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Citation: Honkala, N. (2017). 'She, of Course, Holds No Political Opinions': Gendered Political Opinion Ground in Women's Forced Marriage Asylum Claims. *Social and Legal Studies*, 26(2), pp. 166-187. doi: 10.1177/0964663916681067

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Permanent repository link: <https://city-ref-test.eprints-hosting.org/id/eprint/16090/>

Link to published version: <https://doi.org/10.1177/0964663916681067>

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‘She, of Course, Holds No Political Opinions’: Gendered Political Opinion Ground in Women’s Forced Marriage Asylum Claims

Abstract

Women continue to face challenges in having their asylum claims recognised under the Refugee Convention. This is to a significant extent due to the ways in which the Convention is applied to women’s claims, and is particularly the case in gender-based persecution claims. While there have been important advances in the field of gender and refugee law, contributing to an improved understanding of the relevance of gender within international refugee law, there remains a need for more gender-sensitive interpretations of the Convention. This article critiques the ways in which the political opinion ground of the Refugee Convention has been applied to some women’s forced marriage claims in the UK. Women’s gender-based persecution claims are often categorised under the membership of a particular social group ground and the political opinion ground remains an underused and narrowly interpreted category. Drawing on feminist critiques, it is argued that this demonstrates an underlying gendered politics, and that the political opinion ground can indeed be relevant to women’s asylum claims involving forced marriage. Women’s resistance to their gendered oppression in the form of forced marriage should be seen as a valid expression of their political opinion and agency.

Key Words

Forced marriage, gender and asylum, refugee law, political opinion ground, feminism, adjudication

Introduction

Although in the original text of the Refugee Convention gender was explicitly excluded as a ground for persecution justifying the granting of refugee status, significant advances have been made in recognising the relevance of gender in relation to refugee law. When the Refugee Convention was drafted, gender was discussed only once and the suggestion by a Yugoslav delegate to include the category of sex in the non-discrimination Article 3 was quickly rejected (Spijkerboer 2000: 1). The approach at the time was exemplified by the British delegate's pronouncement 'that the equality of the sexes was a matter for national legislation' (2000: 1). The Chairman of the drafting conference, UN High Commissioner for Refugees van Heuven Goedhart, strongly doubted that there would ever be any refugee cases on account of sex (2000: 1). From the time of the adoption of the Convention till around 1980s, the specific gender-based concerns of asylum-seeker women mostly remained invisible.

It is largely due to NGOs, feminist activists and academics that this invisibility of gender-based concerns of asylum-seeker women has been exposed and brought on to the agenda (Edwards, 2010: 22). Feminists have been critiquing the supposed gender neutrality of the refugee definition for decades (Arbel, Dauvergne and Millbank, 2014, Crawley, 2001, Greatbatch, 1989, Indra, 1987). Early critiques of the absence of gender as a sixth category (in addition to race, nationality, religion, political opinion and membership of a particular social group (PSG)) argued that this meant that gender-related persecution was trivialised and that trying to deal with this type of persecution through the analysis of the other categories was insufficient (Stevens, 1993: 214). Others pointed out that a separate category might lead to all persecution of women being thought of as falling within a single category, leading to perceptions that women's persecution was always something fundamentally different than men's, and by inference perhaps something less important (Freedman, 2015: 75). In practice, however, it has been accepted that the international political climate has not been conducive to the expansion of the refugee definition by way of including gender as a sixth category (Copeland, 2003: 101). Efforts have therefore turned to the interpretation of the

Convention and its practical application. According to current feminist critiques, the problem is not the Convention per se, but rather the ways in which women's experiences are 'actually represented and analytically characterised' within refugee determination processes (Crawley, 2000: 19).

There is thus a need to examine the specific ways in which adjudicators deal with gender-based persecution claims. Gender-based persecution has been conventionally characterised under the PSG ground, leading to the underuse of the political opinion ground. However, is this selection the most appropriate and what does it tell about the ways in which the Refugee Convention is interpreted in relation to women's experiences?

In this article, forced marriage is examined as one type of gender-based persecution claim in which the political opinion ground has been underused and narrowly interpreted. The argument advanced is that its interpretation reveals the gendered politics at play in the context of refugee determinations in which the rights pertaining to gender (and also sexual orientation) are yet to be fully realised. The article therefore explores the specific ways in which the political opinion ground is understood by adjudicators and the implications it may have on women's claims.

The first part of the article discusses the developments in international refugee law in relation to gender-based persecution. It looks at why women's claims involving gender-based persecution conventionally fall under the PSG, and why this might not always be the most appropriate one. The second part examines this tendency in light of feminist critiques of the public/private dichotomy and its effects on the gendered and partial ways in which the political opinion has been interpreted. The argument advanced is that the distinction between the public and private spheres underlines the framing of women asylum seekers' experiences of gender-based persecution as 'private', thereby constructing women as social and cultural actors as opposed to political ones. This restriction to the 'private' may prevent us from appreciating the political nature

of women asylum seekers' claims. The third part draws on my research into women's asylum appeals claims involving forced marriage between 2004 and 2014. Most of these cases were advanced under the PSG ground but in two cases the political opinion ground was also advanced. While the conceptual overlap between the two grounds is recognised, this section illustrates how adjudicators have construed the political opinion ground narrowly. As explained in part three, due to the ways in which these types of cases are published, it is not possible to evaluate how representative of forced marriage claims in general they are. However, the manner in which the political opinion ground has been discussed can shed light on the ways in which women's experiences are represented and their claims are categorised. The argument advanced is that resistance to forced marriage can be seen as political and becomes as such due to the context in which that resistance takes place. To understand refusal of a forced marriage as a valid expression of political opinion and agency avoids the de-politicisation of women's claims and allows the recognition of the personal as political.

