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## The Second Sex

- A Feminist Analysis of International and Swedish Refugee Law

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# Summary

This thesis is written from a feminist perspective examining female asylum-seekers in international and Swedish refugee law. The question for this thesis is whether the refugee instruments are gender-sensitive and give women and men equal access to protection.

The axiom of feminism is that women are subordinate to men in society and that this relationship has to be changed. The aim of feminism is to create legal equality between men and women. There are different approaches to legal equality: equal treatment, special treatment and the newer approaches which reject the preoccupation of similarities and differences between men and women. Feminists use a feminist method which includes asking questions, the woman question. The woman question examines how the law fails to take into account the experiences and values of women and how existing legal standards and concept might disadvantage women.

It is the 1951 Convention relating to the Status of Refugees and the Swedish Aliens Act which are under examination in this thesis. To be granted refugee status the asylum-seeker must fulfil five prerequisites, namely: be outside her country of origin, have a well-founded fear of persecution, establish a failure of State protection and be able to link her fear of persecution to a Convention ground.

This thesis identifies three problems where legislation has failed to take into account the experiences of women. First, women's fear of persecution goes unrecognised because of the interpretation of persecution. The concept of persecution does not include all methods of persecution that women are commonly subjected to. The most common violence against women that differ from violence against men may be sexual violence. Rape has often been seen as a sexual act rather than an act of violence. Even though many human rights instruments are declaring rape as torture, decision-makers in refugee law often evaluate rape as insufficient serious harm to constitute persecution. Likewise, institutionalised discrimination against women is not viewed as severe enough to constitute persecution.

Second, women face problems when establishing failure of State protection in particular when they fear persecution in the private sphere. The level of meaningful protection required is very low. Moreover, it seems like refugee-receiving States distinguish between intercultural persecution, such as domestic violence and sexual violence and persecution which is more common in certain cultures than others, putting a much higher level of protection required to the latter.

Third, women face difficulties with linking their fear of persecution to a Convention ground. Political opinion has been interpreted very narrowly, excluding political activities which are less formal than that of men.

Moreover, decision-makers have rejected to view gender-based persecution as persecution for reason of political opinion. Even membership of a particular social group have been interpreted narrowly and Sweden has until now denied that gender may form the base for a social group. However, Sweden has developed its definition and the provision which will be applicable from March 31, 2006, explicitly states that gender may be a ground for persecution.

The conclusion of this thesis is therefore that women and men do not have equal access to protection in refugee law. Much of the problem derives from that the instruments do not enter the private sphere sufficiently.



# Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
DEVAW	Declaration on the Elimination of Violence against Women
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
FGM	Female Genital Mutilation
ICCPR	International Covenant on Civil and Political Rights
ICC Statute	the Statute of the International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia
Prop.	Proposition (government bill)
Refugee Convention	1951 Convention Relating to the Status of Refugees
SOU	Statens Offentliga Utredningar (The Swedish Government Official Reports)
UDHR	Universal Declaration of Human Rights

UN

United Nations

UNHCR

United Nations High  
Commissioner for Refugees

UNHCR Handbook

United Nations High  
Commissioner for Refugees  
Handbook on Procedures and  
Criteria for Determining Refugee  
Status

# 1 Introduction

## 1.1 Background

Maybe one of the most important principles we have in international law is the principle of non-discrimination. This principle is stated in various documents and is well recognised in most States. The principle expresses clearly that discrimination on account of sex is prohibited. Despite the high ranked status of the non-discrimination principle, women throughout the world are still being discriminated.

The Refugee Convention emphasizes in its preamble that the Convention should be interpreted and applied in a non-discriminatory way. The grounds in the definition of refugee has further been developed and chosen from the field of non-discrimination. However, the ground of sex, which is one of the most frequent, is not one of the five grounds of persecution enumerated in the refugee definition. Neither is gender a written ground.

Sweden has entered the Convention and is thus internationally legally bound to it. The Swedish Aliens Act looks very much alike the Convention and it is emphasised that it is important to harmonise the practice of the Convention. However, the Swedish Aliens Act has been developed with an amendment to the refugee definition, namely gender will be an additional ground of persecution, solely or together with one of the enumerated grounds. Women's rights have been advancing into international human rights law with documents such as Convention on the Elimination of All Forms of Discrimination against Women and its Protocol and Declaration on the Elimination of Violence against Women. Women's rights advancement in human rights has facilitated developments in international and municipal refugee law. Even though such advancements have been achieved women still have a subordinate position in refugee law and application and interpretation of legislation discriminate women.

## 1.2 Purpose

This paper examines how surrogate protection, that is to say refugee law, works towards women. The granting of refugee status may be the last chance for a person to be protected from persecution. It is therefore very important that women have equal access to protection and that instruments are sensitive about the uniqueness of women's experiences.

Sweden is one of the most prominent States in the world concerning gender issues in general. When it comes to Swedish refugee law, Sweden is criticised for failing to be gender sensitive in interpretation of the refugee

definition. The questions raised in this paper are; Are international and Swedish refugee law sensitive about women's experiences and values and thus give women equal access to protection?

### **1.3 Method**

I have used a feminist method by focusing on women and their experiences. The focus on women is maintained throughout the thesis. "Women" will include all kinds of women and not a general stereotype of women as poor, uneducated, oppressed victims. I hope I have been successful in my effort. However, I may have been limited in my perspective because of my own character as being a white European young woman.

There are very few sources which analyze Swedish cases in refugee law from the point of view of women. I have used the study of Bexelius to illustrate my theories. I am aware that there might be faults in the study of Bexelius since she is not reporting for the whole determination process including interviews etc. However, such possible faults should not spoil my theories since they have their base in other sources and the aim of using the study of Bexelius is only to illustrate my theories.

### **1.4 Delimitations**

This thesis focuses on the definition of refugee and thus refugee status. There are other forms of protection in Sweden, subsidiary protection, such as for persons otherwise in need of protection and for persons granted residence permit on humanitarian grounds. But the subsidiary protection is entitled with less rights and therefore, I have chosen to focus only on refugee status.

The emphasis of this thesis is on the evaluation of the refugee definition. The process of investigation is also very important and affects the outcome of the evaluation. However, there is no space to examine both the evaluative and the investigative factors. Therefore, I have chosen to only focus on evaluation. However, investigation sometimes interferes with evaluation and is present in those parts.

Most important is that this thesis is only focusing on women and women's experiences according to feminist method. However, there exist cases with male experiences. These cases are presented for a comparative purpose. Furthermore, the experiences and problems that I have listed in this thesis are neither exhaustive nor general since women are not just women but also members of different ethnic groups, classes, ages etc. The problems that I have examined are those I have identified to be most common.

When examining international and Swedish refugee law, case law has been delimited. In regards to international refugee law, case law has been

delimited for reason of the inconsistent jurisprudence.<sup>1</sup> There are, although, some cases which have been very important and where principles have been stated. Some of those cases are present. For the part of Swedish refugee law, cases are not available for the public. However, they may be available for the purposes of study. Many cases are needed to establish a reliable result and additionally those cases must be selected from an objective point of view. If I would not be able to choose the cases myself, maybe I would just obtain the “good” cases and the result would be unreliable. Moreover, according to the time limits, there would not be enough time to evaluate the cases. I have, though, used guiding decisions in the Swedish Aliens Act section.

## **1.5 Disposition**

This thesis is divided into five parts;

The first part is examining the feminist jurisprudence. This part is explaining the core of feminism and its method. It is thereafter picking out relevant terms and areas that will be used in the investigation of this thesis. It is, thus, describing the dichotomy of public/private which is one of the most common and useful dichotomies to explain the gendered system. Furthermore, it is describing legal equality which is the basis for feminism. Finally, it is explaining the distinction between sex and gender. These terms will be used throughout the thesis.

The second part is describing international refugee law. The Refugee Convention, which is the basis for international refugee law, is closely described.

The third part is focusing on those problems which women have, according to what can be identified in the feminist doctrine, in the determination process. This part is structured after some of the prerequisites in the refugee definition; persecution, failure of State protection and ground for persecution.

The fourth part is describing Swedish refugee law and the problems attached to the Swedish definition of “refugee”. The Swedish Aliens Act is only described where it differs from the international standard.

The fifth part concludes the paper.

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<sup>1</sup> Goodwin-Gill Guy S., p.67

## 2 Feminist Jurisprudence

The axiom of feminism is that women are subordinate to men in the society and this relationship has to be changed. How such subordination shall be changed is not agreed on. There are many feminisms, all with distinctive priorities. In a simple form, feminism can be categorised into liberal feminism, Marxist-socialist feminism and radical feminism. Liberal feminism propagates for equal rights for women within the liberal state. It considers the state as good but the rights and privileges must be extended to women. Marxist-socialist- feminism asserts the problem to the capitalist system of production. Finally, radical feminism alleges that the cause of the problem is the patriarchal system, which is independent of all social structures.<sup>2</sup> Moreover, there are different kinds of subcategories, e.g. black feminism, which is fighting for equality for black women.

The root to discrepancy between the many feminisms is in particular the self-definition of “woman” and the relevance of biological and socially constructed differences between men and women. There are two main approaches to the definition of “woman”: essentialism and social constructivism. Essentialism refers to the idea that all women are alike; they share common essential traits that differentiate them from men. Subscribers to this perspective argue that the meaning of gender identity and the experience of sexism are similar for all women and, besides, any differences between women are less significant than the traits women have in common.<sup>3</sup> However, many feminists challenge the belief that the biological difference between men and women is so profound that certain behaviour will be attributed because of one’s sex. Social constructivists argue that the behaviour of any woman is related to her social environment, which means her behaviour is a reflection of her sex, ethnic group, sexual preferences, class, age and other sources of differences. All these features are creating her behaviour which means that there are a diversity of combinations of these sources and thus a diversity of women behaviours.<sup>4</sup> In this paper, the latter understanding and definition of “woman” is used. Even if it might be more effective to use one definition of “woman” to bring her experiences to recognition, there is a serious risk that such a definition of “woman” would be a definition of a white educated middleclass woman. Such definition would be a simplification of “woman” and would thereby marginalise the group. Women cannot be separated from their class, ethnic group, sexual preferences and other sources of differences.

Catharine MacKinnon has defined feminist jurisprudence as “...an examination of the relationship between law and society from the point of

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<sup>2</sup> [http://en.wikipedia.org/wiki/Feminism#Feminism\\_in\\_many\\_forms](http://en.wikipedia.org/wiki/Feminism#Feminism_in_many_forms), Freedman Jane, p.8

<sup>3</sup> Weisberg Kelly, p.335

<sup>4</sup> Minow Martha, p. 339-345

*view of all women...*”<sup>5</sup> The criticism against the legal system is that the whole legal system is an inherently gendered system which serves to reinforce male domination. The legal system has been created from a male point of view and is presenting male characteristics as the norm and female characteristics as a derivation from that norm<sup>6</sup>. However, how to correct the legal system, like feminism in general, is not agreed upon.

Much of feminist theory begins by describing, defining and exposing patriarchy. Leslie Bender has defined “patriarchy” as “*the feminist term for the ubiquitous phenomenon of male domination and hierarchy. It means that men have had the bulk of the power and have used that power to subordinate women. Their power is not only manifest in the political and economic world; it also governs families and sexual relationship.*”<sup>7</sup>

Feminist inquiry is seeing, describing and analysing the “harms” of patriarchal law and legal system. The fact that patriarchal gender bias is seen as harm leads to thoughts that a “harm-free” alternative would be possible. Feminist jurisprudence thus inquires also the possibility and characteristics of a world without patriarchal law and a non-patriarchal legal system.<sup>8</sup>

International law has seemed for the most part uninterested of feminist analysis. The public international law does not seem to have any impact on women. However where international law is considered directly relevant to individuals, as with refugee and human rights law, there is an enormous impact on women. In these areas of international law it has slowly begun to develop a feminist analysis.

## 2.1 Feminist Method

It is important that feminists do not ignore method, because if feminists seek to challenge existing structures of power with traditional methods they may instead recreate the illegitimate power structures that they are trying to identify and undermine. If the method is failed when asking all the questions about how things are known and about what is known, there may be a risk of legitimating patriarchy again, even when attempting to eliminate it. Thus, not only are the answers subject to scrutiny, but also the way in which we search for them. Mary Jane Mossman declares it like; “*In challenging the validity of 'facts', the possibility of 'neutrality' and the equity of the 'conclusions' which result from such analysis, the feminist perspective directs its attention to our 'ways of knowing' about men and women as well*

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<sup>5</sup> Quoted in Wishik Heather Ruth, *To Question Everything: The Inquiries of Feminist Jurisprudence*, p. 22

<sup>6</sup> Crawley Heaven, p. 17

<sup>7</sup> Bender Leslie, p. 59

<sup>8</sup> Wishik Heather Ruth, p. 23

*as our efforts to seek greater equality for women.*”<sup>9</sup> For doing so, it may require new methods of inquiry.

