction and reproduction of gender takes place at the individual level as well as at the societal level. Individual human beings shape gender roles and norms through their activities and reproduce them by conforming to expectations.<sup>33</sup> The understanding of gender as both an aspect of personal identity and an integral part of social institutions and practices, avoids the pitfalls of *voluntarism*, that is, the idea that people exercise free choice over their actions, and various forms of *determinism*, which suggest that human behaviour is wholly conditioned by constraints.<sup>34</sup>

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<sup>29</sup> Romany, supra note 10, at 99.

<sup>30</sup> Patricia A. Cain, "Feminism and the Limits of Equality" in *Feminist Legal Theory*, Foundations, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia, 1993, 237-247, at 244.

<sup>31</sup> Ibid.

<sup>32</sup> Steans, supra note 12, at 4.

<sup>33</sup> The Council of Europe, supra note 16.

<sup>34</sup> Steans, supra note 12, at 13.

However, it is necessary to clarify that on one hand, gender was developed and is still often used as a term contrasting to sex, in order to depict what is socially constructed as opposed to what is biologically given. Following this distinction, gender is typically thought to refer to personality traits and behaviour while sex refers to the physical body, hence gender and sex are understood as antonymous. On the other hand, gender has increasingly become used to refer to any social construction relating to the female/male distinction, including those constructions that separate “female” bodies from “male” bodies. This latter usage has emerged when many came to realise that society not only shapes personality and behaviour, it also shapes the ways in which bodies appear. Hence, if the body itself is always seen through social interpretation, then sex is not something that is separate from gender but is, rather, subsumable under it.<sup>35</sup> Consequently sex-based and gender-based persecution should be seen as integral parts of the same phenomenon, and when gender is used throughout this paper, it is with this latter understanding.

### **1.5. Universal human rights for whom?**

Human rights law excludes women’s experiences in many ways by an inherent male bias. When the Universal Declaration of Human Rights (UDHR) was prepared, the original draft referred to “...*all men are brothers*...”. It was thanks to lobbying of women’s organisations and the president of the working group, Eleanor Roosevelt, that the text was changed to “*all humans are born equal*” and sex was included in the non-discrimination clause.<sup>36</sup> When the Refugee Convention was drafted in 1951 no women participated and this may be part of the reason why gender-based persecution was overlooked. The consequences of this will be described in the next chapter in this paper.

The UDHR has, despite the efforts of Mrs Roosevelt, received criticism for being too male oriented. As the first who advanced the cause of human rights were Western-educated, propertied men, who mostly feared the violation of their civil and political rights in the public sphere, this area has been privileged in human rights work. They did not, however, fear violations in the private sphere of home as they were the masters of that territory, and this area has consequently been ignored for a long time from the human rights discourse.<sup>37</sup> The public/private dichotomy did not, however, prevent them from readily pressuring states to prevent other forms of abuse that occur in the private sphere at the hands of private actors, such as slavery and racial discrimination.<sup>38</sup>

Whereas there is almost a complete consensus that the prohibition of discrimination on the basis of race has become *jus cogens*<sup>39</sup>, very few authors

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<sup>35</sup> Linda Nicholson, “Interpreting Gender”, *Signs: Journal of Women in Culture and Society* 1994, vol. 20, no.1, 79-103, at 79.

<sup>36</sup> Kirilova Eriksson, *supra* note 9, at 9.

<sup>37</sup> Bunch, *supra* note 7, at 13.

<sup>38</sup> Macklin, *supra* note 8, at 258.

<sup>39</sup> Ian Brownlie, “Principles of International Law”, Oxford University Press, 1998, at 515.

have argued that the same should be valid for the discrimination on the ground of sex or gender, even though it affects half of the population in the world.<sup>40</sup> Those norms that are considered *jus cogens* get universal acclaim by virtue of their protection of interests which are not limited to a particular state or groups of states, but which belong to the community as a whole. If human rights are truly universal, it is difficult to see how, when it involves white supremacy, it constitutes a violation of *jus cogens*, whereas male supremacy is considered to be the internal affair of any individual state.<sup>41</sup>

Two different doctrines have evolved to include domestic violence, as probably the most common and widespread drastic human right violations women suffer, into the human rights discourse;

- Through the theory of accountability the state can be held responsible under international human rights law for its action as well as its inaction. This theory finds its bases in the non-discrimination clauses in the International Convention on Civil and Political Rights. It provides justification for the demand that the state's efforts to combat domestic violence should at least be on par with its efforts to fight comparable forms of violent crime.
- An alternative theory claims that unlike other common crimes, domestic violence is inherently an issue under international human rights law because it systematically subordinates women. The aim is to maintain male supremacy and to deprive women of a range of political, social and economic benefits. Because of this systematic subordination domestic violence is seen as constituting a violation of international human rights law in and of itself.<sup>42</sup>

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<sup>40</sup> Kirilova Eriksson, *supra* note 9, at 9.

<sup>41</sup> Romany, *supra* note 10, at 89.

<sup>42</sup> Kenneth Roth, "Domestic Violence as International Human Rights Issue", in *Human Rights of Women, National and International Perspectives*, ed. Rebecca J. Cook, University of Pennsylvania Press, 1994, 326 – 339, at 332.

## PART 2 REFUGEE LAW

International refugee law occupies a legal space that is characterised by, on the one hand, the principle of state sovereignty and, on the other hand, competing humanitarian principles deriving from general international law and from different treaties.<sup>43</sup> Historically, refugee law has been linked less firmly to human rights than to general principles of public international law, which has enabled states to pursue their own interest in a global context.<sup>44</sup> However, over the years there has been a development of rapprochement to human rights law. One obstacle when linking refugee law and human rights, are the different languages in the two fields, e.g. discrimination and human rights violations do not necessarily amount to persecution, the notion of state responsibility may have different implications in the two fields, etc. Therefore, much time must be spent on diligently defining and exploring the meaning and scope of different notions.

The central document in refugee law is the 1951 Convention relating to the Status of Refugees, hereafter referred to as the Refugee Convention.<sup>45</sup> It defines who is a refugee and provides for certain standards of treatment to be accorded to refugees. However, it says nothing about procedures for determining refugee status and leaves to the states the choice of means as to implementation on the national level. Signatory states, although bound by the refugee definition in the Convention, are free to enact their own laws and regulations concerning the determination of refugee status.<sup>46</sup>

The United Nations High Commissioner for Refugees (UNHCR) is considered the highest authority to interpret the Convention. For this reason the UNHCR Handbook is quoted several times below. The refugee definition in the UNHCR statute and in the Convention contain very similar definitions of the term “refugee”. It is for UNHCR to determine status under its Statute and any relevant General Assembly resolutions, and for states parties to the Convention and the Protocol to determine status under those instruments.<sup>47</sup>

In the Convention a refugee is defined as someone who:

*“...owing to a **well founded fear** of being **persecuted** for reasons for **race, religion, nationality, membership of a particular social group or political opinion**, is outside of his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the **protection** of his country...”<sup>48</sup>*

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<sup>43</sup> Guy S. Goodwin-Gill, “The Refugee in International Law”, Oxford University Press Inc, New York, 1996, at v.

<sup>44</sup> Reinhard Marx, “Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims”, 7 IJRL 3, p 383-406, at 394.

<sup>45</sup> The Refugee Convention, Supra note 6.

<sup>46</sup> Pamela Goldberg, “Where in the World is There Safety for Me?: Women fleeing Gender-Based Persecution”, Women’s Rights, Human Rights, Julie Peters and Andrea Wolper, 1995 Routledge, Great Britain, 345-355, at 346.

<sup>47</sup> Goodwin-Gill, supra note 43, at 7.

<sup>48</sup> The Refugee Convention, supra note 45, Art 1 A.2.

As can be seen above the refugee in the Refugee Convention has been defined in a gender-neutral way. However, just as the construction of the civil and political character of human rights was criticised for stemming from a patriarchal construction of the public and private spheres in the first part of this paper, the same could be said for the refugee definition.<sup>49</sup> When the drafters of the Refugee Convention congregated in Geneva not a single woman was to be found amongst the plenipotentiaries. What was in the mind of the drafters was the archetypal image of a political refugee, someone who is fleeing persecution resulting from his direct involvement in political activity. This definition does not often correspond with the reality of women's experiences "*The law has developed within a male paradigm which reflects the factual circumstances of male applicants, but which does not respond to the particular protection needs of women*".<sup>50</sup> Until recently, the way these gender neutral instruments were interpreted, both at an international and national level, reflected and reinforced gender biases.<sup>51</sup> The discussion concerning gender-based persecution signifies a first move away from this biased thinking.

## 2.1. Persecution

The concepts of "persecution" and "well-founded fear of persecution" have not been expressly defined in any of the UN human rights or refugee conventions. Instead the UNHCR's Handbook can give some guidance;

*"...it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution."*<sup>52</sup>

The traditional view of what constitutes persecution reflects a male consideration of "normal" or acceptable conduct. However, over the past 15 years, there has been an increased recognition of the need to interpret the notion of persecution in a manner which is sensitive to issues of gender. One of the first efforts to recognise the legitimacy of gender-based persecution claims occurred in 1984 when the European Community admitted that such claims might be recognised under the category of membership in a particular social group.<sup>53</sup> In 1985, the European Parliament called on states to grant refugee status "*to women who suffer cruel and inhuman treatment because they have violated the moral or ethical rules of their society*".<sup>54</sup> During that same year, the Executive Committee

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<sup>49</sup> Romany, supra note 10, at 106.

