
Persecution on Account of One's Gender: Refugee Status or Status Quo?

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Introduction

The subject of this paper is women experiencing male partner violence and the determination of refugee status.¹ My central point of departure is the changes that were made in the new Swedish Aliens Act (SFS 2005:716) in 2006 concerning the definition of 'refugee'. The significance of these changes is that persons who have a well-founded fear of persecution on account of their gender or sexual orientation and who, according to previous legislation, were granted protection as 'persons otherwise in need of protection', are now regarded as refugees under the United Nations Refugee Convention.² The changes were made in the light of, *inter alia*, guidelines issued by the United Nations High Commissioner for Refugees (UNHCR). These guidelines were made in view of a longstanding recognition that women historically have been particularly disadvantaged by the Refugee Convention.³ Women have also been underrepresented for many years among refugees in Western countries of asylum. This is the case in Sweden,⁴ as well as in other 'developed countries'.⁵ The global picture seems to be that women are left behind in refugee camps, while men fight, are imprisoned, killed or flee

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² Convention relating to the Status of Refugees, Geneva, 28 July 1951, 189 UNTS 137.

³ UNHCR, 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, 7 May 2002, HCR/GIP/02/02, para. 5. See also Mascini, P., van Bochove, M., Gender Stereotyping in the Dutch Asylum Procedure: 'Independent' Men Versus 'Dependent' Women, 43 *International Migration Review* 2009, No. 1, pp. 112–133, on p. 113, with further references.

⁴ <http://www.migrationsverket.se/>, accessed 7 November 2011.

⁵ Bhabha, J., Demography and Rights: Women, Children and Access to Asylum, 16 *International Journal of Refugee Law* 2004, No. 2, pp. 227–243, on pp. 232 f.

to the West.⁶ The predominance of males among asylum seekers is, however, starting to change. According to the United Nations Population Fund (UNFPA) globalization has brought with it a 'feminization of migration',⁷ including an increase in the numbers of women seeking asylum independently of their families.⁸ The opinion that it is more difficult for women to be granted refugee status has, however, also been questioned in recent years. Statistics from a number of countries suggest rather that women are favoured in the determination of refugee status.⁹ In Sweden too, women are granted refugee status to a greater extent than men, according to statistics from the Swedish Migration Board. There may be 'valid' reasons for this difference. For instance, migration patterns where the man is seeking asylum alone and is followed by the rest of the family, may have an effect on statistics in a way that seems to favour women.¹⁰ According to studies from other countries, 'derivative persecution' of female asylum seekers on the basis of their family membership is more readily accepted by decision makers than direct persecution, where the claimant has to establish that she has suffered or fears persecution on a particular Convention ground.¹¹

⁶ See e.g. Mascini & van Bochove, 2009, p. 117; Kneebone, S., Women within the Refugee Construct: 'Exclusionary Inclusion' in Policy and Practice—The Australian Experience, 17 *International Journal of Refugee Law* 2005, No. 1, pp. 7–42, on p. 10; Bhabha, 2004, pp. 232 f., with further references.

⁷ The term 'feminization of migration' is misleading insofar as it suggests an absolute increase in the proportion of women migrants, when in fact by 1960 women already made up nearly 47% of all international migrants, a percentage that increased by only two points during the following four decades, to about 49% at present. The term, however, refers not only to the fact that more women are migrating, but that gendered migration patterns are changing and that more women are migrating independently in search of jobs, rather than as 'family dependents' traveling with their husbands or joining them abroad. See INSTRAW, Gender, Remittances and Development 2007, Feminization of Migration, p. 2, with further references, also available at <http://www.scribd.com/doc/50124576/UN-INSTRAW-2007-Feminization-of-Migration>, accessed 7 November 2011.

⁸ UNFPA, State of World Population 2006. A Passage to Hope, Women and International Migration, pp. 22 ff., also available at http://www.unfpa.org/swp/2006/pdf/en_sowp06.pdf, accessed 7 November 2011. Also, according to recent UNHCR statistics, available data suggest that women and girls constitute 47 per cent of refugees and asylum-seekers. See UNHCR, Global Trends 2010, 20 June 2011, p. 2, also available at <http://www.unhcr.org/4dfa11499.html>, accessed 7 November 2011.

⁹ Bhabha, 2004, pp. 231 and 236 f. See also Spijkerboer, T., *Gender and Refugee Status*, Ashgate 2002, p. 103 and Mascini & Bochove, 2009, p. 113, with further references.

¹⁰ Noll, G., Popovic, A., Flyktingstatus – en marginaliserad resurs i svensk asylrätt? [Refugee Status—a Marginalized Recourse in Swedish Asylum Law?], *Juridisk Tidskrift* 2005-06, pp. 834–865, on p. 852. According to a study of data from the Dutch INS, when controlling for such factors, men even had a slightly greater success rate than women, although this effect was not significant. However, this success rate only concerned the category of 'successful' asylum seekers. In the category of 'unsuccessful' asylum seekers, men still had a considerably smaller chance of obtaining a residence permit than women. Their findings suggest that men fit the image of a calculating, 'bogus' refugee in more respects while female asylum seekers more closely match the image of a 'victim of patriarchal domination'. Accordingly, 'gender biases' can also be detrimental to male applicants. See Mascini & van Bochove, 2009, particularly on pp. 119 and 127 f.

¹¹ Spijkerboer, T., Stereotyping and Acceleration. Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System, in Noll, G. (Ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Martinus Nijhoff Publishers, Leiden/Boston 2005, pp. 67–102, on p. 19.

