

**This is the original English version of the paper which was translated into Japanese for publication of *Nanmin Kenkyu Journal* [*Refugee Studies Journal*] Vol. 2.**

## **Persecution and Protection: Gender and Asylum in the European Union<sup>1</sup>**

**Jane Freedman / Paris 8 University, UNESCO**

Whilst the issues of gender-related persecution and violence have been placed on the international agenda through the lobbying activities of transnational feminist networks, and whilst the need to offer international protection to victims of this type of persecution has been acknowledged by both national and international political authorities, it can be argued that this protection is still not effectively available. We will focus on the asylum process within the European Union and will argue that the securitisation of immigration and asylum policies has contributed to weakening protection for those seeking asylum on the basis of gender-related persecutions. Increasingly women seeking asylum have been forced to present themselves as idealised “victims” of “barbaric” other cultures in order to have any chance of receiving protection under refugee regimes.

As Europe seeks to “secure” its borders and control migration, asylum seekers have been perceived as a threat to this “security”. Widespread perceptions that Europe is being ‘flooded’ with asylum seekers, many of whom are not in fact genuine asylum seekers but economic migrants and beliefs concerning the supposed costs associated with the reception of asylum seekers, have mobilised support for more restrictive policies on the part of EU states. The overall “securitisation” of immigration as an issue in the EU has resulted in a situation in which the claims to secure Europe’s borders clearly take precedence over the competing security claims of women and men seeking refugee protection. The persecution

and insecurities faced by women seeking asylum are often ignored because their voices remain unheard in the dominant discourses concerning immigration and asylum. Moreover, in order to have their security claims heard women have to fit representations of “victimhood” which ignore their agency and political activities.

For a long time, any consideration of gender issues was absent from discourses and debate on refugees and asylum. It can be argued that the 1951 Convention, like other international human rights conventions, was written from a male perspective and that the situations and interests of women were ignored. Thus violations and persecutions pertinent primarily to women are often left out of the spectrum of those that are considered valid as reasons for granting refugee status. The difficulties in integrating a gendered perspective into asylum policies can be observed at the level of national asylum policies and practices within industrialised states such as the US and Europe. Although the UNHCR has produced a range of guidelines to detail ways in which states should take gender into account in asylum and refugee policies<sup>2</sup>, these have only been transferred into national policy making in a patchy manner, and there is still resistance to the recognition of gender-related persecution as grounds for granting refugee status. This resistance can be attributed both to a failure to acknowledge that gender-related persecution, and women’s activities are “political”, and also to underlying discourses which represent asylum seekers as a “threat” to national security of states.

One of the major difficulties in assessing the situation of women refugees and asylum seekers in Europe is the lack of accurate gender disaggregated statistics. Where gender-disaggregated statistics are available they indicate that women make up only about of a third of the total of asylum claimants within the EU<sup>3</sup>, indicating that even in the processes necessary to reach Europe and make a claim for asylum, women face different obstacles and

choices from men. Women who have been the victims of persecution may face particular social and economic constraints which make it more difficult in many circumstances to leave their countries and travel to Europe to claim asylum. Women often have primary responsibility for the care of children which makes the journey more difficult. In addition, economic inequalities mean that women often may not have the necessary financial resources to undertake such a journey. And as the EU takes stronger and stronger measures to “secure” its borders, it is more likely that asylum seekers will need to enlist the help of smugglers to help them enter Europe, and the high cost of this may well be beyond many women’s reach. Smugglers have also been identified as one of the primary sources of violence, and in particular sexual violence, against women migrants<sup>4</sup>.

The fact that fewer women than men claim asylum in Europe should not lead to the conclusion that women are less persecuted than men. However, the forms that this persecution takes, and the causes of it, may lead to it not always being recognised as such. Women may be persecuted for being members of political organisations, being activists or organisers. However they may also be persecuted for less overtly ‘political’ activities, such as sheltering people, providing food or medical care. Finally, women are likely to become victims of persecution when they do not conform to religious or social norms – if they do not adhere to dress codes, if they do not agree to marry, if they have sexual relations outside of marriage, if they will not agree to practices such as female genital mutilation. All of these forms of behaviour may lead to a woman suffering from persecution in their own countries, the difficulty is that in many European countries, these gender-related forms of persecution are not recognised by the authorities.