Establishing the Convention Ground

The Refugee Convention defines a refugee as a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a PSG or political opinion (Article 1 A). When a State makes a refugee status determination, the asylum seeker must prove that she has a well-founded fear of being persecuted *for reasons of* one or more of these Convention grounds. The legal claim of persecution is conducted by demonstrating 'serious harm' in combination with a 'failure of State protection'. The manner in which these aspects are evaluated may have adverse gender-based effects on women's claims of asylum.

Regarding the evaluation of a relevant convention ground, gender-based persecution has generally been considered to fall within the category of PSG. The UNHCR has, over the years,

given guidance to States on the manner in which gender-based persecution should be interpreted. In 1985, the UNHCR recommended (in Conclusion 39) that ‘women asylum seekers who face harsh or inhumane treatment due to the values of their society may be considered as a particular social group under Art 1 A (2)’.

Moreover, in 1991 the UNHCR Executive Committee’s *Guidelines on the Protection of Refugee Women* recommended that ‘women...fearing persecution or severe discrimination on the basis of their gender’ should be considered a member of a PSG and that ‘others may be seen as having made a religious or political statement in transgressing the social norms of their society’ (UNHCR ExComm, 1991: ¶ 71).

Already two decades ago, then, the UNHCR made clear that some women’s gender-based persecution claims that included transgressing ‘social norms of their society’ could be appropriately determined under political or religious convention grounds. However, as the Guidelines are not binding on States, the UNHCR can only hope that States adopt more favourable practices and policies (Macklin, 1998: 29). As late as in 1996, the British Home Office stated that Conclusion 39 imposed no obligation on State parties to recognise women as a social group (Macklin, 1998: 29). Nevertheless, the Guidelines have been described as carrying considerable weight as they provide authoritative guidance on legal interpretations of the Conventions (Foster, 2007: 71, Juss, 2013).

It can be said that the 1991 Guidelines did pave the way for future developments in the area of gender and asylum. In 1993, the UNHCR Executive Committee encouraged States to develop ‘appropriate guidelines on women asylum-seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men’ (UNHCR ExComm, 1993). Between 1995 and 1999, the Executive Committee made repeated calls on States to develop and implement guidelines that recognised women’s gender-related claims.¹ The sustained criticism

from the various fronts was strong enough finally to get some States to react. Decision-making authorities in Canada were the first to introduce Gender Guidelines (IRB, 1993). This was followed by the USA and Australia (INS, 1995, DIMA, 1996). Swedish, Swiss and German legislators also inserted amendments to their domestic legislation (Spijkerboer, 2000: 3). In the UK, The Refugee Women's Legal Group (RWLG), a non-profit organisation, proposed Guidelines in 1998. The UK Immigration Appellate Authority (IAA) used much of the content of these guidelines in its own (albeit shortened) Guidance for decision-makers (IAA, 2000) and the Home Office issued an Asylum Policy Instruction to its decision-makers on 'Gender Issues in the Asylum Claim' (Home Office, 2004, updated 2007). However, scholars and refugee advocacy organisations have criticised the Home Office for not adhering to its Guidelines (see eg. Baillot et al., 2014; Ceneda and Palmer, 2006).

These changes were a response to an increasing number of claims by women on the basis of gender-related persecution such as rape, domestic violence and 'traditional practices' like female genital mutilation (FGM) (Beyani, 1995: 31). The developments occurred parallel to developments in general international law, international human rights law as well as criminal law. It is fair to say that considerable efforts have been made to raise the profile of women's rights (Kneebone, 2005; 19). For instance, in 1993 the UN proclaimed a Declaration on the Elimination of Violence Against Women (DEVAW), which defined violence as occurring in both public and private spheres and was followed in 1994 by the appointment of a Special Rapporteur on Violence Against Women (United Nations, 1994). In 1996, the Special Rapporteur specifically recommended that 'refugee and asylum laws should be broadened to include gender-based claims of persecution, including domestic violence' (United Nations, 1996: 39). And in her 2003 Report, Coomaraswamy stated that, despite progress in some areas, 'in general States are failing in their international obligations to effectively prevent, investigate and prosecute violence against women'

and that ‘violence against women continues in the family, in the community, and is perpetrated and/or condoned by the State in many countries’ (United Nations, 2003a).

During the negotiation of the Refugee Convention in the 1950s, the first four grounds for persecution (race, religion, nationality and political opinion) were considered in draft form by the conference of plenipotentiaries. The fifth (PSG) was introduced at a later stage by the Swedish representative (United Nations, 1951). This ground was eventually included in the final Convention, but there is not much comment on this issue in the *travaux préparatoires*. Grahl-Madsen (1966: 219) describes this addition as an ‘afterthought’, as a way to protect against persecution based on unforeseen reasons. Given that there is no explanatory historical material, it is unsurprising that the PSG ground is the one with the least clarity, resulting in ‘different approaches between and even within jurisdictions, both in terms of principles and framework adopted to guide interpretation and in the application of these principles to particular fact scenarios’ (Hathaway and Foster, 2003: 477).