Furthermore, it seems that married applicants can expect a higher likelihood of approval than singles.¹²

Available statistics in Sweden suggest that children are favoured in determining asylum, in comparison with adults. In contrast to the statistical analyses, Swedish qualitative studies, however, show that children are evidentially absent from investigations and decisions and that the asylum determination process in matters concerning families is primarily concerned with the father's grounds for seeking asylum.¹³ The qualitative studies that have been carried out to date concerning female asylum-seekers suggest that this is also the case when women seek asylum. Hence, in a press release attached to a report¹⁴ published by the Red Cross about the investigation and assessment of protection needs for women, it was noted that the study reveals 'gender biases', and that there is 'a big gap between the legislation and the reality that asylum-seeking women face today in Sweden' [my translation].¹⁵ Moreover, the Swedish Refugee Advice Centre issued a press release and also published an online debate article in connection with the publication of a handbook for a fair asylum determination process,¹⁶ which was precipitated by an examination of documents governing the process, concluding that gender equality does not seem to be favoured in the policy area of asylum,¹⁷ while it is a commonly observed feature in other policy areas.¹⁸ Similar observations have been made in a

¹² See Holzer, T., Schneider, G., Widmer, T., Discriminating Decentralization. Federalism and the Handling of Asylum Applications in Switzerland 1988-1996, 44 *Journal of Conflict Resolution* 2000, No. 2, pp. 250–276, on p. 269.

¹³ See Juhlén, K., *Barns egna asylskäl* [Children's Own Reasons for Asylum], Rädda barnen, Stockholm 2003, p. 19 and Nilsson, E., *Barn i rättens gränsland. Om barnperspektiv vid prövning om uppehållstillstånd* [Children in the Borderland of Law. On Child Perspectives in the Determination of Granting Residence Permits], Iustus Förlag, Uppsala 2007, p. 235. Concerning applications before the 2006 revision, see Bexelius, M., *Kvinnor på flykt – en analys av svensk asylpolitik ur ett genusperspektiv 1997-2000* [Women on the Run—An Analysis of the Swedish Asylum Policy from a Gender Perspective 1997-2000], Rådgivningsbyrån för asylsökande och flyktingar, Stockholm 2001.

¹⁴ Zamacona Aguirre, M., *Riktlinjer för utredning och bedömning av kvinnors skyddsbehov – Ett fungerande verktyg?* [Guidelines for the Investigation and Assessment of Women's Need for Protection—A Working Tool?], Svenska Röda Korset 2008.

¹⁵ Published 30 November 2008. Available at <http://www.redcross.se/pressrum/rapporter-och-dokument/?itemid=3168>, accessed 7 November 2011.

¹⁶ Bexelius, M., *Asylrätt, kön och politik. En handbok för jämställdhet och kvinnors rättigheter* [Asylum Law, Gender and Politics. A Handbook for Equality and Women's Rights], Rådgivningsbyrån för asylsökande och flyktingar, Stockholm 2008.

¹⁷ Bexelius, M., Sundquist, A., Kvinnors rättigheter är mänskliga rättigheter, *Dagens Arena* 19 March 2008.. See also http://sweref.org/kvinnor/ny_handbok_publicerad.aspx, accessed 7 November 2011.

¹⁸ As described by Yttergren, Å., in this issue, a commonly observed feature of Sweden is its high level of gender equality, which is correlated to its institutionalized welfare.

recent study published by the UNHCR.¹⁹ This critique raises questions about the basis of equality between women and men in the determination of refugee status in Sweden: what values, notions, assumptions or 'systems conditions' do the 2006 revision rest upon?

I have identified three parallel but sometimes conflicting trends within the area of Swedish migration law, each of which is characterized by recent change. The first trend emphasizes rule of law ideals and problems concerning the politicization of migration law. Change in this area is towards the 'juridification' of migration law. The new Swedish Aliens Act that came into force in 2006 can be viewed as an expression of such a change. It involves a change from matters being dealt with by administrative authorities and the Government to a system where appeals are tried in administrative courts. These changes were made in order to strengthen the 'rule of law', defined in the preparatory work as requiring 'uniformity' and 'predictability'.²⁰ The second trend is centered on 'the globalization threat' and the 'feminization of migration', which I have already mentioned. In this area we see further changes towards restrictive immigration and refugee policies. The third trend is based on the experiences of women who are excluded by bureaucratic and legal practices for determining refugee status. As I have already indicated, in this area we have recently seen a change towards greater inclusion, at least at the level of formal statements in the law. The net result of these changes is not a more inclusive attitude towards migrant women but, as I will argue, a highly restrictive system with an inbuilt structural discrimination against migrant women on the basis of gender, race and class.

The first three sections of this paper are structured around these 'movements'. The first section starts with an analysis of the general provisions governing the determination of refugee status and the changes that were introduced by the new act, as well as the 'special' traits of migration law. In the second section, these 'special traits' are considered in relation to the 'globalization threat': in this context we see a politicization of the process, rather than the 'rule of law'. These parts of the paper serve to locate the legislative changes concerning 'persecution on account of gender' in the overall context of migration law which is

¹⁹ Fejjen, L., Frennmark, E., *Kvalitet i svensk asylprövning. En studie av Migrationsverkets utredning av och beslut om internationellt skydd* [Quality in the Asylum Determination Process. A Study About the Migration Board's Investigations and Decisions on International Protection, UNHCR 2011, pp. 113 f. and 142 f.

²⁰ See Prop. 2004/05:170, *Ny instans- och processordning i utlännings- och medborgarskapsärenden* [Government's Proposal, New Order of Instance and Process in Aliens and Citizenship Matters], pp. 108 and 394.

considered in the third section. A more detailed account and critique of these changes is provided in the fourth section. Finally, in the last part of the paper, my conclusions are presented.

