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Female Genital Mutilation and Refugee Status in Swedish Asylum Cases

A Critique from a Gender Perspective

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Preface

Writing this thesis in the cross-section between two of the problem fields that interest me most - gender issues and refugee law - has been an intriguing and most of all inspiring work.

There are few areas in which you can more clearly see gender structures and discrimination against women than when discussing female genital mutilation. It is a form of torture that exclusively targets women, builds upon false ideas of women's sexuality and character, and has almost universal prevalence in certain regions. Another clear result of gender structures is that female asylum seekers systematically have a more difficult time being granted refugee status in comparison to their male counterparts. These are urgent problems that must be dealt with by legal institutions and policy makers, and collecting information about the situation is one modest contribution to this work. I hope that you, the reader, will be as interested in reading about these issues as I have been in investigating their consequences. I also hope that it will serve as inspiration to further your knowledge about female genital mutilation and other forms of gender-related persecution.

Thank you to all of those who have supported me through writing this thesis. To my parents who have raised me to believe that I can do whatever I put my mind to. To my friends around the world who are a continuous source of joy and inspiration. And to Marc and Millie who I am lucky enough to come home to every day.

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Summary

There has been an increased awareness during the past decades of how structural gender inequalities have negatively affected women's ability to claim refugee status as defined in the 1951 UN Convention relating to the Status of Refugees. In Sweden, this discussion led to an amendment of the Immigration Act in 2005, where gender-related persecution was added as a ground for refugee status.

This paper seeks to examine the effects of this amendment in relation to one particular form of gender-related persecution – female genital mutilation (FGM). It does so by posing the following research question:

Has the amendment of 2005 given increased gender equality with regards to granting refugee status based on FGM as gender-related persecution? Viewed from a critical gender perspective, what gender inequalities can still be seen in the assessment of asylum claims based on the risk of FGM?

The paper outlines the legal status of FGM as gender-related persecution in refugee law and highlights the differences between the refugee definition in the 1951 Convention and that of Swedish national law. Following this, five main points of gender critique toward asylum law are lifted and discussed.

The research question is answered by analyzing three cases of asylum claims that have been based on FGM, and examining the existence of the five identified points of critique in each case. By doing so, the paper seeks to pin-point to what extent problems have been resolved and which remain.

The author finds that the amendment has had the desired effect of rendering it easier for women at risk of FGM to claim refugee status, by eliminating any risk of this form of persecution falling outside the refugee definition. The effect on the structural inequalities has however been shallow. A lack of consideration of women's particular situation and needs can still be observed, as well as a lack of understanding of how the public/private dichotomy influences women's ability to claim refugee status.

Sammanfattning

De senaste årtiondena har vi sett en ökad förståelse för hur strukturella ojämlikheter mellan könen inom flyktingrätten har lett till att kvinnor systematiskt har missgynnats vid beviljandet av flyktingskap i enlighet med 1951 års Flyktingkonvention. I Sverige ledde det här till en lagändring av Utlänningslagen år 2005, då könsrelaterad förföljelse lades till som en grund för flyktingskap.

Den här uppsatsen ämnar undersöka effekten av lagändringen för kvinnor som riskerar en specifik form av könsrelaterad förföljelse, nämligen kvinnlig könsstympning. Det här görs genom frågeställningen:

Har 2005 års lagändring givit upphov till ökad jämställdhet avseende kvinnors möjligheten att bli beviljade flyktingskap på grund av risk för könsstympning? Sett ur ett genuskritiskt perspektiv, vilka problem kvarstår i bedömningar av asylansökningar grundade på könsstympning?

I uppsatsen redogörs först för rättsläget gällande könsrelaterad förföljelse och könsstympning inom flyktingrätten. Skillnaderna mellan de svenska flyktingbestämmelserna i Utlänningslagen och dem i 1951 års Flyktingkonvention utreds. I det följande lyfts och diskuteras fem huvudsakliga problem inom flyktingrätten ur ett genusperspektiv.

Frågeställningen besvaras genom en analys av tre rättsfall som alla berör beviljande av flyktingskap på grund av risk för könsstympning. Varje rättsfall undersöks med utgångspunkt i de fem genuskritiska problemen som tagits fram. Genom det här söker uppsatsen svara på i vilken grad problemen har lösts genom lagändringen, samt vilka som kvarstår.

Författaren finner att lagändringen har haft önskad effekt på så sätt att den underlättar för kvinnor som riskerar könsstympning att beviljas flyktingskap, då den eliminerar all risk för att könsförföljelsen ska falla utanför flyktingdefinitionen. Däremot är effekten på de underliggande strukturella problemen endast ytlig. Det kvarstår en oförståelse för kvinnors särskilt utsatta situation och behov, samt en oförståelse för hur dikotomin mellan det privata och offentliga påverkar kvinnors möjligheter till flyktingskap.

Abbreviations

ECHR	European Convention on Human Rights
EU	European Union
FGM	Female Genital Mutilation
IFA	Internal Flight Alternative
SGOR	Swedish Government Official Reports
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

1 Introduction

1.1 General remarks

International refugee law today is still largely based on the UN Convention relating to the Status of Refugees from 1951¹. Since then there has been vast development within the field of international human rights and that of gender awareness, which has rendered it increasingly clear that the refugee definition has been shaped and interpreted through (heterosexual) male experiences and norms. It is widely recognized that women, as a consequence, have often been discriminated against and their claims of refugee status unjustly dismissed.

The need to interpret the 1951 Convention in light of its own purpose and that of modern human rights law, have led to a growing will to modify international refugee law. Among other things, this led to UNHCR's publication of Guidelines on Gender-Related Persecution and the EU's incorporation of gender-specific persecution in the refugee definition through art. 9.2(f) dir. 2004/83/EC. Alongside this, there has been a growing body of critical doctrine that examines the problem field from an academic gender perspective.

In Sweden, this ultimately led to an amendment in 2005 of the refugee definition in the Immigration Act². Gender-related persecution was included in the grounds for *refugee status* in the Swedish Immigration Act ch 4 § 1, in order to further women's ability to claim refugee status and to reiterate the importance of gender awareness throughout the asylum seeking process. In the following it will be examined whether these ends have been met in relation to one particular form of gender-related persecution, namely female genital mutilation (FGM).

1.2 Purpose and problem formulation

This paper aims to investigate whether there is still reason to criticize the refugee definition from a gender perspective with regards to claiming refugee status due to risk of FGM. By relating to the amendment of 2005, the paper seeks to pin-point the extent to which problems have been resolved and which remain. Eight years have passed since the 2005 amendment, however the question remains if the amendment has had the sought after effect of increasing women's visibility and ability to claim asylum.

¹ Hereinafter: the 1951 Convention.

² Author's translation, in Swedish: Utlänningslagen, SFS 2005:716.