This lack of clarity has significant consequences for women’s claims, given that so many of the gender-based claims are made in reference to PSG. Indeed, as Edwards (2010: 28) notes, PSG ‘has now become a default ground for women’s claims, even when one or more of the other grounds may be equally, or more applicable’.

Within UK jurisprudence, the judgment of *Islam v Secretary of State for the Home Department*; *R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20 paved the way for an acceptance of women as a PSG. *Shah and Islam* was a case of joined appeals by two women from Pakistan who applied for asylum in the UK fearing that if returned they would be subjected to domestic violence from which there was no state protection as well as severe sanctions arising from false allegations of adultery. Shah had suffered domestic violence

throughout her marriage. After leaving and coming to the UK, she discovered that she was pregnant and her seventh child was born in the UK. She applied for asylum fearing that if returned her husband would accuse her of adultery and subject her to criminal proceedings for the offence of ‘sexual immorality’ for which punishment was flogging or stoning to death. Islam had also suffered abuse from her husband since the early stage of their marriage. A fight between two politically opposed groups had broken out in the school where she was teaching and she had intervened. Although she had not intervened for a political reason, one of the groups regarded her actions as such and for this she suffered harassment from supporters of one of the groups and accusations of adultery were made against her to her husband. Her husband subsequently beat her and she ended up in hospital. After receiving further harassment she fled to the UK. Both women claimed persecution for the reason of PSG but Islam also claimed persecution for reasons of political opinion. The judgment makes only cursory remarks on this point, considering instead what the Lords thought was the principal issue, namely the meaning and application of the PSG. The House of Lords accepted that ‘women in Pakistan’ was a PSG within the meaning of the Refugee Convention.

Prior to the House of Lords decision, several Tribunal cases dealing with claims under this ground had failed (Kelly, 2010: 11). Specifically in relation to women subjected to FGM, Tribunals had found it difficult to decide whether the claimants could be considered to fit into a PSG. When the question of whether women could constitute a PSG came to the House of Lords in *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, Baroness Hale stated that “the answer... is so blindingly obvious that it must be a mystery to some why [the cases] had to reach this House” (¶ 83). The debate, as in so many similar cases, was about the *definition* of the PSG - whether to accept a broader group of ‘women in Sierra Leone’ or the so-called ‘“intact” women’ group.

The overall tendency to characterise women's claims as coming under the PSG ground is problematic, particularly in circumstances where they could also or be characterised as involving the political opinion ground or at least a combination of the two grounds. Indeed, Harvey (1999) has asked should we not consider an imputed political opinion within the context of *Shah and Islam*? In other words, if feminism has cast the personal as political, should not the localised resistance to private displays of power, in the general societal context, which existed in Pakistan, not be today regarded as the expression of a political opinion? (Harvey, 1999: 239). Similar critiques of the PSG ground were advanced in relation to US jurisprudence. In the ground-breaking American case of *Matter of Kasinga* 21 I. & N. 357 (BIA 1996), the Board of Immigration Appeals granted asylum to a young woman from Togo who fled a threat of FGM and forced marriage.

When accepting that Fauziya Kasinga was a member of a PSG, Board Member Rosenberg said that:

'[U]nlike requests for asylum premised upon political opinion, social group claims, like those involving race, ethnicity, or religion, are status based and do not necessarily require a showing of the presence of an individual's opinions or activities' (375).

While the case was an important precedent in recognising that women fleeing gender-based persecution in the form of FGM could be eligible for asylum in the United States, it also evidenced some concerns about the interpretation of PSG and political opinion grounds. Rosenberg's characterisation of social group on the basis of social and cultural status that is contrasted with political and legal status implicitly uses a very narrow idea of political opinion (Kneebone 2005: 23). After all, a woman's legal and political status is often indistinguishable from her social and cultural status (2005: 23). By opposing such practices as FGM and forced marriage - intimately tied

with patriarchal power structures- a woman *is* expressing her political opinion. Indeed, this is explicitly recognised by the Canadian Guidelines, which state that:

‘A woman who opposes institutionalized discrimination against women, or expresses views of independence from male social/cultural dominance in her society, may be found to fear persecution by reason of her actual political opinion or a political opinion imputed to her (i.e. she is perceived by the agent of persecution to be expressing politically antagonistic views),’

Even though PSG has become the default position for women’s claims it does not come without its unique challenges. For instance, when it comes to recognising ‘women as a PSG’, Foster notes that advocates and decision-makers continue to insist on overly convoluted and artificially contrived groups in order to avoid concerns over ‘floodgates’ (2014: 38). This is despite the fact that whether a group is small or large does not prevent it from being recognised as a PSG. As noted by Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Khawar* [2002] 210 CLR 1, ‘it is power, not number, that creates the conditions in which persecution may occur’. The second problem with the PSG ground is that there exists two distinct approaches to its interpretation: the so-called ‘protected characteristics’ and ‘social perception’ approaches.² In brief terms, the two approaches can be summarized as follows. The protected characteristics approach examines ‘whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it’ (UNHCR: 2002b). Sex would be considered an immutable characteristic (UNHCR: 2002b). Whilst the social perception approach considers whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large’ (Edwards: 2003: 71). A comprehensive analysis, particularly with regards to the divergent jurisprudence arising from the two approaches, has been provided by Foster (2014). For the present purposes it suffices to note that while the UNHCR has tried to negotiate these approaches in its guidance to states, there

remains considerable uncertainty over the interpretation of the PSG (Foster, 2014:38). Furthermore, despite the arguments in favour of recognising women as a PSG, feminists have cautioned against the assumption that women share common experiences, which can be explained by reference to their gender alone (Crawley: 2001: 73). It has been further pointed out that treating women as a cohesive group risks essentialising gender differences and portraying refugee women as 'victims' of their 'barbaric cultures' (Razack: 1995, Oswin: 2001).