General provisions for determining status – the ‘special’ traits of migration law

In international legal doctrine it has been observed that migration laws are ‘special’ in many respects. According to Dauvergne they are typically marked by high degrees of discretion, maintaining a fixed and law-like appearance while being simultaneously infinitely malleable. She points out, however, that this is starting to change; migration laws are now being imbued with more of a ‘rule of law’ character.²¹ The new Swedish Aliens Act can be viewed as an expression of such a change. Yet, the Act is still marked by demands other than those usually required when providing for the ‘rule of law’. Hence, regarding the general provisions of the proceedings it can be noted first that the order of instance in migration matters differs from what is normal in administrative court proceedings in Sweden: in normal administrative matters the highest court is the Supreme Administrative Court, whereas in migration matters the highest court is one step lower – the Administrative Court of Appeal. In justifying this divergence the Government alleged that one aspect of the ‘rule of law’ in these matters is that it must not take too long for a decision to gain legal force, as there are serious consequences of long waiting times in the asylum process.²² Secondly, grounds for appeal are more limited than in the ordinary administrative process. The justification for this limitation, according to the Government, was the basic demand that the new order should deal with matters speedily.²³

Despite the introduction of new orders of instance and process, by which administrative authorities and the Government were replaced by a system where appeals are tried in administrative courts, the Government retains a considerable influence on applications. This is because of its powers to issue regulations: the constitution in the area of migration law

²¹ Dauvergne, C., *Making People Illegal. What Globalization Means for Migration and Law*, Cambridge University Press, Cambridge 2008, pp. 7 f.

²² Prop. 2004/05:170, p. 109.

²³ Prop. 2004/05:170, p. 132.

allows the Parliament to delegate competence to the Government in matters that ought otherwise to be regulated in legislation. This can also be understood in terms of the need for 'speed' and 'flexibility'; migration law being an area of law where it is assumed that the Government must have immediate control, because of the perceived threat of masses of asylum-seekers crossing our borders.²⁴

The technical formulation of the legislation can be said to be very much of a framework character, which means that it allows extensive scope for assessing the circumstances in each case. The Swedish Council of Legislation objected to this feature on the basis that several of the substantive rules needed to be further concretized in order to be applied by courts, to create conditions for a reasonably uniform and foreseeable application.²⁵ However, the Government was of the opinion that the substantive rules were 'sufficiently adjusted' to allow trial in courts. As justification for this, the Government stated that the intention of the investigation (on which the proposed bill was based) was that the 'rule of law', 'uniformity' and 'predictability', would be provided through the specifications that had been made concerning 'the most important basis' for forming a judgement.²⁶

Migration law can thus be understood as a particularly politicized area of law, because of the continuing interference by the Government as well as the technical formulation of the legislation and the emphasis on speed and flexibility. Even the 'rule of law', in this branch of law, is defined in such terms. Accordingly, the 'special' character of migration law implies demands different from those usually required when providing for the 'rule of law'; globalization and the threat of 'illegal' migrants seeking asylum being the key point, bringing with it restriction of refugee law while expanding refugee rhetoric.²⁷

²⁴ For similar observations in international doctrine, see Dauvergne, 2008, pp. 47 f. In the construction of asylum-seekers as a threat, there is also security concerns related to the events of September 11, 2001. See Dauvergne, C., Security and Migration Law in the Less Brave New World, 16 *Social & Legal Studies* 2007, No. 4, pp. 533–549, particularly on pp. 534 and 540 f., with further references. See also Goodwin-Gill, G. S., McAdam, J., *The Refugee in International Law*, Oxford University Press, New York 2007, p. 416.

²⁵ Lagrådets yttrande över lagrådsremiss den 17 mars 2005, Utdrag ur protokoll vid sammanträde 2005-05-09 [Council on Legislation, Opinion on Proposal Referred to the Council on Legislation for Consideration the 17th of March 2005, Transcript from Protocol at Session 090505], pp. 9 f.

²⁶ Prop. 2004/05:170, pp. 108 and 394.

²⁷ See also discussion by Dauvergne, 2008, pp. 5 and 49 f., particularly on pp. 50 f. and Dauvergne, C., Making People Illegal, in Fitzpatrick, P., Tuitt, P. (Eds.), *Critical Beings: Law, Nation and the Global Subject*, Ashgate, Aldershot 2004, pp. 83–99, particularly on p. 86.

Globalization

Turning to the second part of my analysis, increasingly restrictive immigration and refugee policies exist in parallel with the free flow of goods, labour, services and capital. As observed by de los Reyes and Mulinari, the exploitation of cheap labour, which has given rise to the very basis of consumption in the rich world, is no longer tied to specific locations, regions and countries. Moreover, globalization has increasingly come to promote political and economic elites, while unstable working conditions, supply difficulties and a fragmented life, become a reality not only for the poor populations on the periphery, but also for subordinate groups in the rich world. Accordingly, global processes cannot be separated from the concentration of material and symbolic resources in the western world, for it is this spatial redistribution of inequality that gives the nation's imagined community meaning. Perceptions of race fill an important role in re-creating boundaries between 'us' and 'them', that is, between those who belong to the nation and are entitled to claim the nation's prosperity and others belonging to other locations and who are, therefore, not entitled. These boundaries are even more important when 'the others' are no longer distanced in time and space, but force a reshuffle in the rich world's social landscape.²⁸

As noted by Dauvergne, the effect of globalization has been to shift the line between 'us' and 'them' to embrace a new 'us' and simultaneously redraw the boundaries of exclusion, such that: '[t]he seemingly simultaneous arrival of illegal migrants at borders around the world [...] fuels the moral panic: 'we' the rich are under siege'.²⁹ The intensification of border-control measures means that there are now greater incentives than ever to attempt to pass oneself off as a refugee seeking protection in a prosperous western state. Refugees and refugee law are therefore now located at the centre of concern about illegal migration.³⁰ In line with this, '[t]he burden-sharing imperative of refugee law casts refugees as the rich (white) man's burden for the twenty-first century'.³¹

²⁸ de los Reyes, P., Mulinari, D., *Intersektionalitet* [Intersectionality], Liber, Malmö 2005, in re-print 2010, pp. 19 f.

²⁹ Dauvergne, 2008, p. 49.

³⁰ Dauvergne, 2008, p. 54.

³¹ Dauvergne, 2008, p. 171.