<sup>50</sup> N Kelly, quoted in *ibid*.

<sup>51</sup> *Ibid*.

<sup>52</sup> UNHCR, "Handbook on Procedures and Criteria for determining Refugee Status", Geneva, 1979, para 51.

<sup>53</sup> Goldberg, supra note 46, at 347.

<sup>54</sup> UNHCR, *The State of the World's Refugees, A Humanitarian Agenda*, Box 5.2 Gender-related persecution, Geneva, 1997.

of UNHCR issued a recommendation, in which it acknowledges that states may recognize claims of gender-based persecution under the “particular social group” category.<sup>55</sup> In 1991, the UNHCR adopted Guidelines on the Protection of Refugee Women.<sup>56</sup> These guidelines confirmed the need to address gender-based persecution and the need for states to recognise claims for asylum and refugee status for women fleeing persecution on account of gender. At a later stage, the Executive Committee of UNHCR issued a Conclusion on Violence Against Women that calls for the “*development by States of appropriate guidelines on women asylum seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men*”.<sup>57</sup>

The definition of persecution according to refugee law can be seen to contain two elements. The first is whether the harm apprehended by the claimant amounts to persecution. The second is whether the state can be held accountable, in some measure, for the infliction of the harm. Thus, when a female applicant wants to demonstrate that, as a woman, she has a well-founded fear, she can firstly, use evidence of her own past persecution. Secondly, she can point to other “similarly situated” women who have been subject to persecution. E.g., an Iranian woman who is subject to a law requiring her to wear a veil in public. If the law is persecutory, a woman will certainly be unable to show that she has been uniquely singled out by that law (it applies to all women), yet she can still argue that she has a well-founded fear of being persecuted by the application of the law to her.<sup>58</sup>

Gender-based violence constitutes a type of harm that is either particular to the person’s sex or gender, such as female genital mutilation, forced prostitution, rape and other sexual abuses that affects women disproportionately.<sup>59</sup> Gender-based persecution can take many forms. It can range from the forced marriage of an underage Zimbabwean woman to a man many years her senior, to a woman in China who fears being forced to undergo an abortion and perhaps even sterilisation because she already has one child, to an Iranian woman who flees her country because she cannot follow the restrictive religious and social practices mandated by law and fears severe punishment should she return.<sup>60</sup>

Gender-based persecution includes;

- When a woman is persecuted *because* of her gender, it addresses the causal relation between gender and persecution, her gender is the reason for why she is persecuted.

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<sup>55</sup> UNHCR Executive Committee Conclusion No. 39, *supra* note 5.

<sup>56</sup> Information Note on UNHCR’s Guidelines on the Protection of Refugee Women, UNHCR, 42<sup>nd</sup> Sess., UN Doc. ES/SCP/67 (1991).

<sup>57</sup> UNHCR Executive Committee, 44<sup>th</sup> Sess. Refugee Protection and Sexual Violence, Conclusion 2, A/AC.96/XLIV/CRP.3 (1993).

<sup>58</sup> Macklin, *supra* note 8, at 238.

<sup>59</sup> United Nations Declaration on the Elimination of Violence Against Women, A/C.3/48/1.5, 23 February 1994.

<sup>60</sup> Macklin, *supra* note 8, at 348.



- When a woman is being persecuted as a woman, it is the *form* of persecution that is sex/gender-specific. Understanding the ways a woman is persecuted as a woman is critical to naming as persecution things that are done to women and not to men.
- When gender can be considered to be a *risk factor* that makes a woman's fear of persecution more well-founded than that of a man in similar instances.

Though one or more of these links between gender and persecution may be present simultaneously in a given case, they are not synonymous. For example, a woman may be

- persecuted as a woman (e.g. raped) for reasons unrelated to gender (e.g. membership in an opposition political party);
- not persecuted as a woman but still *because* of gender (e.g. flogged for refusing wearing a veil);
- and persecuted *as and because* one is a woman (e.g. genital mutilation).

All three of these cases present examples of gender-based persecution. But it does not necessarily mean that they should all be classified as persecution on grounds of gender, regardless whether gender is propounded as a separate group of persecution or as a particular social group.

The scheme above may help to clarify that not all persecution of women should be framed as "persecution *because* of gender", as that would only reinforce women's marginalisation. It would imply that only men have political opinions, only men are activated by religion, only men have racial presence. In that way it would create and sustain the stereotype that men "own" the categories of oppression that are not explicitly "gendrified". But in the cases where gender is the discrete basis of persecution, it is critical that it is named such, since it otherwise would mask the specificity of women's oppression.<sup>61</sup>

### **2.1.1. Persecuting laws and customs**

Gender-based discrimination is practised universally and is enforced through law, social custom, and individual practice. In 1990, the UNHCR Executive Committee affirmed the linkage between a violation of the rights guaranteed under the Convention on Elimination of Discrimination Against Women (CEDAW)<sup>62</sup> and persecution for purposes of the Refugee Convention, stating

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<sup>61</sup> Based on supra note 8.

<sup>62</sup> United Nations Declaration on the Elimination of Violence Against Women, A/C.3/48/1.5, 23 February 1994.

that severe discrimination prohibited by CEDAW can form the basis for the granting of refugee status.<sup>63</sup>

In the UNHCR Handbook it is stated that discrimination amounts to persecution if:

*“the measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his (sic!) rights to earn his livelihood, his rights to practice his religion, or his access to normally available educational facilities (...) In order to determine whether prosecution leads to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with adopted human rights standards”.*<sup>64</sup>

In 1993, Canada, as one of the first countries in the world, issued guidelines on how to handle asylum applications resulting from gender-based persecution. They provide the following clues to the extent that discrimination may be sanctioned unofficially as “policy” or formally in law:

*“A woman’s claim to Convention refugee status cannot be based solely on the fact that she is subject to a national policy or law to which she objects. The claimant will need to establish that:*

- *the policy or law is inherently persecutory; or*
- *the policy or law is used as a means of persecution for one of the enumerated reasons; or*
- *the policy or law, although having legitimate goals, is administered through persecutory means; or*
- *the penalty for non-compliance with the policy or law is disproportionately severe.*<sup>65</sup>

Thus, it appears that if the law discriminates by selectively abrogating fundamental human rights of designated groups, the *law itself* persecutes. In principle, it should not matter whether it would be relatively “easy” for a woman to obey the law (and thus avoid persecution), e.g. by wearing a veil, if in so doing she must forsake a protected freedom. Another example of legislated discrimination that can be construed as inherently persecutory are Pakistan’s Hudood laws. The Hudood Ordinances are Islamic Penal Laws which criminalizes, among other things, adultery, fornication and rape, and prescribe punishments for these offences that include stoning to death, public flogging and

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<sup>63</sup> UNHCR Executive Committee, “Note on Refugee Women and International Protection”, EC/SCP/59 (28 Aug. 1990), at 5.

<sup>64</sup> UNHCR Handbook, *supra* note 94, at para 54 and 59.

<sup>65</sup> The Canadian Immigration and Refugee Board, Guidelines issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, 1993, at para 8.

amputation.<sup>66</sup> These laws affect all citizens of Pakistan, but are applied to women with particularly disastrous effects. A discriminatory policy with a legitimate goal but pursued through persecutory means, might be the one child policy in the People's Republic of China. A scenario where the penalty for non-compliance with a discriminatory law might be disproportionately severe, might be illustrated by the Iranian law that makes a women's failure to wear a chador a criminal offence punishable by seventy-five whiplashes.<sup>67</sup>

### **2.1.2. Violence against women**

The UN Declaration on the Elimination of Violence Against Women defines violence against women as:

*“any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty”.*<sup>68</sup>

A recent report by Amnesty International on violence against women has eloquently described violence against women and its roots:

*“Torture of women is rooted in a global culture which denies women equal rights with men, and which legitimises the violent appropriation of women's bodies for individual gratification or political ends. (...) Violence against women feeds off this discrimination and serves to reinforce it. When women are abused in custody, when they are raped by armed forces as “spoils of war”, when they are terrorized by violence in the home, unequal power relations between men and women are both manifested and enforced. (...) There is an unbroken spectrum of violence that women face at the hands of men who exert control over them.”*<sup>69</sup>

As Amnesty International points out, the fundamental reason for violence against women lies in the global culture of inequality. However, the reasons for why individual women are singled out for violent treatment can vary. It may be because of her sex and gender, because of her relationship to a man or because of the social, religious or ethnic group she belongs to or a combination of these.<sup>70</sup>

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<sup>66</sup> For more on Hudood laws, see Human Rights Watch “Double Jeopardy, Police Abuse of Women in Pakistan”, New York 1992.