The third problem is that from a feminist perspective, constructing women's claims purely under PSG can serve to de-politicise their claims. While the tendency to use the PSG ground in gender-based persecution claims may mean that women's claims may be recognised, reliance on this ground perpetuates the construction of women and their experiences as social and cultural and as such apolitical (Edwards, 2010: 28).

Gendered Politics of Interpreting the Political Opinion Ground

Why then is the political opinion ground so underused in gender-based persecution cases? What is lost when women's resistance to their institutional discrimination and gendered oppression is not seen as political? Can feminist critiques of the public/private distinction shed light on this issue? The distinction between public and private spheres, identified as a key feature of classical Western liberal thought, has been a persistent theme in feminist scholarship (see e.g. Charlesworth, 1988-1999, Pateman 1988, Thornton, 1995). In this tradition, men have been associated with the public sphere, dominating the government and civil society, while women have been associated with the private sphere, in the character of family (Thornton, 1991: 449). The distinction between the two spheres correlates with the liberal notion of negative freedom that is characterised as taking the position that interference in people's 'private' lives should be minimised and that the State's responsibility in its governance should be based on the public areas.

Even though the public/private distinction has been attacked as a culturally constructed ideology, it persists in legal thinking and is built into the language of law itself (See eg. Charlesworth, Chinkin and Wright, 1991: 627, MacKinnon: 1989). Arguably, the public/private distinction explains why the political opinion has been less often used in gender-based persecution cases because it frames the ways in which politics is interpreted partially and narrowly within the refugee determination context. The measurement for an understanding of politics has been a masculine experience of public political activity and persecution arising from a direct link to the State. The traditional image of the Convention refugee is a male exile fleeing from political persecution from his home State. The historical context of the Convention in the aftermath of the Second World War during the Cold War era explains that the classic subject of the Convention was the Soviet dissident or the Jewish person in Germany, while the classic oppressor was the state (Arbel, Dauvergne and Millbank, 2014: 3). In other words, the emphasis was on public actors and activities whereby the persecution occurred in the public sphere and was defined by its connection to traditional structures of state authority (Mullaly, 2013: 202). Historically, and partly still today, the assumption was that the public sphere of political activity was the preserve of men, while women were relegated to the private sphere. These assumptions may prevent us from appreciating the political nature of women asylum seekers' claims. Within the refugee determination context, women's political participation continues to be marginalised and various forms of gendered resistance are underestimated in both policy and practice (Crawley, 2001: 79).

The Refugee Convention refers to political opinion rather than political activity (Article 1 A). There is no requirement for the person to necessarily have *expressed* his opinion (Hathaway and Foster, 2003: 407). Goodwin-Gill and McAdam (2007: 87) have suggested that political opinion should be understood in a broad sense to include 'any opinion on any matter in which the machinery of State, government, and policy may be engaged'. However, even this broader

definition requires that the 'State, government, or policy' be 'engaged' (Edwards, 2003: 68). As Alice Edwards (2003: 68-69) asks:

'[s]hould not political opinion apply to any thought, opinion, action or inaction that can be seen as questioning or opposing the views of authority or society at large, whatever the type of authority in place?'

This interpretation would include any form of authority that has the power to impose law or social rules or to punish and discriminate against those refusing to participate in the accepted social or cultural practices (Edwards, 2003: 69). An inherent bias towards Western political structures, results in jurisprudence that shows a failure to recognise political structures and activity in non-Western States (2003: 69). Thus it is important that the power structures and circumstances of asylum seekers' experiences in their home country are recognised when refugee women make their claims.

Guidance to how the political opinion should be interpreted can be found in Article 19 of the Universal Declaration of Human Rights (UDHR), which enshrines the right to freedom of opinion and expression. The concept of political opinion is construed in the Convention as a human right. So, for instance, in Australia the courts recognised the right of a writer to express political opinion through his poetry under the convention ground (Haines, 2003: 347). A gender-sensitive understanding of political opinion can thus include opinions on gender roles (2003: 347).

The concept of politics is critical to the process of determining refugee status under the political opinion ground. The idea that women are less likely than men to be involved in politics is implicit in the arguments that women's claims should be made under the PSG ground (Crawley, 2001: 18). Not only does this view perpetuate the public/private dichotomy, it fails to understand the context in which women participate and where their resistance often takes place (2001: 18). The problem lies with the way in which decision-makers use a gendered interpretation of what

counts as political opinion thus invalidating women's claims (Freedman, 2015: 80). As Indra (1987: 3) has noted:

‘[T]he key criteria for being a refugee are drawn primarily from the realm of public sphere activities, dominated by men. Where women's presence is more strongly felt, there is primarily silence - silence compounded by an unconscious calculus that assigns the critical quality “political” to many public activities but few private ones’.