One of the major effects of the transposition of liberal definitions of human rights into the interpretation of the Refugee Convention been to reinforce the division between public and private found in much of liberal rights discourse. Whilst demands from women's movements that the scope of rights be extended to include issues like violence against women has led to a re-framing and re-development of the criteria for advancing women's rights across a number of spheres<sup>5</sup>, this issue of the demarcation of public from private still remains. The underlying assumption of the public-private division undermines refugee law and practice by creating situations within much of what women do and what is done to them may be seen as irrelevant to refugee and asylum law. The threat of forced marriage, or of female genital mutilation, for example, may be considered as threats of a "private" nature as they take place within the sphere of the family or home, and therefore it may be considered that they do not come under the scope of the Convention. Similarly forms of persecution related to women's 'private' behavior – for example their refusal to adhere to certain dress codes - , or to violence that takes place within the 'private' sphere of the family – violence committed by a husband, father or another family member - , may not be recognised as grounds for the granting of refugee status.

This public-private division might be argued to be particularly acute in cases of domestic violence which is a type of violence often dismissed as "irrelevant" to asylum claims, even when the women who experience this type of violence can expect no help or protection from the police or state authorities in their country of origin. Because this type of violence takes place within the family, and is indeed perpetrated by family members, it is somehow perceived as less severe than other types of violence which are experienced in the public sphere<sup>6</sup>. A woman who is severely beaten by her husband or father can thus expect less recognition from immigration officials and judges than one who is beaten by the police in her country of origin.

Similarly, sexual violence and rape may not be considered on the same level as other types of violence as they are deemed “personal” or “private”, a result of “private feelings of lust or desire, and not a form of persecution or torture. Rape and sexual violence are often effectively normalized, and considered as part of the universal relations between men and women. This normalization or relegation of rape to a “private” affair between individuals means that it might not be taken seriously when women make claims for asylum. Although many studies have pointed to the extensive use of sexual violence against women, particularly in conflict situations<sup>7</sup>, this type of violence is still not always recognised as a form of “persecution” that can justify the granting of refugee status. It is estimated that over 50 per cent of refugee women have been raped<sup>8</sup>. Sexual violence may be an explicit tool of political oppression, or may be part of generalised violence in situations of civil war. Its effects on women are both physical and psychological harm. Women who have experienced such violence may also be rejected by their communities and their families as they are perceived to have dishonoured them by engaging in sexual intercourse even if this was forced. However, despite the prevalence of rape and sexual violence and the clear harmful effects on women, often it is not recognised as a form of ‘serious harm’ under the terms of the Refugee Convention<sup>9</sup>

In Germany, for example, women have been refused asylum on the grounds of rape during times of ethnic conflict, because ‘widespread rape by hostile militia has been dismissed as the common fate of women caught in a war zone and not recognised as persecution’<sup>10</sup>. A report by the Black Women’s Rape Action Project and Women Against Rape in the UK describes a similar phenomenon. The report provides an example of a Ugandan woman who was raped by soldiers during an interrogation about her alleged support for rebels in the country. The Asylum Appeal Adjudicator rejected her claim, dismissing the rape as an act of “sexual gratification” and not persecution under the terms of the Refugee

Convention. This judgment was upheld in the High Court where the judges argued that the woman was not a victim of persecution but merely of “dreadful lust”<sup>11</sup>.

The underlying presence of this public-private division also has an impact on the way that what is “political” is defined, and this in turn means that women’s activities may not be considered as “political” in the same way as men’s and that their asylum claims will be denied for this reason. The gendered division of labour and gendered roles adopted within most cultures and most societies, mean that women’s activities within any given society will often be different from those of men. They may indeed participate more “indirectly” in political activity, becoming involved in “supporting” roles such as hiding people, passing messages or providing food or medical care. But because they have been largely absent from political elites they are often considered as non-political. When considering asylum claims, often the different types of political activity undertaken by women are overlooked or dismissed, so that their claims for asylum on the grounds of persecution based on political opinion are not accepted. A further argument for taking women’s political activity seriously, and for considering women’s claims for refugee status on the basis of this political activity, relates to women who refuse to comply with discriminatory laws or norms in their countries of origins. Rather than viewing this refusal as a private matter which has no political relevance, it might be considered that women who choose to disobey rules and laws in this way are committing a highly political act. Women who refuse, for example, to comply with laws which impose particular modes of dress, such as the veil or chador, might be seen to be undertaking a highly political act of opposition. A similar analysis could be made of Chinese women’s opposition to the one-child policy imposed by their government which exposes those who contravene the regulations to the risk of forced abortions and sterilisations. Again,

however, the issues of pregnancy and childbirth involved in this type of opposition are often not constructed as “political” and so fall outside of the interpretation of who is a refugee.