<sup>67</sup> Macklin, *supra* note 8, at 230. She further makes some useful comparisons to non-gendered cases.

<sup>68</sup> UN Declaration on Violence Against Women, *supra* note 59, art. 1.

<sup>69</sup> Amnesty International, “Broken bodies, shattered minds. Torture and ill-treatment of women”, ACT 40-001-2001

<sup>70</sup> Women, Law & Development International, “Gender Violence: The Hidden War Crime”, Washington D.C., 1998, at 20.

Violence against women is often connected to certain misconceptualisations of the notion of “honour”, honour as it is being conceptualised by families and whole communities in terms of the chastity of “their” women.<sup>71</sup> It has been stated by the Special Rapporteur on Violence Against Women that:

*“A key component of community identity, and therefore the demarcation of community boundaries, is the preservation of communal honour. Such honour is frequently perceived, by both community members and non-community members, as residing in the sexual behaviour of the women in the community.”<sup>72</sup>*

*“If attitudes towards female sexuality are often the cause of violence against women, it becomes important for society to “protect” its women from the violence of “the other”.”<sup>73</sup>*

Protecting the honour of the woman, and in turn the honour of the nation, therefore, gains political significance, and will be enforced either directly through the state, as seen in legislated discrimination and laws regulating women’s behaviour, or through a woman’s family and community.<sup>74</sup> International law has not been immune from these discriminatory notions of honour either, as until lately international humanitarian law has addressed sexual assaults in terms of women’s honour, as is elaborated below.

### **2.1.2.1. In armed conflicts**

The deconstruction of a culture can be considered one of the primary goals of warfare, because only through its destruction – which involves destruction of people – can a decision be forced. Women are therefore being targeted because of their cultural position and their important role within the family structure.<sup>75</sup> Cultural biases toward women in peacetime serve to exacerbate the exploitation of women during wartime. The kind of gender-specific concepts of honour that is described above, finds its ultimate expression in times of war where women are considered to be the vessels of the community honour, and men its protectors. Sexual violence is and continues to be an effective weapon as the men who belong to the same group as the raped women, often exacerbate and perpetuate the crime by rejecting the women that have been sexually abused and by putting the blame on the women.<sup>76</sup>

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<sup>71</sup> Ibid.

<sup>72</sup> Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, E/CN.4/1997/47, para 8.

<sup>73</sup> Preliminary Report submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, E/CN.4/1995/42, para 61.

<sup>74</sup> Crawley, supra note 21, at 108.

<sup>75</sup> Ruth Seifert, “War and Rape, Analytical Approaches”, Publication by the Women’s International League for Peace and Freedom, 1993.

<sup>76</sup> Women, Law & Development International, supra note 70, at 20.

When women are being persecuted by state agents in their homes, this has powerful symbolic motives. It is often intended to demonstrate that the state does not recognise “boundaries” between public and private spheres, and that nowhere is sacred. There are clear parallels between family torture, where women are being tortured or raped in front of their children or husbands, and the way in which rape has been used as an instrument of war, as a means to terrorise the (male) enemy and brutalise the whole community through violation of “its” women.<sup>77</sup>

As indicated above, an obstacle against the recognition of gender-based violence in international law has been that, until recently, international humanitarian law has addressed sexual violence in terms of women’s honour, separate from other crimes of violence, such as murder, mutilation, cruel treatment and torture. This definition makes sexual violence a moral crime instead of the violent physical crime it actually is. It also represents biased thinking, implying that only “pure” women can be raped. Where rape is treated as a crime against honour, the honour of women is called into question and virginity and chastity is often a precondition for rape to qualify as a crime. Honour implies the loss of status or respect; it reinforces the social view, internalised by women, that the raped woman is dishonourable.<sup>78</sup>

Rape and sexual abuse in connection with armed conflicts have proven to be a very effective propaganda tool, which can further stigmatise the abused women. In war propaganda women are portrayed as victims and the abuses are blamed on the enemy and used to instil anger and hate.<sup>79</sup> The Zagreb-based Centre for Women War Victims have expressed their fears as follows:

*“... we fear that the process of helping raped women is turning on a strange direction, being taken over by governmental institutions... and male gynaecologists in particular. We fear that the raped women could be used in political propaganda with the aim of spreading hatred and revenge, thus leading to further violence against women and to further victimisation of survivors.”<sup>80</sup>*

### **2.1.2.2. By their family members**

The UN Report on Violence Against Women in the Family states that:

*“There is no simple explanation for violence against women in the home. Certainly, any explanation must go beyond the individual characteristics of the man, the woman and the family and look to the structure of relationships and the role of society in underpinning*

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<sup>77</sup> Crawley, supra note 21, at 87.

<sup>78</sup> Rhonda Copelon, “Surfacing Gender: Re- Engraving Crimes Against Women in Humanitarian Law”, Hastings Women’s Law Journal, Vol. 5:2, Summer 1994, at 249.

<sup>79</sup> Women, Law & Development International, supra note 70, at 20.

<sup>80</sup> M.Belic and V.Kesic, quoted in Christine Chinkin, “Rape and Sexual Abuse of Women in International Law”, European Journal of International Law, Vol. 5 (1994) No.3,

*that structure. In the end analysis, it is perhaps best to conclude that violence against wives is a function of the belief, fostered in all cultures, that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.*<sup>81</sup>

It has also been argued by feminist scholars that domestic violence equals torture. Rhonda Copelon bases her argumentation responding to four critical elements that are generally defined in binding instruments: (1) severe physical and/or mental pain and suffering; (2) intentionally inflicted; (3) for specified purposes; (4) with some form of official involvement, whether active or passive.

In response to the argument that torture is different because its purpose is to elicit information she states:

*“This distinction, which harks back to the original nature of torture, ignores the contemporary understanding of torture as an engine of terror... ..It may also reflect a gender-biased identification with the victims of state torture as opposed to domestic violence – the torture victim resisting the giving of information is heroic, whereas the battered woman somehow deserves it.”*<sup>82</sup>

Understanding domestic violence as torture would have drastic implications on refugee law, as the principle of *non-refoulement* prohibits states to return an asylum seeker to a country where he/she faces torture.<sup>83</sup> Another interesting aspect is that violence against women within their homes is not limited to countries of the so-called “developing” world but also exists in the countries in which women seek asylum.<sup>84</sup> Many women have been forced to leave their countries, normally seen as democratic and respecting human rights, because the state has not been able to protect them from violent husbands or boyfriends.

## **2.2. State responsibility**

### **2.2.1. In human rights law**

For a long time, there was an assumption that states are not responsible for violations of women’s rights in the private or cultural sphere. The reasons for this have been described in the first part of this paper. As already established above, this assumption largely ignores the fact that such abuses are often condoned

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<sup>81</sup> UN Centre for Social Development and Humanitarian Affairs, “Violence Against Women in the Family”, U.N. Sales. No E.89.IV.5, New York, United Nations 1989.

<sup>82</sup> Copelon, supra note 24, at 130.

<sup>83</sup> Art. 3, 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

<sup>84</sup> Crawley, supra note 21, at 130.

and even sanctioned by states even when the immediate perpetrator is a private person.

However, as the human rights discourse developed and began to take the experience of women into account, two routes were distinguished to hold states responsible for systematic “private” male violence against women:

- By systematically failing to provide protection for women from “private” actors who deprive women of their right to life, liberty and security, the state becomes complicit in the violation.
- The state can be responsible for failing to fulfil its obligation to prevent and punish violence against women in a non-discriminatory fashion, a failure denying women the equal protection of the law.<sup>85</sup>

In the procedure of determining state complicity in “private” violations against women, it is not enough to point to random incidents of non-punishment of perpetrators of violence against women. Thus, it is when the state fails to arrest, prosecute, and imprison perpetrators of violence against women, that it can be interpreted as acquiescence in or ratification of the private actor’s conduct. It can be described as the verifiable existence of a parallel state with its own system of justice; a state sanctioned by the official state, which protects male power through embodying and ensuring existing male control over women at every level.<sup>86</sup>

### **2.2.2. In refugee law**

There is an important difference between a failure of state protection under international refugee law and the notion of state responsibility in human rights law. Under refugee law it needs to be established that there has been a failure of state protection and not necessarily that the state is accountable or culpable for the harm sustained or feared, as described above. By way of example, an applicant will need to show that a policy or law is inherently persecutory, that the policy or law is used as a means of persecution for one of the enumerated reasons, that the policy or law, although having legitimate goals, is administered through persecutory means, or that the penalty for non-compliance is disproportionately severe. In this context, the existence of certain laws or social policies or the manner in which they are implemented, may themselves constitute or involve a failure of state protection.<sup>87</sup> Thus, the turning point when a “common crime” becomes persecution depends on the role of the state in systematically failing to protect the claimant from the feared harm.<sup>88</sup>

The failure to recognise violence against women as a violation of human rights for which a state is accountable, as described above, also has implications in

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<sup>85</sup> Romany, supra note 10, at 99.

<sup>86</sup> Ibid, at 100.

<sup>87</sup> Crawley, supra note 21, at 48.