The problem formulation is thus: *Has the amendment of 2005 given increased gender equality in regards to granting refugee status based on FGM as gender-related persecution? Viewed from a critical gender perspective, what gender inequalities can still be seen in the assessment of asylum claims based on the risk of FGM?*

1.3 Research Limitations

In the interest of narrowing the research field, the paper focuses solely on FGM and disregards other forms of gender-related persecution. Also, although international conventions and EU law plays an important part in the paper, the perspective and focus point is always that of investigating Swedish law and its effects. Furthermore, the victims of FGM have more than one thing in common, not only are they all of the female sex, a vast majority of them are also children. The fact that the applicants are minors, no doubt plays a part in the courts' assessment of the cases analyzed below. I have however limited my perspective to that of a gender analysis, and leave the perspective of children's rights to future research.

1.4 Theory and Method

The method applied is one of critical gender analysis. In order to answer the research question, three cases of FGM as grounds for claiming refugee status are systematically analyzed by focusing on five main points of gender critique toward asylum law and evaluating the existence of the indicated problem in each case. The cases have been selected on the basis that they have been appealed to at least the Migration Court and that they all focus on FGM as part of the asylum claim. Furthermore, they all contain argumentation substantial enough to provide material for a gender analysis. All three cases involve people from countries with a high prevalence of FGM, Somalia which has been estimated to an FGM rate of 97,9% (in 2005), Sudan with 90% (in 2000) and Eritrea with 88,7% (in 2002).³ This means that the applicants come from similar backgrounds in this respect, which could be a drawback in terms of variety, but I believe that it allows the courts' reasoning (and my own) to focus on the individualization of the risk even further and pushes the argumentation toward differentiating the risks of these women in particular from that of the female population in general.

Using only three cases means that generalization of the results is difficult, if not impossible. I maintain however that due to the nature of the problem field and

³ WHO, 2008, p. 29.

recognized ambition of full gender equality, finding points to critique is always noteworthy, even when the selection of cases is small. This allows the finding of possible problems that can later be investigated in a greater selection of cases.

With this method of critical analysis, the theoretical background that encompasses my analysis and research is for natural reasons critical feminist theory. This is also in line with the theoretical basis of the UNHCR:s Guidelines and the aims of the Swedish legislative parliament, which are further discussed below. The analysis is largely based on feminist theory concepts such as the dichotomy of the public and the private, and it is not the aim of the paper to question these concepts as such but rather to build on feminist theory toward a critical analysis.

1.5 Current research and material

Research on gender-related persecution peaked in the mid-2000's, after which the discussion seems to have subsided, giving the impression that the gender aspect of refugee status is, if not a resolved issue, one that has been properly addressed. This is one of my main motivations to study the actual effects of the 2005 amendment. The primary sources used in this study consist of the Swedish Immigration Act, the 1951 Convention and the EU directive 2004/83/EC that all relate to the refugee definition and are recognized sources of law in Sweden. The publication SGOR 2004:31 *Refugee status and gender-related persecution* is also used extensively as a way of establishing the Swedish legal framework. To establish the five points of gender critique, feminist literature on asylum law is used; primarily Bexelius's *Asylum law, gender and politics* and Crawley's *Refugees and Gender* that are both respected feminist researchers in the field. Some non-legal, empirical material has been used in order to describe the practice of FGM, among others the report *Eliminating Female Genital Mutilation* issued by the WHO and other UN agencies.

1.6 Structure

In *chapter 2*, the thesis deals with FGM and refugee status in Swedish asylum law, in order to give an introduction to the particularities of FGM as a practice and as grounds for refugee status in Swedish law, but also in relation to the 1951 Convention and the EU directive 2004/83/EC. In *chapter 3*, the gender critique of asylum law is discussed and summarized into the five main points of critique. In *chapter 4*, the three cases are presented and dealt with in relation to each of the five points of critique. In *chapter 5*, the findings are summarized and discussed.

2 FGM and Refugee Status – the legal background

2.1 FGM

FGM is in many ways a unique form of gender-related persecution and raises need for particular concerns. In order to better understand the discussion of FGM and asylum law, one first needs an understanding of the form of persecution itself.

The World Health Organization (WHO), defines FGM as:

“all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reason.”⁴

The practice is divided into four different types, ranging from partial removal of the clitoris, to complete infibulations⁵, all of which can have severe health consequences such as excessive bleeding, infections, chronic pain and life-threatening complications later on in life connected to among other things, sexual intercourse and childbirth.⁶

FGM is estimated to be practiced in over 28 countries, mainly occurring in Africa, but also in Asia and the Middle East, with prevalence ranging from around 1% (Cameroon in 2004) up to almost universal subjection to FGM, 97,9% (Somalia in 2006).⁷ Although it is widely practiced, and targets a group that includes half of the country’s population, asylum seekers in Sweden need to show an individualized risk of FGM, meaning that not all women from for instance Somalia receive refugee status automatically.⁸ This places FGM in a category that differs both from grounds that are more uncommonly occurring within the applicant’s country of origin such as political opposition, and from most grounds that automatically entitle a person to asylum, such as coming from a region with severe armed conflict.

The reasons that women are subjected to FGM vary, but the main explanation is social pressure and conformity. It is closely associated with religious and cultural beliefs that FGM is a desired and effective method to control women’s sexuality and sexual desire, to render the woman more submissive in character, to “cleanse” the

⁴ WHO, UNICEF, UNFPA, *Female genital mutilation. A Joint WHO/UNICEF/UNFPA Statement*, 1997.

⁵ WHO, 2008, p. 4.

⁶ WHO, 2008, pp. 33-34.

⁷ WHO, 2008, pp. 29-30.

⁸ Prop. 2005/06:6, p. 9.

woman by removing body parts that are considered to be “male”, that it serves a symbolic function as a rite of passage, or that FGM promotes better hygiene. Although often motivated on religious grounds, FGM is not necessarily connected to Islam, but rather to social and cultural traditions that predate this particular religion.⁹

The decision to subject a girl (or woman) to FGM is most commonly a collective one, taken by the family and clan or community.¹⁰ The procedure is often carried out by female family members or by elders in the girl’s clan or community.¹¹ The ages during which the procedure is carried out varies between regions and countries, but most often between a few months to fifteen years of age.¹² The collectiveness of the decision and complexity of social structures, can make for a difficult assessment of a girl’s individual risk of being subjected to FGM.

Women’s practical ability to refuse FGM varies, mainly depending on where they live and how influential they or their families are in society. Generally speaking, the procedure is upheld due to rigid social structures and a fear of being rejected by the community.¹³ In many regions it is generally believed that men will only marry women who have undergone FGM¹⁴; in a society where single women have virtually no possibility to support themselves financially or to be socially accepted under these terms, this can have an enormous impact on the decision-making process of a woman or her family.¹⁵ Refusal to undergo FGM can thus have detrimental consequences to a woman’s life and her ability to exercise her freedoms and rights, whereas FGM itself seriously jeopardizes a woman’s physical and mental health. This also renders it a particular asylum ground. Generally, violence against women can be hindered by physical protection of a woman from that particular agent of violence. In simplified terms, when a woman is threatened by violence she needs protection by the state or another actor from a particular danger, and once the danger is removed she can attempt to continue her life. When it comes to FGM, the situation is different. Women who do not undergo FGM are at risk in other ways, financially and security-wise but also as

⁹ Crawley, 2001, p. 177-180; WHO, 2008, p. 5-6.