Within this gendered framework, oppression of religious minorities is political, while oppression at home is not (Indra, 1987: 3). There are many activities which are often not represented as political, such as grassroots and non-governmental activism or providing food, shelter and medicines (Freedman, 2015: 81). These ‘non-conventional’ activities are ‘rendered political by the context in which they take place and the goal that they seek to achieve’ (Valji et al, 2003: 66). Furthermore, many women who are politically active in these ways can risk a ‘double punishment’ from the authorities as they are seen as opposing the regime in some way as well as opposing their expected gender roles (Crawley, 2000: 18).

In addition there is a tendency to misinterpret gendered forms of persecution and resistance as private rather than political (Crawley, 2000: 18). There is a need to recognise these types of activities as political if the refugee definition is to be applied to women in a gender-sensitive manner. Only if women's political participation is recognised as being tied to power relations and structures can women's activities be seen as coming within the Refugee Convention definition (Freedman, 2015: 81). Moreover, the use of the political opinion ground in cases involving gender-based discrimination and violation of ‘social mores’ would result in the ‘recognition of diversity of women's experiences and locate them in their political and social context (Crawley, 1999: 329). Kneebone (2005: 26) has argued that the tendency to characterise women's experiences under the PSG ground overemphasises women's vulnerability and dependence at the

expense of her political opinion. In fact if politics are understood more broadly, more gender-based claims could be argued through the political opinion ground. This is favourable in the circumstances where the context gives the political meaning to women's resistance to their gendered roles. To appreciate the political nature of that resistance avoids de-politising women's experiences.

Political Opinion and Forced Marriage Claims

The choice of whether and whom to marry is a fundamental human right enshrined in several international human rights instruments. 'Free and full consent' in relation to marriage is included in the UDHR (Article 16 (2)), the UN Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriage (Article 1 (2)) and the Covenant on International Civil and Political Rights (Article 23 (2)). The International Covenant on Economic, Social and Cultural Rights uses the word 'free' consent (Article 10 (1)). The international convention on women's rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) locates marriage rights in their larger political and socio-economic context. Article 16 (1) stipulates that state parties to the convention:

'[s]hall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular shall ensure, on a basis of equality of men and women...the same right to enter into marriage... and the same right freely to choose a spouse and to enter into marriage only with their free and full consent'.

The Committee monitoring the implementation of CEDAW further stressed in their General Recommendation No. 21 that 'a woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being'. In these ways, CEDAW

addresses the historical and continued oppression and subordination of women within the context of marriage.

Given that the choice of whether and whom to marry is a fundamental human right, the absence of such consent in forced marriage is a violation of that right. Yet forced marriage typically includes a multitude of associated patterns of gendered violence, including rape, as well as denials of other human rights in addition to the lack of consent. Recently within international criminal law, forced marriage in conflict situations has been recognised as a crime against humanity.³ It has also been recognised as a contemporary form of slavery (United Nations, 2003b).

Reliable statistics on forced marriage are difficult to come by because of their often unofficial and undocumented nature. This is also compounded by the ‘difficulty in distinguishing between coercion and consent in matters of marriage’ (Gill and Mitra-Kahn, 2012: 108). In relation to the prevalence of child brides, the International Centre for Research on Women estimates the number around 67 million in the world, a figure that is predicted to rise to 142 million within the next ten years (ICRW, 2012). Although forced marriage predominantly affects girls and young women⁴, forced marriage can occur at any age and is not solely dependent on the age and lack of consent but rather the intersecting societal, political and economic inequalities inherent in the girl’s or woman’s position in relation to others.

Feminists have long recognised the multitude of pressures facing women to marry, including ‘poverty, pregnancy and social norms and expectations that are underpinned by the patriarchal structures of their culture, religion and the State’ (Sundari and Gill, 2009: 172). Much of the persecution women face occurs in the private sphere and violence against women in its various forms is often supported by the ‘social legitimacy of marriage’ (Cheal, 2008: 80). In order to understand forced marriage within its context, the ways in which ‘women are dominated,

economically controlled and socially disciplined by practices such as forced marriage’ need to be taken into account (Gill and Mitra-Kahn, 2012: 119). It is precisely in the recognition of the historical and continued oppression and subordination of women in the marriage context that the political dimension of resistance to forced marriage becomes evident. Feminist opinions *are* political opinions.

Given the clear position in international human rights law, forced marriage can be seen as a paradigmatic example of gender-based persecution. Indeed, many international and national gender guidelines characterise forced marriage as an example of gender-based persecution (IRB, 1993, DIMA, 1996, IAA, 2000, UNHCR 2002a and UNHCR 2008). Echoing the concerns of NGOs in the UK (Asylum Aid, 2006), however, Dauvergne and Millbank (2010: 61) conclude that adjudicators in the UK and Australia rarely used these guidelines when analysing whether those forced to marry form a PSG or whether forced marriage constituted persecution.