## 2.1.1 The Woman Question

Feminist method includes asking questions. A question becomes a method if it is regularly asked. Feminists have referred to the feminist jurisprudence as asking “the woman question” which involves examining how the law fails to take into account the experiences and values of women and how existing legal standards and concepts might disadvantage women.<sup>10</sup> This question is designed to identify gender implications of rules and practices which may appear to be neutral or objective. The features of rules are being exposed together with the way they operate. The purpose of the woman question is to identify and expose and then further suggest how the rules may be corrected.<sup>11</sup>

Heather Ruth Wishik has suggested a list of questions that should be posed by a feminist inquiry into the relationship between law and society.

- 1) 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?
- 2) What assumptions, descriptions, assertions and/or definitions of experiences – male, female, or ostensibly gender neutral – does the law make in this area?
- 3) 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?
- 4) What patriarchal interests are served by the mismatch?
- 5) What reforms have been proposed in this area of law of women’s life situation? How will these reform proposals, if adopted, affect women both practically and ideologically?
- 6) In an ideal world, what would this woman’s life situation look like, and what relationship, if any, would the law have to this future life situation?
- 7) How do we get there from here?<sup>12</sup>

## 2.1.2 Feminist Practical Reasoning

Some feminists have claimed that women when reasoning are more sensitive to situation and context and they resist universal principles and generalisations.<sup>13</sup> Whether women have a certain way of reasoning will not be discussed here and is not relevant in this part. However, this reasoning process has taken on normative significance for feminists. Bartlett presents a

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<sup>9</sup> Mossman Mary Jane, p. 539

<sup>10</sup> Crawley Heaven, p. 17

<sup>11</sup> Bartlett Katharine T., p. 551

<sup>12</sup> Wishik Heather Ruth, p. 26-28

<sup>13</sup> Barlett Katherine T., p. 553

practical reasoning called “feminist practical reasoning.”<sup>14</sup> This reasoning challenges the legitimacy of the norms of those who claim to speak, through rules, for the community. She asserts that no legal reasoning can be free from community norms, because law is always situated in a context of practices and values.<sup>15</sup> Practical reasoning and asking the woman question may make more facts relevant or essential to the resolution of a legal case than a non-feminist legal analysis. Feminist practical reasoning requires the examination of all perspectives. Feminist practical reasoning has its clearest implications where it reveals insights about gender exclusion within existing legal rules and principles, though it could apply to a wide range of legal problems. There are some assumptions that have to be made to approve feminist practical reasoning as a proper relationship between the reasoning and the legal substance. One has to assume that one neither can nor should one eliminate political and moral factors from legal decision-making. Feminists have found that neutral rules and procedures tend to drive ideologies of decision-maker underground, and that these ideologies do not serve women’s interest well.<sup>16</sup>

This reasoning stands in opposition to the traditional, legal method which offers little opportunity for fundamental questioning about the process of defining the issues, selecting relevant principles and excluding irrelevant ideas. The traditional legal reasoning is characterised by abstraction, objectivity, rationality and deductive logic.<sup>17</sup> Traditional legal methods value more the ongoing consistency of ideas than their future vitality.<sup>18</sup>

Refugee law is using the traditional deductive reasoning. Feminists, who have used feminist practical reasoning in refugee law, have been criticised because their propositions are excessively purposive and depart from the literal meaning of the Refugee Convention.<sup>19</sup>

## 2.2 Legal Equality

Equality is a fundamental concept of our legal system. The equality principle is based on the ideology that all persons are equal and have equal rights under the law. The notion of equality varies from different historical periods to different ideological thoughts. Thus, the concept of equality of feminism has not always been the same. Even so, the debate over the meaning of equality has been central to the development of both feminism and feminist legal theory.<sup>20</sup>

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<sup>14</sup> Bartlett Katharine T., p. 553

<sup>15</sup> Bartlett Katherine T., p. 553

<sup>16</sup> Bartlett Katherine T., p. 555

<sup>17</sup> Barnett Hilaire, p. 23

<sup>18</sup> Mossman Mary Jane, p. 539

<sup>19</sup> Barnett Hilaire, p. 24

<sup>20</sup> Weisberg Kelly D., p. 121

Martha Minow identifies three stages of feminist scholarship in the matter of equality. The first scholars spoke for women's claims to be granted the same rights and privileges as men. Women were then fighting for obtaining the right to vote and to hold the same jobs as men. The second stage of feminist scholarship is focused on the respect and accommodation for women's historical and contemporary differences. The advocates fought to redress the undervaluation and disregard for women's historical and persistent interests, traits and needs. Examples of goals from this stage include obtaining pregnancy and maternity leaves from paid employment and revalue traditional women's work. Writers in the third stage reject the preoccupation with women's similarities to and differences from men.<sup>21</sup>

Feminist scholars and litigators agreed in the 1970s that one general abstract standard of equality should be applied to women. This abstract standard of equality guaranteed that likes would be treated alike and unlikes would be treated unlike, which meant that women similarly situated to men should be accorded the same entitlements as men. However, this abstract standard faltered in the face of situations when women are not like men, such as pregnancy. Two different alternative paths were developed to this approach: equal treatment and special treatment.<sup>22</sup>

## 2.2.1 Equal Treatment

Scholars within the equal treatment theory argue that women are or could be just like men if they were given the chance. This path is thus termed gender-neutral.<sup>23</sup> The ability by women to become pregnant is not treated as a considerable difference. Pregnancy is treated as one of many physical conditions like those that affect an employee's ability to work. That is to say, a pregnant woman should be treated as similarly situated workers with other disabilities.

However, according to the "equal treatment approach", equality can just be obtained when women are not distinguishable from men. In instances where there is no male standard (i.e. pregnancy) it becomes sex discrimination to give what only women need; and it is not sex discrimination to deny women what only women need. Moreover, the sameness standard misses the fact of social inequality imposed by male supremacy.<sup>24</sup>

The reason for the bad protection of women in international law may be that existing international law tends to interpret sexual equality with equal treatment.

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<sup>21</sup> Weisberg Kelly D., p. 122

<sup>22</sup> Weisberg Kelly D., p. 211

<sup>23</sup> MacKinnon Catharine A, p.276

<sup>24</sup> MacKinnon Catharine, p.276-278

## 2.2.2 Special Treatment

The other path is arguing that women are different to men. This argumentation is therefore claiming special treatment or protection. The model states that society must take into account the differences and ensure that women are not punished for them. Scholars to this approach mean that the pregnant women should have special benefits that ensure that she is not disadvantaged because of biological difference. It is argued that women should have special rights because women cannot be men's equals since the equality by definition require sameness.<sup>25</sup>

## 2.2.3 New Approaches to Legal Equality

Many feminists are critical to the above-mentioned approaches of equality. The newest approaches to the legal equality debate ignore the similarities to men and the differences from men. Both Mary Becker and Diana Majury suggest that feminists should not search for a general standard of equality. They mean that the "formal equality" (or treating like cases alike) harms women because of its false promise of neutrality and assumption that it is possible to ignore a person's sex. It has further been argued that formal equality can even be dangerous for women since it is eliminating sex-based legislation, which has been protecting women.<sup>26</sup>

Christine Littleton is also critical to the equality theory and claims that the equality theory has to be reconstructed. She suggests a new model called "equality as acceptance."<sup>27</sup> This model focuses not on sources of differences but on their consequences. "Woman" should be central in the normative debates about how the world ought to be structured. Consider for example pregnancy at the workplace; pregnancy should not be viewed as different from the norm. The workplace should have been structured in such way that employers would not be asked to make accommodations for pregnancy. Women would then be fully accepted. In addition Littleton's equality theory requires equal acceptance of social and cultural differences. It should be possible to follow a male, female or androgynous lifestyle according to its natural choice without being punished or rewarded because of such choice.<sup>28</sup>

There are also many scholars<sup>29</sup> that reject the idea of one abstract formula of equality. They mean that one abstract formula of equality is not possible since there are so many different schools in feminism. The different schools have different goals with the equality concept. To have one abstract formula

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<sup>25</sup> Littleton Christine A., p. 251

<sup>26</sup> Becker Mary E., p. 221-234

<sup>27</sup> Littleton Christine A., p. 255-260

<sup>28</sup> Littleton Christine A., p. 257-260,

<sup>29</sup> See Becker Mary E., Prince Charming: Abstract Equality, Cain Patricia A., Feminism and the Limits of Equality in Feminist Legal Theory Foundations

would limit the equality. It could even be better not to focus on equality but on the opposite, discrimination.

## 2.3 The Public/Private Dichotomy

Academics often use dichotomies and binary categories to describe and to analyse the world. The feminist critics use the dichotomy public/private in their attempt to explain the gendered system. The concept “public” can be referred both to the State and to non-domestic life while “private” can be referred to society and domestic life. The public sphere is belonging to men while feminist have explored how women have been historically confined to the private sphere, not only through biological factors, but also through the social construction of gender roles. It has been suggested by feminist critiques that these dichotomies are highly gendered at a deeper level. The two spheres are not accorded with equal value; more value and significance is attached to the public, male world than to the private, female world.<sup>30</sup> The male control in the public sphere has been consolidated explicitly by legal means throughout the history. The most obvious example may be how men had the right to vote while women did not have the same right to participate in the political sphere. Furthermore, other institutions and ideological opinions and attitudes have contributed to limit women’s participation in the public sphere. The law, however, which is very present in the male public sphere, is in large part absent from the private sphere, and this absence itself has contributed to male dominance and female subservience.<sup>31</sup> The classical concept of the private sphere was connected with individualism. The family or the private sphere is to be considered a sphere free from State intervention.<sup>32</sup> However, the outcome is that the stronger party in family relations will benefit, generally the husbands and the parents. Thus, men will dominate both the public and the private sphere.

The women are isolated in a world where the law is not intruding. This obscures the discrepancy between women's actual situation and the nominal commitment to equality. Equality is expressed predominately in legal form, but since the law as a whole is removed from the women's world, the equality norm is perceived as having very limited application to women. Taub and Schneider are pointing out the importance of the law with their statement; *“In short, the law plays a powerful role, though certainly not an exclusive role, in shaping and maintaining women’s subordination. The law has operated directly and explicitly to prevent women from attaining self-support and influence in the public sphere, thereby reinforcing their dependence on men. At the same time, its continued absence from the private sphere to which women are relegated not only leaves individual*

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<sup>30</sup> Crawley Heaven, p. 18

<sup>31</sup> Taub Nadine and Schneider Elizabeth M p. 9

<sup>32</sup> See e.g. art 8 ECHR

*women without formal remedies but also devalues and discredits them as a group.*”<sup>33</sup>

International law is gender-neutral in theory, however, in practice it interacts with gendered domestic laws and social structures which regulate women and men to separate spheres of existence and therefore, even international law has a limited application to women.<sup>34</sup> States have had an obligation in international law to protect family and private life and personal integrity from public intervention. They have therefore not been willing to intervene in the private sphere in which many violations against women are taking place such as rape, assault and battery etc.<sup>35</sup>

Human rights law challenges the traditional state-centred scope of international law. It is giving individuals and groups, otherwise with very restricted access to the international legal system, the possibility of making international legal claims. Human rights law has been the most accessible and hospitable area of international law for women since it acknowledges women’s lives, albeit in a limited fashion.<sup>36</sup>

## 2.4 Sex and Gender

Feminism distinguishes between “sex” and “gender.” Sex is the biological determination and determines physical appearance and reproductive capacity while gender refers to the relationship between men and women based on historically, socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another.<sup>37</sup> Gender is, thus, the social construct of relationship between men and women, and gender relations and gender differences are varying geographically and culturally. Gender has sometimes wrongly been used as the same as “woman”, meaning that all women have the same gender identity. However, woman is not the same as gender. Women may have different gender-identities.

Feminism uses the term gender-related persecution when dealing with a certain persecution of women and the causes related to that persecution. The term gender-related persecution has no legal meaning per se. UNHCR declares it as a “*range of different claims in which gender is a relevant consideration in the determination process.*”<sup>38</sup> Both methods of persecution linked to gender and causes of persecution are put under the concept of gender-related persecution.

The CEDAW Committee has defined gender-based violence *as violence that is directed at a person on the basis of gender or sex. It includes acts*

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<sup>33</sup> Taub Nadine and Schneider Elizabeth M., p. 13

<sup>34</sup> Crawley Heaven, p. 19

<sup>35</sup> Lerwall Lotta p. 12

<sup>36</sup> Charlesworth Hilary and Chinkin Christine, p. 201

<sup>37</sup> UNHCR Guidelines on Gender-related persecution, para. 1.3

<sup>38</sup> UNHCR Guidelines on Gender-Related Persecution, para. 1.1

*that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.*<sup>39</sup> Also according to this definition, gender-based violence includes both methods of persecution and grounds for persecution.

Gender-related persecution is normally separated into gender-based persecution and gender-specific persecution. Gender-based persecution refers to the experiences of women who are persecuted *because* they are women. Gender-specific persecution refers to the forms of serious harm which are specific to women.<sup>40</sup> Audrey Macklin gives some examples of the differences: “One 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 to wear a veil), and persecuted *as* and *because* one is woman (e.g., female genital mutilation).”<sup>41</sup> As it has been illustrated by the example, gender-specific persecution does not necessarily constitute persecution on account of gender.