The moral panic is also fuelled by the 'feminization of migration', which I described earlier. This is particularly the case in the face of the expanded role of international human rights. As Dauvergne argues, states now have greater incentives to narrow the scope of refugee law. The growth of human rights norms is therefore paradoxically linked to states pulling away from refugee law commitments.³² Together with the abovementioned critique this raises, however, the question of whether this politicized area of law is not also 'special' as regards the Swedish policy of gender equality.

Gender in the Swedish definition of refugee: the 2006 revision

Thirdly, it is important to look at changes which affect the way in which gender is dealt with specifically in the legislation and in practice. The Swedish definition of a refugee is set out in Chapter 4, Section 1 of the Aliens Act and is based on article 1A(2) of the 1951 Refugee Convention as amended by the 1967 Protocol.³³ However, after the revision in 2006 the definition, in contrast to the Convention, explicitly covers persecution on account of gender or sexual orientation.³⁴ This amendment was made in the light of the UNHCR guidelines, but it was also made in the light of the European Council Qualification Directive.³⁵ The UNCHR guidelines are, in comparison to the Directive, not legally binding.³⁶ The Commissioner's statements provide, however, legal interpretative guidance for interpretation of the

³² Dauvergne, 2008, pp. 60 f. and 166, particularly on pp. 62 and 64.

³³ Protocol Relating to the Status of Refugees, New York, 31 January 1967, 606 UNTS 267.

³⁴ Art. 1A(2) of the Convention, as amended by the 1967 Protocol, defines a 'refugee' as a person who '[...] 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 the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. [...]' Chapter 4, Section 1, first paragraph of the Aliens Act States that 'In this Act 'refugee' means an alien who is outside the country of the alien's nationality, because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group [...].'

³⁵ Council Directive 2004/83/EC of 29 April 2004 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 and the Content of the Protection Granted, OJ L 304, 30.9.2004 pp. 12–23.

³⁶ This Directive, applicable to nearly all EU Member States, calls for countries to comply by passing and enforcing domestic legislation by October 2006. As regards the implementation of the Directive into Swedish law, in addition to the aforementioned changes, further changes have been made, which came into force on 1 January 2010. See SFS 2009:1542 om ändring i utlänningslagen (2005:716) [Swedish Code of Statutes, Act Amending the Aliens Act (2005:716)].

Convention and Protocol.³⁷ They also form the basis in many states, including Sweden, for recognizing women as constituting a ‘particular social group’ which makes them important sources in any analysis of refugee status. Under UNCHR guidelines the category ‘membership of a particular social group’ cannot be so interpreted as to render the other Convention grounds superfluous or as a ‘catch all’ that applies to all persons fearing persecution. Thus, to preserve the structure and integrity of the Convention’s definition of a refugee, a social group cannot, according to the guidelines, be defined exclusively by the fact that it is targeted for persecution.³⁸ There is nevertheless no ‘closed list’ of what groups may constitute a particular social group. Rather, the term ‘membership of a particular social group’ should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.³⁹

In the last decade it has been more prevalent for some victims of domestic abuse to be recognized as Convention refugees on social group grounds. According to one line of reasoning recognition is restricted to those cases where the state fails to protect the victims of domestic assault because they are women. Another line of reasoning simply finds that women who are subjected to domestic violence are persecuted because of their social group (women), since their gender is a substantial factor for their persecution.⁴⁰ According to the UNHCR the causal link between the persecution and the grounds may be satisfied where there is a real risk of the person being persecuted at the hands of a non-state actor for reasons related to one of the Convention grounds. This is the case where the failure of the State to protect the claimant is Convention related, *or* where the risk of being persecuted at the hands of a non-

³⁷ <http://www.unhcr.se/en/resources/legal-documents/guidelines-and-positions.html>, accessed 7 November 2011. See also statements in the preamble to the Council Directive 2004/83/EC of 29 April 2004 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 and the Content of the Protection Granted, OJ L 304, 30.9.2004 pp. 12–23. In Sweden it is established in the preparatory work (Prop. 2004/05:170, p. 94) and in case law (MIG 2006:1) that the UNHCR handbook (Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Geneva, 1979, HCR/IP/4/Eng/REV.1, re-edited in 1992), together with the conclusions that the UNHCR supports, provide guidance for application.

³⁸ UNHCR, 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, 7 May 2002, HCR/GIP/02/01, para 2. About the relation between the category ‘membership of a particular social group’ and the other grounds in the Convention, see e. g. Macklin, A., Refugee Women and the Imperative of Categories, 17 *Human Rights Quarterly* 1995, No. 2, pp. 213–277, particularly on pp. 256–263.

³⁹ UNHCR, Guidelines on ‘Membership of a particular social group’, para 3.

⁴⁰ See Kelley, N., The Convention Refugee Definition and Gender-Based Persecution: A Decade’s Progress, 13 *International Journal of Refugee Law* 2002, No. 4, pp. 559–568, on p. 565, with further references.

state actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.⁴¹ Furthermore it is sufficient that the Convention ground is a relevant contributing factor. It need not be shown to be the sole, or dominant, cause.⁴²

When the definition in the Geneva Convention was implemented into the Swedish legislation it was emphasized that it is 'important that the refugee determination takes place in a generous spirit [my translation].'⁴³ It is, however, also emphasized in the preparatory work that we cannot apply the Convention in a way that, irrespective of the direction, would deviate from its applications in other countries; the work for harmonization within the European Union being particularly important.⁴⁴ The above-mentioned Qualification Directive sets minimum standards for refugee status and other forms of international protection for the European Union Member States. In some areas the Directive is close or identical to the Convention. In key areas, however, there is a tendency to add more detail, narrowing the interpretations of the refugee definition.⁴⁵ For example, the Directive, unlike the Refugee Convention, defines persecution and it also explicitly recognizes gender-specific forms of persecution, including sexual violence (Article 9).