<sup>88</sup> Macklin, supra note 8, at 233.

refugee law for female asylum seekers. The problem for many female asylum seekers may not lie so much in the demonstrating that the abuse constitutes a “serious harm”, but instead to show that the state is implicated in, or has failed to protect from, that harm.<sup>89</sup>

It should, therefore be considered persecution for the purpose of refugee law, when the government is passively encouraging and legitimising the abuse of women by refusing to intervene to protect against human rights violations, to investigate charges, or to prosecute and punish perpetrators of harmful acts.<sup>90</sup> The same applies if a state pays inadequate attention to prevent one particular form of violence in relation to other comparable forms of violence.<sup>91</sup> Further, statutes and laws which are enforced by the government can be gender-neutral albeit discriminatory and applied in a manner that targets women and also in these cases the state involvement is clear.<sup>92</sup> In situations of domestic violence, state inaction may take the form of official condoning (e.g., marital rape exemptions in law). However, it is more often the case of lack of police response to pleas for assistance, refusal to investigate or prosecute individual cases, and a reluctance to convict or punish. This indicates that, while violence against women may be legally proscribed, it is socially accepted.<sup>93</sup> The UNHCR Handbook takes the position that “*acts by private citizens, when combined with state inability to protect, constitute “persecution”*”.<sup>94</sup>

In order to respond to the experiences of women as asylum seekers, the assessment within the determination process of whether there has been a failure of state protection must reflect existing international obligations to protect against systematic abuse based on gender.<sup>95</sup> The duty imposed on the state to prevent and punish should be one of due diligence. Due diligence requires the existence of reasonable measures of prevention that a well administered government could be expected to exercise under similar circumstances.<sup>96</sup>

### **2.3. The grounds for persecution**

Some of the most difficult issues in current jurisprudence arise over whether a gender-related asylum claim involves persecution “on account of” one of the five enumerated grounds which are norms of non-discrimination.<sup>97</sup> While race, religion, nationality, member of a particular social group and political opinion appear in the 1951 Refugee Convention, persecution and well-founded fear of persecution on the basis of gender are not included as an explicit category.

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<sup>89</sup> Crawley, *supra* note 21, at 52.

<sup>90</sup> Todd Stewart Schenk, “A proposal to Improve the Treatment of Women in Asylum Law: Adding a “Gender” Category to the International Definition of “Refugee”, *Indiana Journal of Global Legal Studies*, June 1995, and *supra* note 46 .

<sup>91</sup> Roth, *supra* note 42, at 334.

<sup>92</sup> Crawley, *supra* note 21, at 48.

<sup>93</sup> Macklin, *supra* note 8, at 234.

<sup>94</sup> UNHCR Handbook, *supra* note 52, para 65.

<sup>95</sup> Crawley, *supra* note 21, at 50.

<sup>96</sup> Romany, *supra* note 10, at 102.

<sup>97</sup> Crawley, *supra* note 21, at 62.



### 2.3.1. Race

In the UNHCR's Handbook it is stated that racial discrimination amounts to persecution if:

*“...a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregards of racial barriers is subject to serious consequences. (...)There may (...) be situations where due to a particular circumstances affecting the group, such membership will in itself be sufficient ground to fear persecution.”<sup>98</sup>*

Women are often not only targeted because of their own race but also because they are perceived as propagating a racial group or ethnic identity through their reproductive role.<sup>99</sup> An example of how race and gender interact can be found in the propaganda against the Tutsi women in Rwanda in the early 1990's. When the genocide began in 1994, rape of Tutsi women were widespread. The targeted use of sexual violence against Tutsi women were fuelled by both ethnic and gender stereotypes, Tutsi women were targeted on the basis of the genocide propaganda which had portrayed them as calculating seductress-spies bent on dominating and undermining the Hutu. They were also targeted because of the gender stereotype which portrayed them as beautiful and desirable, but inaccessible to Hutu men whom they allegedly looked down upon and were “too good” for. Rape served to shatter these images by humiliating, degrading, and ultimately destroying the Tutsi women.<sup>100</sup>

### 2.3.2. Religion

Persecution on religious grounds may take various forms. According to the UNHCR Handbook it may consist of:

*“...e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.”<sup>101</sup>*

There is a considerable degree of overlap between the grounds of religion and political opinion which in many cases involve social norms, for instance the imposition of a dress code may rather signify a battle between women and the

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<sup>98</sup> UNHCR Handbook, supra note 94, at para 69 and 70.

<sup>99</sup> Crawley, supra note 21, at 64.

<sup>100</sup> Human Rights Watch “Shattered Lives, Sexual Violence during the Rwandan Genocide and its Aftermath”, September 1996.

<sup>101</sup> UNHCR Handbook, Supra note 94, at para 72.

state over the control of the individual's body and personal space, than an expression of religion.<sup>102</sup>

In many cases, being deemed as fearing persecution on the basis of religion, may be too simplistic. At least to the extent that this may not comport with the claim that it is not religion *per se*, that is the problem, but rather the interpretations and the discursive uses of a particular religion, e.g. Islam, by the state.<sup>103</sup> In order to understand the experiences of women from countries such as Iran, Afghanistan, Pakistan and the Sudan, it is necessary to see that the repression does not stem from the fact that Islam is inherently more oppressive to women than other religions, but rather from the fact that the regimes use women as a way of signalling their agenda.<sup>104</sup>

### **2.3.3. Nationality**

*“The term “nationality” in this context is not to be understood only as “citizenship”, it also refers to membership of an ethnic or linguistic group and may occasionally overlap with the term “race”.”<sup>105</sup>*

As stated in the UNHCR Handbook, the term nationality and race may in many cases overlap. The dynamics between gender and nationality are much the same as described above with regards to race. Furthermore, as with race, the nature of the persecution in many cases take a gender-specific form, most commonly that of sexual violence including rape in particular, although not exclusively, against women and girls.<sup>106</sup>

A gender-related claim of fear of persecution may also be linked to reasons of nationality in situations where a law causes a woman to lose her nationality (i.e. citizenship) and the protection combined therewith, because of marriage to a foreign national.<sup>107</sup>

### **2.3.4. Member of a particular social group**

One possibility of fitting in gender-based persecution in the existing refugee definition, is to qualify persecuted groups of women as a “*particular social group*”. This is the solution that UNHCR itself has been advocating;

*“(…)States, in the exercise of their sovereignty, are free 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*

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<sup>102</sup> Crawley, supra note 21, at 86.

<sup>103</sup> Macklin, supra note 8, at 255.

<sup>104</sup> Crawley, supra note 21 at 85.

<sup>105</sup> UNHCR Handbook, supra note 94, at para 74.

<sup>106</sup> Crawley, supra note 21, at 67.

<sup>107</sup> Macklin, supra note 8, at 240

*"particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.*<sup>108</sup>

By using this solution it would be possible to e.g. analyse the Saudi dress code by considering the plethora of rules, policies, customs, and laws circumscribing the lives of Saudi women. Women are not allowed to drive, must sit in the back of buses, are limited in their educational and employment opportunities, and may not travel without consent of a male relative. Thereby, the restriction on dress may be understood as one strand in a web of oppression that cumulatively amounts to persecution of Saudi women, as a particular social group. The various restrictions lead to *"consequences of a substantially prejudicial nature for the claimant"*<sup>109</sup> in terms of her ability to access educational facilities, to earn a livelihood, and to function as an autonomous and independent individual.<sup>110</sup>

### **2.3.5. Political opinion**

*" Holding opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicants hold opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant."*<sup>111</sup>

Women who are imprisoned for political reasons run the risk of "double punishment", as they are not only punished because they oppose the regime in some way, but also because they shirk the traditional role of women, by being politically active at all.<sup>112</sup> A woman may also suffer harm on the basis of an imputed political opinion as a result of the perception that her political views are aligned with those of a dominant family or community members.<sup>113</sup>

Political opinion is often interpreted as only encompassing traditional "public" political activity. This is, however, only a reflection of gender bias and should be replaced by a broad interpretation of the ground. A broader interpretation would make it possible to include activities that are not so publicly visible, e.g. providing food, clothing, medical care, hide people, pass messages and so on.

### **2.3.6. Gender**

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<sup>108</sup> E.g. Conclusion No. 39 (XXXVI), Refugee Women and International Protection, UN Doc. HRC/IP/2/Rev. 1986 (July 8, 1985).

<sup>109</sup> The Canadian Immigration and Refugee Board, *supra* note 65.

<sup>110</sup> Macklin, *supra* note 8, at 231.

<sup>111</sup> UNHCR Handbook, *supra* note 94, para 80.

<sup>112</sup> Crawley, *supra* note 21, at 82.

<sup>113</sup> *Ibid.*

The initial omission of gender is understood by many as a reflection of post-World War II thinking.<sup>114</sup> Unfortunately, this omission has had severe implications for many female asylum seekers all over the world, which we can see by the discussion on how to include gender-based persecution into the already existing grounds for asylum in the Convention.