¹⁰ WHO, 2008, p. 5-7.

¹¹ Crawley, 2001, p. 175.

¹² WHO, 2008, p. 4.

¹³ Crawley, 2001, p. 177-180.

¹⁴ WHO, 2008, p. 6.

¹⁵ Crawley, 2001, p. 189.

victims of severe discrimination. The institution of FGM can continue to affect a woman throughout her entire life, whether she undergoes the procedure or not.

For the women who are subjected to FGM, the procedure often has a continuous physical effect for the remainder of her life. If subjected to infibulation it is for instance common that a woman is cut open for labor, and after giving birth is reinfibulated.¹⁶ This means that the fact that a woman has already been subjected to FGM should not exclude her from being granted refugee status, since she can be in need of protection from the continued effects and consequences.

Although forbidden in many countries, including many of the ones from which asylum seekers seek protection, the practice continues to be widespread due to rigid social structure and states' inability or unwillingness to enforce the passed laws.¹⁷ Due to this women and parents of daughters, frequently seek protection as asylum seekers.

2.2 International law on FGM and refugee status

As mentioned in the introduction, the most important international legal framework in the field is without a doubt, the 1951 Convention. This convention has formed the basis of asylum law around the world, and the refugee definition has been adopted in countless nations, there among Sweden.¹⁸

The 1951 Convention's definition of a refugee is defined in Art 1A(2) according to which the refugee must meet a number of criteria. Firstly the person must be outside of his or her country of nationality, meaning that a refugee cannot apply for refugee status without first leaving their country of origin. Secondly, the refugee must have a well-founded fear of persecution. In determining well-founded fear, two elements are regarded: the asylum seeker's subjective feeling of fear and the objective element, meaning an examination of the factual circumstances and whether or not the person's feeling of fear has a reasonable, well-founded ground.¹⁹ As mentioned above, the risk that they are facing must also be individualized, and not one that is faced by the population in general. As we will see in the cases analyzed in chapter 4, the individualization of risk is something thoroughly discussed in many cases of FGM as grounds for refugee status.

¹⁶ Crawley, 2001, p. 186.

¹⁷ Crawley, 2001, p. 177.

¹⁸ SGOR 2004:31, p. 25.

¹⁹ SOU 2004:31, p. 32.

Thirdly, this well-founded fear of persecution must be based on the person's race, religion, nationality, political opinion or membership of a particular social group.²⁰ Finally, the persecution needs to be carried out by state actors (directly or indirectly), or if the persecution is carried out by non-state actors (which is the case with FGM), the refugee must be unable, or unwilling due to well-founded fear, to make use of state protection in their country of origin.

A person who meets these criteria and is not subject to any of the grounds of exception (for instance voluntarily returning to their home country, Art 1C(4), or having committed a serious non-political crime in their home country, Art 1F(b)) is found to be a refugee according to the convention.

In relation to asylum seekers risking FGM, this means that their fear of FGM has to be well-founded, objectively and subjectively, and also that the persecution has to align with one of the above-mentioned grounds of persecution. Up until recently there has been disagreement of where to place FGM and certain other forms of violence against women in regards to these grounds. Some have argued that being a woman (sometimes a woman of a certain age or ethnicity) can constitute membership of a particular social group, others that the sheer size of such a group renders it impossible to view it as such. UNHCR has affirmed that according to their interpretation of the refugee convention, women *can* constitute a social group, seeing as they share common characteristics, are treated differently than other members of society and meet all other relevant criteria – being a certain size has never been one of these.²¹ There has also been discussion about the extent to which FGM and other forms of gender-related persecution can be connected to the category of political opinion. Gender critics argue that opposing FGM can be construed as a political act and should be recognized as such.²² Another take on the issue is that gender-related persecution should be included as a sixth category alongside the existing grounds for persecution, this will be further discussed below.

Within EU-legislation, the most important regulation is the directive 2004/83/EC. This sets up minimal criteria for the granting of asylum and treatment of asylum seekers within member states.²³ Gender-related persecution is not recognized

²⁰ 1951 Convention Art 1A(2).

²¹ UNHCR, 2002a, p. 7, UNHCR, 2002b, pp. 3-4.

²² Crawley, 2001, p. 194.

²³ SGOR 2006:6, pp. 68-69.

as a separate category, instead the directive relates and confirms the refugee definition stated in the 1951 Convention and its five categories of persecution.²⁴ With regards to the category of membership of a particular social group, it is specified that:

“Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article”²⁵

Furthermore it is stated in Art 9.2(f) that gender-specific²⁶ persecution can be included in the definition of persecution referred to in Art. 1A(2) of the 1951 Convention. In the directive 2004/83/EC, gender-related persecution is thus seen as a possibility to refugee status, but is not recognized as a category of its own. This is however a directive of minimum standards, as mentioned above, meaning that the member states are free to adopt more permissive asylum regulations²⁷, which as we will see is what has been done by Sweden in regards to gender-related persecution.

2.3 FGM and refugee status in Swedish law

The 1951 Convention has been signed and ratified by Sweden and is thus considered a source of law in the nation.²⁸ Likewise, the EU-directive 2004/83/EC is binding for Sweden as a member state.²⁹ In practice however, it is the Swedish national regulations found in the Immigration Act that are used as a source of law in the everyday decision making process. Guidance is however sought in the above-mentioned sources of international law and also in UNHCR Guidelines, the latter of which according to the agency themselves, aim at providing interpretive guidance.³⁰ In the following, the national asylum legislation of Sweden will be examined.

Asylum can be granted according to the Swedish Immigration Act on three grounds. Firstly, an applicant can be found to be a *convention refugee*, according to the Immigration Act ch 4 § 1, meaning that they fall under the definition of a refugee found in the 1951 Convention. Secondly, a person can be found to be *alternatively in need of protection*, in accordance with ch 4 § 2, if they come from a conflict zone inter alia. Thirdly they can be found to be *otherwise in need of protection*, in accordance with ch 4 § 2a. Closely connected to the asylum regulations are the regulations on non-

²⁴ 2004/83/EC, Art. 10.

²⁵ 2004/83/EC, Art. 10.1(d).

²⁶ For a discussion on gender-related versus gender-specific persecution see SGOR 2004:31, pp. 74-76.

²⁷ SGOR 2006:6, p. 69.

²⁸ SGOR 2004:31, p. 25.

²⁹ SGOR 2006:6, p. 55.