Furthermore, the Directive provides a definition of 'a particular social group' (Article 10). It states that persons shall be considered to form a particular social group where members of that group share an innate characteristic, a common background that cannot be changed, or a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that the group has a distinct identity in the relevant country

⁴¹ UNHCR, Guidelines on 'Membership of a particular social group', para. 23 and UNHCR, Guidelines on Gender-Related Persecution, para. 21. According to Edwards the responsiveness of the State in providing protection should increase in direct proportion to the vulnerability of the particular individual. If the State would take concrete action in the case of a child or a woman beaten in the street by a stranger, but does not do so in relation to a child or woman subjected to violence at home, it could be determined that the State has withheld protection from those citizens. According to her the public/private dichotomy is never more pronounced than in these types of cases and is often reflected in the level of protection available to such individuals. See Edwards, A., Age and Gender Dimensions in International Refugee Law, in Feller, E., Türk, V., Nicholson, F. (Eds.), *Refugee Protection in International Law*, UNHCR's Global Consultations on International Protection, Cambridge University Press, Cambridge 2003, pp. 46–80, on p. 65.

⁴² See UNHCR, Guidelines on Gender-Related Persecution, para. 20.

⁴³ Prop. 1979/80:96 med förslag till ny utlänningslag, m.m. [Government's Proposal for a New Aliens Act etc.], p. 42.

⁴⁴ Prop. 1996/97:25, *Svensk migrationspolitik i globalt perspektiv*. [Government's proposal, Swedish Migration Policy in Global Perspective], pp. 96 f. and reference to the statement in Prop. 2004/05:170, p. 172.

⁴⁵ See also Dauvergne, 2008, pp. 149 f.

because it is perceived as being different by the surrounding society. Depending on the circumstances in the country of origin, a particular social group might be based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with the national law of the Member States. Gender-related aspects might be considered, without themselves alone creating a presumption for the applicability of the Article. The Directive has also taken a ‘protection’ position on non-state actors (Article 6). In other words, actors perpetrating persecution or serious harm include (a) the State, (b) parties or organisations controlling the State or a substantial part of the territory of the State and non-State actors, if it can be demonstrated that these actors (a and b), including international organisations, are unable or unwilling to provide protection. Protection is ‘generally provided’ when these actors ‘take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.’ (Article 7) However, as international organisations do not have the attributes of a State, in practice their ability to enforce the ‘rule of law’ is often very problematic. Hence the position taken in the Directive is more restrictive than the UNHCR position, and has therefore been criticized.⁴⁶

As already pointed out, after the revision in 2006 the definition of refugee in the Swedish Aliens Act explicitly covers persecution on account of one’s gender.⁴⁷ In the Government bill it was also established that gender may constitute ‘membership of a particular social group’. Furthermore, it was pointed out that persecution in the private sphere may be a basis for refugee status. According to the Government, in such cases it is important to consider the social structure in the home land and the home state’s willingness and ability to offer protection. A person who risks being exposed to persecution by individuals on grounds of gender, may in some cases be denied protection in their home country because of the prevailing political, social, religious or cultural structures. If the authorities do not offer any

⁴⁶ See Crawley, H., Lester, T., *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, United Nations High Commissioner for Refugees Evaluation and Policy Analysis Unit, Department of International Protection, and Regional Bureau for Europe, EPAU/2004/05 May 2004, pp. 59 f., with further references.

⁴⁷ In the Act, the term ‘sex’ is used, referring to biological as well as social sex. See Prop. 2005/06:6, *Flyktingskap och förföljelse på grund av kön eller sexuell läggning* [Government’s Proposal, Refugee Status and Persecution on Account of One’s Gender or Sexual Orientation], p. 34. In the English translation of the Swedish Act the term ‘sex’ is translated with ‘gender’. See Chapter 4, Section 1 of the Aliens Act.

protection and in reality accept the abuse, the woman has no possibility to obtain state protection and in such cases she may be regarded as a refugee. Similarly, in some cultures the man's right to exercise power over the woman is an uncontested and fundamental part of the social structure, meaning that it is impossible for women to get state protection from violence, restrictions on freedom, or honour related reprisals from the men in the family circle.⁴⁸ In the investigation that the Government bill is based on there is also a discussion about 'wife-battering', where it is declared that there may be many reasons for a woman to be exposed to serious battering; for instance because she has been unfaithful, or accused of being unfaithful – the primary cause or driving force normally being seen to be jealousy. According to the investigation, it would be far-fetched to say that the action of the man in these cases is due to her 'membership of a particular social group'. At the same time it was observed in a note that in the example given only women are referred to, as 'in accusations about unfaithfulness as a rule it is women who risk being exposed to persecution' [my translation].⁴⁹ Hence, abuse that women are exposed to in the private sphere is construed as something that is primarily linked to jealousy. Furthermore, it is clear from the preparatory work that in these cases it is also required that the home state's inability to supply protection is not due simply to lack of resources or inefficiency.⁵⁰ This statement in the preparatory work has later been referred to in case law concerning a woman from Albania who had been exposed to violence by her former husband.⁵¹ She had turned to the police but got no help and sought asylum because she was in danger of being killed by her own and her former husband's family. In this case, persecution sufficient to ground refugee status was considered to be in place, as 'the authorities' unwillingness to give her protection was due to social and cultural structures and the fact that she was a woman' [my translation]. This is, however, not something that is required in non-gender-related cases when persecution is exercised by private actors.⁵² Unlike the position in the UNHCR guidelines, it is thus not enough in

⁴⁸ Prop. 2005/06:6, pp. 25 f.

⁴⁹ SOU 2004:32, *Flyktingskap och könsrelaterad förföljelse* [Government Commission, Refugee Status and Persecution on Account of One's Gender], p. 126.

⁵⁰ Prop. 2005/06:6, p. 28. The Government's opinion was shared by the Committee on Social Insurance. See Bet. 2005/06:SfU4, *Förföljelse på grund av kön eller sexuell läggning* [Committee on Social Insurance, Persecution on Account of One's Gender or Sexual Orientation], p. 14.

⁵¹ MIG 2008:39.