However, this definition of the gender-specific and gender-based persecution may be confusing and is not undisputed. The above-mentioned terminology separates methods, which are gender-specific persecution and the grounds; the so called gender-based persecution. However, it is not separating gender and sex. Gender is used as meaning both sex and gender. However, methods may be both sex-specific and gender-specific. Most commonly it appears that sex influences the choice of methods of persecution while gender is the reason for the persecution. Therefore, the terminology would be clearer if there was a distinction between sex- and gender-specific persecutions.<sup>42</sup>

In this paper, the latter definition will be used, meaning sex- and gender-specific persecution will be separated as well the methods and reasons for persecution.

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<sup>39</sup> CEDAW, General Recommendation No. 19 para. 6

<sup>40</sup> Crawley Heaven, p. 7

<sup>41</sup> See Macklin Audrey, Refugee Women and the Imperative of Categories

<sup>42</sup> Folkelius Kristina and Noll Gregor, p. 610-614

# 3 1951 Convention and 1967 Protocol relating to the Status of Refugees

The international community's obligation to asylum seekers is based on the 1951 Convention, 1967 Protocol relating to the Status of Refugees and the principle of non- refoulement.

In the Refugee Convention, the preamble refers to the Charter of United Nations and the United Declaration of Human Rights concerning the principle of non-discrimination and it has been argued that the Refugee Convention should be read on the background of the this declaration and that the prohibition against discrimination should be emphasised.<sup>43</sup>

The definition of "refugee" in the Refugee Convention reads as followed:

"... owing to well-founded fear of being persecuted for reasons of 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>44</sup>

In April, 2004, the Council of European Union adopted a directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the Qualification Directive). This is a directive to harmonise the asylum law within the European Union. However, it is only stating the minimum standards.

Hathaway has proposed a model, based on the refugee definition in the Refugee Convention, consisting of five essential elements, of which each element must be established before refugee status can be granted. The elements are; alienage, well-founded fear, persecution, grounds, and failure of State protection.<sup>45</sup> I will use this model when describing the Refugee Convention in this chapter.

## 3.1 Alienage

A claimant to refugee status must be "outside his country of origin". However, the claimant does not have to flee because of fear for persecution.

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<sup>43</sup> Rv. Immigration Appeal Tribunal ex parte Shah; Islam v. Secretary of State for the Home Department (1999) 2 AC 629 Canada (Attorney – General) v. Ward (1993)2 S.C.R. 689

<sup>44</sup> Art. 1(A)2 1951 Refugee Convention

<sup>45</sup> Hathaway James C., p. vi-viii

The fear may derive from conditions arising when the claimant already is abroad, the so-called "sur place" situation.

## 3.2 Well-founded Fear

The well-founded fear element treats the evidentiary standard, which should be applied in a claim assessing to refugee status. It is generally asserted that well-founded fear entails two elements: an objective and a subjective element. Fear is the subjective element concerning the asylum seekers fear for persecution; her very personal response to the prospect of return to her home country. The objective element consists of well-foundedness, meaning there must be some indications for fulfilling the objective element.<sup>46</sup>

However, this approach is not undisputed. Against this doctrine it has been argued that "well-founded fear" has nothing to do with the subjective experiences of the asylum seeker except insofar as the claimant's testimony may provide some evidence of the state of affairs in her home country.<sup>47</sup> The determining factor for refugee status is whether the objective elements demonstrate a present or prospective risk of persecution. Hathaway is arguing that the two-pronged approach, objective and subjective elements, of the definition of "well-founded fear" is neither historically defensible nor practically meaningful in the context of drafting history of the Refugee Convention.<sup>48</sup> It is further argued that "fear" should be understood as a forward-looking expectation of persecution and when this is voiced it comes to the State to determine whether such expectation is borne by the actual circumstances of the case.<sup>49</sup>

It has been argued that an appropriate starting point for an analysis of objective conditions within the refugee claimant's State of origin is an examination of that country's general human rights record. Persons who flee countries that are known to commit or acquiesce in persecutory behaviour should benefit from a rebuttable presumption that they have a genuine need for protection. Conversely, those claimants who come from states which have generally laudable human rights records should face a tougher objective threshold. They must, whether through their own testimony or whatever other evidence that can be marshalled, counter the established perception that their country is one that can be relied upon to afford them meaningful protection.<sup>50</sup>

UNHCR argues that the determination of refugee status will primarily require an evaluation of the applicant's statements rather than a judgement

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<sup>46</sup> Hathaway James C., p. 65, UNHCR Handbook, para. 38

<sup>47</sup> Hathaway James C.,

<sup>48</sup> Hathaway James C., p. 65

<sup>49</sup> Bedlington Jenny, Foster Michelle, Goodman Ryan, Hailbronner Kay, Haines Rodger P.G., Hathaway James C., Legomsky Stephen, Mathew Penelope, Noll Gregor, Phuong Catherine, The Michigan Guidelines on Well-founded Fear, para. 4-5

<sup>50</sup> Hathaway James C., p. 80-81

on the situation prevailing in the country of her origin.<sup>51</sup> UNHCR is further arguing that the objective element, the knowledge of the conditions in the applicant's country of origin, is important in assessing the credibility of the applicant.<sup>52</sup>

Patricia Tuitt notes that the well-founded fear concept has evolved from a relatively simple inquiry where the refugee's subjective feelings were prominent to a more complex and wide-ranging inquiry within which concepts as "safe states" will increasingly be sole determinants of the issue of the well-founded fear.<sup>53</sup>

### 3.3 Persecution

The term "persecution" is not defined in the Refugee Convention or in any other international instrument. It is widely accepted that the drafters of the Refugee Convention left the meaning of persecution undefined since the task to list all cruel acts that might come into the human imagination is neither possible nor serving the purpose. The omission of the meaning of persecution has thus left States with a large measure of discretion which has resulted in an inconsistent jurisprudence.<sup>54</sup> There are however some guidelines and recommendations concerning the concept of persecution, but they are all vague in their interpretation. There are two principal approaches to what is meant with "persecution" In its restrictive interpretation, persecution means the threat of deprivation of life or physical freedom.<sup>55</sup> This position is tied to a narrow reading of the article of non-refoulement in the Refugee Convention, which states;

*"No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"*<sup>56</sup>

In its broader sense, persecution remains very much a question of degree and proportion.<sup>57</sup> This other approach is arguing that sustained or systematic denial of core human rights is the correct and most appropriate standard.<sup>58</sup> The second approach is the most accepted and dominated.

The UNHCR maintains 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*

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<sup>51</sup> UNHCR Handbook, para. 37

<sup>52</sup> UNHCR Handbook, para. 42

<sup>53</sup> Tuitt Patricia, pp. 80-83, 85-86

<sup>54</sup> Goodwin-Gill Guy S., p. 67

<sup>55</sup> Grahl-Madsen Atle, p.195

<sup>56</sup> Art. 33(1) Refugee Convention

<sup>57</sup> Goodwin-Gill Guy S., p. 68

<sup>58</sup> Hathaway James C., p. 105

*the same reasons, would also constitute persecution.*"<sup>59</sup> What "*serious violations of human rights*" means, is not explained or defined, neither are those human rights that are protected identified. It is however agreed in the doctrine that there must be a certain level of harm to constitute persecution; there must be a serious harm. However, what serious harm means is not agreed on.

UNHCR is suggesting that international law can assist decision-makers while determining the persecutory nature of a particular act.<sup>60</sup> It must be noted though that certainly not all human rights are included and it is also important to point out that all human rights were not created equal. James Hathaway has catalogued a hierarchy of the rights contained in UDHR, ICCPR and ICESCR:

**"The first order rights** are non-derogable in any circumstances and include the right not to be arbitrarily deprived of life; freedom from torture and other cruel, inhuman, or degrading treatment or punishment; freedom from slavery; and freedom of thought, conscience, and religion. Denial of these rights will always constitute persecution. **Second order rights** include freedom from arbitrary arrest and detention; right to fair trial, right to equal protection; presumption of innocence; freedom of opinion, expression, assembly and association; and franchise. States may derogate from these rights during an officially proclaimed public emergency. Otherwise, denial of these rights also constitutes persecution. **Third order rights** engage the positive duties of a state to progressively work toward the achievement of a right to work; favourable conditions of employment; entitlement to food, shelter, clothing, medical care, social security, and basic education and protection of the family, especially children and mothers. These rights are unenforceable but states are required to undertake a good faith effort, within the limits of available recourses, to realize the goals in a non-discriminatory way. **Fourth order rights** do not rise above the hortatory, and include the right to own and be protected from arbitrary deprivation of property, and protection against unemployment."<sup>61</sup>

Whether a hierarchy of human rights can be identified at all, is subject of a controversial debate. Human rights are viewed as indivisible and interdependent. The idea of indivisibility is not compatible with any hierarchy of human rights. However, even in the human rights instruments, some human rights have a specific status by being non-derogable.<sup>62</sup> Many scholars think that non-derogable rights are the minimum of core human

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<sup>59</sup> UNHCR Handbook, para. 51

<sup>60</sup> UNHCR Guidelines on Gender-Related Persecution, para. 9

<sup>61</sup> Hathaway James C., pp. 109-112

<sup>62</sup> See art. 4 ICCPR

rights<sup>63</sup> and these rights are thus be protected from persecution if violation of them is serious. The Qualification Directive is in particular pointing at those rights that are non-derogable in the European Convention on Human Rights<sup>64</sup> when explaining persecution.<sup>65</sup> However, the non-derogable rights differ from convention to convention. The American Convention on Human Rights for example provides for eight more non-derogable rights than the European Convention on Human Rights.

The UNHCR's Guidelines on Gender-Related Persecution declares that international human rights law and international criminal law identify some violations to amount to persecution.<sup>66</sup> It is further recommended that international law can assist while decision-makers determine the persecutory nature of a particular act.<sup>67</sup> The ICC Statute has included rape, sexual slavery and enforced prostitution into "crime against humanity" and "war crime".<sup>68</sup> In addition, both the ICTR Statute and the ICTY Statute state rape as a crime against humanity.<sup>69</sup> The Qualification Directive is moreover declaring acts of persecution can, *inter alia*, take the form of acts of sexual violence and acts of gender-specific nature.<sup>70</sup> The European Court of Human Rights has further established that rape is a violation against art.3 ECHR, which means that rape can constitute torture.<sup>71</sup> The Special Rapporteur on torture is clearly defining rape as torture.<sup>72</sup> The Second World Conference on Human Rights has further identified violence against women as violation of human rights.<sup>73</sup> Whether violence against women is serious violations of human rights is however not established. Finally, in 2000, the United Nations Security Council adopted Resolution 1325, which "calls upon all parties to armed conflict to take specific measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse."<sup>74</sup>

The authorities have to distinguish between persecution and punishment for violations of the law. Those who have violated a law are normally not granted refugee status. However, if the punishment of such violation is not in proportion to the law violation, because of the religious or political climate, such punishment can constitute persecution. A law may in addition be persecutory in and of itself. However, the claimant must establish that she has well-founded fear of being persecuted as a result of that law. The

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<sup>63</sup> See Teraya Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights*, p. 923, Goodwin-Gill, Guy S., *The Refugee in International Law*, p.68

<sup>64</sup> Art. 15(2) ECHR

<sup>65</sup> The Qualification Directive, art. 9.1(a)

<sup>66</sup> UNHCR's Guidelines on Gender-Related Persecution, para. 5

<sup>67</sup> UNHCR's Guidelines on Gender-Related Persecution, para. 9

<sup>68</sup> ICC Statute, arts. 7(1)(g) and 8(2)(b)(xxii)

<sup>69</sup> ICTR Statute art. 3 (g) , ICTY Statute art. 5 (g)

<sup>70</sup> The Qualification Directive, art. 9.2 (a), art. 9.2 (f)

<sup>71</sup> *Aydın v. Turkey* (57/1996/67/866), pp. 26-27

<sup>72</sup> U.N. Commission on Human Rights, Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, para 14

<sup>73</sup> Vienna Declaration and Programme of Action, para. 1.18

<sup>74</sup> Security Council Resolution 1325, para. 10

mere existence of such law does not establish persecution if it is no longer enforced. Where the penalty or punishment for non-compliance with or breach of a policy or law is disproportionately severe and has a gender dimension, it will amount to persecution.<sup>75</sup> However, even if a State may have prohibited a persecutory practice the State may nevertheless continue to tolerate the practice or may not be able to stop it. In such cases, the practice will still amount to persecution.<sup>76</sup>

Discrimination does not generally amount to persecution. However, discrimination may amount to persecution on cumulative grounds according to UNHCR: *“Where measures of discrimination are, in them selves, 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 [her] future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.”*<sup>77</sup> Discrimination may amount to persecution if the measures “lead to consequences of a substantially prejudicial nature for the person concerned.”<sup>78</sup> Examples of this kind of discrimination can be serious restrictions on a person’s right to earn her livelihood, her right to practice her religion or her access to normally available education. In 1990, the UNHCR Executive Committee stated that severe discrimination prohibited under CEDAW can form basis for the granting of refugee status.<sup>79</sup> Also the Qualification Directive is stating that *“an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)”*, which is severe violations of basic human rights, may amount to persecution.<sup>80</sup> The level of discrimination sufficient to rise to the level of “serious harm” is not agreed on between States.<sup>81</sup>

### **3.4 Failure of State Protection**

Refugee law offers a subsidiary protection to asylum seekers. It is exclusively those who cannot receive protection in their country of origin who are entitled to protection in another country. Therefore, if it is possible to establish a meaningful protection from the State of origin to the claimant, there cannot be said to exist a fear of persecution.