While there are differences between women across the world, there are also many commonalities; and while the pattern of gender inequalities varies around the regions, it is nevertheless a global phenomenon.<sup>115</sup> There is a number of international reports that have pointed out the global nature of violence against women and that also indict states for their complicity in perpetuating its invisibility and privatisation.<sup>116</sup> It must, therefore, be acknowledged, that in addition to basic needs shared with all asylum applicants, female asylum applicants have particular needs that reflect their gender and their position within society. These unique needs of females are a function not of innate gender differences, but of pervasive gender discrimination and women's resulting inferior position in most societies.<sup>117</sup>

Obviously, not all cases where a woman is persecuted, she is persecuted on the base of her gender. Even though a sixth category of gender would be introduced, every application would still have to be considered on an individual basis in order to determine what is the actual ground for the persecution. In some cases women will be able to make claims for refugee status on one of the existing five grounds in the Convention, as has been described above. But for many, the persecution experienced or feared is of a type not traditionally recognised under the Convention or under most countries' asylum eligibility laws.<sup>118</sup>

## **2.4. Misconceptualisation or reconceptualisation?**

As a consequence of the omission of gender among the grounds of persecution in the 1951 Refugee Convention, the discussion has focused on whether women's experiences can and should be interpreted so that they may be included into the already existing grounds or whether it is instead necessary to add a sixth ground (gender), in order to encompass all forms of gender-based persecution. The question is whether interpreting women's special experiences into the existing grounds should be considered a misconceptualisation as was discussed in the first part of this paper - a misconceptualisation that serves to maintain the original presumptions and does not challenge the basis for these (biased) presumptions. Can the introduction of gender as a sixth ground bring about a reconceptualisation that would reveal, instead of conceal, the persecution that has its origin in women's distinctive existential and material state of being?<sup>119</sup>

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<sup>114</sup> Schenk, *supra* note 90

<sup>115</sup> Steans, *supra* note 12, at 4.

<sup>116</sup> E.g. *supra* note 81.

<sup>117</sup> Schenk, *supra* note 90.

<sup>118</sup> Goldberg, *supra* note 46, at 348.

<sup>119</sup> See above 1.1. Feminist jurisprudence

UNHCR and the European Parliament have recommended that gender-based persecution claims be understood to fall within the category of “member of a particular social group”. However, with this recommendation they failed to acknowledge other potential bases for establishing gender-based persecution.<sup>120</sup> Furthermore, this option, although it may produce socially desirable results, does not recognise the importance of the issue of persecution on account of gender. Gender as a social category might be an appropriate remedy if the persecution of women were isolated or temporary, but that approach does not afford women enough protection within the context of society’s recognised, widespread, and institutional persecution of women worldwide.<sup>121</sup> Furthermore, it must be acknowledged that the grounds of race, religion and nationality are no less socially constructed than gender.<sup>122</sup>

To ground gender-based persecution in political opinion does not share the same partiality as religion or race in the way that the latter is addressing only one single aspect of the persecution experienced by the woman claimant. Instead, by equating resistance to gender oppression with a political opinion, one seizes the language of liberal democratic rights discourse and refashions it for feminist use. However, the same defect of masking gender under another name can be held against it.<sup>123</sup> Also, by using this language one risks being caught in the trap of voluntarism, the idea that people exercise free choice over their actions. For instance, if a woman who escapes a situation of domestic violence is deemed to have done so on the ground of persecution of her political opinion, rather than her gender, it may imply that other women who have not escaped (or have not tried to) do *not* have the political opinion that they have the right to live without violence. Such a logic appears even more questionable as it is well-established in the research on domestic violence that one of the mechanisms behind it is that this kind of violence becomes part of the every day life of the woman - it becomes the normality. The trap of perceived normality is one of the reasons why it is so difficult for a battered wife to leave her abusing man.<sup>124</sup> In that regard gender as a sixth ground would provide for a better recognition of the dynamics behind the construction and reproduction of gender.

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<sup>120</sup> Goldberg, *supra* note 46, at 231.

<sup>121</sup> Schenk, *supra* note 90.

<sup>122</sup> Macklin, *supra* note 8, at 261.

<sup>123</sup> Macklin, *supra* note 8, at 260.

<sup>124</sup> Mona Eliasson, “Mäns våld mot kvinnor”, *Natur och Kultur*, Stockholm, 1997.

## **PART 3 THE SWEDISH EXAMPLE**

Having looked at gender and refugee law from an international perspective, we now turn to domestic legislation and application. The way gender-based persecution is dealt with in national refugee legislation differs considerably between countries. This chapter will focus on the Swedish example. The choice of Sweden has two reasons; firstly, the author is herself Swedish and is therefore more familiar with the situation in this country, and second, the fact that Sweden prides itself of being among the most advanced in the world with regard to equality between sexes. It is, therefore, interesting to analyse how Sweden deals with issues of gender and sex equality when it comes to citizens of other countries, in particular refugees.

A new clause for gender-based persecution was introduced in the Swedish legislation in 1997, as has already been explained in the introduction. Since its introduction this gender-clause has been used to grant residence permits only in some very few cases. All of these cases concern female genital mutilation. In order to find plausible causes for the rare use of this clause, this section will examine the practice of the Swedish immigrant authorities and strives to establish on which basic assumptions and understandings that practice is based. The sources for this section are the Swedish Migration Board's (*Migrationsverket*) Guidelines on Gender-based Persecution, which include a survey and case studies,<sup>125</sup> and a report from the Swedish Refugee Advice Centre which analysed 80 Swedish asylum cases from a gender perspective.<sup>126</sup>

### **3.1. Legislation**

#### **3.1.1. On gender in general**

The Swedish model for equality between sexes has since long been based on what has been called a symmetrical vision (*likhets-principen*). Thus, in the eyes of the law, men and women are equal. It is the almost complete absence of any mentioning of gender in the legislation that is the most striking feature of the Swedish model. Hence, gender neutral legislation is the norm in the Swedish legislation and the law is not allowed to differentiate between women and men except for in two cases, i.e. military service and measures to increase equality at work.<sup>127</sup> Yet, another step outside of the gender neutral norm was taken in 1998 when a special provision against the crime of violence against women in a relationship was introduced.<sup>128</sup> This provision clearly recognises the

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<sup>125</sup> Migrationsverket, "Förföljelse på grund av kön – grunder för uppehållstillstånd.", SIV-129-2000-5900, 2001-03-28.

<sup>126</sup> Maria Bexelius, "Kvinnor på flykt, en analys av svensk asylpolitik ur ett genusperspektiv 1997-2000", Rådgivningsbyrå för asylsökande och flyktingar, Nykopia, Stockholm 2001.

<sup>127</sup> Eva-Maria Svensson, "Genus och rätt, en problematisering av rätten", Lustus Förlag AB, Uppsala, 1997, at 14-16.

<sup>128</sup> Gross violation of a woman's integrity, (*Grov kvinnofridskränkning*) Article 4 § a in the Penal Law.

asymmetrical position of men and women in the society and the gender dimension of this violence.<sup>129</sup>

Traditionally, Swedish laws pertaining to the situation of women have had a primarily empirical focus, i.e. they have first and foremost been practical-concrete and were seen as an active strategy to improve the position of women in society.<sup>130</sup> This has not prevented that progressive legislative changes which are aimed at enhancing equality between sexes have normally not been used very offensively by the Swedish courts.<sup>131</sup> Over time, it has become obvious that the very view on the law, its structures and its principles and the interpretations of different basic legal institutions seem to stop or at least hamper more fundamental changes.<sup>132</sup>

The innovation of introducing a specific gender clause in the Swedish refugee legislation can thus be viewed as an anomaly in traditional Swedish legislation, in that it emphasizes gender in a legislation that otherwise is silent on the issue, with the few exemptions mentioned above. On the other hand, it may also form part of an effort to remedy underlying imbalances in the same spirit as the crime on violence against women. For now, however, one can only speculate on the actual origins of the gender clause, as, whereas the preparatory work on the revision of the legislation on violence against women was very ambitious and profound, the same can hardly be said about the preparatory work to the new gender clause in refugee law. (More on this below!)

### **3.1.2. On asylum issues**

Before 1997, an asylum seeker could get a Swedish residence permit as a Convention refugee, as a *de facto refugee* or on humanitarian grounds.<sup>133</sup> *De facto* refugee status was granted to asylum seekers who, without being a refugee in the meaning of the Refugee Convention, were unwilling to return to their countries of origin on account of the political situation there and were able to plead very strong grounds in support of this. In 1983, a proposal to include also persons fleeing gender-based persecution in this category was rejected with the argument that persons fleeing gender-based persecution should instead be granted residence permits on humanitarian grounds.<sup>134</sup> Yet, in cases where applicants are granted residence permits on humanitarian grounds, there is no *right* to such protection, as it is granted by discretion in cases where the conditions of removal would make a deportation inhumane.<sup>135</sup>

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<sup>129</sup> Proposition 1997/88:55 Kvinnofrid, at 21.

<sup>130</sup> Svensson, *supra* note 127.

<sup>131</sup> Eva-Maria Svensson, *Genusforskningen inom juridiken*, Högskoleverket, juni 2001.

<sup>132</sup> Svensson, *supra* note 127.

<sup>133</sup> Kristina Folkelius and Gregor Noll, "Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act", *International Journal of Refugee Law* Vol. 10 No. 4, 607-636, at 616.

