

Gender-based persecution at the International, European and Spanish levels: obstacles and challenges

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Abstract

This paper is an effort to discuss the concept of gender-based persecution and the normative framework at the International, European and Spanish levels. My starting point is that International Refugee Law has been androcentric since its establishment. This is the reason why the first thought that comes to our mind when we think about a refugee is a man fleeing his country of origin owing to a well-founded fear of being persecuted for political opinions. And it is also the reason that gender-based persecution is not specifically covered in the 1951 Convention Relating to the Status of Refugees. Fortunately, the International Community, better late than never, became aware of the particular experiences of refugee women. But the incorporation of gender-based persecution has been weak and has not taken into account the needs and experiences of refugees and asylum-seeking women. My main conclusion is that a recognition of gender-based persecution as an autonomous ground must be seek.

Keywords: *gender-based persecution - International Refugee Law - women - women refugee - gender*

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1. Introduction

International Refugee Law has been developing for almost a century, and, like other areas of International Law, it has been androcentric since its establishment. By androcentric I mean the recurrent tendency to place the male experience at the center, ignoring the female one. This is the reason why the first thought that comes to our mind when we think about a refugee is a man fleeing his country of origin owing to a well-founded fear of being persecuted for political opinions.

The notion of refugee appeared in the period between World War I and World War II to address the problem of displaced people as a result of factual situations that were occurring (for instance the various armed conflicts, revolutions, rebellions, and authoritarian regimes of the 20th century). Goodwin-Will explains that the history of International Refugee Law began in February 1921, when the problem of some 800,000 Russian refugees adrift in Europe as a result of the World War I, the revolution and the disastrous civil war was identified.¹ The Russian refugees were followed by Armenian, Assyrians, Germans refugees and gradually the International Community responded to the problems of people fleeing the tragedies of the last century.

Since the activities of the public sphere have always been dominated by men, leaving women relegated to activities within the private sphere, the idea of the refugee is associated with a male who is persecuted in the public sphere by State agents, the most explicit example is a male who flees because he is persecuted by a totalitarian regime because of his opinions or political activism².

The 1951 Convention Relating to the Status of Refugees (hereinafter ‘the Convention’) was drafted in the aftermath of World War II to respond to the thousands of European citizens seeking asylum. At the time, the drafters of the Convention did not take into account the particular experiences of women because they were thinking of European men fleeing the war. Again, wars, armed conflicts, and political activism and persecution, occurring within the public sphere, have always been a man's business.

Unsurprisingly, gender-based persecution was not covered by the text of the Convention. Its Article 1, which establishes the definition of the term ‘refugee’, only covers well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.³ Gender-based persecution was also not covered by the 1967 Protocol relating

¹ Guy S. Goodwin-Gill, ‘International Refugee Law: Where it Comes From, and Where It’s Going...’ (2017) Vol. 45 No. 1 International Journal of Legal Information 24.

² Jane Freedman, ‘Mainstreaming gender in refugee protection’ (2010) Vol. 23 No. 4 Cambridge Review of International Affairs 589.

³ Article 1 (A) (2) Convention Relating to the Status of Refugees, Geneva, 28 July 1951 (Entry into force: 22/04/1954) United Nations, Treaty Series, vol. 189, p. 137.

to the Status of Refugees (hereinafter ‘the Protocol’) and regional Conventions that expanded the refugee term (namely the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration on Refugees).

In addition to a well-founded fear for the reasons mentioned above, it is necessary for the person to be outside the country of *his* nationality and be unable or, owing to such fear, is unwilling to avail *himself* of the protection of that country⁴. This definition, although it uses the terms ‘his’ and ‘himself’ in its wording, has never been used to restrict women from international protection. On the contrary, men and women have always been able to apply for asylum on the grounds given in the Convention. However, some authors argue that the definition still had important implications and created difficulties for many women in gaining refugee status.⁵

Nowadays, women around the world move from their places of origin for multiple, complex and interrelated reasons. Some of them are poverty, lack of economic opportunities, social inequality, violence, persecution, among others. In recent years, many authors have begun to use the concept of ‘feminization of migration’, which does not refer to an exponential increase in the number of female migrants as one would think. Statistics show that in the last thirty years the total percentage of female migrants has not changed much (49.3% in 1990, 49.4% in 2000, 48.4% in 2010 and 48.1% in 2020).⁶ By contrast, this concept refers to the fact that women are increasingly migrating autonomously as independent migrants and primary economic providers for their families, rather than as dependents of men. The problem is that in migration research women are often invisibilised and most recently they are stereotyped as mothers, unskilled women who have followed their husbands, who do not speak the language, are subject to the patriarchal and religious traditions and their jobs can only be as domestic workers or in the sex industry.⁷

During the entire migration process women are exposed to violence, abuse, harassment and violation of human rights. Such violence can take the shape of persecution or not. It is important to note that women may face persecution during the migration transit. In other words, persecution does not start in the country of origin, but may appear later. Indeed, violence against women is

⁴ Article 1 (A) (2) Convention Relating to the Status of Refugees (*emphasis added*).