A failure of State protection exists in the following situations:

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<sup>75</sup> UNHCR Guidelines on Gender-Related Persecution, para.12

<sup>76</sup> UNHCR Guidelines on Gender-Related Persecution, para. 11

<sup>77</sup> UNHCR Handbook, para.55

<sup>78</sup> UNHCR Handbook, para. 54

<sup>79</sup> UNHCR Executive Committee Note on Refugee Women and International Protection EC/SCP/59 (Aug. 28/1990)

<sup>80</sup> The Qualification Directive, art. 11.1 (b)

<sup>81</sup> Crawley Heaven, p. 46

- 1) if “serious harm” has been inflicted by the authorities or by associated organisations, groups or individuals;
- 2) if “serious harm” has been committed by others and the authorities are *unwilling* to give effective protection, because they support the actions of the private persons concerned, because they tolerate them or because they have other priorities;
- 3) if “serious harm” has been committed by others, and the authorities are *unable* to give effective protection.<sup>82</sup>

The assumption is that all States are capable and willing to give its citizen protection if the opposite is not proved.<sup>83</sup> Clear and convincing confirmation of its inability to protect seems to be the standard to challenge this presumption. The interesting question in this discussion is where States meet the minimum level for protection. The States are not obliged to eradicate all risk for harm. However, it is not enough for the State to be willing to protect its citizen; it must also be able to give an effective protection. It has been argued that the state obligation is “*to reduce the risk of serious harm to below the level of well-foundedness.*”<sup>84</sup>

Guidance can be seen in art. 33(1) Refugee Convention. If the asylum-seeker cannot be sent back to her country of origin, failure of State protection must be considered as established. Likewise, if the requirement of well-founded fear is not fulfilled, there is no failure of State protection. Protection is generally provided when the State takes reasonable steps to prevent persecution and suffering by operating an effective legal system. Such a system should include detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.<sup>85</sup>

Regarding the rights recognised in ICESCR, states are not obliged to fulfil them immediately upon accession. However, the duty of each party is simply “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with view to achieving progressively the full realization of the rights recognised”<sup>86</sup>... and to “guarantee that the rights enunciated will be exercised without discrimination of any kind.”<sup>87</sup> Therefore, an absence of State protection can be said to exist only where the government fails to ensure the non-discriminatory allocation of available resources to meet the most basic of socio-economic needs.<sup>88</sup>

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<sup>82</sup>Quoted in Crawley Heaven, , p. 49

<sup>83</sup> Canada (Attorney – General) v. Ward (1993) 2 S.C.R. 689, pp. 724-726

<sup>84</sup> Haines Roger, para. 29

<sup>85</sup> The Qualification Directive, art. 7.2

<sup>86</sup> ICESCR art. 2.1

<sup>87</sup> ICESCR art. 2.2

<sup>88</sup> Hathaway James C., p. 117

Much of the persecution committed against women is committed by non-State agents. The agents can be husbands, boyfriends, fathers, in-laws and even women in the local community.<sup>89</sup> There are two models regarding persecution by non-state actors: the protection model and accountability model.<sup>90</sup> Most countries have chosen the protection model over the accountability counterpart, meaning that an asylum grant does not punish the failed state, but protects the asylum-seeker. Therefore, the asylum-seeker does not have to demonstrate active or indirect involvement of the state in persecution by third parties but needs to show a failure of state protection.<sup>91</sup> According to UNHCR Handbook; persecution can take form of government inaction as well as government action.<sup>92</sup> Much of the persecution because of religion will be performed by hostile groups of the population while the persecution for reason of political opinion will more commonly derive from official action.<sup>93</sup> Neither in the Refugee Convention nor in the travaux préparatoires is it explained about the source of the persecution. However, the Qualification Directive clarifies that non-state actors may be actors of persecution if the State, national or international organisations and parties controlling the State or part of the territory are not willing or able to protect the citizen.<sup>94</sup>

### **3.5 Grounds for Persecution**

Well-founded fear of persecution must be related to one or more of the Conventions grounds. The Convention identifies five grounds of persecution: race, religion, nationality, membership of a particular social group, and political opinion. These grounds have been correspondingly developed in the field of non-discrimination.<sup>95</sup> The Convention ground must be a relevant contributing factor though it does not have to be the sole or dominant cause.<sup>96</sup> In cases where there is a risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the enumerated Conventions grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to the Convention ground, but the inability or unwillingness of the State to offer protection is because of a Convention ground, the causal link is also established.<sup>97</sup> The persecution feared may be on account on one or various grounds.

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<sup>89</sup> Crawley Heaven, p. 52

<sup>90</sup> Heyman Michael G., p. 734

<sup>91</sup> Heyman Michael G., p 734, Phuong Catherine, pp. 81,83

<sup>92</sup> UNHCR Handbook, para 65

<sup>93</sup> Goodwin-Gill Guy S., p. 71, note. 175

<sup>94</sup> The Qualification Directive, art. 6 (c)

<sup>95</sup> Goodwin-Gil Guy S., p. 43

<sup>96</sup> UNHCR Guidelines on Gender-Related Persecution, para. 20

<sup>97</sup> UNHCR Guidelines on Gender-Related Persecution, para. 21

### 3.5.1 Race

The interpretation of race should be in its widest form to include all kinds of ethnic groups.<sup>98</sup> Account should be taken to art. 1 CERD, which defines racial discrimination as distinction based on *race, colour, descent, or national or ethnic origin*. This broad meaning can be considered valid also for the purposes of the Refugee Convention. UNHCR states that the mere fact of belonging to a certain race is not enough to substantiate a claim to refugee status. However, there may be certain situations where, due to particular circumstances affecting the group, such membership will in itself be sufficient ground to fear persecution.<sup>99</sup>

### 3.5.2 Religion

Religion consists of two elements, the right to hold or not to hold any form of theistic, non-theistic or atheistic belief and the right to live in accordance with this chosen belief, including participation in or abstention from formal worship and other religious acts, expressions of views and the ordering of personal behaviour.<sup>100</sup> Persecution for reasons of religion may assume various forms:

- 1) prohibition of membership of a religious community;
- 2) prohibition of worship in public and private;
- 3) prohibition of religious instruction;
- 4) serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.<sup>101</sup>

Like the ground race, mere membership to a certain religion is not enough to substantiate a claim to refugee status; however there may specific situations when it may be enough.<sup>102</sup>

Many religious practices have significant implications for gender relations. In certain States, the religion assigns particular roles or behavioural codes to women and men. Women may face harm for not conforming her behaviour according to those roles; such persecution may be linked to religion.<sup>103</sup>

There is a considerable degree of overlap between the religion and the political opinion grounds, in particular in countries where State and religion are not separated.

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<sup>98</sup> UNHCR Handbook para. 68

<sup>99</sup> UNHCR Handbook, para. 70

<sup>100</sup> Hathaway James C, p. 146

<sup>101</sup> UNHCR Handbook para. 71

<sup>102</sup> UNHCR Handbook, para 73

<sup>103</sup> UNHCR:s Guidelines on Gender-Related Persecution, para. 25

### 3.5.3 Nationality

Nationality is usually interpreted broadly to include origins and membership of particular ethnic, religious, cultural, and linguistic communities.<sup>104</sup> It may occasionally overlap with “race.”

### 3.5.4 Membership of a Particular Social Group

The ground “membership of a particular social group” is that ground with least clarity and it is not defined by the Refugee Convention.<sup>105</sup> The travaux préparatoires are not very helpful since they just contain the Swedish delegate’s observation “*Experiences has shown that certain refugees had been persecuted because they belonged to particular social group. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included*”<sup>106</sup>. There has been varying interpretations of what constitutes a social group within the meaning of the Convention. UNHCR’s Guidelines declares that the ground has to be read in consistency with the object and purpose of the Convention, which means that this ground should not be interpreted as a “catch all” who fear persecution.<sup>107</sup> The ground membership of a particular social group was brought to the Convention as a complement to the other grounds. Therefore, it is important that this ground does not make the other grounds unnecessary and superfluous.<sup>108</sup> Moreover, UNHCR is arguing that the term “membership of a particular social group” should be read in an evolutionary manner.<sup>109</sup>

Two approaches have been dominating the decision-making especially in common law jurisdictions: the “protected characteristics” approach and the “social perception” approach.<sup>110</sup> A social group is defined according to the protected characteristics approach:

- 1) by an innate, unchangeable characteristic,
- 2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or
- 3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.<sup>111</sup> The Ward case says though that a particular social group cannot be based solely on the common victimisation of its members.<sup>112</sup>

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<sup>104</sup> Goodwin-Gill Guy S., p. 45

<sup>105</sup> UNHCR:s Guidelines on Membership of a particular social group, para. 1

<sup>106</sup> UNGA: Conference of Plenipotentiaries, p.14

<sup>107</sup> UNHCR:s Guidelines on Membership of a particular social group, para 2

<sup>108</sup> UNHCR:s Guidelines on Gender - Related Persecution, para. 28

<sup>109</sup> UNHCR:s Guidelines on membership of a particular social group, para 3

<sup>110</sup> UNHCR:s Guidelines on Membership of a particular social group, paras. 6, 7

<sup>111</sup> UNHCR’s Guidelines on Membership of a particular social group, para. 6

<sup>112</sup> Canada (attorney General) v. Ward, (1993) 2 S.C.R. 689

The social perception approach examines whether the group shares a common characteristic, which makes them a cognisable group or sets them apart from society at large.<sup>113</sup> The two approaches tend to overlap. However, there may be some gaps between the two. UNHCR has its own interpretation of the definition;

*“a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”*<sup>114</sup>

In civil law jurisdictions, the particular social group ground is generally less well developed. Most decision-makers place more emphasis on whether or not a risk of persecution exists than on the standard for defining a particular social group.<sup>115</sup>

Sometimes it can be reasonable to require the asylum seeker to make necessary changes to not be associated with the group instead of giving her an asylum outside her country.<sup>116</sup>

Most States agree on that gender can be the base for a particular social group but it is not always enough. The identification of the social group must be considered together with the motives for the persecution.<sup>117</sup> In 1985, the Executive Committee of the High Commissioner said that women asylum-seekers who face harsh or inhuman treatment due to having transgressed the social mores of the society in which they live may be considered as a particular social group.<sup>118</sup>

The Qualification Directive allows for the recognition as a refugee of those persons who have a well-founded fear of being persecuted on account of gender. The Qualification Directive states that; *gender-related aspects might be considered, without by themselves alone creating a presumption for the applicability of this article.*<sup>119</sup>

### **3.5.5 Political Opinion**

Political opinion should be understood in the broad sense. It may include an opinion as to gender roles and to include a non-conformist behaviour, which will lead the perpetrator to impute a certain political opinion to the

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<sup>113</sup> UNHCR’s Guidelines on Membership of a particular social group, para. 7

<sup>114</sup> UNHCR:s Guidelines on Membership of a particular social group, para. 12

<sup>115</sup> UNHCR’s Guidelines, Membership of a particular social group, para. 8

<sup>116</sup> SOU 2004:31, p. 117

<sup>117</sup> SOU 2004:31, p. 117

<sup>118</sup> Executive Committee, Conclusion No. 39 (XXXVI), 1985, on Refugee Women and International Protection, para. k

<sup>119</sup> The Qualification Directive, art. 10.1(d)

applicant.<sup>120</sup> UNHCR argues that there is not such as an inherently political or an inherently non-political activity.<sup>121</sup> UNHCR Handbook states it as:

*“Holding political opinions different from those of Government is not in itself a ground for claiming refugee status and an applicant must show that [she] has a fear of persecution for holding such opinions. This presupposes that the applicant holds 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>122</sup>*

It is not necessary that the claimant has expressed a political opinion, but a political opinion must have come into the authorities notice or has been imputed on the claimant.<sup>123</sup>

Women's opportunity to take part in politics, in organised form, is often very limited. For this reason, it does not mean that women are politically inactive. Women are more frequently involved in so called low-level politics. In addition they are often also attributed with political opinions and subjected to persecution because of activities of their male relatives.<sup>124</sup>

Political opinion has traditionally had the meaning of political opinions contrary to or critical of the policies of the government and ruling party.<sup>125</sup> There is, however, another broader approach saying "any opinion on any matter in which the machinery of State, government and policy may be engaged."<sup>126</sup>

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<sup>120</sup> UNHCR:s Guidelines on Gender - Related Persecution, para. 32

<sup>121</sup> UNHCR Guidelines on Gender-Related Persecution, para. 32

<sup>122</sup> UNHCR Handbook para.80

<sup>123</sup> Goodwin-Gill Guy S., p.49

<sup>124</sup> UNHCR:s Guidelines on Gender-Related Persecution, para. 33

<sup>125</sup> Grahl-Madsen Atle, p. 220

<sup>126</sup> Goodwill-Gill Guy S., p. 49

# 4 The Problems that Women Face in the Determination Process

The provisions in the asylum law are gender-neutral, which means that the refugee instruments make no distinction between male and female refugees. It is therefore natural to think that men and women are equal in the asylum process. However, in practice women are subordinate to men because the process has been developed and has traditionally been performed through a male perspective. Both the application and the interpretation of the definition “refugee” have contributed to the subordination of women.