A further barrier to the recognition of gender related persecution, is the way in which persecutory practices which may be common in “Third World” Countries are assigned to “cultural difference” and are thus viewed as part of the order of things. This normalisation of persecutions through their ascription to cultural differences feeds into the debates over the possibility of defining universal women’s rights, or whether these rights should be culturally sensitive. The difficulty is to determine how far any defense of “cultural difference” is actually a defense of practices which amount to an attack on women’s rights and to persecution of women. As Rao points out, the arguments against universal rights based on the need to maintain cultural difference, actually serve a variety of interests and may in fact be employed by regimes which are unfavourable to women’s emancipation<sup>12</sup>. Claims to defend ‘traditional’ cultures often involve control of areas such as family life which lead to the subjugation of women within the domestic sphere<sup>13</sup>.

These conflicts between women’s individual rights and those who seek to impose “traditional” or “cultural” practices upon them can easily lead to persecutions of women, but claims for asylum based on these persecutions may not be recognised as legitimate if the imperative of recognising cultural difference prevails. For example, in a recent decision, the British Court of Appeal rejected an asylum claim from a Sierra Leonean woman who feared forced genital mutilation if she were returned to her country. One of the judges argued that the practice of female genital mutilation was clearly accepted by the majority of the population of Sierra Leone and was not in those circumstances discriminatory<sup>14</sup>. This decision was later overturned by the House of Lords who ruled that the claimant could be considered as part of a “particular social group” of women from Sierra

Leone who were at risk of FGM, however, despite the positive outcome for this woman, the earlier ruling by the appeal court judges shows a worrying trend of cultural relativism which is present among many of those involved in processing and judging asylum claims. This cultural relativism goes hand in hand with the fears of a “flood” of female asylum seekers if European states were to admit that what these women were experiencing was indeed persecution and not merely a local custom which was widely practiced and therefore acceptable.

Much of the legal debate over the best way to ensure that gender specific forms of persecution are brought within the remit of the terms of the Refugee Convention has revolved around the notion of a ‘particular social group’. One of the grounds for persecution that is included within the Convention as a basis for granting refugee status is that of membership of a particular social group. But although many cases of gender-related persecution might be thought to enter into this category, with women in a particular country being considered as members of a particular social group when gender based persecution is widespread within this country, there has been a reluctance to admit that women can be recognised as a particular social group in this way.

The recognition of women as a particular social group is a solution favoured by the European Parliament, which adopted a resolution in 1984 calling upon states to consider women who had been the victims of persecution because of their sex, as a particular social group, under the terms of the Refugee Convention. The UNHCR also supports this line of action, its *Guidelines on the Protection of Refugee Women* (1991)<sup>15</sup>, also calling for women who face persecution for violating social norms to be considered for refugee status as members of a particular social group. However, although there have been cases where women have been offered refugee status under this ground of the Convention, the limits to the

particular social group constituted are always very precise, in order to avoid setting a precedent of a wide category which could be open to many women asylum seekers. It seems unlikely that most European states will move towards a more general recognition of gender as a characteristic of a particular social group because of the perception that this recognition would lead to a ‘flood’ of asylum claims by women. In an interview, for example, the head of the French Commission de Recours des Réfugiés (Refugee Appeal Commission), expressed the opinion that the recognition of the principle that women formed a particular social group would lead to the risk of receiving asylum claims from ‘half of humanity’.<sup>16</sup>