³⁰ SGOR 2004:31, pp. 25-26; SGOR 2006:6, p. 55; UNHCR, 2002a, p. 1.

refoulement and those on exceptional reasons. Non-refoulement forbids extraditing a person to a country where they risk torture or otherwise inhumane treatment, and is regulated in the Immigration Act ch 12 § 1, ECHR art. 3 and dir. 2004/83/EC art. 21.³¹ Non-refoulement is not a ground for asylum, but rather an impediment to executing the extradition. The regulation on exceptional reasons, Swedish Immigration Act ch 5 § 6, states that a person can be granted residence permit without falling under the categories in the asylum regulations, if there are exceptional reasons for this.

It is however only the first ground for asylum, in ch 4 § 1, which grants the applicant *refugee status*, and this is the one that this paper focuses on. The Swedish definition of a convention refugee, found in the Immigration Act ch 4 § 1, differs from that of the 1951 Convention in one respect – through the amendment of 2005, where gender-related persecution was added as a sixth category.

FGM's status in relation to the different ways to asylum has varied over the past decades. The first successful asylum claims in Sweden based on risking FGM were the so-called "Togo-cases" of 1997, where two sisters and their family were granted residence permits because the girls were found to be at risk of FGM upon return to their country of origin (Togo) and thus otherwise in need of protection, which is where gender-related claims were included at the time.³² Interestingly enough, the Board clearly stated in the case, that the girls could not fall under the refugee definition, since membership of a particular social group did not include women. Shortly after this, the Migration Board changed their practice and FGM was instead viewed as torture, and asylum granted on the grounds of non-refoulement.³³ It was however still not seen as grounds for refugee status, until the amendment of 2005.

In 2002 a committee was given the task to examine how gender-related persecution could be incorporated into the Swedish refugee definition. The results were presented in SGOR 2004:31 which, much like the Guidelines of UNHCR, stated that gender-related persecution was in fact already grounds for refugee status, seeing to the purpose and aims of the 1951 Convention.³⁴ The problem was not in the definition but rather in faulty implementation due to lack of gender awareness.³⁵ The

³¹ European Convention on Human Rights, Art. 3; dir. 2004/83/EC, Art. 21; SFS 2005:716, ch 12 § 1.

³² UN 328-97; SGOR 2004:31, pp. 50-51.

³³ SGOR 2004:31, p. 50-51; see also Bexelius, 2008, pp. 179-180, for further discussion.

³⁴ SGOR 2004:31, pp. 84-85.

³⁵ SGOR 2004:31, p. 130.

committee however found that it advisable to include gender-related persecution as a category in the Swedish refugee definition, in order to reiterate its status in asylum law.³⁶ This was passed through the amendment of 2005 and gender-related persecution was added as a category.³⁷ The purpose was thus not to change the meaning of the refugee definition or to differ from the one stated in the 1951 Convention, but rather to clarify the refugee definition's correct interpretation.³⁸

2.4 Gender-related persecution as a separate category

The issue of whether or not to include gender persecution as a sixth category has been debated over the past decades. Though some argue that adding a sixth category would render it easier for women to be granted refugee status from persecution that might otherwise fall outside the definition³⁹, UNHCR has maintained that gender-related claims already fall under the existing ones.⁴⁰ Sweden, as we know, included a sixth category in the Immigration Act, but there are other ways in which to achieve greater gender equality. A gender aware assessment and decision making process, where for instance women's opposition of gender structures is truly recognized as political action, could also secure an asylum system that is non-discriminatory.

In 2003 EURASIL compiled information on how risking FGM was categorized in relation to asylum in a number of countries. According to this, most of the countries examined⁴¹ recognized FGM as persecution on the grounds of membership of a particular social group.⁴² Others recognized it on the basis of non-refoulement⁴³ or that of otherwise in need of protection⁴⁴, showing that there are different possibilities to categorizing gender-related persecution.⁴⁵ As Freedman argues, gender mainstreaming in refugee issues is a complex process where one, among other things, needs to be careful to not break out women's issues as a separate problem. Gender issues need to be addressed as part of the larger context.⁴⁶

³⁶ SGOR 2004:31, p. 47.

³⁷ Prop. 2005/06:6, pp. 3-6.

³⁸ SGOR 2004:31 pp. 129-133; Prop. 2005/06:6, p. 30.

³⁹ See e.g. Kennedy: *Gender-related Persecution and the Adjudication of Asylum Claims*, 1998; Kim, *Gender-related Persecution: A Legal Analysis of Gender Bias in Asylum Law*, 1994.

⁴⁰ UNHCR, 2002a, p. 2.

⁴¹ Austria, Belgium, France, Ireland, Portugal, Lithuania, Slovakia, Cyprus, USA and Canada.

⁴² SGOR 2004:31, p. 153-162.

⁴³ The Netherlands, Czech Republic, and to a certain extent Lithuania.

⁴⁴ Denmark, Finland and (at the time) Sweden.

⁴⁵ SGOR 2004:31, p. 153-162.

⁴⁶ Freedman, 2010, p. 594.

3 Gender critique of asylum law

3.1 Why a gender analysis?

According to VCLT Art 31, a treaty shall be interpreted in its context and in light of its object and purpose. In the context of the 1951 Convention and its refugee definition, this means that, it shall be interpreted in light of its preamble, general purpose and also of subsequent human rights instruments that have been signed by the parties involved, inter alia. It is clear from all of the above that a guiding principle is human rights without discrimination, thereby also encompassing equal rights between men and women.⁴⁷

The stance that heightened gender awareness is needed in the implementation of the 1951 Convention has also been reiterated by UNHCR.⁴⁸ Furthermore, the Swedish government has clearly established that they strive after gender equality in the implementation of asylum laws, and it is clear that the purpose of the 2005 amendment was to further this goal.⁴⁹ With this background, a gender analysis of asylum cases in Sweden, is both relevant and important. In the following I will outline the main gender critique toward asylum law and the points that will be examined in the selected cases.

3.2 The public and the private

First, a few words should be said about the overarching idea of the public and private spheres. For the past decades feminist theorists have stressed the importance of unveiling and combating the dichotomy between the public and the private.⁵⁰ This dichotomy stems from a binary view of the world, and is seen as all-encompassing, splitting life into two categories – the public sphere vs. the private sphere; male vs. female.⁵¹ In terms of asylum law, one important consequence of the public/private dichotomy is that women's activities and asylum grounds are often placed within the private sphere, and are either not included in the legal framework, or dismissed by individual decision-makers as they are not taken as seriously as matters that are placed within the public sphere.⁵²

⁴⁷ See e.g. the 1948 UN Declaration on Human Rights; the 1951 Convention, Preamble § 1.

⁴⁸ UNHCR, 2002a, p. 2.

⁴⁹ SGOR 2004:31, p. 11; Prop. 2005/06:6, p. 3-6.

⁵⁰ Crawley, 2001, p. 18.

⁵¹ Crawley, 2001, p. 19.

⁵² Crawley, 2001, p. 20.