⁵² It may be noted that Lars Ohly et al. in a proposal tabled in Parliament (a 'private member's bill'), motion Sf1 yrkande 7, asked for a notification that persecution in the private sphere as grounds for refugee status should be handled in accordance with international refugee law and that, in cases involving persecution by e.g. a husband which are related to one of the Convention grounds, it should not matter whether or not the failure of the State to protect the claimant is Convention-related, as referred to in Bet. 2005/06:SfU4.

Swedish law for a woman to be exposed to persecution in the private sphere ‘on account of gender’. There is also a requirement that the state’s failure to supply protection is ‘on account of gender’. Accordingly, Sweden embraces the more restrictive line of reasoning described earlier, among those states that recognize victims of domestic abuse as refugees on social group grounds.

Implementing a gender (and gendered) perspective (marked by racism?)

As already described, as a result of the 2006 revision, the Swedish Aliens Act explicitly covers persecution on account of one’s gender. It was also established in the preparatory work that gender may constitute ‘membership of a particular social group’ and that persecution in the private sphere may be a basis for refugee status. In the investigation that the Government bill is based on, however, abuse that women are exposed to in the private sphere is construed as something that is primarily concerned with infidelity and jealousy (cf ‘*crime passionnel*’). According to the investigation, it would be far-fetched to say that the man’s actions in cases of accusations of infidelity are due to the woman’s ‘membership of a particular social group’. It is possibly far-fetched to say that the jealousy in these cases is due to her ‘membership of a particular social group’, but I am not convinced that the action of the man in such cases, i.e. the expressions that the jealousy takes or is ‘allowed’ to take (actions available in the situated emotional repertoire), is not due to her ‘membership of a particular (subordinate) social group’. For, if one assumes (which the investigation does) that it is mainly women who are exposed to such persecution, why then is it men who do the hitting? Do women not get jealous? If not, is that related to gender? And, if they do get jealous, why do they not hit ‘because of’ it? What is more, if we acknowledge feelings—or the expressions they take or are allowed to take (violence) – to be gendered, how can we even differentiate between gender (ground) and violence (persecution)? There is no analysis of this in the investigation. Yet, the structural abuse of which this persecution is an expression is construed as emotional, as individual actions taken for personal reasons, just because it is manifested in a family context.

The point of departure is obvious: the power structures that are acknowledged elsewhere in society are not applicable to relations within the family in this branch of law.⁵³ Accordingly, a woman who risks abuse from her husband or partner may be excluded from refugee status as the persecution that she risks is not defined as being based on 'membership of a particular social group'. Paradoxically, upholding the law's separation between the subject and the persecution in this case means 'personalizing' the violence. An analysis of the preparatory work thus reveals that the gender perspective implemented in the legislation is also a 'gender biased' perspective. Hence, the perspective contained in the act not only preserves the 'structure and integrity' of the Convention (the ground/persecution divide), but also the power structures in society.⁵⁴ Accordingly, construing 'violence in the private sphere' as emotional, as individual actions for personal reasons, also means construing it as a 'social problem', placing not only the responsibility for the protection but also the abuse, on 'the others'.⁵⁵ The consequence of this construction in law is that many of these women will be without protection, since in their home country they are often assigned to their violent men for their support and 'protection'.⁵⁶ According to the UNHCR, many of these women may also be threatened by their own family if they attempt to leave their husband or partner, as it may be perceived as 'dishonouring' the family.⁵⁷ In this case, however, when the violence is defined as 'honour related' or when it appears in a 'patriarchal society', it is more likely that

⁵³ Nilsson, 2007, p. 157 and Bexelius, 2001, particularly on p. 186. See also discussion by Spijkerboer, 2005, pp. 67–102, particularly on pp. 69, 79 f. and 88. For an analysis of the private/public distinction within international refugee law, see Crawley, H., *Refugees and Gender—Law and Process*, Jordans, Bristol 2001, pp. 18 f. See also discussion by Kneebone, 2005, particularly on p. 31 f. and 37 f., and Heyman, M. G., *Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations*, 17 *International Journal of Refugee Law* 2005, No. 4, pp. 729–748.

⁵⁴ For further analysis see forthcoming article, Nilsson, E., The 'Refugee' and the 'Nexus' Requirement. The Relation Between the Subject and the Persecution in the United Nations Refugee Convention, *Women's Studies International Forum* (to be published in 2013). See also discussion about cause/reason and 'men doing jealousy' by Burman, M., *Immigrant Women Facing Male Partner Violence—Gender, Race and Power in Swedish Alien and Criminal Law*, in same issue.

⁵⁵ In Sweden, an alien who does not meet the criteria for refugee status can also be granted protection as a 'person eligible for subsidiary protection' [alternativt skyddsbehövande], in accordance with Council Directive 2004/83/EC, or according to a wider national definition, as a 'person otherwise in need of protection' [övrig skyddsbehövande]. Furthermore, a residence permit can be granted on the grounds of 'exceptionally distressing circumstances' [synnerligen ömmande omständigheter]. According to MIG 2008:13, however, social problems, as a rule, should be solved in consultation with the authorities in the home country and not, as a principle, be determined as 'exceptionally distressing circumstances'.

⁵⁶ See also Jastram, K., Newland, K., *Family Unity and Refugee Protection*, in Feller, E., Türk, V., Nicholson, F. (Eds.), *Refugee Protection in International Law*, UNHCR's Global Consultations on International Protection, Cambridge University Press, Cambridge 2003, pp. 555–603, on pp. 559 f.