Further, the issue of whether or not it would be beneficial for women asylum seekers to be classified as a particular social group in this general way, with the notion of particular social group being based on the idea of a shared gender, is a matter for debate, with some arguing that this would be inappropriately comprehensive<sup>17</sup>. As many feminists have previously argued, ‘women’ do not constitute a cohesive social group, and within any country there will be numerous differences between the status and situation of various women. With reference to asylum claims therefore, ‘the very assumption that women have common experiences which can be explained by reference to their gender alone can itself undermine the argument’<sup>18</sup>. Attempting to define women as a particular social group may also fall into the trap of essentialising gender differences, and portraying refugee women as victims of ‘barbaric’ third world cultures<sup>19</sup>. The problems with these types of representations which portray women from Third World countries as “victims” is that it fixes an opposition between “them” and “us”, between “Western women” and “Other women” which might obscure the real structures of gender inequalities in different societies and the reasons for the persecutions that women suffer as a result.

The climate of disbelief surrounding asylum seekers means that the level of “proof” needed to substantiate their claim has risen continually. Often the form of proof required is that of physical evidence of violence or torture in the form of a medical certificate certifying the scars of such violence. Again this demand for proof may be particularly difficult for women who have suffered sexual violence or rape as these types of violence may be difficult to prove and women may be reluctant to talk about them or to submit to medical examinations which will heighten their feelings of shame. Women and NGOs interviewed for this research commonly pointed to a lack of proof as the reason for which women’s asylum claims had been rejected.

Ironically, some moves towards greater recognition of some forms of gender-related persecution has also resulted in some instances in greater barriers to proving these cases. This results from assumptions among some immigration officials that once they have created a judicial precedent, many other asylum seekers will be tempted to “jump on the bandwagon”. Thus, French NGOs report that in cases where a woman is claiming asylum on the grounds of feared female genital mutilation the level of proof required in terms of medical certificates and expert witness statements has become very stringent, and that any claimant who does not have all of these certificates will be sure to have her claim rejected.<sup>20</sup>

The rising number of women who claim asylum on the grounds of rape or sexual violence has also led to a problem of credibility as some decision-makers seem to assume that ‘all women say they’ve been raped’.<sup>21</sup> As Schottes and Schuckar point out, asylum seekers coming from civil war regions quite often tell very similar stories about sexual abuse and rape. They are then accused of making up their story in the hope of being granted asylum<sup>22</sup>. Women’s accounts may also be less likely to be believed if they fail to give details of rape or sexual violence when they first make their claim, although there are often compelling psychological or social reasons not to do so<sup>23</sup>.

In order to respond to some of the above criticisms of the operation of international laws and policies, a few countries have introduced so-called “gender guidelines” which aim to ensure that issues related to gender are taken into account in the determination of asylum claims. The adoption of such guidelines is a solution favoured by the UNHCR who have produced a range of guidelines over the years in order to try and encourage states to incorporate a gender sensitive approach into their processes of determining asylum claims. However, evidence from European states suggests firstly that there is little uniform acceptance for the need to incorporate such guidelines into their national policies or legislation, and secondly, that even where guidelines have been adopted their implementation rests patchy at best.

There is often still little transparency in the process for granting asylum in European countries, and the idea that any kind of logical or “scientific” process has been established to distinguish between “real” and “false” refugees is highly misleading<sup>24</sup>. Decisions often rely on the personal intuitions of an immigration official or a judge. In this sense, whilst some decisions favourable to a more gender sensitive asylum policy and process may be highlighted, a general trend of structural gender inequality still underlies the asylum process. Socio-economic and cultural factors contribute to the way in which the asylum seeker is perceived by asylum officials and judges, as a “threat” to European security, or as a good “victim” who poses no threat and who deserves protection. For women, the need to portray themselves as “victims” in this framework pushes them to frame their claims in a particular way, often with the complicity of NGOs and support groups who will encourage them to conform to these gendered and racialised stereotypes of the good victim who does not pose a threat to European society.

Underlying all of the above discussions is the issue of dominant representations which both portray women refugees as helpless victims, and reinforce the difference between “us” and “them”, Western women and the racialised “other”. The persecutions that take place in those “other” countries are attributed to immutable social and cultural characteristics, and the real dynamics of gender inequality underlying all types of gender-related violence, whether “here” or “there” is not analysed.