This is an important reason that political persecution (part of the public, and traditionally more male, sphere) has been seen as the more traditional ground for refugee status, whereas asylum grounds such as failure of state protection from domestic violence (part of the private, and traditionally more female, sphere) has only recently been recognized as grounds for refugee status.⁵³

It has long been more difficult to be granted refugee status on the basis of persecution by non-state actors than that of the more traditional (and traditionally male) form of state persecution.⁵⁴ FGM is a typical form of non-state persecution; it is forbidden in many of the countries in which it is a common practice⁵⁵ and is not carried out by government officials, but rather private persons in the girls' close environment. Instead it is the failure of the state to protect the woman's rights that entitles her to refugee status.⁵⁶ FGM can easily be regarded as within the private sphere of a woman's life.⁵⁷ The public/private dichotomy should, according to UNHCR's guidelines not have an effect on a person's ability to receive refugee status.⁵⁸ Persecution by state and non-state actors are both possible grounds for refugee status according to international law and Swedish asylum law.⁵⁹

3.3 The main critique

After a thorough literature review I have summarized a number of points that to my knowledge makes up the most common and important critique toward asylum law from a gender perspective. Such a list of critique will always be wanting in some way, however the following points have been selected because they have been found to be the most relevant in relation to FGM as a particular form of gender-related persecution. Other critique will have to be evaluated in future research.

3.3.1 The public/private

Feminist critics of asylum law see that persecution by non-state actors is more often dismissed than persecution by state actors.⁶⁰ This stems from the fact that women's experiences are still more often seen as lying within the "private sphere", which places

⁵³ Crawley, 2001, p. 21.

⁵⁴ Bexelius, 2008, p. 113.

⁵⁵ Crawley, 2001, p.177.

⁵⁶ 1951 Convention Art 1A(2).

⁵⁷ Bohmer & Shuman, 2008, p. 228.

⁵⁸ Bexelius, 2008, p. 115.

⁵⁹ SFS 2005:716, ch 4 § 1; see also: dir. 2004/83/EC, art 6.

⁶⁰ Bexelius, 2008, pp. 113-127.

women at a disadvantage in refugee applications.⁶¹ FGM, being seen as a private matter and one that is related to non-state actors, is therefore not seen as grounds for refugee status to the extent to which it should.

3.3.2 Late claims

Due to lesser knowledge of the asylum seeking process⁶², not knowing that FGM is illegal let alone grounds for refugee status, or due to feelings of shame connected to gender-related persecution⁶³ some women state risk of FGM late in the application process. A lack of understanding of women's situation, lead to these late additions not being taken into account, or that their lateness is to the applicant's disadvantage.⁶⁴

3.3.3 Internal flight alternative

Critics find that a lack of understanding of how difficult it can be for a woman to move within her country of origin due to structural and cultural obstacles, leads to an unrealistic evaluation of the woman's internal flight alternatives (IFA). There is not enough consideration taken to the fact that it is generally more difficult for a woman to move within the country than it is for men.⁶⁵

3.3.4 Cultural relativism

Some critics argue that there is a tendency to view FGM through a lens of cultural relativism, seeing it as a cultural practice that to some extent should be accepted, or at least viewed in a milder way than other forms of persecution. This hinders women from successfully claiming refugee status on this ground.⁶⁶

3.3.5 Consequences of FGM or of FGM refusal

There is not enough consideration to the consequences that a woman faces when she chooses not to undergo FGM. These consequences are a threat in themselves and stretch on further in time than the actual risk of being forced to undergo FGM.⁶⁷ Nor is consideration taken to the continued consequences facing women who have already been subjected to FGM, such as reinfibulation.⁶⁸

⁶¹ Crawley, 2001, pp. 19-20.

⁶² Crawley, 2001, pp. 210-211.

⁶³ Crawley, 2001, p. 211.

⁶⁴ Crawley, 2001, pp. 210-212.

⁶⁵ Crawley, 2001, p. 191; Bexelius, 2008, pp. 166-167.

⁶⁶ Crawley, 2001, pp. 180-183.

⁶⁷ Crawley, 2001, p. 189.

⁶⁸ Crawley, 2001, p. 186.

4 Three cases of FGM as grounds for refugee status

The amendment of the Immigration Act in 2005, aimed at improving the inequalities that were observed in gender critique such as the one outlined in the previous chapter.⁶⁹ In order to evaluate how this goal was met, I will now examine three cases and address each of the points raised above in relation to each individual case.

4.1 MIG 2012:12 – The case of the three sisters

In February 2011, a mother and her three daughters from Somalia, who were three, ten and eleven years old respectively, applied for asylum at the Migration Board. They were fleeing the Islamist organization Al-Shabaab in their home country. The father of the family had been abducted by the organization, after defying a prohibition against film screenings, and never returned. Also, the organization had reportedly expressed that the girls needed to undergo FGM and that the mother should not live alone.⁷⁰

The family's claim for asylum was initially based on fear that the mother would be killed or subjected to forced marriage by Al-Shabaab upon returning to their country of origin, and that the three girls were at risk of being subjected to FGM.⁷¹ In the higher instances, the claim is entirely based on the risk of FGM⁷², which will also be the focal point of the following analysis.

The Migration Board found that the girls were not to be granted refugee status, but instead found them to be alternatively in need of protection because of an ongoing armed conflict in their home region.⁷³ Since they were then not entitled to the travel documents that are sometimes granted refugees, the girls appealed to the Migration Court and were found to be entitled to refugee status and travel documents. The Board appealed this ruling to the Migration Court of Appeal, opposing the granting of refugee status and also stating that the Migration Court could not as a first instance, try and grant travel documents and that it should instead be referred back to the Board in

⁶⁹ SGOR 2004:31, p. 11; Prop. 2005/06:6, p. 3-6.

⁷⁰ Migration Board's Ruling, 2011-02-22, pp. 3-4.

⁷¹ Migration Board's Ruling, 2011-02-22, p. 2.

⁷² MIG 2012:12, p. 3.

⁷³ Migration Board's Ruling, 2011-02-22, pp. 5-6.

this part.⁷⁴ The Court of Appeal reiterated that the girls were to be granted refugee status but referred the issue of the travel documents back to the Board.⁷⁵

4.1.1 The public/private

There are two main elements in the assessment of the application that raises the issue of the public/private dichotomy. Firstly, it is stated in the case that the mother of the girls is a known objector to FGM. The Migration Board lifts this fact to show that Al-Shabaab must have known that the girls had not undergone the procedure for a long amount of time and the mother has still been able to protect them.⁷⁶ However there is no mention of the mother's potential risk of persecution as a consequence of expressing and acting on this opinion.

Her known resistance toward FGM, and refusal to subject her daughters to it, is thus not seen as a political action that could potentially be grounds for refugee status. This despite the fact that protesting against FGM and facing persecution as a consequence can be seen as grounds for refugee status based on political opinion according to UNHCR⁷⁷ and also according to the Swedish legislative history leading up to the 2005 amendment.⁷⁸ The mother states that she has been visited in her home and threatened by members of Al-Shabaab.⁷⁹ If her actions were viewed by the Board or Courts as political, this could be regarded as political persecution in itself; and even if the threats would not amount to persecution, it is noteworthy that none of the instances make any mention of it, suggesting that it is not even relevant to assess. This could be seen as a result of the public/private dichotomy. Her objection toward FGM and refusal to subject her daughters to it, are seen as private actions within the family and are not placed within the political/public sphere and thereby not amounting to political activity.