⁵⁷ UNHCR, *Handbook for the Protection of Women and Girls*, Geneva 2008, p. 155.

the violence will be considered gender-related and will provide favoured access to asylum.⁵⁸ This is also the case when female genital mutilation is involved.⁵⁹ When the persecution is familiar to our own 'gendered practices', or when the 'gendered practices' are otherwise considered too 'general', it is not so likely.⁶⁰ Instead, as pointed out by Freedman, the persecutions that take place in those 'other' countries are attributed to immutable social and cultural characteristics, while the dynamics of gender inequality underlying all types of gender-related violence, whether 'here' or 'there', is not analysed.⁶¹ Rather, 'personalizing' the violence in this case means 'particularizing' it, but also 'culturalizing' it (and 'racifying' it as immutable), not identifying it as a 'universal' pattern of domination and control.⁶² The contrast between 'us' and 'them' is therefore reinforced by the fact that the other culture is understood as bearing the imprint of patriarchal oppression while our own is understood as equal, i.e. perceptions of Swedish gender equality are used to draw a line between ourselves and the immigrant population where the difference between 'us' and 'them' is created with

⁵⁸ See Prop. 2005/06:6, p. 28; MIG 2008:39; MIG 2011:8. For similar conclusions in international doctrine, see e.g. Mascini & van Bochove, 2009, p. 130; Kneebone, 2005, pp. 37 and 41; Spijkerboer, 2002, p. 105.

Furthermore, it has been demonstrated that a refugee woman's claim is most likely to succeed if it is a 'good woman' claim. See Spijkerboer, 2002, p. 103.

⁵⁹ See Prop. 2005/06:6, p. 28 and guiding decision by the Swedish Migration Board, 2008-10-24, Lifos No. 19649. FGM enters clearly into the category of a 'good woman' claim described in note 61, above, as it involves 'vulnerable' and 'innocent' victims. This is particularly the case when the victims are young girls. See also discussion by Freedman, J., Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection?, 48 *International Migration* 2010, No. 1, pp. 175-198, on p. 190.

⁶⁰ See Nilsson, 2007, p. 161.

⁶¹ Freedman, 2010, p. 191. See also discussion by Mascini & van Bochove, 2009, p. 130. According to the authors the smaller success rate of men has not provoked action so far because it 'offers policy-makers, interest groups, and social scientists fewer opportunities to exemplify the moral superiority of the West in regards to the South, than when it concerns the patriarchal domination of women'.

⁶² I use the word 'universal' to capture 'discursive structures' and 'hegemony', i.e. I lay no claim to 'universalism'. Instead I believe time and place are central categories in analysing and 'denaturalizing' socially and historically created inequalities, such as men's violence against women. See de los Reyes, P., Gröndahl, S., Introduction: Framtidens feminismer: Vägar bortom törnrosalandet [Introduction: Future Feminisms: Roads Beyond the Land of the Sleeping Beauty], in de Los Reyes, P., Gröndahl, S., Laskar, P., Martinsson, L., Rosenberg, T. (Eds.), *Framtidens feminismer. Intersektionella interventioner i den feministiska debatten* [Future Feminisms. Intersectional Interventions in the Feminist Debate], Tankekraft Förlag, Hägersten 2007, pp. 11–22, particularly on pp. 14, and de Los Reyes, P., Rosengård är min Shatila!: Hegemoniska berättelser och gränsöverskridande erfarenheter [Rosengård is my Shatila!: Hegemonic Narratives and Transnational Experiences], in de Los Reyes, P., Gröndahl, S., Laskar, P., Martinsson, L., Rosenberg, T. (Eds.), *Framtidens feminismer. Intersektionella interventioner i den feministiska debatten* [Future Feminisms. Intersectional Interventions in the Feminist Debate], Tankekraft Förlag, Hägersten 2007, pp. 101–115, on pp. 101 f. See also Mouffe, C., *On the Political*, Routledge, New York 2005, particularly on pp. 83 f. and 120 f. For a discussion of challenges that an intersectional analysis grounded in a structural framework provides for understanding the role of culture in domestic violence, see Sokoloff, N. J., Dupont, I., Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalised Women in Diverse Communities, 11 *Violence Against Women* 2005, No. 1, pp. 38–64, particularly on p. 58.

reference to equality versus oppression of women.⁶³ As shown, this 'culturalization' in the 2006 revision of the Aliens Act, through its construction of the abuse as emotional, also means ascribing 'the others' gendered (immutable and race-related) attributes (feelings), i.e. construing them as inferior, irrational and uncivilized.⁶⁴ Hence, gender and race 'intersect' in the construction of 'the others'.⁶⁵

As has been shown, women who risk abuse from their husbands or partners may be excluded from refugee status as the persecution that they risk is not defined as being based on 'membership of a particular social group' (not because she is a woman). Should the abuse nevertheless be defined as being 'on account of gender', it is also required that the state's inability to supply protection is 'on account of gender'. It is, in other words, required in Swedish law that the persecution is publicly sanctioned, a kind of 'institutionalized violence'. Ironically this demand means that these women are exposed by the Swedish migration authorities to such 'institutionalized violence' 'on account of gender' that would have been a basis for refugee status if it had been the authorities in their homeland that had exposed them to it. It also constitutes an exception to the 'rule of law' principle, defined as 'uniformity' and 'predictability', as it implies 'inequality before the law' for women seeking refugee status. In other words, women from countries that lack resources or countries with an inefficient state administration are discriminated against by this requirement in comparison to male victims of persecution. For according to the preparatory work it is mainly women – though not because they are women – that risk this kind of persecution.

⁶³ de los Reyes, P., Molina, I., Kalla mörkret natt! Kön, klass, och ras/etnicitet i det postkoloniala Sverige [Call the Dark Night! Gender, Class and Race/Etnicity in the Postcolonial Sweden], in de los Reyes, P., Molina, I., Mulinari, D. (Eds.), *Maktens (o)lika förklädnader. Kön, klass och etnicitet i det postkoloniala Sverige: en festschrift till Wuokko Knocke 2002* [Power's (Un)equal Disguises. Gender, Class and Ethnicity in the Postcolonial Sweden: a Festschrift to Wuokko Knocke 2002], Bokförlaget Atlas, Stockholm 2006, pp. 303 f.

⁶⁴ For an analysis of how gender ideologies and discourses imbue colonial structures, metaphors and symbolism, see de los Reyes & Mulinari 2005, in re-print 2010, p. 68.