⁵ Jane Freedman, ‘Mainstreaming gender in refugee protection’ (2010) Vol. 23 No. 4 Cambridge Review of International Affairs 589.

⁶ United Nations, Population Division, International Migrant Stock (2020) <<https://www.un.org/development/desa/pd/content/international-migrant-stock>> **All links were accessed on 11 July 2021.**

⁷ Ariane Alam, Thomas Bauer and others, ‘Report: Migrant, Refugee and Asylum-seeking women and girls in Europe’ (2019) Institute of Political Studies - Strasbourg Produced for the Gender Equality Division of the Council of Europe <<https://rm.coe.int/report-migrant-women-scpo-jan-2019/168092d8cd>>.

exacerbated during migratory journeys. Thus, a woman ‘voluntarily’ decides to flee, but during the journey something happens that prevents her from returning to her country of origin. Rape is a common experience on migratory journeys, especially for women and girls travelling alone, and it is common for them to prefer to travel accompanied by a man, such as a husband or father. Another of the worst phenomena of the migration process is trafficking in persons for sexual exploitation, where women and girls are the principal victims. This circumstance explains the great disparity between the number of women and girls in transit countries and those in countries of arrival.⁸ The answer is simple: they disappear on the journey, they are abducted. Trafficking in persons does not necessarily imply persecution, only under certain circumstances, for instance the well-founded fear of becoming a victim of trafficking in her country of origin.

Women who are forced to migrate also do so for a variety of complex reasons, many of which are directly related to their gender. These are the women who suffer persecution in their countries, who have the right to seek asylum and who deserve international protection. Today, more and more women have to leave their countries of origin for fear of female genital mutilation, forced marriages, physical and psychological gender-based violence, forced abortion, rape, harassment, persecution for not respecting the cultural practices or morality codes, etc.

None of these types are specifically covered by the Convention and women continue to have difficulties in applying for asylum. One of the problems is that, for example, even if a woman is doing political activism by refusing to have her daughter forced to marry or to undergo female genital mutilation, these acts are not seen as political acts but as cultural issues or issues of private and family life that have nothing to do with political activism. The same is the case when a woman is raped by her husband or suffers violence by her husband, this traumatic event is either not considered serious enough to be a type of persecution to claim international protection even if there is a lack of State protection, or it is considered a problem of the private sphere. And we could mention many more examples.

Women are fleeing and will continue to flee multiple threats, women refugees continue to risk their lives in unsafe boats, for instance, trying to cross the Mediterranean to Europe. In most cases, women risk not only their own lives, but also those of their children. The growing number of asylum seekers worldwide and the constant security policy of States -that seems to want to restrict the entry of migrants without distinguishing between those who do so because they have no other way out and those who migrate ‘only’ for economic reasons-, means that the refugee issue remains

⁸ *Ibidem*.

relevant, especially in Europe. Add to this the continuing difficulties faced by women and girls, as the group most likely to experience violence and discrimination, the issue deserves to be investigated.

In this Master's Thesis, first of all, I will identify what we mean by gender-based persecution and the different types. Secondly, I will investigate the incorporation of gender-based persecution at the International level. And finally, I will examine the situation in Spain: the Directives of the European Union and the Spanish Asylum Law, to understand what are the main obstacles and what are the challenges that still lie ahead. My main hypothesis is that at the International, European and Spanish levels the experiences and needs of refugee women and girls are not taken into account when it comes to guaranteeing asylum because gender-based persecution is not regulated or is regulated in a deficient manner. In order to try to prove it, I will analyze the main bibliography, legislation and caselaw on the topic.

One of the main characteristics of our cultures and intellectual traditions is that they are androcentric, male-centered, and have made men the paradigm of the human.⁹ In the legal arena, almost all norms have been created taking into account the experiences and needs of men. And these experiences are taken as universal. The gender perspective introduces the viewpoint and perspective of women. In this paper, I will attempt to support my analysis from a gender perspective.