I have identified three main problems that women often face in the determination process. First, women's fear of persecution goes unrecognised because the interpretation of persecution does not include those methods of persecution that women are commonly subjected to. Second, women who are persecuted in the private sphere find it difficult to establish “failure of State protection”. Third, women face problems with linking their fear of persecution to a Convention ground.

## 4.1 Persecution

Violence against women is one of the most widespread violations of human rights; one of three women will suffer some form of violation in her lifetime.<sup>127</sup> However, women face rejections of their claims since their fear of persecution goes unrecognised. The persecution that many female asylum-seekers fear is not recognised as persecution either because the level of persecution is not seen as sufficiently severe to constitute persecution or the act is not seen as an act of violence.

Women are exposed to, and fear the same types of persecution as men. Moreover, there is a growing recognition that women also face forms of persecution that are unique to them as women.

There is a growing awareness about sex- and gender-specific persecution in refugee law, which has been advancing with help of the advancements achieved in human rights law. However, the improvements in refugee law are not sufficient for fulfilment of legal equality. The concept of persecution is still very much treating men's and women's experiences in accordance with the equal treatment approach to legal equality. It is however lacking in special treatments and even more in new equality models such as “equality as acceptance.”<sup>128</sup>

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<sup>127</sup> unifem, Facts and Figures on VAW

<sup>128</sup> Littleton Christine A., p. 257-260

If we accept the meaning of persecution as serious violations of human rights, women's human rights are not equally high valued as men's human rights. Macklin has criticised the hierarchy of rights suggested by Hathaway as gendered in the ordering of priorities.<sup>129</sup> Crawley is further suggesting inclusion of CEDAW and DEVAW to ensure that sex- and gender-specific violence is recognised in the concept of persecution.<sup>130</sup> The most obvious and common violence against women that differ from men may be sexual violence against women.

#### **4.1.1 Sexual Violence**

Sexual violence includes any coerced sex in marriage and intimate relationships, rape by strangers, sexual harassment, forced prostitution and sexual trafficking, early marriages, female genital mutilation, virginity testing and other forms of practices that control a woman's use of her body. Sexual violence is used in many different ways. It is used to punish or frighten male relatives of the victim, to punish the victim itself and to demoralise the family, etc. Sexual violence is even used in war as weapon. In the last ten to fifteen years, attention has been brought to rape in war and the international understanding of why and how such violence occurs has improved. Evidence has shown that sexual violence in situations of armed conflict is often arbitrary and unsystematic, partly because of the breakdown of community support system, social norms and laws.<sup>131</sup> Sexual violence may have very harsh after-effects for women. In many cultures the experience of sexual violence leads to ostracising the woman, both by the family and the community. She may be unable to marry or may be “married off”. In some States she may be liable to punishment by the State.

Sexual violence should not be a controversial example of “serious harm” in the context of the definition of “persecution.” However, feminists have for a long time criticised international refugee law and decision-makers for being ambiguous in their approach to include sexual violence in the concept of persecution.<sup>132</sup> Rape has often been seen as a sexual act rather than an act of violence, even when it is officials from governments performing it.<sup>133</sup> The woman is considered as a random victim of male lust. Spijkerboer argues that sexual violence only becomes persecution if it can be established that it was used as a means for a certain goal.<sup>134</sup> Sexual violence is a violation of the right to not be subjected to torture or other cruel, inhuman or degrading treatment or punishment. This right is laid down in various international instruments.<sup>135</sup> According to the human rights hierarchy suggested by Hathaway sexual violence is thus included in first order rights

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<sup>129</sup> Macklin Audrey, p. 225

<sup>130</sup> Crawley Heaven (1997), p. 51

<sup>131</sup> Ward Jeanne, Vann Beth, p. 13

<sup>132</sup> Crawley Heaven, p. 42

<sup>133</sup> Crawley Heaven, p. 35, Spijkerboer Thomas (2005), p. 80

<sup>134</sup> Spijkerboer Thomas (2005), p. 81

<sup>135</sup> See e.g. arts. 3 and 5 UDHR, art. 7 ICCPR, CAT

and denial from these rights always constitutes persecution.<sup>136</sup> It has also been argued that there is a higher level of proof in sexual violence cases than in cases of other forms of torture, because in sexual violence cases there is a presumption of lust directed at a body whereas this presumption is absent in other cases of torture.<sup>137</sup>

## 4.1.2 Institutionalised Discrimination

Many States have legislation, norms and traditions that discriminate women. It can take the form of restrictions of behaviour or forcing her to behave in a certain way. These discriminative laws, norms and traditions are affecting women to a subordinate position in the community. Institutionalised discrimination may be *inter alia*:

- 1) Dress Codes
- 2) Employment or Education Restrictions
- 3) Behavioural Restrictions
- 4) Marriage Related Harm<sup>138</sup>

There are many examples of institutionalised discrimination. The most obvious may be the various dress codes. But even discriminating property rights and discriminatory norms and mores in the relationship between men and women are very common.

Much discrimination against women is sanctioned in the marriage. Forced marriages for women are still common in many States, as well as the impossibility for women to get a divorce. It may be a nightmare for women who have been forced to marry someone of their parents' choice including for example rape and domestic violence. Even so, it is very hard for them to establish persecution by virtue of the Refugee Convention.

There are two approaches of what part of discrimination gives rise to persecution. The first approach is arguing that the punishment for violating a social norm may be persecution. The punishment for violating gendered discriminatory norms may be very severe, such as punishment by lashes for not wearing a veil in the Iranian criminal law. When the punishment for violating gendered discriminatory norms violates international human rights standards, is the concept of "serious harm" clear.<sup>139</sup> The punishment although may not be from the official authorities. It could also be from the community or family.

The other approach argues that the gendered social norm itself constitutes persecution.<sup>140</sup> An example of this approach may be if a policy compels

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<sup>136</sup> Hathaway James C., pp. 109-112

<sup>137</sup> Spijkerboer Thomas (2005), p. 81

<sup>138</sup> Crawley Heaven, p. 107

<sup>139</sup> Crawley Heaven, p. 45

<sup>140</sup> See e.g. Kelly Nancy, Gender-related persecution: assessing the asylum claims of women

women to wear a veil, it is violating the woman's freedom of religion or conscience. The problem women face here is to establish that such discrimination rises to the level of persecution. This problem has its base in the common opinion that general human rights are not seen as women's rights. Decision-makers sometimes argue that discrimination against women is an expression of cultural tradition and the purpose of the Refugee Convention was not to award refugee status because of disapproval of social mores and conventions in non-western societies.<sup>141</sup> However, when a cultural tradition or social more is seriously violating a human right and the asylum-seeker fulfils the other requirements in the definition, it is the purpose of the Refugee Convention to give her protection. Furthermore, human rights are interdependent. I would like to argue that if women do not have equal access to economical rights as men do, women will be dependent on men. Therefore, if there are employment restrictions for women in a State, women will first be forced to marry a man. Second they will be economically dependent on their husband and most likely will not be equal in their relationship. Women will not be able to divorce, etc. even if they have such rights in the legislation. If we examine the harm claimed by the asylum-seeker according to a feminist practical reasoning, the examination will reveal more harm that the asylum-seeker may risk as seen in the example above.

## 4.2 Failure of State Protection

The element of failure of State protection is associated with many problems due to persecution in the private sphere for female asylum-seeker.

The most obvious failure of State protection is when harm is inflicted by authorities. However, this type of failure may be very well hidden in official laws and regulation. It is not necessary that legislation in a particular State is violating human rights. However, the practice may violate the human rights seriously. Women may have problems establishing failure of State protection in such cases. It is not always known in the refugee receiving State how the human rights are cared for in other States. In sex- and gender-related claims, the usual evidence may not be readily available. Statistical data or reports on incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Furthermore, it may be dangerous for women to report on sexual violence as it could be used as evidence for unfaithfulness and lead to harsh punishment.<sup>142</sup> Fear may therefore be the only element left for decision-makers. It is therefore important that fear is not delimited when a case is evaluated. Patricia Tuitt is pointing out that the well-founded fear concept has evolved from having the subjective element as prominent to giving the objective element the sole determinants of the issue of well-founded fear by categorising "safe states."<sup>143</sup> She purports that there may be a problem with doing so since

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<sup>141</sup> Islam and Others v. SSHD (unreported) 2 October 1996 (13956) (IAT)

<sup>142</sup> Migration Board, Guidelines on Gender-based persecution, p. 13

<sup>143</sup> Tuitt Patricia, p. 80

during the subjective element the applicant has her chance to make herself visible in the determination process.

Another problem women are facing when the harm is inflicted by authorities is that the violator is not viewed as a representative of authorities. A common problem is that government officials raping or violating a woman sexually are viewed as acting as private persons.

States, which are unwilling to protect its citizen from certain kinds of persecution, are common in asylum cases. Women fear persecution by someone else than the authorities but cannot obtain any protection from the State. Much violence committed against women on a global scale occurs in the private sphere. It is committed by husbands, boyfriends, in-laws or women in the local community. In these cases, the problem for the asylum-seeker is not only to demonstrate that the physical or sexual abuse they suffer constitutes serious harm, but also to persuade the decision-maker that the state is implicated in the infliction of that harm.<sup>144</sup> In situations of domestic violence state inaction may take the form of official condonation (e.g., marital rape exemptions in law). More often it takes forms such as lack of police response to pleas for assistance, refusal to investigate or prosecute individual cases and a reluctance to convict or punish. The reluctance indicates that violence against women is legally proscribed, but socially sanctioned.<sup>145</sup> Failure consists not only of direct persecution but also of tolerance of abuse by non-state actors. Both international and regional organisations require due diligence from States.<sup>146</sup> From the perspective of legal equality of men and women, States must take positive steps to prevent persecution.<sup>147</sup> This means that States must further give special protection to women in those areas where persecution is unique to women and a certain gender.

Many States are not able to protect their female citizens from persecution even if they are willing to. There is a difference between a failure of State protection under international refugee law and the notion of State responsibility in human rights law. A State has positive obligations to protect its citizen under human rights law. If they do not fulfil these obligations, there is State responsibility.<sup>148</sup> Both CEDAW and DEVAW are codifying international norms and enunciate the standard of due diligence.<sup>149</sup> However, the aim in the Refugee Convention is not to hold States responsible but to ensure that effective surrogate protection is available. Insofar as it is established that meaningful State protection is available to the claimant, a fear of persecution cannot be said to exist. The problem for women is that the level of meaningful State protection seems

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<sup>144</sup> Crawley Heaven, p. 52

<sup>145</sup> Macklin Audrey, p 234

<sup>146</sup> See e.g. the Qualification Directive art. 7.2

<sup>147</sup> Heyman Michael G., p. 742

<sup>148</sup> Crawley Heaven, p. 49

<sup>149</sup> art. 16 CEDAW, arts. 4 a-q DEVAW

very low.<sup>150</sup> For example not many States are able to protect their citizens from domestic violence. Domestic violence is the most widespread form of abuse against women. Data indicates that women are not safe in any country from this type of violation.<sup>151</sup> However, asylum-seekers face problems while establishing failure of protection regarding domestic violence cases. The reasonable steps States must take to prevent domestic violence are not big steps. Women, trying to establish failure of State protection in regard to sexual violence face the same problems.

It seems like when establishing the level of protection provided, decision-makers evaluate the protection according to a western protection model, meaning both sexual violence and domestic violence are wide-spread phenomena and no state is successful in preventing either. A very low level of protection is required to establish no failure of State protection. However, where western States are successful in preventing a certain persecution or where such persecution does not exist in the culture, e.g. FGM, a much higher level of protection is required. Macklin has commented that Western States may be unwilling to believe that their own mechanisms of protection are inadequate, as the phenomenon of gender persecution challenges the self-understanding of so called “non-refugee producers.”<sup>152</sup> This conclusion is consistent with arguments that only claims of “Exotic Other Females”<sup>153</sup> are successful. Razack argues that a successful applicant must be cast as a “cultural other.”<sup>154</sup> Spijkerboer notes that in the great majority of writings on the refugee law of non-compliance by women with social mores, one gets the impression that social mores are a phenomenon particular to States in the South and more specifically to Muslim States.<sup>155</sup> This problem goes back on the definition maintained both by feminists and others of woman. It is important that experiences of all women are seen.

One of the major difficulties here is whether evidence is required that state protection has actively been sought. In what circumstances can it be expected by the asylum-seeker to turn to the authorities for protection? In many States where there is a weak human rights system, there may be a legitimate reason for not reporting the persecution, especially in cases concerning sexual and domestic violence.<sup>156</sup> However, where there is not a total failure of state protection, then the burden will be on the applicant to demonstrate that her state of origin was unable or unwilling to provide protection.

In cases involving social mores and discrimination the applicant is often facing problems with establishing failure of State protection since it is often members of the family and the community who discriminate the woman.

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<sup>150</sup> Crawley Heaven, p. 52

<sup>151</sup> Krug et al., pp. 90-91.