Secondly, the mother's ability to protect the girls is assessed and discussed extensively throughout all three instances. One of the main differences in the conflicting views of the Migration Board and the applicants is to what extent the mother can protect the girls. The Board argues that since she has been able to protect

⁷⁴ UM 3234-11, pp. 2-3.

⁷⁵ MIG 2012:12, p. 8; p. 10.

⁷⁶ MIG 2012:12, p. 6.

⁷⁷ UNHCR, 2002a, p. 8.

⁷⁸ SGOR 2004:31, pp. 92-94.

⁷⁹ Migration Board's Ruling, 2011-02-22, p. 5.

them for this long, she can surely continue⁸⁰, whereas the applicants maintain that the mother's possibility to protect her daughter is now gone.⁸¹ This is also an issue that the Court and Court of Appeal assess thoroughly, both finding that it is generally difficult for parents to protect their daughters from FGM in Somalia and that there is no realistic possibility to protect the girls in this case.⁸²

The fact that the courts so extensively discuss the family's ability to protect, can also be seen as a result of the public/private dichotomy. Although the social context is an important part of individualizing risk, it is difficult to not see the Court making family protection the focal point of the assessment as an expression for an underlying idea that FGM is a family issue and hence within the private sphere – calling for an evaluation of the protection found within the private sphere.

By stating that parents have a difficult time protecting their daughters, since the pressure to undergo FGM also comes from society and extended family⁸³ they are in part moving the issue into the public sphere by framing it as a societal issue. However, a real step back from the dichotomy in line with the ambition of UNHCR and the UNGA⁸⁴ would be to see state protection as the relevant form of protection to discuss at such an extent, regardless of whether the persecution is within the family or outside, and to instead limit the discussion of individualization to identifying a real risk that the girls need to be protected from. Judging from the extensive discussion on the mother's ability to protect, it is clear that the courts saw a need for protection, and most likely a significant risk.

4.1.2 Late claim

The applicants stated all of their claims and information about FGM in the beginning of the application process, so this aspect of the problem field was not tried in this case.

4.1.3 Internal flight alternative

There is not much mention of IFA in any of the three instances. The applicants state that there is no possibility for protection anywhere in Somalia, due to the general situation in the country;⁸⁵ and both Courts refer to information about FGM that is

⁸⁰ Migration Board's Ruling, 2011-02-22, p. 5; UM 3234-11, p. 3; MIG 2012:12, pp. 5-6.

⁸¹ UM 3234-11, pp. 2-3; MIG 2012:12, p. 7.

⁸² MIG 2012:12, p. 10; UM 3234-11, pp. 3-4.

⁸³ UM 3234-11, p. 3; MIG 2012:12, p. 10.

⁸⁴ UNHCR, 2002a, p.2.

⁸⁵ UM 3234-11, p. 2; MIG 2012:12, p. 3.

based on the whole country.⁸⁶ Though the Migration Board has no reason to see to the family's IFA in relation to risk of FGM (as they do not find that there is a real risk), they do briefly mention that there is no reason to assume that the family has a strong enough network elsewhere in the country to consider IFA from the conflict area.⁸⁷ This might be an expression of consideration to women's particular difficulty to move within the country, but if so it is not explicitly stated.

4.1.4 Cultural relativism

There is no sign, in any of the instances, of a cultural relativism that renders FGM more acceptable than it otherwise would be. It is clearly stated that FGM is gender-related persecution and thus grounds for refugee status.⁸⁸

4.1.5 Consequences of FGM or of FGM refusal

There is little mentioned about the consequences of refusing FGM. In the Migration Court of Appeal, the applicants state that women who have not been subjected to FGM are stigmatized and cannot live safely in Somalia as they will not be allowed to marry a man or to live with other women.⁸⁹ The court also mentions this fact in their own reasoning⁹⁰, but the ruling is clearly based on the risk of FGM, not on the risks of refusing. There is no mention of the risks of living as a woman in Somalia without undergoing the procedure in the ruling from the Migration Court or Board.

The mother has been subjected to FGM⁹¹, and there is no mention by her or any of the instances that ongoing consequences could mean continued gender-related persecution. The Board, whose description of the background is otherwise quite detailed, makes no mention at all of the fact that the mother has undergone FGM. It is mentioned in the ruling of the Migration Court, but only as a way to judge the risk of the daughters.⁹²

4.2 UM 7247-07 – the Nigeria case

In UM 7247-07 a family consisting of two parents, two daughters and a son applied for asylum in Sweden. The mother of the children stated that she was trafficked from Nigeria to Italy and forced into prostitution there. While in Italy she married the man

⁸⁶ MIG 2012:12, p. 4; UM 3234-11, p. 3.

⁸⁷ Migration Board's Ruling, 2011-02-22, p. 6.

⁸⁸ See e.g. MIG 2012:12, pp. 10-11; UM 3234-11, p. 4.

⁸⁹ MIG 2012:12, p. 7.

⁹⁰ MIG 2012:12, p. 10.

⁹¹ UM 3234-11, p. 2; MIG 2012:12, p. 3.

⁹² UM 3234-11, p. 2.

with whom she later applied for asylum in Sweden. They based their application to the Migration Board on that they were in need of protection from the organization that had trafficked the woman, because they owed them money that could not be paid back. Also, they stated that it was impossible for them to return to Nigeria, where the organization they feared was active and there was no hope for state protection.

The application was denied, and the woman together with her three children appealed to the Court of Migration (at this point the couple had separated). In their appeal it was added that the daughters were at risk of FGM upon returning to Nigeria. Their application for refugee status was denied on the basis that there were internal flight alternatives. However, they were granted residence permits in Sweden on the ground of extraordinary reasons, in accordance with the Immigration Act ch 5 § 6, mainly because of the difficult situation they would be facing in Nigeria due to the prospect of having to relocate within the country.

4.2.1 The public/private

In the case, there is little evidence that the public/private dichotomy affects the assessment of the applications. Although recognized as a form of persecution that takes place within the private sphere, and carried out by family members⁹³, the relevant point of discussion is, unlike in the case illustrated above, placed on the possibility for state protection.⁹⁴

4.2.2 Late claim

The risk of FGM is not stated until the case is in the Migration Court, which according to the applicants is due to a lack of understanding that this information was needed. The mother of the children states that she thought it would be enough to inform about the trafficking and prostitution in order to be granted refugee status.⁹⁵ Her late claim is thus largely a consequence of her lack of knowledge in the field.

The Migration Board, as defendant before the Court, suggest that the lateness of the addition could show that the applicant is now exaggerating her claim.⁹⁶ In short, they see it as reason to doubt the applicant's credibility. The Court however does not allow the lateness of the claim to affect the outcome of the case. The applicant is still found to have a strong subjective fear of her daughters being subjected to FGM. The

⁹³ UM 7247-07, p. 2.