Case studies

When an asylum seeker’s claim is refused, which happens in around 63% of cases in the UK (Eurostat, 2015), she may be able to appeal against the decision. From appeal to the First-tier Tribunal, an asylum seeker has on ‘onward’ or ‘second appeal’ to the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC)⁵, though the ability to do so is limited by the recent introduction of fees and cuts to legal aid.⁶

There are challenges to any analysis of the cases from the Upper Tribunal (and its predecessors) as only some of them are reported. The Upper Tribunal adopted a new determinations database on 2 August 2013, which provides improved access to unreported cases from 1 June 2013. However, the decision on whether to make a case publicly available remains under the discretion of the Tribunal Reporting Committee under the direction of the President of the Tribunal. As statistics

are not available, it is not possible to say the extent to which the reported cases are representative. Altogether, there were 11 reported cases that dealt with women fleeing forced marriage, or the risk thereof to varying degrees. While the small number of the cases precludes any causal analysis, their jurisprudence can give us some illustration of how, at least in some cases, the political opinion has been understood. Out of the 11 reported cases dealing with women's appeals involving a forced marriage element between 2004 and 2014⁷, the political opinion ground was advanced in only three cases: *FB (Lone women - PSG – internal relocation – AA (Uganda) considered) Sierra Leone* [2008] UKAIT 00090, *FM (FGM) Sudan CG* [2007] UKAIT 00060 and *FM (Sudan) and JM (Sufficiency of protection - IFA - FGM) Kenya* [2005] UKIAT 00050. In *JM (Kenya)*, the political opinion ground was not examined in any meaningful way but dismissed outright by the adjudicators who found that internal relocation was available. The following sections therefore focus on the two cases where the Tribunal did give consideration for the political opinion ground.

FB (Sierra Leone) shows most clearly the discriminatory nature of a male-centred approach to politics, and therefore the gendered application of international refugee law. FB came to the UK when she was 16 years old, having formerly lived in Bankala village in Sierra Leone with her parents and brothers. During the civil war, in 1999, her father was killed. Her mother was a local soweï (a leader of the so-called female initiation societies comprising of Sande/Bondo women in Sierra Leone and Liberia) (Steady, 2005) and one of the women who carried out FGM. When FB was about 16 she underwent FGM and while recovering in a nearby village, she was told that her mother had died and that she was to replace her mother as a soweï. On her return to her village she told of her reluctance to the local chief. However, he insisted that she must go through the rituals to become a soweï and become one of his wives. FB refused and fled.

FB's claim ultimately turned on an issue of internal relocation, as is common in these types of cases (Honkala, 2015). With respect to the consideration of the relevant Convention ground, the

Tribunal accepted that she fell within a PSG. However, she also advanced the political opinion ground and it is the Tribunal's consideration of this ground that is the focus here.

The adjudicators described FB as 'having rejected that role [becoming a sowe] because she is opposed to such traditional practices', as 'a woman who has eschewed traditional values, as part of a particular social group' 'by her resistance to accepting the prevailing cultural norms in her own rural society' (¶¶ 61, 62, 71). While the adjudicators' reasoning evidences a problematic view of 'culture', there is nothing in these passages that disqualify them from describing a political opinion.⁸

It is therefore striking that the adjudicators in *FB (Sierra Leone)* went on to find that "*the appellant, of course, holds no political opinions*" [my emphasis]. They then immediately contradicted this in the following sentence: 'she does not approve of FGM or wish to participate in the Bondo or to marry an elderly man occupying a position of local chief' (¶ 72). The adjudicators' reasoning is worth quoting at length here:

'[H]er motives are not political in any discernible way. That, however, is not the point. She has been identified as one who has rejected the traditional and customary ways of her village. Those traditions and customs include the recognition of the local chief in the social hierarchy. There is thus a political element that might be extracted both from the social place of Bondo and the position of the chief as the principal source of local governance. These so-called 'political' elements are relied upon to support a claim that a rejection of customary *mores* will be imputed as opposition to the existing *status quo* and therefore as an imputed political opinion giving rise to a further Convention reason' (¶ 73).

Here, the Tribunal's reasoning seemed to recognise that the argument advanced by her was that rejection of becoming a sowe and resistance to forced marriage was seen as opposition to the existing status quo. Furthermore, they seemed to recognise the political context of the local chief in

the social hierarchy and the position of him as the principal source of local governance. Given this, however, the adjudicators continued:

‘[W]e have, however, concluded that it does not, in spite of these political ‘overtones’[....] Our view is that there is but a peripheral connection between these political strands and her resistance to being a soweï and becoming involved with rituals which she considers harmful and demeaning (both to herself and those subjected to them) and her obvious reluctance to marry a man for whom she does not care’ (¶ 73).

The Tribunal’s conceptualisation of politics here is very narrow. The adjudicators dismissed the evidence of her resistance being political, and described her actions as including ‘so-called ‘political’ elements’ and ‘these political overtones’, but having only a ‘peripheral’ connection to her resistance. The implication of the Tribunal here is that FB’s resistance was not *really* political because it did not resemble the narrow male model where politics is what happens in the public sphere.

In finally dismissing the political opinion ground claim, the adjudicators stated that:

‘[t]he fact that the chief is, in a sense, a local politician and that the Bondo has a political element in its operations is not conclusive in characterising, this claim as one of imputed political opinion. This classification may, in large measure, be a simple matter of fact’ (¶ 73).