<sup>152</sup> Macklin Audrey, p. 214, 264

<sup>153</sup> A term used in Razack Sherene, *Domestic Violence as Gender Persecution Policing the Borders of Nation, Race and Gender*

<sup>154</sup> Razack Sherene, p. 50

<sup>155</sup> Spijkerboer Thomas, p. 33

<sup>156</sup> Migration Board, *Guidelines on Gender-based Persecution*, p. 13

Even though sometimes the State institutionalises social mores, it is more common that the State has failed to give the asylum-seeker effective protection from the fear she experiences from her family or community.

## **4.3 Ground for Persecution**

### **4.3.1 No Ground for Gender**

A problem experienced by many female asylum-seekers is to bring their claim within a Convention ground. For example women who have experienced sexual violence in prison camps or in similar situations by officials, military etc. find it very difficult to establish a Convention ground for fear of persecution. There is no link to religion or political opinion or the other grounds enumerated in the Refugee Convention. The persecution was simply inflicted because of the applicant's gender. The same problem is attached to women who have been fleeing domestic violence. Husbands may inflict violence on their wives because of bitterness, drunkenness or out of mere boredom. Although the violence grows out of a number of factors, when inflicted on their partners, it does express the view that they can vent these feelings on women with impunity.<sup>157</sup>

Whether gender may be included in the enumerated grounds in the Refugee Convention will be discussed below. Generally, the existing grounds are interpreted too narrow to include gender-based persecution. Spijkerboer has pointed out that it is easier for women who have experienced derivative persecution, persecution because of kinship, than direct persecution, because it is so difficult for women to establish a ground for the persecution.<sup>158</sup>

### **4.3.2 Political Opinion**

In the ground "political opinion," it is very obvious that male experiences are norm and female experiences are an exception from the norm. The ground "political opinion" is often central in claims of asylum seekers. Concerning female asylum-seekers, this may not be the situation since women are much less likely than men to be involved in politics according to the dominant meaning of "politics". In this sense "politics" has a very narrow meaning relating primarily to the institutional echelons in the public sphere.<sup>159</sup> In many contexts, women's political resistance is less formal than that of men and it often takes place within the geographically and conceptually private sphere. The political activities women are involved in are, in many instances, not as public as making speeches, attending demonstrations and writing publications but rather include informal

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<sup>157</sup> Heyman Michael G., p.740

<sup>158</sup> Spijkerboer Thomas., *Gender and Refugee Status* (Ashgate, Dartmouth 2000), restated in Alice Edwards, *Age and Gender Dimension in International Refugee Law*, [www.unhcr.ch/cgi-bin/texis/vtx/home?id=search](http://www.unhcr.ch/cgi-bin/texis/vtx/home?id=search)

<sup>159</sup> Crawley Heaven, p. 24

organisations and meetings, providing food, clothing and medical care, hiding people, passing messages from one political activist to another and so on.<sup>160</sup> However, all of these activities may be essential for the on-going existence of the political organisation. Women's political activities have failed to be acknowledged and are very much seen as marginal. There is an example of how a “crazy mother from Plaza Del Mayo in the 1970” sought asylum, which was initially rejected because her activity had not been political but merely of personal character as a mother grieving her son. However, after a review she was granted refugee status.<sup>161</sup> The Western States find it very difficult to evaluate how women may form political protests and representation in other ways than in the public sphere. The public sphere is very incorporated in the Western States, even though political activities may take other forms in other countries. Therefore, the experiences of women participating in “politics,” through other forms than the dominant meaning, are excluded from obtaining refugee status.

It is not possible to set up requirements for political activities. Whether an activity is political should be determined in the context of the activity. Spijkerboer says, *“whether an activity should give rise to claim refugee status depends on the reaction of the authorities or non-State actors in the women's country of origin.”*<sup>162</sup> Spijkerboer is also giving a demonstrative example; *“There is political talk and private talk – as we know. But there is also private cooking and political cooking”*<sup>163</sup> meaning that if the food is given to a political opponent the act is probably seen as political in the country of origin. The decision-makers have to break the wall between the public and private sphere and focus on what the act means for the country of origin. This means that political acts may even take place in the private sphere.

It should also be noted that in many countries, women who participate in politics may be at a greater risk than men may be because they are not only punished for being political opponents but also because they are challenging gender ideologies by being women and also being political active.<sup>164</sup>

Gender-based persecution should be linked to “political opinion.” Gender is a social construct, meaning political opinions about how a woman should be. Women who resist gendered oppression, e.g. dress codes, prohibition of divorce for women etc., should be able to link their fear of persecution to political opinion. These women are refusing to be “proper” women, meaning they are refusing to comply with the gender idea in that community, which is to take a political stand.<sup>165</sup> In practice, this has been shown to be difficult for women since the decision-makers are not willing to

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<sup>160</sup> Crawley Heaven, p. 24

<sup>161</sup> Spijkerboer Thomas (2005) p. 73

<sup>162</sup> Spijkerboer Thomas., p. 58

<sup>163</sup> Spijkerboer Thomas., p. 58

<sup>164</sup> Spijkerboer Thomas, p. 25

<sup>165</sup> Spijkerboer Thomas, p.41

accept the acts as politically motivated but more as personally motivated.<sup>166</sup> However, it is irrelevant why the applicant resisted the oppression. The relevant focus is why the persecution may occur and that is probably not occurring on personal reason but on political. Even if the perpetrators are non-state actors and performing the persecution because of personal reason, the causal link is still established if the state “accepts” the persecution.

The same arguments are brought forward in cases of domestic violence. Women who fear domestic violence and are not able to get any protection in their country of origin should be able to link their cases to political opinion. The authorities in that particular State are of the political opinion that women are inferior to men and are not worthy to be protected. However, decision-makers have instead linked domestic violence as a private matter.<sup>167</sup>

### **4.3.3 Religion**

There is an overlap between political opinion and religion, therefore women who try to link their claim of persecution to religion often face the same problems as those linking their fear of persecution to political opinion. Women may be persecuted for not conforming their behaviour in accordance with the teachings of a prescribed religion. Challenges to social mores and norms have often been seen as personally motivated rather than linked to religion.

### **4.3.4 Membership of a Particular Social Group**

Women in many States have found it difficult to convince the decision-makers that women can constitute a particular social group. Many States do not accept women as a social group. They argue that there has to be something else than the persecution that combines the group and the group has to exist independently of the persecution.<sup>168</sup>

This discussion goes back to the view on “woman” and gender. If we accept the essentialist view on “woman,” women would constitute a particular social group since they all are of same sex and also members to the same gender.

Furthermore, it has been argued that women are a too large group to constitute a group in the meaning of the Refugee Convention. This is argued even if the size of the group should not matter as long as the prerequisites are fulfilled for a group. Group size is irrelevant since the groups of race, religion, nationality and political opinion are also large groups and are not

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<sup>166</sup> Crawley Heaven, p.124

<sup>167</sup> Crawley Heaven, p.141

<sup>168</sup> Canada (Attorney-General) v. Ward (1993) 2 S.C.R. 689

bound by the question of size. In addition, the recognition of women as a social group does not mean all women qualify for refugee status.

If we define woman from a social constructive perspective, women are not a social group since women are not a cohesive group. Even within individual countries, women fall into sub-groups because of their economic, social and cultural situation and persecution is not equally applied to these sub-groups. They thus have different gender-identities. What may constitute a particular social group is then not “women” but sub-groups of women. The gender of that subgroup would explain the reason of the harm inflicted and then the group would be more cohesive and clear.

Until very recently most States have refused to categorise gender as a particular social group. However, this has changed. Many States are agreed on that gender may be the base for a particular social group.<sup>169</sup>

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<sup>169</sup> See EURASIL THEMES 2003, FGM-02rev1-EN Draft Compilation of replies to the questions relating to claims based on female genital mutilation(FGM), EURASIL, 19-20 June 2003

## 5 The Swedish Aliens Act

Sweden has entered the Refugee Convention and its protocol and is therefore internationally legally bound to it. The Refugee Convention is the basis for the Swedish Aliens Act and that is why they are very similar. The preparatory work to the Swedish Aliens Act, emphasises the importance of harmonising the practice of the Refugee Convention. Sweden must therefore apply the Convention in a way that will not distinguish considerably from other States' practices.<sup>170</sup> However, the character of the Refugee Convention is of minimum rights. States can therefore be more generous than the original. Sweden must though adjust their work to the European Unions work on harmonising the definition of refugee.<sup>171</sup> Apart from the international recommendations and practices, Sweden has produced its own guidelines and interpretation of the refugee definition.

The Swedish definition of refugee is almost identical with that of art. 1(A) 2 of the Refugee Convention. Art. 3:2 Aliens Act reads as followed;

“The term refugee as used in this Act refers to an alien who is outside the country of his nationality owing to a well-founded fear of being persecuted for reasons of race, nationality, membership of a particular social group, or religious or political opinion, and who is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. This applies irrespective of whether persecution is at the hands of the authorities of the country or these cannot be expected to offer protection against persecution by individuals.

A stateless person who for the same reason is outside the country of his former habitual residence and who is unable or, owing to such fear, is unwilling to return to that country, shall also be deemed a refugee.”<sup>172</sup>

Those fulfilling the requirements in section 2 Aliens Act are called Convention refugees referring to the similarities with the Refugee Convention.<sup>173</sup> As the Refugee Convention, the Swedish Aliens Act has five prerequisites to fulfil the status of refugee;

- 1) outside the State of origin,
- 2) well-founded fear,
- 3) persecution,
- 4) grounds; race, religion, nationality, member of a particular social group, political opinion, and
- 5) failure of State protection.<sup>174</sup>

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<sup>170</sup> Prop. 1996/97:25, pp. 96-97

<sup>171</sup> The Qualification Directive (2004/83/EG)

<sup>172</sup> Translation from the Swedish Migration Board

<sup>173</sup> Wikrén Gerhard and Sandesjö Håkan, p. 130

<sup>174</sup> SOU 2004:31 p. 30

Persons who are not Convention refugees may qualify for asylum in accordance with art. 3:3 Aliens Act. This provision was adopted in 1997 and gives “*persons otherwise in need of protection*” a possibility to obtain a residence permit. Persons otherwise in need of protection are those who have left their native country and

- 1) have good reason to fear death sentence or capital punishment, torture or other inhuman and degrading treatment
- 2) need protection due to war or an environmental disaster in their native country
- 3) fear persecution due to their gender or homosexuality.

These persons are not being granted refugee status but are allowed to stay in Sweden, though with less protection and rights. It can be understood from the preparatory works that the provision was introduced to give women improved protection.<sup>175</sup>

The third way of obtaining protection in Sweden is to get permission to stay on account of *humanitarian grounds*.<sup>176</sup> The practise has, however, shown that the possibility to stay in Sweden on humanitarian grounds is very limited and will not be discussed in this paper.<sup>177</sup>

The Swedish Aliens Act has been developed with an amendment that will be applicable from March 31, 2006. Persecution because of gender shall be included in art. 3:2 Aliens Act. This article will be named 4:1. Those, who fear persecution on account of gender will thus be granted refugee status and with that obtain better protection than that in section 3 paragraph 3 Aliens Act. The provision in current art. 3:3 para. 3 will consequently be superfluous and shall therefore be removed. The new article 4:1 will read as followed:

“The term refugee as used in this Act refers to an alien who is outside the country of his nationality owing to a well-founded fear of being persecuted for reasons of race, nationality, *religious or political opinion or for reason of gender, sexual orientation or other membership of a particular social group*, and who is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. This applies irrespective of whether persecution is at the hands of the authorities of the country or these cannot be expected to offer protection against persecution by individuals. A stateless person who for the same reason is outside the country of his former habitual residence and who is unable or, owing to such fear, is unwilling to return to that country, shall also be deemed a refugee.”<sup>178</sup>

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<sup>175</sup> Prop. 1996/97:25, p. 100

<sup>176</sup> art. 2:4 para. 5, art. 2:5b para. 2 Aliens Act

<sup>177</sup> SOU 2004:31 p.42

<sup>178</sup> Translation from the Swedish Migration Board

The new art. 4:1 is not intended to amend the prerequisites of refugee status in the Alien Act but to express an interpretation which includes persecution on these grounds.<sup>179</sup>

## **5.2 Art. 4:1 Aliens Act**

### **5.2.1 Well-founded Fear**

Wikrén declares that the evaluation for refugee status has its basis in the objective element in Swedish practice. He is though asserting that the subjective element is significant as a factor in the evaluation for a prospective risk.<sup>180</sup>

The burden of proof is on the asylum-seeker. However, it is often stated that it is very seldom that complete evidence can be presented and therefore statements of the asylum-seekers should be accepted if they appear as credible and probable. The legislative comments to Swedish asylum legislation emphasise the importance of not setting the level of evidence required too high.<sup>181</sup>

It has been argued that Swedish decision-makers do not pay significant attention to the subject element in practise. The woman's witness of already experienced persecution is not of significant importance in the evaluations of the Migration Board. Neither are Swedish authorities very concerned with the subjective element when women are traumatised after sexual violence in the domestics or outside.<sup>182</sup>

The Guidelines of the Migration Board state that it is not enough that persecution has already occurred for a risk of persecution to exist. However, the already occurred persecution shall serve as basis for risk assessment.<sup>183</sup> The Migration Board is further observing that a political change with a generally favourable character may not necessarily mean that the conditions for women have changed in the same way.<sup>184</sup>