⁹⁴ UM 7247-07, p. 6.

⁹⁵ UM 7247-07, p. 3.

⁹⁶ UM 7247-07, p.4.

court does state that “it is noteworthy that [the mother] has not previously mentioned that the daughters could risk FGM”⁹⁷, but what is interesting about it and how it might possibly affect the Court’s assessment of the case is left unsaid.

4.2.3 Internal flight alternative

As defendant before the Court, the Migration Board claims that there are internal flight alternatives for the applicants. It is stated that FGM is common throughout large parts of Nigeria, but that there is state protection available, particularly in states where the practice is illegal. The Court shares the Board’s view that internal flight is a realistic alternative for the family. In this part of the assessment there is no particular consideration taken to the fact that it could be difficult for a single woman to move with her three children to a different part of Nigeria.⁹⁸ The gender-related discussion on IFA is in other words lacking. However, when the applicants are granted residency on the basis of extraordinary reasons, it is largely due to the fact that they will most likely be forced to IFA. In this part of the assessment it is taken into account that she is a single woman with three young children and that it is likely that she will be forced into prostitution again in order to support the family.⁹⁹ In other words there is consideration taken to gender, however it is noteworthy that it is not taken until this later stage, preventing them from being granted refugee status which they might otherwise be entitled to.

4.2.4 Cultural relativism

There is no sign of a cultural relativism that renders FGM more acceptable than it otherwise would be. When risk of FGM is claimed, it is clearly stated this is gender-related persecution and thus grounds for refugee status.

4.2.5 Consequences of FGM or of FGM refusal

Besides the discussion on potential IFA, there is no mention of the consequences that the girls might face by refusing to undergo FGM. Furthermore, the mother of the children has been subjected to FGM. This is however in no way taken into account in regards to her own safety and health, but only as used as evidence that her daughters are also at risk.¹⁰⁰

⁹⁷ UM 7247-07, p. 6. Author’s translation, name removed out of discretion.

⁹⁸ UM 7247-07, p. 4-6.

⁹⁹ UM 7247-07, p. 7.

¹⁰⁰ UM 7247-07, p. 3.

4.3 UM 11636-10 – The daughter and father

In UM 11636-10, a man and three of his five children applied for asylum in Sweden. The applicants were from Sudan, where the man's wife and two other children had remained behind. According to the application, they had fled Sudan to escape subjecting the eldest daughter to FGM. The applicants stated that the eldest daughter, who was at the time of application sixteen years old, had been pressured and eventually threatened by relatives and friends, to undergo FGM. The father had managed to protect her thus far, but now said that he found it impossible and was therefore seeking asylum. In the case it is extensively discussed whether or not the father has a continued ability to protect his daughter, and of parents' power in general to independently decide to not subject their daughters to FGM.¹⁰¹

4.3.1 The public/private

In this case, as in the case of the three sisters referenced above, the parents' ability to protect the daughter is one of the focal points of the assessment. The Migration Board motivates their decision to not grant refugee status by stating that the parents have a continued possibility to protect the daughters and there is therefore no well-founded fear of persecution.¹⁰² In the appeal of the case to the Migration Court, this is also the main issue discussed. The Migration Court finds that parents' ability to protect their daughters from FGM in Sudan is limited due to social structures and pressure from extended family and the rest of the community. They also state that a woman can be pressured to undergo FGM even as an adult.¹⁰³ Much like in the case of the three sisters, the Court places the family's ability to protect in a societal context, moving it into the public sphere at least in part. Despite this, the discussion never parts from the question of whether or not the parents can protect their daughter. The possibility of state protection is only mentioned briefly by the Court, by stating that FGM is not illegal in Sudan.¹⁰⁴ Other than the extensive discussion on family protection there is no sign of the public/private dichotomy affecting the assessment of the case.

4.3.2 Late claim

The applicants stated all of their claims and information about FGM in the beginning of the application process, so this aspect of the problem field was not tried in this case.

¹⁰¹ UM 11636-10.

¹⁰² Migration Board's Ruling, 2009-04-24, p. 5-6.

¹⁰³ UM 11636-10, p. 7: p. 10.

¹⁰⁴ UM 11636-10, p. 10.

4.3.3 Internal flight alternative

Internal flight alternatives are not discussed in the application to the Migration Board, since they find that there is no real risk of FGM to begin with.¹⁰⁵ In the Migration Court however IFA is brought up by both parties. The applicants state that there is no possibility for IFA seeing as FGM is practiced in all of Sudan. The Board however argues that if the pressure to undergo FGM is in fact from the clan, the family can flee this through IFA.¹⁰⁶ The Court finds that there is no IFA for the family. In this assessment they take into account that there is no realistic possibility for them to support themselves in another part of Sudan; but mainly they refer to the fact that FGM is legal, practiced in all of Sudan and there is no possibility for a woman to seek protection in any part of the country.¹⁰⁷ In discussing this they are seeing to the realistic possibilities of the girls (and their families) to flee within their country of origin, also considering their gender and social position.

4.3.4 Cultural relativism

There is no sign of a cultural relativism that renders FGM more acceptable than it otherwise would be. It is clearly stated that FGM is gender-related persecution and thus grounds for refugee status.

4.3.5 Consequences of FGM or of FGM refusal

The consequences of refusing FGM are somewhat discussed throughout the case. The daughter states that she has been condemned by her relatives and clan¹⁰⁸, and a number of times, a woman's possibility to marry despite refusal of FGM is brought up. The applicants state both to the Board and in the Migration Court that women in Sudan can be pressured to undergo FGM even as adults, particularly before marriage, and that those who choose not to can suffer by not being able to marry. The Board however, maintains that no adult women are forced to undergo FGM and that she has the option to marry a highly educated man, who are reportedly more likely to marry a woman who has not undergone FGM.¹⁰⁹ Through this discussion, which is lifted in both instances, some of the consequences of not undergoing FGM are recognized and addressed, and both the Board and Migration Court show gender sensitivity by recognizing the reality that Sudanese women live in.

¹⁰⁵ Migration Board's Ruling, 2009-04-24, pp. 5-6.

¹⁰⁶ UM 11636-10, pp. 7-8.

¹⁰⁷ UM 11636-10, p.11.

¹⁰⁸ Migration Board's Ruling, 2009-04-24, p. 2.

¹⁰⁹ Migration Board's Ruling, 2009-04-24, p. 5.

4.4 Summary

4.4.1 The public/private

The public/private dichotomy has been seen to have some effect on the assessment of the cases. The most important sign of this is the extensive discussion on the parents' ability to protect their daughters in two of the cases. Also, in one case the fact that the mother was a known objector to FGM failed to instigate a discussion of whether or not threats against her could be seen as persecution based on political opinion.

4.4.2 Late claims

The issue of late claims was only tried in one of the three cases. In this case we can witness that the lateness of the claim is noted but it is unclear how it has affected the assessment of the case, if at all. There is no explicit consideration taken to the applicant's gender in regards to late claims.