Furthermore, they concluded that ‘these considerations are largely academic’ (¶ 74). The adjudicators presented a positivist vision of law as able to separate itself from political considerations and able to read facts objectively. By describing the classification of the local chief as a politician to be ‘a simple matter of fact’, the adjudicators saw a ‘truth’ rather than a particular

interpretation. This in turn allowed them to find that, in any case, these questions were ‘purely academic’ because they had already identified ‘that the harm is related to her particular social group’ (§ 74). Of course, this finding does not preclude a finding of political opinion ground because the Refugee Convention allows for multiple Convention grounds. More holistic interpretations often find that persecution engages more than one Convention ground. In fact, separating that which is the supposedly legal from that which are ‘purely’ academic masks the privileging of one type of politics over others. Essentially, then, by misinterpreting her political resistance as something private, the adjudicators not only perpetuated the public/private dichotomy but denied the asylum seeker woman’s agency.

The Tribunal’s reasoning in *FB (Sierra Leone)* evidences the pressing issue of gendered interpretation of the political opinion ground. The normative situations of political persecution that judges envision are moments where public figures, imagined to be men, publicly speak out against their government (McKinnon, 2010: 81, Musalo, 2003). However, FB’s resistance was against her gendered oppression: it was against what was expected of her. Not only was her resistance political, it was identified as such by the local political power structures of the community. As Macklin (1995: 260) notes:

‘[i]dentifying women’s resistance to gender subordination as political opinion...[is]... profoundly feminist, if indeed one believes that the personal is political and that patriarchy is a system constituted primarily through power relations and not biology’.

In effect, the adjudicators failed to recognise how the asylum-seeker woman’s resistance to particular gender roles and her refusal to be forced into marriage evidenced her *political* agency.

In *FM (Sudan)* the political opinion ground was argued in addition to a fear, if returned, of her daughters being subjected to FGM and forced marriage. FM gave evidence of her experience of

FGM and how she had become politicised against it in her teens. She joined a women's union, distributed leaflets against FGM, attended a WHO meeting on FGM and participated in a demonstration against FGM and violence against women. As a result of her participation in the protest she lost her job as a teacher. After her marriage, three years later, she participated in another demonstration organised by the same women's union. The police intervened and she was arrested, interrogated for five hours and beaten. Subsequently, FM moved to Pakistan with her husband, where their four children were born. In Pakistan, FM continued her activism on women's rights. In 1999, the family moved to the UK on her husband's work posting, and in 2002 FM applied for leave to remain in the UK. FM also gave evidence of how she continued her political and human rights activities in the UK, joining the Sudan Human Rights Organisation, Sudanese Women's Rights Group, Darfur Centre for Human rights and Development as well as the Sudanese Solidarity Group. She attended protests, regular meetings and did volunteer work. The country expert stated that there was 'no doubt' that FM would have been noticed and labelled as an activist, and that her long association with Sudanese human rights organisations meant that she was associated with groups that were regarded, by the regime as 'an embarrassment' (¶ 27). Indeed, he said, 'they were regarded as real enemies of the regime' (¶ 27).

In this case, the Tribunal had to consider whether she would face future risk of persecution for reasons of a political opinion. Whilst 'accepting the genuineness of the first appellant's interest in women's rights in Sudan and her stance on the issue of FGM', the adjudicators did not consider that she had 'shown a genuine interest in overtly anti-regime activities during her time in UK' (¶ 149). The adjudicators arrived at this conclusion despite evidence from a country expert that the regime had continued to 'resist the presence and activities of human rights groups', that there had been efforts by the regime to legalise FGM, and that 'those who campaign against FGM are almost inevitably drawn from those who oppose the totalitarian regime on other grounds' (¶¶ 8, 15). There was evidence from the *British Medical Journal* that the Sudanese government was engaging in a

clamp down on the press which was affecting public health campaigns as the government considered articles discussing FGM as ‘subversive’ (¶ 10).

In dismissing any connections between FM’s political activities against FGM and the regime, the adjudicators fundamentally failed to appreciate the political interplay between gender and nation-building. The adjudicators refused to see how political power struggles, as in so many cases, are played out on women’s bodies and how the controlling and policing of women’s sexuality and their bodies are intertwined with propaganda about the ‘nation’s identity’. ‘The politicisation of gender identity in the context of the type of nationalism’ that President Bashir’s regime was engaged in is familiar to feminist critiques on nationalism and struggles over national identity (Crawley, 2001: 108). As Crawley (2001: 108) has noted, ‘many anti-colonial nationalist regimes have aimed to recover or reinvent “tradition” in order to develop a new nationalist consciousness’.

Indeed, President Bashir’s regime had tied FGM to ‘authenticity’ and the discourse of ‘getting back to origins’ (Mustafa Abusharaf, 2006: 154) and was ‘openly scornful’ of international agreements, stating that Sudan refused to sign CEDAW because ‘the country could do without such strange practices’ (*FM (Sudan)* ¶ 14). The national identity in these types of nationalist struggles is often located within the private sphere, construed in “cultural” terms against the West, because women have been constructed as the bearers of an ‘authentic/authenticated culture’ (Crawley, 2001:108). However, as Mogdham (1994: 16) argues, ‘it is in the context of the intensification of religious, cultural, ethnic and national identity... that we see the politicisation of gender, the family and the position of women’. Through issuing policies that govern relations between men and women, from property rights to sexual and family relations this politicisation of gender becomes institutionalised (Crawley, 2001: 27). Seeing her political activities within their context of gender and nation-building explains why advocating women’s rights was seen as subversive by the regime.

The significance of this political process was lost on the Tribunal. As is well known, President Bashir was indicted to the ICC in 2009 on five counts of war crimes, including campaigns of torture and rape.