### **5.2.2 Persecution**

There was a provision in the 1980 Swedish Aliens Act regarding the concept of persecution. This provision was however not maintained in the later definition. However, it was stated in the preparatory work that there was no intention to change the practise of the concept of persecution since the provision was in consistency with the definition of refugee in the

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<sup>179</sup> SOU 2004:31p. 26

<sup>180</sup> Wikrén Gerhard and Sandesjö Håkan, p. 162

<sup>181</sup> Migration Board, Guidelines on Gender-based Persecution, p. 15

<sup>182</sup> Bexelius Maria, p. 174

<sup>183</sup> Migration Board, Guidelines on Gender-based Persecution, p. 13

<sup>184</sup> Migration Board, Guidelines on Gender-based-Persecution, p. 16

Convention.<sup>185</sup> According to the previous provision persecution was defined as “*persecution aiming towards the life and freedom of the alien or which is otherwise serious.*”<sup>186</sup>

The Guidelines of the Migration Board declares that the concept should be interpreted in a broad sense and should be interpreted with support of national legislation and practise and with international rules, recommendations and human rights instruments.<sup>187</sup> Sweden has ratified ICCPR, ICESCR, CERD, CEDAW, and ECHR among other important human rights instruments. The government bill 2005/06:06 gives examples on what can constitute persecution. It is stating that FGM is an obvious example of persecution. Other examples are persecution related to a woman’s ability to have children such as forced abortion and compulsory sterilization. It is further pointing out that rape may be persecution.<sup>188</sup>

The Handbook of the Migration Board is further defining the concept of persecution by saying that harassment and discriminating acts may together be so severe that they constitute persecution. This statement must mean that the Migration Board accepts cumulative persecution. Support for this theory can further be found in the preparatory work to the Swedish Aliens Act. The government bill 1996/97:25 says that a combination of harassment and restrictions can be seen as persecution even if every act is not seen as persecution.<sup>189</sup> This is reconfirmed in the Migration Board’s Guidelines on Gender-based persecution.<sup>190</sup>

Discrimination on a certain level may also constitute persecution. Already in the preparatory work of 1951 the authorities are pointing out that discrimination of certain groups and individuals with certain intensity can constitute persecution. The preparatory work gave as an example the prohibition of religious practise or the prohibition of using public schools etc.<sup>191</sup> A guiding decision has furthermore stated that serious restrictions on the right to earn a livelihood can constitute persecution.<sup>192</sup> However, this kind of persecution should be the outer borders for the concept of persecution.<sup>193</sup> The Aliens Appeals Board has in a guiding decision established that social harassment and social outcast can be included in persecution.<sup>194</sup> Women are often discriminated by not being allowed certain education or work. Families argue that it makes no sense to invest in someone who will be married off to another family and thus will not

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<sup>185</sup> Wikrén Gerhard and Sandesjö Håkan, p. 135, prop. 1988/89:86 pp. 77, 154

<sup>186</sup> ”förföljelse som riktar sig mot utlänningens liv eller frihet eller som annars är av svår beskaffenhet” 1980:376 Swedish Aliens Act art.3 section 3

<sup>187</sup> Migration Board, Guidelines on Gender-based persecution, p. 13

<sup>188</sup> Prop. 2005/06:06 pp. 22-23

<sup>189</sup> Prop. 1996/97:25, p 98

<sup>190</sup> The Migration Board, Guidelines on Gender-based Persecution, p. 13

<sup>191</sup> SOU 1951:42 p. 170

<sup>192</sup> UN 31-93

<sup>193</sup> Prop. 1954:41 p. 177

<sup>194</sup> UN 391-00

contribute to the original family's economy.<sup>195</sup> It is very difficult to establish when discrimination itself constitutes persecution.

There is no more specific definition or explanations to what is meant by persecution in Swedish refugee law.

### 5.2.3 Failure of State Protection

Sweden is one of those States, which has interpreted the Refugee Convention as including persecution both from State and from non-State actors. The legislation says:

”This applies irrespective of whether persecution is at the hands of the authorities of the country or these cannot be expected to offer protection against persecution by individuals.”<sup>196</sup>

This sentence was introduced in 1997 and made an immense difference since after this amendment, persons from States where there is no functioning State could be granted refugee status.<sup>197</sup> The preparatory work of 2004, is giving the example of men violating their wives to illustrate persecution by private actors.<sup>198</sup> The government bill 2005/06:06 is further stating that persecution in the private sphere may constitute refugee status if the inability or unwillingness of the authorities is linked to a Convention ground. However, it is further declaring that the State's inability to give protection may be a lack of resources or inefficiency and then the inability is not linked to a convention ground. Thus, the asylum-seeker cannot be granted refugee status in those cases.<sup>199</sup> It is important in those cases where there is failure of State protection due to lack of resources or inefficiency to note why there is a lack of resources in that particular area. If there is only a lack of resources and inefficiency in sex and gender-related persecution, the State has taken a political stand as a lack of resources and inefficiency often is a result of political priority. The asylum-seeker will not be granted refugee status if the inability cannot be *obviously* derived to prevailing gendered power structure<sup>200</sup>. The perquisite “obviously” signals high level of proof. States, which have nice legislation and are doing some mediocre attempts to fight violence will probably be viewed as States protecting its citizens. Those women who fear sex-specific and gender-based violence and discrimination will probably fail to establish failure of State protection because of inefficiency in the State of origin, meaning that asylum-seekers from those State are not able to obtain refugee status. Women who fear domestic violence will most certainly have problems because of the “lack of resources and inefficiency-exceptions”. It is interesting to see what kind of persecution will come, if any, into these

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<sup>195</sup> unicef - Sweden

<sup>196</sup> art. 3:2 Aliens Act

<sup>197</sup> Prop 1996/97:25, pp. 97, 289, 366

<sup>198</sup> SOU 2004:31, p. 126

<sup>199</sup> Prop. 2005/06:06 p. 28

<sup>200</sup> Prop. 2005/06:06 p. 28

exceptions. Decision-makers do not have to follow preparatory work. However, it is a source of interpretation and the aim of the legislation. One can only speculate. However it is easy to believe that such intercultural persecution as discussed in the previous chapter would come into the exceptions.

## **5.2.4 Grounds**

The grounds for persecution are the same grounds as in the Refugee Convention; race, religion, nationality, membership in a particular social group and political opinion. The new art. 4:1 explicitly states that persecution due to gender will grant refugee status if the other requirements are fulfilled. It is emphasised in prop. 2005/06:06, that persecution due to gender can be included in all enumerated grounds in art. 4:1 of the Alien Act or gender can be a claim in and of itself. The term *kön* is used in the Swedish Alien Act. This term should embrace both biological sex and social and cultural gender.

### **5.2.4.1 Gender**

Gender itself will constitute a ground of persecution. The ground will thus be able to include all cases that before had their base in art. 3:3 para. 3. It is expressed in the preparatory work that rape may have its cause in race, nationality, religion, membership of a particular social group or political opinion, but it may also have causes which are not linked to the current Convention grounds.<sup>201</sup> However, critics have been sceptical of the significance of the allowance of gender as a Convention ground. Current art. 3:3 para. 3 Aliens Act has only been accepted in very few cases. In 2003 20 persons were allowed to stay for reason of Art. 3:3 p.3 and in 2004 the number was 28.<sup>202</sup>

### **5.2.4.2 Political Opinion and Religion**

The Swedish Migration Board is emphasizing that political activity expressed by women may be different from that of men. However, it still may give rise to an even larger risk and vulnerability and should therefore be considered in the determination.<sup>203</sup>

It is further stated that persecution for reason of political opinion may also be based on gender, e.g. when the opinion regards women's rights, family planning or dress codes.<sup>204</sup>

Most of the persecution based on gender would be possible to link to political opinion according to the new art. 4:1 since gender is a social and therefore a political construct. It is not possible to say whether the decision-makers will estimate gender as a political construction. However, in the existing practice, it has been argued that decision-makers have been very

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<sup>201</sup> Prop.2005/06:06, p. 23

<sup>202</sup> Unnbom Cajsa, p. 2

<sup>203</sup> Migration Board, Guidelines on Gender-based Persecution, p. 14

<sup>204</sup> Prop. 2005/06:06, p. 24

restrictive in their interpretation of gender-based persecution included in political opinion.<sup>205</sup>

Religion as ground for persecution could play a significant role in cases where the religion is prescribing certain discriminative roles and behaviours to women.

#### **5.2.4.3 Membership of a Particular Social Group**

According to the Swedish interpretation of the definition of "membership of a particular social group" the following may constitute membership;

- 1) by an innate, unchangeable characteristic,
- 2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or
- 3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.<sup>206</sup>

Persecution due to gender has not been included in the ground "membership of a particular social group" until the new legislation.<sup>207</sup> However, it is stated in prop. 2005/2006:06 that it is of great importance that this will now be changed.

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<sup>205</sup> Bexelius Maria, p. 169

<sup>206</sup> SOU 2004:31 p. 119

<sup>207</sup> Prop. 2005/06:06, p. 24

## 6 Conclusions

The question raised for this thesis is whether international and Swedish refugee law are sensitive about women's experiences and values and thus give equal access to protection.

Feminist scholars have fought for legal equality for many years now. The goal has not always been the same throughout time. Feminists have been fighting for the same rights and privileges as men, passing the stage of respecting and valuing women's historical and contemporary differences, to rejecting the preoccupation of the differences and similarities to men.

Refugee law has not followed the developments that have been achieved in feminist doctrine. Women are not benefiting equitably from refugee law as the general equality debate looks today. I have identified three main problems that are common to women. First, the concept of persecution is only recognising some of women's experiences. It is recognizing persecution which is more common in non-western societies. However, persecution which is intercultural, such as sexual violence is not completely included. Legislation, guidelines and recommendations are all very vague about what persecution means. However, there are two approaches of how to interpret persecution. The stricter one which is only including threats towards life and freedom and the broader one which defines persecution as sustained or systematic denial of core human rights. Providentially the latter one is the most accepted and dominated. However, core human rights do not always include women's rights. Therefore, women are denied protection as violations of those rights are not viewed as severe enough to constitute persecution. The public/private dichotomy is very useful to reveal how women are discriminated because of the interpretation of persecution. Persecution in the private sphere is viewed as not so severe as deserving protection. Feminists have for a long time complained that refugee law is not accepting sexual violence as persecution. However, advancements in human rights law has been reproduced in refugee law and sexual violence is more and more viewed as persecution. Women are also suffering severe discrimination in many States, discrimination which makes them dependent on fathers, husbands or other male relatives. Whether such discrimination could be included in the concept of persecution is doubtful since discrimination is viewed as the outer border of persecution. However, it is important that such discrimination be included in the concept of persecution because of its consequences. The failure of refugee law is its application of equal treatment. Refugee law is equal when persecution feared by women is the same as the persecution feared by men. However, when it comes to persecution and discrimination feared only by women, refugee law fails to be sensitive about the uniqueness of women's experiences.

The second problem is very much linked to persecution. It is a problem for women to establish failure of State protection of persecution in the private

sphere. It seems that States meet the level required of State protection easily in cases of persecution which are occurring throughout the world. Asylum-seekers fearing domestic violence fail often in the “failure of State protection”-prerequisite. On the other hand, women fearing harmful traditional practices, such as FGM, find it much easier to establish failure of State protection. It seems like the Western States require a higher level of protection when it comes to persecution which is not traditionally “western” and much lower when it is an intercultural persecution. This problem is analogous with the problem many women face municipally when seeking protection from violence in the private sphere. There are very few States, if any, which are able to protect its female citizens from domestic and sexual violence. The problem women face in refugee law is this same protection problem but on an international scale.

The third problem identified in the paper concerns the enumerated grounds and how they are interpreted. Firstly, there is no ground for gender in the Refugee Convention. It has been argued that gender is not necessary as a ground since the Refugee Convention already covers gender-related claims if interpreted correctly.<sup>208</sup> However, the doctrine has shown that interpretations of the grounds are often very narrow and strict. Political opinion is still primarily bound to activities occurring in the public sphere. Women, who are refusing to be “proper women”; resisting dress codes, behaviour restrictions etc. have found it difficult to link their fear of persecution to political opinion. The same interpretation is made with religion. Persecution in this category is viewed as being personally motivated instead of having religious ground. Even the ground membership of a particular social group has been interpreted narrowly.

It would be possible to make the Refugee Convention more gender-sensitive by a reinterpretation of persecution and the Convention grounds. The concept of persecution must value women's experiences and dare to enter the private sphere and see the consequences of certain discrimination. A reinterpretation of the Convention grounds would also solve the problems women face in this prerequisite. Decision-makers must view gender for what it really is, meaning a social construct, meaning politics. Gender-based persecution should therefore be included in political opinion. Adding gender as a Convention ground or interpreting gender as a social group is not necessary. However, if decision-makers are not able to interpret gender as political opinion, this would be a second solution.

A solution to the failure of State protection problem is complicated. The problem is very political and Western States do not want to be identified as States that failure to protect their citizens. Therefore, they are neither expecting other States to be able or willing to protect their citizens in certain areas as domestic violence. In the case of failure of State protection the solution is not just to make the concept more gender-sensitive but also to make it more cultural sensitive.