4.4.3 Internal flight alternative

IFA is discussed, at least briefly, in all three cases and the gender awareness of these discussions differ greatly between them. In one case (UM 11636-10) there is consideration taken the gender of the applicants. In another (MIG 2012:12) there is no explicit consideration taken. In the third case (UM 7247-07), consideration is taken but at a later part of the assessment. Instead of considering the gender of the applicants before concluding that there is an IFA, the consideration leads to the granting of residence permits on the basis of extraordinary reasons. In short, there are reasons to criticize the implementation of IFA from a gender perspective, but not in all of the examined cases.

4.4.4 Cultural relativism

Cultural relativism does not seem to affect the assessment in any of the three cases. Stating that FGM constitutes gender-related persecution and thus grounds for refugee status, is an uncomplicated and standardized conclusion.

4.4.5 Consequences of FGM or of FGM refusal

The consequences facing a woman who does not undergo FGM are only mentioned in one of the three cases. In the case where it is discussed, there is a gender sensitive reasoning about the girl's future possibility to marriage and a secure life. Two of the three cases feature mothers who have undergone FGM. There is no mention in either of these cases of the potential continued consequences of FGM that the women face and whether this could constitute grounds for persecution.

5 Conclusions

We have now examined and analyzed three cases based on five points of feminist critique. In the following, the findings will be discussed and conclusions drawn in order to answer the overarching question presented in the introduction: *Has the amendment of 2005 given increased gender equality in regards to granting refugee status based on FGM as gender-related persecution? Viewed from a critical gender perspective, what gender inequalities can still be seen in the assessment of asylum claims based on the risk of FGM?*

I have found, through analyzing the three cases, that the amendment has had positive effect on the ability to claim refugee status on grounds of risking FGM, since it eliminates any need to question whether or not the persecution falls under the refugee definition. Once the Board or Courts settle that there is a real and individualized risk of FGM, there is no need to further discuss the implication of this – it is simply stated in all of the examined cases that FGM is a form of gender-related persecution and thus grounds for refugee status. This eliminates any risk of *cultural relativism* impacting the decision-making process in a way that renders the practice even slightly acceptable and thus jeopardizes a woman's right to refugee status. In this sense, the amendment has clearly lived up to its ambition to eliminate gender inequalities.

However, the analysis of the cases at hand has shown that there is still reason to criticize and further develop the practical implementation of the refugee definition with regards to gender equality. Persecution by non-state actors is, as we have seen, grounds for refugee status, if there is an element of failure of state protection. In the cases that have been analyzed in this thesis, the failure of state protection has been discussed very briefly. The applicants all come from countries where there is little or no possibility to be aided by state actors, which of course impacts the discussion, but I find that it is still note-worthy how little attention has been put to this.

In judging whether the applicant suffers an individualized risk of FGM upon returning to her country of origin, all instances in all three cases have put much focus on one deciding factor – the families' ability to protect the applicant. This is seen as an important determinant in deciding if there is a well-founded fear. First, the risk is established, e.g. a grandmother who is persistent in her will for the granddaughter to undergo FGM. Secondly, the Court seeks to establish the parents' ability to protect the

daughter from this threat. This may seem a natural step to take, yet I argue that it is one that should be taken with caution. I find that the extent to which the parents' ability to protect is discussed, does not correspond to a reasonable discussion on the individualization of the applicant's risk. In the cases studied, the importance given to this element is not comparable to other factors that are considered in the individualization of risk. Instead, I argue that the discussion on family protection is in essence replacing the one on state protection. In many of the countries where FGM is commonly practiced, there is no state protection to speak of, instead the family or clan represents the person's security. This could be one reason that family protection is so extensively discussed, but in the light of feminist theory I argue that there is one more reason – *the dichotomy of the public and private*.

FGM is still seen by many as a private practice, and the responsibility to protect is then placed within the private sphere. Besides the need to show an individualized risk, there is however no criteria stated that the family must be unable to protect the victim in order for the person to be granted refuge status. As I have argued in the thesis, if the Board or Courts find a need to so extensively discuss the parents' ability to protect their daughter from FGM, it is likely that there is a real, individualized risk to protect her from. It is difficult to imagine the issue of family protection being raised to such an extent in relation to a case of political persecution of an adult male. This is one way that we can see that structural gender inequalities and the dichotomy of the public and the private prevail despite the addition of gender-related persecution as a separate category.

Another way in which the effect of the dichotomy has been observed, is the lack of discussion on objection toward FGM as political opinion. All three cases involve parents who have objected toward FGM, some very openly so. Yet this fails to instigate any form of discussion on the category of political opinion. One reason for this could be a lack of understanding that women's political activity is often displayed differently than men's, and more often within the private sphere.

Prevailing structural gender problems can also be seen in the analysis of the other points of critique. A gender sensitive assessment of *IFA* was only made in one of the cases. Also there was little, if any, sign of an assessment of the *consequences of FGM or its refusal* in any of them. Nor did the one case that contained the element of a *late claim* show signs of a gender aware assessment of this. These findings combined suggest a lack of understanding of women's particular situation and needs. I argue that it

shows that, although gender-related persecution has been added as a sixth category, there is still a lack of deeply-rooted understanding of how gender can impact asylum claims and how inequalities between men and women can be reduced.

To summarize, I find that the amendment has had a positive immediate effect by removing any doubt of whether FGM is in fact grounds for refugee status. This places little responsibility on the decision maker, and makes for a simple assessment where women are at a lesser risk of falling outside the refugee definition. Though the change that has been brought about by the amendment is imperative, it also seems to have a shallow effect on the underlying structural inequalities within the asylum system. As the analysis has shown, there is still a great need for heightened gender awareness in the decision making process, and are still reasons to criticize the assessment of FGM as grounds for refugee status from a gender perspective. This is particularly true in regards to the understanding of the public/private dichotomy.

This raises the question of whether or not including gender-related persecution as a sixth category is an effective way to achieve heightened gender equality. One could also argue, along the thoughts of Freedman, that the current solution breaks women off into a separate category, framing them as a minority and hindering the realization that other categories than that of gender-related persecution could encompass the claim. Based on this argument, one could find that heightened gender awareness in all areas of the assessment would be facilitated by not adding gender-related persecution as a separate category but rather ensuring a more gender aware assessment of the existing categories, placing more responsibility on the decision maker and perhaps addressing the underlying structures in a more profound way. This could lead to a more thorough restructuring of the system, but has the drawback of placing the assessment of gender-related claims in the hands of individual decision makers at the Migration Board, and thereby risking that women and girls who are now routinely granted refugee status due to gender-related persecution would then receive different outcomes.

This is an issue however that will be left for future research to examine. The conclusion of this thesis remains that the amendment has made it easier for many women to claim refugee status on the basis of risking FGM, but this improvement in gender awareness has been a shallow one, meaning that difficulties still remain for those who do not necessarily fall under the pre-defined category but rather are in need of an individual, gender sensitive assessment.

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