<sup>134</sup> Migrationsverket, *supra* note 125.

<sup>135</sup> Proposition 1996/97:25, *Svensk migrationspolitik i globalt perspektiv*.

In 1997, a new structure and a new terminology was introduced in the Swedish Aliens Act (*Utlänningslagen*).<sup>136</sup> The term “*de facto* refugee” was taken out and a new category was introduced to cover what the law terms “*persons otherwise in need of protection*”. In this category a new protection ground was introduced which covers persons who “*have a well-founded fear of persecution on account of his gender (kön) or sexuality*”. At the same time the Swedish parliament rejected the idea of including gender under the category of “*member of a particular social group*” in the 1951 Refugee Convention, claiming instead that this type of persecution would, through the special article, get a stronger protection than before.<sup>137</sup>

The new article 3.3 reads as follows:<sup>138</sup>

- “In this law, the term ‘persons otherwise in need of protection’ refers to aliens who, in cases other than those referred to in section 2<sup>139</sup> (i.e. cases covered by the 1951 Refugee Convention, author’s remark), has left the country of which he is a citizen because he*
- 1. has a well-founded fear of being sentenced to death penalty or corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment,<sup>140</sup>*
  - 2. needs protection on account of an external or internal armed conflict or cannot return to his country of origin on account of an environmental disaster or*
  - 3. has a well-founded fear of persecution on account of his gender (kön) or homosexuality.”<sup>141</sup>*

In the preparatory work to the new article it is explained that the article is written with the 1951 Refugee Convention in mind, i.e. the level of persecution and fear should be equivalent to that required by the Convention to qualify for refugee status. It is also expressed that a combination of different harassments and restrictive measures may constitute a ground for asylum, even though each separate action may not.<sup>142</sup>

As stated above, the preparatory work on the new gender clause does not provide much guidance concerning the interpretation and implementation of the law. The major confusion arises over the interpretation of the notion of “*kön*”, as has already been described above. But also a more thorough investigation of the

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<sup>136</sup> Utlänningslagen (SFS 1989:529) as amended by SFS 1996.

<sup>137</sup> Supra note 134.

<sup>138</sup> Supra note 136, Chapter 3, Section 3, author’s translation.

<sup>139</sup> Hereafter the refugee article.

<sup>140</sup> Hereafter the torture clause.

<sup>141</sup> Hereafter the gender clause.

<sup>142</sup> Proposition 1983/84:144, author’s translation.



gender dimension of persecution, as was provided in the preparatory work on the law on violence against women, would be needed.

### **3.1.3. The confusion of gender**

As a consequence of the fact that there is no explanation of the notion of “*kön*” in the preparatory work, there has been some discussion whether it should be understood as encompassing both the aspect of “sex” and “gender”, or only one of them. Kristina Folkelius and Gregor Noll have questioned whether “*kön*” refers to sex or gender, claiming that the term “*kön*” is equivalent to the term sex and “*genus*” should be used in Swedish for gender.<sup>143</sup> Whereas this distinction has been adopted to a certain degree in academic discussions in Sweden, this is not the case when it comes to legislation. “*Genus*” in Swedish is a highly academic term used mostly for purely scientific reasons, while the traditional meaning of *kön* covers both sex and gender. Furthermore, Swedish legislation has solely used the term *kön* throughout its history on issues concerning gender equality.<sup>144</sup> Likewise, the official Swedish translation of “gender-based violence” is *könsbetingat våld*.<sup>145</sup>

Thus, when the preparatory work is silent on the interpretation of “*kön*” the conclusion must be that it should have the same meaning as it had in previous legislation. The restrictive interpretation of gender-related legislation by implementing organs should not be mistaken for a limitation of *the law* to (biological) sex, setting aside cases based on (social) gender. There is no indication that this was the intention of the law when it was introduced.

There is a number of statements in the Guidelines that give the impression that the Migration Board does not fully take account of the gender aspect of “*kön*”;

- “*women who have been exposed to gender-based persecution demand special attention in the same way as men who have been tortured or otherwise exposed to severe abuses (...)*”<sup>146</sup>

This statement can of course be explained with the symmetrical vision that has long been the basis in Swedish legislation, men and women are just the same and therefore require identical treatment. However, the Board thereby overlooks the dynamics behind gender-based persecution and ignores that gender guidelines are needed just *because* gender-based violence is different and has other consequences for the female victim than torture has for a male victim.

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<sup>143</sup> E.g. supra note 133.

<sup>144</sup> E.g. Equal Opportunities Act (*Jämställdhetslagen*), SFS, 1991:433 and for more on the use of “*kön*” in that law see Anita Dahlberg “Jämställdhetslagen som paradox och dekonstruktion” in *13 Kvinnoperspektiv på rätten*, Ed. Gudrun Nordborg, Lustus Förlag, Uppsala 1995.

<sup>145</sup> See e.g. FN:s deklaration om avskaffande av våld mot kvinnor, Swedish translation of the UN Declaration on the Elimination of Violence Against Women.

<sup>146</sup> Supra note 125, author's translation.

- *“...other (forms of persecution) are completely gender specific, i.e. they only concern women, e.g. forced abortion or feminine genital mutilation.”<sup>147</sup>*

The examples provided for “completely gender specific” persecution support the theory that “*kön*” should be interpreted “sex”, as they both concern the female body. Apparently, according to the Migration Board, persecution is completely gender specific when it concerns body parts which only exist on women. Thus, as men are the norm, it is when specifically female body parts are attacked that persecution becomes gender-specific.

- *“...when there is a risk for honour killing (...) the gender clause is less relevant as the tradition of honour killings is in the nearest gender neutral; it is an act that can be done to whoever has broken a social norm (...). A similar reasoning can be applied on cases where a woman risks to be punished by the authorities in an inhuman way, i.e. through flogging or stoning. Such inhuman punishments are most often not gender-specific.”<sup>148</sup>*

Also with this statement the Migration Board overlooks the gender dimension of notions of social norms and honour killings. (More on this below!) It also fails to acknowledge that even though the method of punishment may be gender neutral, it may nevertheless be a component of gender-based persecution if it is used in a gender specific way, e.g. for crimes that only women are sentenced for or as punishments that are implemented in a different way for women and men.

- *“Also in the case of less severe phenomenon as risk of social outcasting the same argumentation is valid.”<sup>149</sup>*

The argumentation referred to is the one above, i.e. social outcasting should be considered as gender neutral, as it may in theory apply to both gender. Of course this statement neglects that social norms often are different and harder for women, as are the punishments for breaking them, which clearly makes social outcasting a highly gendered phenomenon. It gets yet another gender dimension as it is virtually impossible for a woman to survive without the support of her family and community in some countries. From a female point a view social outcasting can therefore be a question of life and death, which contradicts that classifying as “less severe” by the Migration Board.

### **3.2. Practice**

It is difficult to draw any clear conclusions from looking at statistics that are made available from the Migration Board. The obstacles are several:

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<sup>147</sup> Ibid., author’s translation.

<sup>148</sup> Migrationsverket, supra note 125, author’s translation.

<sup>149</sup> Ibid.

- Even though data has been collected concerning female applicants, the corresponding data is not available for male applicants.
- In cases where external researchers obtained access to case files, the selection of the case files is still made by the Migration Board.
- The motivations in the decisions are often very short and often do not provide enough information to clarify on which basis and reasoning the decision has been based on.

Since the gender article was introduced in 1997 the following statistics concerning residence permits given to female asylum seekers have been collected. The figures show the numbers of women granted asylum and indicates on which articles in the Swedish Aliens Act the decisions were based.

<u>Year</u>	<u>art 3:2</u> (Convention Refugees)	<u>art 3:3 p1</u> (Torture)	<u>art 3:3 p3</u> (Gender)	<u>Humanitarian</u> <u>grounds</u> <sup>150</sup>
1997	551	211	5	3051
1998	444	247	2	2099
1999	299	244	15	1532
2000	223	374	7	3314

The Migration Board claims that the actual number of applicants that claim gender-based persecution is a relatively small compared to the total number of applications.<sup>151</sup> During the years 1997-1999, a mere 22 women were given residence permits under the new gender clause and they all concerned female genital mutilation. No other form of claimed gender-based persecution has resulted in a successful application.<sup>152</sup> As the torture clause provides a better protection than the gender clause, in cases where they both can be claimed, preference is given to the torture clause.

The Migration Board estimates that the number of cases of gender-based persecution is limited to approximately 5% of all women seeking asylum in Sweden.<sup>153</sup> It is difficult to assess the relevance of this figure, as the Migration Board does not explain which information or conclusion this estimate is made on. For instance, is it limited to cases where the gender clause has been used so far, i.e. female genital mutilation, or does it purport to include also other forms of gender persecution?

In order to find plausible causes for the rare use of the gender clause, the focus will now turn to the practice of the Swedish immigrant authorities. Such an analysis is, however, bound to be rather indicative and inconclusive as the material available is so sparse and uninformative. Thus, an exhaustive account

<sup>150</sup> Migrationsverket, supra note 125.

<sup>151</sup> Ibid.