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<sup>208</sup> UNHCR Guidelines on Gender-Related Persecution, para. 6

I have chosen to examine Sweden as an example of a Member State of the Refugee Convention. The definition of “refugee” in the Swedish Alien Act is almost identical with that of the Refugee Convention. However, the Swedish version is expressing the interpretation of recognition of non-state actors as perpetrators. From March 31, 2006 the legislation will also explicitly express gender as ground for persecution. I have in this examination used the new legislation as a base for my reasoning. Generally, Swedish refugee law is dealing with the same problems as international refugee law except the last problem of gender as a persecution ground.

Swedish legislation does not explain what is meant by persecution but refers to practise, international rules, recommendations and human rights instruments. Sweden is part of CERD, CEDAW, ECHR, ICCPR and ICESCR, which all are helping in the interpretation of persecution. According to these instruments, the government bill 2005/06:06 and guidelines on gender-related persecution, most sexual violence could come within the concept of persecution. However, whether discrimination against women comes into the same is doubtful.

The second problem is the problem with establishing failure of State protection. Sweden accepts non-state actors as actors of persecution. Thus, domestic violence may therefore constitute persecution if the harm is severe enough. However, there is a significant problem here since proposition 2005/06:06 declares that a State’s inability to give protection may be lack of resources or inefficiency. If the inability is not linked to a Convention ground the asylum-seeker cannot be granted refugee status. This sentence may be very disturbing to feminists, depending on how much the decision-makers will use the preparatory work as source of law. Other government bills have been used as sources of law and have had a great impact on the outcome of interpretation.<sup>209</sup> Few States are able to protect their female citizens against gender-based violence because of reasons, among others, related to a lack of resources. I would like to argue that a lack of resources to protection of women is often an issue of priority and unfortunately women are not the group connected with greatest priority. I would therefore say that a lack of resources may be a political decision to not prioritize women and can therefore perfectly constitute failure of State protection in an asylum-case. If decision-makers are not able to see the gendered reality of a lack of resources and inefficiency many women will probably fail when establishing failure of State protection.

The third problem identified in chapter five is the problem with establishing a ground of persecution. This problem may be outdated in Sweden since the new provision explicitly expresses that gender can be a ground for persecution. It must though be noted that the gender provision in current art.

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<sup>209</sup> See e.g. props. 1996/97:25 and 1997/98:42. These government bills emphasized a generous asylum standard and the number of persons granted residence permits raised significantly.

3:3 para. 3 of the Swedish Aliens Act has been accepted only in very few cases.

I have identified three problems with application and interpretation of the Swedish refugee definition. The new provision, art. 4:1 of the Aliens Act solves one of these problems; namely the problem with linking fear of persecution to a ground. However, the problems identified in this thesis are often interconnected. For example sexual violence that is committed by a private actor because of gender. Art. 4:1 will only solve the problem female asylum-seekers face when linking their fear of persecution to a ground. However, in a case as the example above this will be without any effects since the asylum-seeker still may fail in the prerequisite of persecution and failure of State protection. But even if the asylum-seeker fears “accepted” persecution because of gender performed by State authorities, it is not very likely that the new provision will change the Swedish practise significantly. As been pointed out before, art. 3:3 para.3 of the Aliens Act has only been accepted in very few cases. These few types of claims will in the future receive refugee status. However, all the other women fighting for obtain refugee status are still stuck with the same problem as before gender was included as a Convention ground.

For the reasons discussed above, I do not think that the new legislation will make any enormous changes for female asylum-seekers who fear sex-specific persecution because of gender. However, it is at least a step in right direction. Step by step....

# Bibliography

## Literatures:

Barnett Hilaire (1998) *Introduction to Feminist Jurisprudence*, Cavendish Publishing Ltd, London

Bexelius Maria (2001) *Kvinnor på flykt – en analys av svensk asylpolitik ur ett genusperspektiv 1997-2000*, Nykopia, Stockholm

Charlesworth Hilary and Chinkin Christine (2000) *The Boundaries of International Law -a Feminist Analysis*, Manchester University Press, Manchester

Crawley Heaven (1997) *Women as Asylum Seekers A Legal Handbook*, Immigration Law Practitioners Association, London

Crawley Heaven (2001) *Refugees and Gender Law and Process*, Jordan Publishing Limited, Bristol

Freedman Jane (2003) *Feminism – en introduktion*, Open University Press, Buckingham

Goodwin-Gil Guy S. (1996) *The Refugee in International Law*, 2<sup>nd</sup> Edition, Oxford University Press Inc., New York

Grahl-Madsen Atle (1984) *The Status of Refugees in International Law*, A.W Sijthoff, Leyden

Hathaway James C. (1991) *The Law of Refugee Status*, Butterworths, Toronto

Spijkerboer Thomas (1994) *Women and Refugee Status beyond the Public/Private Distinction*, Emancipation Council, The Hague

Tuitt, Patricia (1996) *False Images – Law's Construction of the Refugee*, Pluto Press, London

Wikrén Gerhard and Sandesjö Håkan (1999) *Utlänningslagen med kommentar*, 6th edition, Norstedts Tryckeri AB, Stockholm

## Articles:

Anker Deborah E. (2002) "Refugee Law, Gender, and the Human Rights Paradigm," *Harvard Human Rights Journal*, vol. 15, [www.law.harvard.edu/students/org/hrj/iss15/anker.shtml](http://www.law.harvard.edu/students/org/hrj/iss15/anker.shtml)

Bartlett Katharine T. (1993) "Feminist Legal Methods" in *Feminist Legal Theory Foundations*, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia

Becker Mary E, (1993) "Prince Charming: Abstract Equality" in *Feminist Legal Theory Foundations*, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia

Bender Leslie (1993) "A Lawyer's Primer on Feminist Theory and Tort" in *Feminist Legal Theory Foundations*, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia

Cain Patricia (1993) "Feminism and the Limits of Equality" in *Feminist Legal Theory Foundations*, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia

Charlesworth Hilary, Chinkin Christine and Wright Shelley (1995) "Feminist approaches to international law" in *Feminist Legal Theory Foundations II: Positioning Feminist Theory within the Law*, Ed. Olsen E. Frances, New York University Press, New York

Edwards Alice (2003) "Refugee Protection in International Law: age and gender dimension in international refugee law," in *Refugee Protection in International Law UNHCR's Global Consultations on International Protection*, Ed. By Erika Feller, Volker Türk and Frances Nicholson  
<http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=419c74784>

Folkelius Kristina and Noll Gregor (1998) "Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act", *International Journal of Refugee Law*, Vol. 10. No. 4, Oxford University Press

Greatbatch Jacqueline (1989) "The Gender Difference: Feminist Critiques of Refugee Discourse", *International Journal of Refugee Law*, Vol. 4, No. 4

Haines Roger (2001) "Gender-Related Persecution", Global Consultations on International Protection in the context of the 50<sup>th</sup> anniversary of the 1951 Convention relating to the Status of Refugees, San Remo  
[www.un.org/womenwatch/daw/meetings/consult/CM-Dec03-EP8.pdf](http://www.un.org/womenwatch/daw/meetings/consult/CM-Dec03-EP8.pdf)

Heyman Michael G., (2005) "Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations", *International Journal of Refugee Law*, Vol. 17, No.4

Kelly Nancy, (1993) "Gender-related persecution: assessing the asylum claims of women", *Cornell International Law journal*, Vol. 26, No. 3

Lerwall Lotta (1999) ”Förbud mot könsdiskriminering i internationell rätt,” *Lika inför lagen Rätten ur ett genusperspektiv*, Ed. Granström Görel, Iustus Förlag AB, Uppsala

Littleton Christine A. (1993) “Reconstructing Sexual Equality” in *Feminist Legal Theory Foundations*, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia

Macklin Audrey (1995) “Refugee Women and the Imperative Categories,” *Human Rights Quarterly*, Vol. 17 No.2, The Johns Hopkins University Press

MacKinnon Catharine A. (1993) “Difference and Dominance: On Sex Discrimination” in *Feminist Legal Theory Foundations*, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia

Minow Marta (1989) “Introduction: Finding our Paradoxes, Affirming Our Beyond,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 24 No. 2

Mossman Mary Jane (1993) “Feminism and Legal Method: The Difference It Makes” in *Feminist Legal Theory Foundations*, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia

Phuong Catherine (2001) “Persecution by Third Parties and European Harmonization of Asylum Parties,” *Georgetown Immigration Law Journal*, Vol. 16

Razack, Sherene (1995) “Domestic Violence as Gender Persecution Policing the Borders of Nation, Race and Gender,” *Canadian Journal of Women and the Law*, Vol 8

Spijkerboer Thomas (2005) “Stereotyping and Acceleration Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System” in *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Ed. by Gregor Noll, Martinus Nijhoff Publishers, The Netherlands

Taub Nadine and Schneider Elizabeth M. (1993) “Women’s Subordination and the Role of Law” in *Feminist Legal Theory Foundations*, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia

Teraya Koji (2001) “Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights,” *European Journal of International Law*, Vol. 12, No. 5

Unnbom, Cajsa (2005) ”Flyktingstatus till utsatts kvinnor och hbt-personer” *Artikel 14*, issue 3  
[www.farr.se/artikel14/nr053/utsk13.php](http://www.farr.se/artikel14/nr053/utsk13.php)

Ward Jeanne, Vann Beth (2002) "Gender-based Violence in Refugee settings," *The Lancet Supplement*, vol 360, p. 13-14

Wishik Heather Ruth (1993) "To Question Everything: The Inquiries of Feminist Jurisprudence" in *Feminist Legal Theory Foundations*, Ed. D. Kelly Weisberg, Temple University Press, Philadelphia

### **UN Instruments**

Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954.

Convention on the Elimination on All Forms of Discrimination against Women, UN Doc. A/54/38, *entered into force* September 3, 1981

[Declaration on the Elimination of Violence Against Women](#), UN. Doc. A/48/49 (1993),

International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966), *entered into force* Mar. 23, 1976.

Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), *entered into force* July 1, 2002

[International Covenant on Economic, Social and Cultural Rights](#) U.N. Doc. A/6316 (1966), *entered into force* July 28, 1978

Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/Res/955 (1994), as amended

Statute of the International Criminal Tribunal for the former Yugoslavia U.N. Doc. S/Res/827 (1993)

### **UN Recommendations, Conclusions, Reports, Guidelines etc:**

CEDAW (1992) General Recommendation No.19 Violence against Women UN Doc. A/47/38

Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, 5 February 1996, UN Doc. E/CN.4/1996/53

Second World Conference on Human Rights (1993) Vienna Declaration and Programme of Action, A/CONF.157/23, Vienna

Security Council Resolution 1325 (S/RES/1325)

U.N. Commission on Human Rights, Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Visit by

the Special Rapporteur to Pakistan, U.N. Doc. E/CN.4/1997/7/Add.2 (1996) (Nigel Rodley, Special Rapporteur).

UN Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002

UN Guidelines on international protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02 7 May 2002

UNGA: Conference of Plenipotentiaries, Summary Records. UN Doc. A Conf.2/SR.23, 19 Nov. 1951

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/ENG/REV.1 Reedited Geneva (1992), UNHCR 1979

UNHCR Programme Executive Committee Conclusion No. 39 on Refugee Women and International Protection (1985), 36th Sess

UNIFEM, Fact and Figures on VAW, available at [http://www.unifem.org/gender\\_issues/violence\\_against\\_women/facts\\_figures.php](http://www.unifem.org/gender_issues/violence_against_women/facts_figures.php)

WHO (2002) World Report on Violence and Health, edited by Krug Etienne G., Dahlberg Linda L., Mercy James A., Zwi Anthony B., Lozano Rafael available at; [http://www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en/full\\_en.pdf](http://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf)

### **European Instruments:**

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, ETS nr. 155, September 2003

### **European Community Law:**

Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who otherwise Need International Protection, 2004/83/EC, OJ L 304/12, 30.9.2004

### **Swedish Legislation and Comments:**

Utlänningslagen (Aliens Act) SFS 1989:529

Proposition 1954:41 med förslag till Utlänningslag

Proposition 1988/89:86 med förslag till Utlänningslag  
Proposition 1996/97:25 Svensk migrationspolitik i globalt perspektiv  
Proposition 2005/06:06 Förföljelse på grund av kön eller sexuell läggning

SOU 1951:42 Förslag till utlänningslag  
SOU 2004:31 Förföljelse på grund av kön eller sexuell läggning

Migration Board (2001) [Gender-based persecution: Guidelines for investigation and evaluation of the needs of women for protection.](#)

**Other Guideline:**

Third Colloquium on Challenges in International Refugee Law, The Michigan Guidelines on Well-Founded Fear, held at the University of Michigan Law School, Ann Arbor, Michigan, USA, held on March, 26-28, 2004

# Table of Cases

Canada (Attorney – General) v. Ward [1993] 2 S.C.R. 689

R. v. Immigration Appeal Tribunal ex parte Shah; Islam v. Secretary for the Home Department (1999) 2 AC 629

Aydin v. Turkey - 23178/94 [1997] ECHR 75 (25 September 1997)

## **Alien Appeals Board:**

AAB 31-93

AAB 391-00