⁶⁵ This term, introduced by Kimberlé Crenshaw and used in several UN documents related to women's human rights, focuses on the interaction between different power structures. See Crenshaw, K. W., Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, *University of Chicago Legal Forum* 1989, pp. 139–167, on p. 140. See also Crenshaw, K. W., Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color, 43 *Stanford Law Review* 1991, No. 6, pp. 1241–1299. For more recent international literature on 'intersectionality', see e.g. Lutz, H., Herrera Vivar, M. T., Supik, L. (Eds.), *Framing Intersectionality. Debates on a Multi-Faceted Concept in Gender Studies*, Ashgate, Surrey 2011; Grabham, E., Cooper, D., Krishnadas, J., Herman, D. (Eds.), *Intersectionality and Beyond: Law, Power and the Politics of Location*, Routledge-Cavendish, New York 2009; Yuval-Davis, N., Intersectionality and Feminist Politics, 13 *European Journal of Women's Studies* 2006, No. 3, pp. 193–209; McCall, L., The Complexity of Intersectionality, 30 *Signs: Journal of Women in Culture and Society* 2005, No. 3, pp. 1771–1800.

Final remarks

The preparatory work for the changes made in the Swedish Aliens Act in 2006 concerning the definition of refugee was driven by a wish to implement a gender perspective. Yet, as I have argued, a closer reading of the preparatory work reveals ‘gender biases’, with many asylum-seeking women being discriminated against in comparison to male victims of persecution. The reason for this is that the ‘special’ character of migration law rests upon demands other than those usually required by the ‘rule of law’. As described, in this area of law, the ‘rule of law’ is transformed into ‘speed’ and ‘flexibility’, while ‘uniformity’ and ‘predictability’ – at least when it comes to women from countries that lack resources or countries with an inefficient state administration – is retained as rhetoric.

Furthermore, it appears that the gender perspective implemented in the act is also marked by ‘othering mechanisms’ and underlying racism, and it seems it is this racist notion of ‘the others’ that is the reason for the limitations in the Act; the risk of having the entire world’s oppressed (‘non-white’ and poor) women (and children too for that matter) on ‘our threshold’.⁶⁶ As a result, in this branch of law, domestic violence as a ‘universal’ pattern of domination and control is not acknowledged. Instead the violence is construed as ‘private’ or ‘cultural’, employed to exclude protection. When the persecution is familiar to our own ‘gendered practices’ or when they are otherwise considered too ‘general’, there is a denial of the link between the persecution and the ground for seeking refugee status. However, if the ‘othering mechanisms’ are strong enough, the violence may qualify as being ‘on account of gender’. Hence, sometimes the ‘cultural’ harm is translated into the ‘public’ sphere of protection of the Refugee Convention. This is e.g. the case when women (or children) are exposed to ‘honour related’ violence or violence appearing in a ‘patriarchal society’ or when the application is based on the excision of female genital mutilation. So, in order to be considered ‘structural’, the violence must not be ‘familiar’ or ‘general’, but ‘other’.

⁶⁶ See also discussion by Burman, M., in this issue.

Accordingly, in these cases, the effect of 'culturalization' is also a trend to 'exclusionary inclusion'.⁶⁷

With the exception of this 'exclusionary inclusion', 'ongoing exclusion' is the key word for women in this branch of law. Hence, in migration law ideology the law's demand for (formal) 'equality before the law', 'uniformity' and 'predictability' has meant the implementation of new perspectives, while staying with the old assumptions and values; taking male experiences as a starting point, privileging the public, excluding the private, i.e. an 'add and stir' approach.⁶⁸ Should the abuse be defined as structural ('on account of gender'), then it is, however, also required that the state's inability to supply protection is 'on account of gender'. With or without the 'rule of law', it seems gender equality is not a favoured issue. Accordingly, under the threat of masses of asylum-seekers crossing our borders, there are very limited possibilities for taking gender into account, as globalization and the feminization of asylum-seekers increases this threat. It is particularly the case if 'we' revise our self-image as a good and equality producing state and acknowledge that it is not only 'the other' women (and children) that are being oppressed. Holding on to international refugee law may from this perspective seem impossible, applying it in a 'generous spirit' even less possible. Taking the human rights of these women seriously in our own 'non-refugee producing states' may, however, work as an incentive for 'us' to also seriously commit to the development of welfare and human rights in 'refugee-producing states'; making these women a responsibility not only of the 'others' but of ourselves.⁶⁹ There are therefore reasons for problematizing time and the role of history when it comes to the creation of meaning and legitimacy in an unfair world order. A discourse which displaces the issue onto other times and places has been conducive to hiding the way living conditions for 'the others' in the poor world have been a precondition for the welfare of 'us' in the rich

⁶⁷ See also analysis of the Australian law and policy by Kneebone, 2005, pp. 8, 22 f. and 40.

⁶⁸ The expression 'add women and stir' is used by Charlesworth and Chinkin concerning the development of international criminal law in the 1990s. See Charlesworth, H., Chinkin, C., *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, Manchester 2000, p. 335.

⁶⁹ See also description by Yttergren, Å., in this issue, about the two principles that are central to development assistance in Sweden: a poor people's perspective and a human rights perspective.

world.⁷⁰ Building welfare for the ‘rich (white) man’, casts a burden on the ‘poor (black) woman’. It is pay-back time.

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⁷⁰ de los Reyes & Mulinari, 2005, in re-print 2010, p. 76. Migrants also contribute to our welfare, too often, however, in terms of ‘brain-draining’ or ‘social dumping’. Migrant women e.g. are often recruited into ‘women-specific’ jobs that are unprotected and low paid. See discussion by Jean d’Cunha at <http://www.saynotoviolence.org/around-world/news/five-questions-jean-d-cunha>, accessed 7 November 2011, and de los Reyes & Mulinari, 2005, in re-print 2010, on p. 85 and 102 f. See also Calleman, C., Domestic Services in a ‘Land of Equality’—The Case of Sweden, 23 *Canadian Journal of Women and the Law* 2011, No. 1, pp. 121–139.

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