These types of ethnocentric and racialising attitudes may make it easier for feminists in the West writing about asylum and refugees to identify some kinds of practices as persecution whilst others are not so easily recognised. Female genital mutilation a practice that is held up as a paradigm of “other” cultures has been the subject of many feminist campaigns. Far fewer women have mobilised to support victims of domestic violence in other countries, or indeed have suggested that victims of domestic violence in Western states should themselves be able to seek international protection or asylum elsewhere. This “othering” of cultural practices and of women seeking asylum leads to a tendency to disconnect the experiences of Western women with those of women who seek asylum. How can this problematic dichotomy be overcome without in the process reverting to a false universalism which ignores divisions among women produced by race, class or ethnicity? The answer must be to consider the local and international contexts carefully when examining what is persecution against women, and what can be done to “help” women seeking asylum or women refugees. In seeking to understand obstacles to the achievement of gender equality in refugee protection it is also necessary to examine critically the global norms that have been created, and the frames which are used to represent women refugees and asylum seekers. The “voice” of women asylum seekers and refugees is ignored in the framing of issues relating to gender specific persecution. The discursive opportunities which exist are not open to these women for reasons of political, social and economic marginalisation and exclusion. The

NGOs and associations which make claims for gender specific policies and legislation do so on behalf of refugee and asylum seeking women, these women themselves have little or no voice in the process. Speaking for women asylum seekers and refugees leads to representations and framings of them which rely heavily on pre-existing cultural norms as argued above, and which contain these women in their role of “victims”. Real understanding of the gendered causes of forced migration would take into account the voices and perspectives of those women who flee, and would adapt solutions for protection to specific experiences and to particular national and local contexts.

---

1 This report is a complete translation of abridged copy of special lecture “Persecution and Protection: Gender and Asylum in European Union” hosted by EU Studies Institute (EUSI) on February 17th 2010.

2 Freedman, J., *Gendering the international asylum and refugee debate*, Palgrave Macmillan.

3 *ibid.*

4 Freedman, J., “Analysing the Gendered Insecurities of Migration: A Case Study of Female Sub-Saharan African Migrants in Morocco,” *International Feminist Journal of Politics*, 14(1), March, 2012.

5 Charlesworth, H. and Chinkin, C. M., *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000.

6 Copelon, R., “Intimate terror: Understanding domestic violence as torture,” in Cook, R. ed., *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, 1994.

7 Pearce, H., “An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture,” *International Journal of Refugee Law*, 14(4), October, 2002, pp.534-560.

8 *ibid.*

9 Macklin, A., “Refugee Women and the Imperative of Categories,” *Human Rights Quarterly*, 17(2), May, 1995, pp. 213-277.

10 Ankenbrand, B., “Refugee Women under German Asylum Law,” *International Journal of Refugee Law*, 14(1), January, 2002.

11 BWRAP & WAR, *Misjudging Rape: Breaching Gender Guidelines and International Law in Asylum Appeals*, Crossroads Books, 2006.

12 Rao, A., “The Politics of Gender and Culture in International Human Rights Discourse” in Peters, J., & Wolper, A. ed, *Women’s Rights, Human Rights*, Routledge, 1995, pp.167–175.

13 Molyneux, M. and Razavi, S., *Gender Justice, Development and Rights*, Oxford University Press, 2002.

14 Refugee Women’s Resources Project, “‘Gender’ and ‘tribal membership’ can define social group, USA Appeal Court reiterates,” *Women’s Asylum News*, Oct. 2005, pp.1-4.

15 UNHCR, *Guidelines on the Protection of Refugee Women*, 1991.

16 Interview September 2005.

17 Crawley, H., *Refugees and Gender: Law and Process*, Jordan, 2001.

18 *ibid.*, p.73

19 Oswin, N., “Right Space: An Exploration of Feminist Approaches to Refugee Law,” *International Feminist Journal of Politics*, 3(3), 2001, pp. 347-364.

20 Interview 2005 and 2006.

21 Interview March 2006.

22 Binder, S. and Tosic, J., “Refugees as a Particular Form of Transnational Migrations and Social Transformations: Socioanthropological and Gender Aspects,” *Current Sociology*, 53(4), July, 2005.

23 *supra* note 11.

24 Valluy, J., *Rejet des exilés: Le grand retournement du droit de l'asile*, Editions du Croquant, 2009.