2. The concept of gender-based persecution and the main problems women face

In this chapter I will try to identify what we mean by gender-based persecution, taking into account that the concept has been at the center of several debates. Fear of persecution on one of the grounds set out in the Convention is one of the necessary elements to qualify as a refugee. Following Goodwin-Gill, the general matters of the definition are:

- a. The applicant must be outside his or her country of origin (i.e. have crossed an international border)
- b. The applicant should have fled for fear of persecution. The author highlights that it is not necessary that the persecution should have actually occurred. This fear of persecution, moreover, must be well-founded. Both subjective and objective elements must be taken into account. As for the former, we must analyze his or her personal experience, his or her personality, his or her belonging to a certain racial, religious or social group, his or her beliefs

⁹ Alda Facio and Lorena Fries, 'Feminismo, género y patriarcado' (2009) Año 3 No. 6, Revista sobre enseñanza del Derecho de Buenos Aires 259.

and commitments, etc. All subjective situations that lead us to deduce that the predominant motive is a reasonable fear. It is important to locate the applicant in a social and political context. And for the objective element, it is necessary to evaluate the declarations of the applicant, the conditions in the country of origin, his or her credibility, etc. In short, ‘sufficient facts to permit the finding that the applicant faces a serious possibility of persecution’.¹⁰

c. The fear of persecution must be one of the five grounds of persecution stated in the Convention: race, religion, nationality, membership of a particular social group and political opinion.

d. Lack of protection by the State of nationality. It must be borne in mind that international protection is subsidiary protection. Protection must always be granted, in the first instance, by the State of origin or nationality.

In order to analyze gender-based persecution, it is first necessary to analyze what ‘persecution’ means. The Convention does not give us a clear definition, so the the United Nations High Commissioner for Refugees (hereinafter ‘UNHCR’) in his Handbook on Procedures and Criteria for Determining Refugee Status affirms:

There is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.¹¹

‘Persecution is most appropriately defined as the sustained or systemic failure of State protection in relation to one of the core entitlements recognized by the international community’.¹² In this regard it is important to add that ‘while persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of State protection, the refugee definition

¹⁰ Guy S. Goodwin-Gill, *The Refugee in International Law* (2nd Edition, Clarendon Press Oxford 1996) 41.

¹¹ UN High Commissioner for Refugees (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’, April 2019, HCR/1P/A/ENG/REV. 4 <<https://www.refworld.org/docid/5cb474b27.html>> (This is an unchanged reissue of UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees published in 1979).

¹² Rodger Haines, ‘Gender-related persecution’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003) 319.

does not require that the State itself be the agent of harm'.¹³ This is especially relevant because women are more likely to be persecuted by non-State actors.

It is clear that the human rights of women are constantly being violated and International Refugee Law has not provided them with the protective framework they need. Among the authors who study these issues, the positions on how to incorporate gender-based persecution are diverse. The position adopted by UNHCR has been not to modify the Convention, but to read it with a gender-sensitive perspective. The arguments given by UNHCR are related to the fact that a modification of the Convention would probably imply that States would provide less protection.

Thus, UNHCR has developed some guidelines that promote a gender-sensitive interpretation of the Convention. This will be analyzed in the following chapter, but it is worth mentioning here the definition provided by UNHCR on the concept of gender. UNHCR Handbook for the Protection of Women and Girls states:

The term "gender" refers to "the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes are socially constructed and are learned through socialization processes. They are context/time specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader sociocultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.¹⁴

In addition, Rodger Haines -quoting Heaven Crawley- says that:

The term 'gender' (...) refers to the social construction of power relations between women and men, and the implications of these relations for women's (and men's) identity, status, roles and responsibilities (in other words, the social organization of sexual difference). Gender is not static or innate but acquires socially and culturally constructed meaning because it is a primary way of signifying relations of power. Gender relations and gender differences are therefore historically, geographically and

¹³ *Ibidem*.

¹⁴ UN High Commissioner for Refugees (UNHCR), 'UNHCR Handbook for the Protection of Women and Girls', January 2008 <<https://www.refworld.org/docid/47cfc2962.html>>.

culturally specific, so that what it is to be a ‘woman’ or ‘man’ varies through space and over time. Any analysis of the way in which gender (as opposed to biological sex) shapes the experiences of asylum-seeking women must therefore contextualise those experiences.¹⁵

Having examined what persecution means and what the term of gender means, it then remains to see what we understand by the concept of gender-based persecution. As already mentioned, gender-based persecution is not found in the Convention as one of the five grounds. However, authors such as Jane Freedman provide a definition. Freedman uses the term ‘gender-related persecution’ and claims that it is ‘a term which encompasses persecution which is done to women because they are women, but also persecution which is carried out for other reasons, but takes a particular form because the victim is a woman.’¹⁶

