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WOMEN OF THE GLOBAL SOUTH AS “VICTIMS OF OPPRESSIVE CULTURES”: LAW AND PRACTICE ON GENDER-BASED ASYLUM

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Abstract

The 1951 Refugee Convention has been criticized for its gender-blindness. There is no explicit mention of the word ‘sex’ or ‘gender’ as grounds for refugee status. However, over the last three decades, there has been much emphasis on gender-sensitive interpretation of the refugee definition. Despite the positive developments in international refugee law, asylum claims based on gender-related forms of persecution pose interpretive challenges, and are inadequately and inconsistently addressed in domestic jurisdictions. When women from the Global South apply for asylum in the countries of the Global North on the basis of gender-based persecution, they are labelled as vulnerable victims of their oppressive cultures. The paper discusses this practice in detail, with examples. The author argues that portraying asylum-seeking women as passive victims and simply attributing this status to the cultures of their home countries is a flawed approach. The author makes some suggestions to rectify this problematic tendency, building on what UNHCR and various scholars have stated in this regard.

Introduction

The original definition of refugee as contained in the Convention relating to the Status of Refugees, 1951 was drafted with the purpose of protecting European men fleeing political persecution at the hands of the State. Women’s experiences of persecution, on the other hand, often fall within the private sphere and are perpetrated by non-State actors. The 1967 Protocol to the Refugee Convention amended the original Refugee Convention to extend its protections to people beyond Europe. Around 1980s and 1990s, there emerged new patterns of displacement as majority of the refugees were fleeing from developing countries i.e. the countries of the Global South. The causes of displacement had to do more with political and economic turmoil rather than political persecution. During this period, there was a significant increase in number of women lodging asylum claims due to gender-related harms in their home countries. Such harms include female genital mutilation, domestic

violence, honour crimes, rape etc. Asylum adjudication or refugee status determinations is the process by which host governments or UNHCR determine whether a person seeking international protection is eligible for refugee status or not. The asylum seeker needs to prove that she suffered or fears persecution in the country of origin and that the state was unwilling or unable to protect her.

Gender-based Asylum and International Refugee Law – An Overview

Under the Convention definition, a refugee is a person who fears persecution or has been subject to persecution on any of the five grounds, i.e., race, religion, nationality, membership in a particular social group, or political opinion. Sex or gender is not mentioned among the grounds of persecution. The ground which has most frequently been relied on in cases of gender-based asylum claims is the ‘particular social group.’ This term by itself is vague. From early 1990s onwards, UNHCR has issued interpretive guidance regarding

situations in which women asylum seekers may be considered as members of a particular social group. There are UNHCR Guidelines on the Protection of Refugee Women, 1991 and 2002, and the UNHCR Handbook for the Protection of Women and Girls, 2008. These documents have urged States to interpret the five grounds laid down under the refugee definition in a gender-sensitive manner. UNHCR has laid down the concept of particular social group as follows: "A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."²⁸²³ Although the ambiguity in the definition of particular social group has been retained to protect any group singled out by a government for victimisation, it leaves a huge room for narrow interpretation. This in turn means that certain asylum claims can be conveniently excluded based on the discretion of the authorities.²⁸²⁴

Following UNHCR's call, countries such as Canada, the United States, Australia, the United Kingdom and few other European countries have issued gender guidelines for asylum determination. Some of the landmark cases on gender-based asylum claims in various jurisdictions around the world are briefly discussed hereunder:

*Canada v Mayers (1993)*²⁸²⁵

In this case, the Canadian Federal Court of Appeal decided that a Trinidadian woman who had been physically and sexually abused by her husband in circumstances of police indifference was a refugee. It was held that she belonged to a particular social group, namely "Trinidadian women subject to wife abuse."

²⁸²³ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (1979).

²⁸²⁴ Sushil Raj, *The gender element in international refugee law: Its impact on agency programming and the North-South debate*, 1 ISILYBIHRL, 164-182 (2001).

²⁸²⁵ *Canada (Minister of Employment and Immigration) v. Mayers* (1993) 1 F.C. 154 (C.A.).

*Matter of Kasinga (1996)*²⁸²⁶

In this case, the U.S. Board of Immigration Appeal granted asylum to a woman from Togo fleeing female genital mutilation (FGM). It was held that the practice of FGM which was committed against the will of the applicant constituted persecution and that Ms. Kasinga's proffered particular social group, which was based on gender, nationality, tribal membership, and opposition to FGM, was viable.

*Ex parte Islam/Shah (1999)*²⁸²⁷

In this case, the UK's House of Lords examined the claim of two Pakistani women who were both victims of domestic violence at the hands of their husband. The specific harm feared by the claimants was prosecution on account of false accusation of adultery. It was held that such harm amounted to persecution. Because of the discriminatory treatment of women in Pakistan and the lack of effective protection by the state, the court found that women in Pakistan constituted a 'particular social group.' Lord Hoffman observed: "while the husbands' violence was 'personal,' that is, directed towards the appellants as individuals, the evidence established that the state would not assist them because they were women. It therefore denied them protection against violence which it would have given to men."²⁸²⁸

*MIMA vs. Khawar (2002)*²⁸²⁹

MIMA vs. Khawar is a decision of the High Court of Australia. The applicant in *Khawar* was a Pakistani woman who claimed to have been the victim of domestic violence at the hands of her husband and his family. The applicant claimed that she sought the assistance of the police on different occasions, when she went to complaint about her husband's violence. However, the police never helped her. The Court found her to be eligible for refugee status. Justice Lindgren observed that what was

²⁸²⁶ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)

²⁸²⁷ *Islam v Secretary of State for the Home Department, R v Immigration Appeal Tribunal and Another, ex parte Shah* (1999) UKHL 20

²⁸²⁸ *Id.*, per Lord Hoffman at 1035.