Conclusion

The UNHCR Gender Guidelines acknowledge the important interconnections between different Convention grounds and affirm that a claim based on transgression of social or religious norms could come under religion, political opinion or a PSG ground (2002, ¶ D (23)). It is important that women's resistance to their gendered oppression is recognised as evidencing women's political agency in order to avoid de-politicising their claims. The case of *FB (Sierra Leone)* is an example of jurisprudence whereby women's claims are constructed socially and culturally rather than recognising the central political dimensions and context. *FM (Sudan)* similarly evidences the troubling tendency to downplay women's political participation. Even when political activism against FGM was considered by the regime as subversive, the adjudicators did not consider that her political opinion was evidenced. In both cases the jurisprudence fails to recognise women's claims involving power relationships that reflect the political and legal position of women.⁹ The decisions also demonstrate the ways the Tribunal examines the political opinion ground that reflects a narrow and masculine experience of the political.

It is not the purpose of this article to advocate the abandonment of the PSG ground in these types of cases. There may be benefits for advocates and practitioners to advance this group, depending on the particularities of the cases. Refugee determinations are always individualistic and decisions on which grounds to advance depend on the particular circumstances of the case. However, interpretations of the PSG ground remain uncertain and when it comes to women being recognised as such its use is not without its difficulties. Given the policy context in which European governments seek to restrict the number of asylum seekers, recognition of women per se

constituting a PSG seems unlikely to be widely accepted (Crawley, 2001: 73, Freedman, 2015: 85). It also needs to be acknowledged that the desirability of such an approach is open to certain criticisms. Instead, framing women's asylum claims as related to the political opinion ground may avoid some of the practical and political concerns associated with PSG (Crawley: 2001; 69). At the same time, the connection of political opinion with a refugee is so ubiquitous that refugees continue to be described colloquially as 'political refugees'. It remains important therefore to challenge narrow, partial and gendered interpretations of what counts as political opinion. There are already cases based on forced marriage in which the political opinion ground has been advanced and the ways in which it has been interpreted can shed light on the challenges, which women may face when advancing this ground. Arguably, there is a need to rethink the political opinion ground as a basis for women's gender-based persecution claims.

Although much has been achieved in the field of gender and refugee law, there remains slow progress in terms of national tribunals utilising gender guidelines that call for gender-sensitive approaches to interpreting the Refugee Convention. This is of particular concern in the UK where after the reconstitution of the appeal tribunal in 2005, the new Tribunal considered itself not bound by its predecessors Gender Guidelines (Asylum Aid, 2007: 20). Clearly the issue is politically controversial and the governmental position on restricting avenues for migration poses significant challenges for refugee advocates, activists and asylum seekers. Considering that the refugee determination processes suffer from a number of institutional challenges, from lack of resources to lack of adequate training of decision-makers, perhaps critiquing the use for the political opinion ground may not be seen as the most strategically important goal. This does not however diminish the importance or the need for challenging gendered interpretations of the Convention and for making the case for women's political agency and resistance to gendered oppression to be seen as political. In such circumstances where the resistance to forced marriage is seen by the claimant as an expression of their political opinion to their gendered oppression and where the state is unwilling or unable to offer protection of the rights of the claimant, advancing the political opinion ground

can be warranted. Crucially, from a feminist perspective this avoids constructing women narrowly as victims of their social or cultural circumstances and de-politicising their resistance, but rather recognises the women as active political actors.

Notes

1. UNHCR Executive Committee (1995) *Conclusion No.77 (XLVI)*, (1996), *Conclusion No.79 (XLVIII)*, (1997), *Conclusion No.81 (XLVIII)*, (1999) *Conclusion No.87 (L)*, .
2. The protected characteristics approach originated in the US BIA case *Matter of Acosta I. & N.* Dec. 211 (1985) but has since become dominant, having been adopted in Canada, New Zealand and the UK.
3. *The Prosecutor of the Special Court v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (the AFRC accused) (Appeal Judgment)*, SCSL-2004-16-A, Special Court for Sierra Leone, 22 February 2008.
4. International data shows that young girls and women are disproportionately affected by forced marriage and much of this data concerns child marriage (Psaila E, 2016). The UK Forced Marriage Unit recorded its enquiries in 2015 to be 80% female and 20% male victims (UK Home Office & Foreign & Commonwealth Office, 2016).
5. For a comprehensive review of the changes see, Craig S and Fletcher M (2012).
6. Although asylum seekers continue to have a right to legal aid, practical access to such has been limited by reduction in service and closures of the two major providers of immigration and asylum advice and representation: Refugee and Migrant Justice (RMJ) and Immigration Advisory Service (IAS). See, Burrridge A and Gill N (2016).
7. Cases were only examined at the Upper Tribunal level as First-tier Tribunal decisions are not publicly available. Research was conducted during 2010-2014, and a 10-year period was chosen as it represents a relatively substantial period of time where jurisprudential and policy trends may be gleaned and reflected upon. In the same time period, there was one case involving a male claimant *OO (gay men; risk) Algeria CG* [2013] UKUT 00063.
8. There seems to be a tendency to assign these types of harms to culture rather than viewing them as a result of gender inequality. The tendency to exoticize harms has been discussed in the US context (Millbank J and Dauvergne C, 2010).
9. For a critique of this issue in the Australian context, see, Kneebone S (2005).

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