<sup>152</sup> Bexelius, supra note 126.

<sup>153</sup> Migrationsverket, supra note 125.

of the Swedish asylum practice cannot be expected. However, it is nevertheless possible to establish some indications of how gender-based persecution is dealt with by the Swedish immigrant authorities.

### **3.2.1. Gendered customs and laws**

The report by the Swedish Refugee Advice Centre states that a claim of gender-based persecution most often involves different kinds of gender-discriminating customs and laws.<sup>154</sup> However, in no such case was a residence permit granted based on the gender clause.<sup>155</sup> This may seem counter-intuitive, as one would imagine that it was for this type of cases that the gender clause was introduced. A closer look at the preparatory work and the Migration Board's guidelines provides some clues to this effect.

In the preparatory work to the new article it is stated that:

*“As some referral instances have pointed out it is hardly so that anyone risks persecution solely on the ground of belonging to a certain gender/sex (kön). It has to be that the person concerned at the same time is breaking the laws or customs of the country.”<sup>156</sup>*

Thus, with the understanding that “kön” only refers to sex this would imply that it is not the biology of women that makes them persecuted. While this may be true to a certain degree, there are some objections that can be made against it;

- The same argument could be made for persecution on the grounds on race and nationality. Are minorities and ethnic groups persecuted because they are born into these or is it because they resist the role that the society assigns to them?
- Is it possible to distinguish so definite between gender and sex? Even though they may express different aspects of a personality, they are still intertwined and are constantly interacting with each other, as was described in the first part.
- There is hardly any parallel discussion on this in the international human rights discourse. Instead efforts are made to distinguish **when** women are discriminated or their rights are violated for biological reason and when it is based in perceptions of gender. Thus if a women can be discriminated against *because* she is a woman according to human rights law and it is possible that discrimination may amount to persecution as is stated in the UNHCR Handbook, the conclusion must be that she can be persecuted because she is a women.

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<sup>154</sup> Ibid.

<sup>155</sup> Migrationsverket, supra note 125.

<sup>156</sup> Supra note 142, author's translation.

- Are minorities and ethnic groups persecuted because they are born into these or is it because they resist the role that the society assigns to them? In the latter case, they could as well be said to express a political opinion when they object to this assignation.

*“Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all circumstances...”<sup>157</sup>*

The Migration Board used the statement in the preparatory work to reject the idea that general customs and legislations in a country, e.g. the dress code in Iran, may constitute gender-based persecution.<sup>158</sup> In this regard it is interesting to recall the discussion in the first part concerning the development of *jus cogens*.<sup>159</sup> Would it be possible for the Migration Board to have a similar position regarding the race discriminating laws under the former apartheid regime in South Africa?

The activity requirement in the statement in the preparatory work raises other concerns; does it imply that a woman must already have broken these laws and customs before she has a right to seek asylum? It seems rather unreasonable to expect of a woman in e.g. Taliban-ruled Afghanistan to walk in the streets of Kabul without a *burqua*<sup>160</sup>, before she can be considered to be persecuted on the base of her gender by the regime. Most likely, she would not even have survived long enough to seek asylum. Yet, if an action is *not* needed and it is sufficient for the asylum seeker to state that she is opposed to the customs or the law, the reference in the preparatory work seems unnecessary as it must be considered established that the asylum seeker opposes the laws and the customs she is fleeing from in this case.

Furthermore, in the UNHCR Handbook persecution on the ground of political opinion demands that *“...the applicant’s opinions not tolerated by the authorities have come to the notice of the authorities or are attributed by them to the applicant”*.<sup>161</sup> Racial discrimination amounts to persecution if *“...a person’s human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences.”*<sup>162</sup> This would imply that the Swedish Migration Board demands more activity of a woman who is persecuted

<sup>157</sup> UNHCR Handbook, supra note 94, para 55.

<sup>158</sup> Migrationsverket, supra note 125.

<sup>159</sup> See above 1.4. Human rights for who?

<sup>160</sup> Full body and face cover.

<sup>161</sup> UNHCR Handbook, supra note 94, para 80.

<sup>162</sup> Ibid, para 69.

on the base of her gender than of a person that is persecuted on the base of his/her race, where it is enough that his/her dignity is affected to a certain extent. Could it be so that women's dignity is considered worth less to protect than that of a man of colour? Thus, when it is a woman who is severely discriminated, it is also needed that she openly opposes the customs and laws. This would imply that when a woman wants to exercise her basic human rights and freedoms she is adopting a certain political opinion, while men of a certain race, nationality or religion have inherent universal human rights.

In none of the cases that were studied in the report by the Swedish Refugee Advice Centre, was there a discussion concerning the will or ability of the state to protect the women, not even when it came to states that have a gender-discriminating legislation.<sup>163</sup>

### **3.2.2. Rape and other forms of sexual violence**

Among the 42 cases concerning sexual violence that were examined in the report from the Swedish Refugee Advice Centre, a residence permit based on the "gender-clause" was not granted in a single case. In 18 cases the applicant was given a residence permit on humanitarian grounds.

In the guidelines from the Migration Board, there is no reference to the social consequences of rape and other forms of sexual violence that the victims of these crimes face in many countries. This is highly unfortunate as, which has been described in the second part of this paper, for a victim of sexual violence, the societal consequences afterwards may themselves constitute an ever bigger threat for her life and security than the crime itself. The stigmatisation and ostracising of the victim form part of the gender dimension of sexual violence.

### **3.2.3. Domestic violence**

Of all cases involving domestic violence, examined in the report by the Swedish Refugee Advice Centre, all but one applicant was rejected. The applicant in that one case which resulted in approval, was allowed to stay on humanitarian grounds. In several cases information on a husband's record of violence or a threat of murder was commented on by wordings such as "*problems of a private nature, marital problems, problems of a family nature*". This phrasing can be put in contrast to the statements in the preparatory work on legislative reforms on violence against women in Sweden which states that "*in many areas there is an imbalance in the power division between sexes. The most extreme example of this imbalance is violence that men use against women who they have or have had a close relationship to. (...) Men's violence against women, therefore, constitutes a serious societal problem.*"<sup>164</sup> Thus, when women are being beaten by their husbands in another country it is a private matter, but when Swedish women are being beaten it is classified as societal issue.

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<sup>163</sup> Bexelius, supra note 126.

<sup>164</sup> Regeringens proposition Kvinnofrid 1997/88:55, author's translation.

In none of the cases examined in the report was there any discussion concerning the background information on gender-discriminating customs and laws in connection to domestic violence. This fact is most remarkable as it is, as has been explained in the previous parts in this paper, just from this angle that it is possible to determine whether a domestic violence case constitute persecution.

It is further stated in the report that in most cases a claimed risk to be physically and sexually abused by a husband was connected to other forms of gender-related risks, such as getting sentenced for a husband's adultery accusations, honour killings, etc. There was, however, no discussion concerning the possibility of that the accumulation of these risks would together constitute persecution.<sup>165</sup>

The guidelines treats the issue of domestic violence with complete silence.

### **3.2.4. Honour killings**

As the guidelines treat the phenomenon of so called honour killings, it is defined as "*extreme violence that in most cases can be connected to the private sphere*". As was described above, the Migration Board claims that the gender clause is not relevant in cases of risk for honour killings as they can be considered as gender neutral. It may, theoretically, be executed against whoever has violated a norm or custom in the society.

This extremely formalistic way of interpreting the crime of honour killing is a clear contradiction with how honour killings are described in the international human rights discourse. You don't need very strong gender lenses to be able to realise that even though the word honour killing may appear gender neutral, in practice it only concerns women. It is the different social norms for women and the gendered notion of honour in connection with the low status of women that creates the basis for this crime.<sup>166</sup> Honour killings have been condemned in several international reports that confirm the gender dimension to this crime, including *inter alia* the United Nations Rapporteur on Extrajudicial, Summary or Arbitrary Executions<sup>167</sup> and the UN Security Council<sup>168</sup>.

Further, the guidelines claim that the practice of "blood feud" should be included among honour killings. The institution of the "blood feud" can be considered as a male counterpart to "honour" killings of women. The aim is not punishment of a murderer, but satisfaction of the blood of the person murdered or, initially, satisfaction of one's own honour when it has been maculated.<sup>169</sup> Although it can be established that honour killings and blood feuds both treat notions of honour,

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<sup>165</sup> Bexelius, supra note 126.

<sup>166</sup> Crawley, supra note 21, at 109.

<sup>167</sup> E.g. E/CN.4/2001/9.

<sup>168</sup> Working towards the Elimination of Crimes Against Women Committed in the Name of Honour, A/RES/55/66, 31 January 2001.

<sup>169</sup> Gendercide Watch Honour Killings and Blood Feuds at <[http://www.gendercide.org/case\\_honour.html](http://www.gendercide.org/case_honour.html)>

it does not mean that the mechanisms behind these practices are the same. Neither does it mean that by lumping the two together, the crimes become gender neutral.