²⁸²⁹ *Minister for Immigration and Multicultural Affairs v. Khawar*, (2002) HCA 14.

required was “a sustained or systemic absence of state protection for members of a particular social group attributable to a perception of them by the state as not deserving equal protection under the law with other members of the society, whatever the origin or explanation of that discriminatory perception might be.”²⁸³⁰

Asylum Seeking Women as Victims of Oppressive Cultures – A Critical Analysis

The asylum adjudicators have the right to grant or deny an asylum claim based on that country’s legislation or regulations regarding acceptable grounds for asylum, often using their own discretion as to whether a particular case meets the necessary conditions.²⁸³¹ When women from the Global South apply for asylum on the basis of gender-based persecution in the countries of Global North, they are perceived as passive victims of the oppressive cultures of their home countries. There is much evidence available which shows that adjudication of gender-based asylum claims in countries of the Global North is heavily influenced by biases and stereotypes. It is not a fair and objective procedure. There is a systemic problem of granting asylum only when gender-related violence can be linked to practices attributable to non-Western, “foreign” cultures. This basically serves two purposes: firstly, the countries of the Global North are able to advance their anti-refugee agenda. The asylum adjudicators in the countries of the developed world are often performing a filtering role. By admitting only women, the other categories are shown to be less worthy of protection and thus, excluded on that basis. Secondly, the Global North is presented in the dominant narrative as the one saving the women from their cultural traditions to become free, emancipated modern female subjects like Western women who are portrayed as modern, educated and sexually liberated.

Sara L. McKinnon in her book, ‘Gendered Asylum’ has discussed “how various forms of gender

violence come to be fixed in the U.S. national imaginary to particular places and bodies.”²⁸³² She notes, “Militarized sexual violence and femicide is linked to Central America, female genital surgeries with Africa, social castigation for nonconformity to gendered norms with the Middle East, invasive population control practices to China.” Thus, women are viewed with the stereotyped and incomplete understanding of their condition, which tends to ignore the intricate aspects of their complex experiences.

The Mediterranean Sea is where irregular migration to Europe is the most visible. Barbara Pinelli, an anthropologist, conducted research involving refugee women from Africa arriving in Italy through the Mediterranean. In her article ‘Death and Salvation of refugee women on European Borders: Race, gender and class of bodies and power,’ she has noted that there is an expectation around storytelling from women who are perceived as passive, vulnerable, pitiable victims of, ‘male oppression’ or ‘oppressive cultures, religions or traditions.’ Thus, to get the protection as refugees in the Western countries, asylum seeking women are expected to condemn the cultural practices prevalent in their home countries.

There is a growing body of such evidence which shows that women are much more likely to get refugee status when their asylum claims are based on exotic forms of harm – such as FGM, forced marriage, honour killings etc. In fact, claimants even edit or change their asylum applications in order to “fit within legal categories and expectations of how a “Refugee Woman” should be.”²⁸³³

²⁸³⁰ Id. at para 160.

²⁸³¹ Stop Violence against Women, *Gender-Based Asylum*, https://www.stopvaw.org/gender-based_asylum.

²⁸³² SARA L MCKINNON, *GENDERED ASYLUM: RACE AND VIOLENCE IN U.S. LAW AND POLITICS* 41 (University of Illinois Press 2016).

²⁸³³ Oxford Connie, “Where are the Women?” in E. Arbel, C. Dauvergne, & J. Millbank (Eds.), *Gender in refugee law: From the margins to the centre* (Abingdon, Oxon: Routledge, 2014).

Conclusion

To rectify this problematic trend of generalizing asylum-seeking women as victims of oppressive cultures, the following are some suggestions:

The law and practice on gender-based asylum claims are still evolving. As discussed in this paper, gender related asylum claims pose interpretive challenges and there are inconsistencies amongst and within jurisdictions. Thus, host countries need to gradually start adopting sufficiently protective and consistent interpretations of the definition of refugee and more particularly, of the notion of persecution in the context of asylum claims lodged by women.

As a 2016 report published by UNHCR found, there is general scarcity of female interviewers and interpreters.²⁸³⁴ As much as possible, there should be provision of trained female interviewers and interpreters in refugee status determination procedures. This enables the asylum seeker to speak freely about the violence that she has experienced. It is also extremely important to ensure that the asylum examiners have extensive background information on the situation of women in the country of origin. To avoid stereotyping, the examiners must have good and accurate knowledge about the root causes and the structural problems that lead to gender inequality in particular societies.

It is not a sound approach to see women seeking asylum on the basis of gender-related persecution as a homogenous group of passive and vulnerable victims. Their experiences are shaped by intersectional factors such as age, religion, class, ethnicity, sexual orientation etc. Moreover, there are diverse forms of gender-based persecution, and in some cases, the fact that a woman took a decision to leave her homeland could itself constitute a bold step. The root cause for subordination of women across the world is patriarchy. Therefore,

portraying asylum-seeking women solely as passive victims and attributing this status to the cultures of their home countries is a flawed approach.

To sum up, in deciding asylum claims, decision makers must adopt a holistic approach, factoring in human rights norms and the individual circumstances of refugees, taking into consideration the multiple aspects of women's lives through an intersectional lens that considers gender along with other aspects of identity, such as class, race, religion, ethnicity, and nationality.²⁸³⁵

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