The Migration Board states that if the home country cannot or is not willing to provide protection, it may be possible to grant asylum under the torture article.<sup>170</sup> It is again difficult to see why a threat to life should be classified as torture because it has a gendered dimension. Also, take note of the reference to the report of the United Nations Rapporteur on Extrajudicial, Summary or Arbitrary **Executions** (e.g. killings/murders) above.

### **3.2.5. Female genital mutilation (FGM)**

As stated above, the only category of cases that have led to granting of residence permits based on the new gender clause, are cases where women fear to be subjected to female genital mutilation. In the Migration Board's guidelines it stated that also the torture clause may be used to give asylum to women who fear FGM since it is to be considered an "*inhuman act*".<sup>171</sup> Again, a gender based act of persecution is not labelled torture, but is circumscribed with other expressions.

The cases involving FGM are the only cases which involves a discussion of the surrounding social context according to the report by the Swedish Refugee Advice Centre. Even though an applicant cannot show that her **personal situation** is so, that it could be said for certain that she would be mutilated, the knowledge about the **general conditions** in the country gives her a right to a residence permit. The general conditions includes e.g. the existence of FGM and difficulties to resist the social pressure and forced FGM.<sup>172</sup> Consideration has also been taken to whether there are known cases of where women have been seeking the protection against FGM and that traditional customs seems to be an area where the local authorities consider that they should not get involved.<sup>173</sup>

The example of FGM shows that there is a possibility to take into consideration the wider context and the particularity of the act of persecution is regarded. Unfortunately, these considerations and discussions are lacking from the other cases of gender-based persecution, which may be part of the reason why those applicants were not allowed to stay.

### **3.3. Critique of the Swedish legislation**

The gender clause in the Swedish Aliens Act has been criticised because it gives women less protection than if they are claiming asylum as Convention

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<sup>170</sup> Bexelius, supra note 126.

<sup>171</sup> Migrationsverket, supra note 125, author's translation.

<sup>172</sup> Bexelius, supra note 126.

<sup>173</sup> Ibid.



refugees or according to the torture article. In this regard, it has even been claimed that the Swedish law can be seen as discriminatory against women.<sup>174</sup>

By comparison to the gender clause the Convention refugee category gives access to the following benefits:

- Mandatory family reunion after recognition according to Article 4 of the 1990 Dublin Convention.<sup>175</sup>
- A shorter delay in naturalisation and a potentially more favourable status under domestic law.
- A travel document in accordance with Article 28 of the 1951 Refugee Convention.

Compared to the gender clause, the torture clause offers the benefit of an absolute protection from removal.<sup>176</sup>

Some author's have warned that Sweden have set a dangerous precedent by introducing a special category for cases with a gender aspect. They fear that this solution may to easily be misunderstood as exclusion of these cases from the framework of international law by other countries.<sup>177</sup>

### **3.3.1. Remedies**

As has already been stated in the beginning of this chapter, the Swedish legislation is based on a symmetrical vision and gender has generally been absent from legislative texts. The introduction of a clause specifically referring to gender in the Aliens Act can, therefore, be seen as a novelty in the Swedish legislation. The recognition that a person (a woman) may be persecuted on account of her gender must stem from an understanding of the asymmetrical positions of women and men in society. Given the fact that this is a new concept in Swedish law, it would be natural to expect that extra efforts had been put into the preparatory works on clarifications in order to avoid mistakes in the acts implementation. It is, thus, quite remarkable that the preparatory works are so silent on the new gender clause. When a new criminal provision on "*gross violations of a woman's integrity*" was introduced a year after the gender clause in the Aliens Act, it was accompanied by detailed preparatory work which describe in detail the mechanisms behind men's violence against women, an analysis of effects on society, etc. Similarly detailed research should also have preceded the introduction of the gender clause in the Aliens Act. At the same time, it is important to keep gender explicitly mentioned as a ground for persecution as it flows out of the official Swedish policy that recognises the

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<sup>174</sup> Folkelius and Noll, supra note 133.

<sup>175</sup> Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Members States of the Community, Dublin, 15 June 1990

<sup>176</sup> Migrationsverket, supra note 125.

<sup>177</sup> Folkelius and Noll, supra note 133, at 634,

imbalance of power between the sexes on a domestic level. It should, therefore, also do so in its relationship with aliens, i.e. refugees.

It would, however, not be enough with a clarifying preparatory work. That would have to be followed up with extensive training of the personnel in the immigration authorities. To distinguish the gender dimension demands a certain change of mind, as officials would have to develop what has been described as “gender lenses” earlier in this paper. Clearly, this is something that does not happen automatically through a change of the law.

One of the few things expressly stated in the preparatory work is that the legislators wanted to strengthen the protection for gender-based persecution. Practical experience so far has shown that this objective has clearly failed, as has been explained above. In order for the gender clause to have the effect the legislator (presumably) intended, a number of measures would have to be taken:

- First and foremost, the protection accorded by the gender clause must be strengthened and give the same level of protection as the 1951 Convention.
- It should be clarified that the gender clause ought to be seen as complementary to the five grounds in the 1951 Refugee Convention but not as exclusive, as persecutions on other grounds also may have gender dimensions.
- Detailed and extensive research should be undertaken by the legislator on gender-based persecution and the mechanisms behind it, so that it can be clarified which cases the clause is designed for.

## **Conclusion**

The first part of this thesis described the feminist methodology and its “gender lenses” that this paper has strived to apply. The question then arises: how can one make women and their experiences visible and how does one adjust existing systems and structures so that they take account of these experiences? It has been argued that many feminist-inspired legislative reforms during the past twenty years were achieved by categorising women’s injuries as analogous to injuries men suffer. This method should be regarded as a misconceptualisation as it maintains the original (male-biased) presumptions and does not challenge the basis for these presumptions. Instead, reconstructive feminist jurisprudence should set itself the task of reconceptualising new rights in such a way as to reveal, rather than conceal their origin in women’s distinctive existential and material state of being.

In the second part, this discussion was translated into the debate of international refugee law on how to include gender-based violence into the grounds of persecution, as gender was omitted when the Refugee Convention was created in 1951. Some argue that gender-based persecution should be interpreted into the already existing grounds, i.e. race, religion, nationality, member of a particular social group or political opinion. They say that it is not the omission of gender as a ground for persecution that is the problem. Instead, they argue that the problem is that women’s experiences have been interpreted as to not fit into the existing categories and it is, therefore, the interpretations of these grounds that need to change. The UNHCR and the European Parliament have argued that gender-based persecution should be subsumed under the ground of being member of a particular social group. Some have advocated that resistance to conform with gendered norms and customs should be classified as a political opinion. Yet, others have argued that where gender is the discrete basis of persecution, it is critical that it is named as such, since one would otherwise mask the specificity of women’s oppression. This paper has argued for the latter position.

The third and last part of this paper examined the Swedish example, where gender-based persecution was introduced as a new concept in the Aliens Act in 1997. This was a new concept in that it for the first time named gender as a ground of persecution, but also as it may be seen as a step aside from symmetrical vision that has traditionally been the basis for Swedish legislation. Unfortunately, the new gender clause suffered from a number of defects which have hampered its significance and implementation. The most important defect is that it does not give the applicant the same protection as that given to an applicant who is granted a residence permit on the grounds listed in the Refugee Convention or under risk of torture. Also, the lack of research into the notion of gender-based persecution and its dynamics in the preparatory work has paved the way for a misunderstanding of the term “*kön*” in the implementation of the clause. It has, however, also been stressed that, as the official Swedish policy recognises the imbalance of power between the sexes on a domestic level, the

same recognition should characterize its relationship with aliens, i.e. refugees. Thus, it is important to name gender-based persecution for what it is, but its status should be strengthened and equalised with the five grounds already mentioned in the Refugee Convention.

As the journalist Linda Hossie criticises the Canadian gender guidelines, she also eloquently formulates the argumentation in favour of explicitly enumerating gender among the grounds for asylum:

*“The problem with the draft guidelines, meanwhile, is that they treat women’s refugee problems as a subtle variation of men’s. But the situation of women is unique. Forced abortion, forced pregnancy, ritual and (disabling) clitoridectomy – all of which are appallingly common – are forms of persecution that have no parallel in men’s experience. To oblige women seeking asylum to prove that such treatment is just a variation of the oppression faced by men is illogical and – when you get right down to it – discriminatory. Even when women face routine political, religious or ethnic persecution, it is compounded by their almost universal second-class status. Women draw the ire of sexist cultures much more readily than do men, and for much less provocative actions.”<sup>178</sup>*

There may be a fear among some, that strengthening the protection for gender-based persecution might result in floods of new asylum seekers. The reality is that permanent resettlement or asylum in a remote country will never be a viable or even desirable option for the overwhelming majority of displaced women. As the refugee scholar James Hathaway has stated *“We are not going to see a flood of female claimants. Most women can’t get out of their countries, and when they can, they’re lucky to make it to the next country”*.<sup>179</sup> For many women, however, the ability to remain outside their homeland and to find refuge is of crucial importance, as forced return can mean persecution in the form of abuse, extreme ridicule, ostracism, and even death.

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<sup>178</sup> Quoted in Macklin, *supra* note 8, at 257.

<sup>179</sup> Quoted in Macklin, *supra* note 8, p 220.

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