What Freedman is telling us is that women are persecuted for a variety of reasons, it can be for the fact that they are women, or it can be for any of the reasons for which a man is persecuted (for instance, the reasons defined in the Convention) but which take on a particular form because they are women. But the author also tells us that in some cases the two elements may be or may be not combined. In a similar way, Haines states that ‘gender-related persecution refers to the experiences of women who are persecuted because they are women, that is, because of their identity and status as women. Gender-specific persecution refers to forms of serious harm which are specific to women. The reasons for such persecution and the form it takes may, however, overlap.’¹⁷

A woman, then, may be persecuted based on race but such persecution may take a specific form such as any kind of gender-based violence. Also, a woman may be persecuted for not respecting the dress codes of her community, ‘but the punishment for the infringement of these gendered norms of behaviour might itself not necessarily be specifically gendered – the woman might be imprisoned...’¹⁸. Generally, however, the acts by which men and women are persecuted tend to take different forms, with the gender dimension playing a predominant role. And finally, a woman may

¹⁵ Rodger Haines, ‘Gender-related persecution’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 319.

¹⁶ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st Edition, Palgrave Macmillan UK 2007) 47.

¹⁷ Rodger Haines, ‘Gender-related persecution’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 319.

¹⁸ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st Edition, Palgrave Macmillan UK 2007) 48.

be persecuted for not respecting these dress codes, but her punishment may take the form of sexual violence or rape. This last example is where both elements are combined.

All types of gender-based persecution experienced by women ‘occur because of gendered power relations within different societies’.¹⁹ These power relations are based on an assumed biological inferiority, which assigns gender roles to both men and women. This implies that women will always be subordinate to men. It should be made clear that this system is not natural but historical. The patriarchal system is based on male dominance exercised through sexual violence against women, institutionalized and promoted through the institutions of the family and the State.²⁰ It is important to note that ‘much of the persecution which women face is directed against their sexual and reproductive capacities, as men seek to control both their sexuality and their capacity to reproduce.’²¹ And in many cases, violence against women is due not only to the fact of being a woman, but also to the fact of not being a suitable woman.²²

On top of that, women encounter many difficulties in seeking international protection. Ninete Kelly analyzes the problems faced by women when they want to apply for asylum on the basis of gender-based persecution or others grounds under the Convention and expresses that:

The problems were essentially threefold. Even where women feared persecution for the same reason as their male counterparts (religion, race, political opinion), if the persecution was gender-specific (such as rape), it was not readily recognized as a persecutory act within the meaning of the Convention. Secondly, women who had a well-founded fear that was gender-specific, such as fear of persecution for failing to follow strict discriminatory codes of conduct for women, were not regarded as fleeing for a Convention refugee ground. Finally, women, especially those who had been subject to sexually degrading treatment, often found it not only difficult to talk about their experiences before male decision-makers, but equally hard to substantiate with objective evidence.²³

¹⁹ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st Edition, Palgrave Macmillan UK 2007) 48.

²⁰ Alda Facio and Lorena Fries, ‘Feminismo, género y patriarcado’ (2009) Año 3 No. 6, *Revista sobre enseñanza del Derecho de Buenos Aires* 259.

²¹ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st edn, Palgrave Macmillan UK 2007) 46.

²² Carmen Miguel Juan, ‘Una mirada feminista al Derecho Internacional de los Derechos Humanos y al Derecho Internacional de las personas refugiadas’ (2014) Tesis Doctoral Universidad de Valencia.

²³ Ninette Kelly, ‘The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress’ (2001) Vol. 13 No. 4 *International Journal of Refugee Law* 559.

To these problems developed by Kelly, we could add one more. This is the difficulty women and girls have in fleeing their countries of origin. The Convention requires that to be recognised as a refugee a woman must be outside her country of origin. And women, being relegated to the private and family sphere and the most affected by extreme poverty globally, find it more difficult to escape from their homes. In addition, because they are the caretakers of children and other family members, if they wish to escape they must do so with their children or dependents or abandoned them. And obviously when women are imprisoned, escape is virtually impossible. In this sense, Freedman argues:

For many women flight is not an option, either because their material circumstances will not allow it – through lack of money, inability to travel without risk and physical restraint – or because the violence and persecution has been normalised to such an extent that women accept it without questioning whether there is an alternative.²⁴

a. The relevance of the public-private dichotomy

Western thought has been structured around a whole series of dualisms or oppositional pairs that divide the world into contrasting spheres or polar opposites.²⁵ The public-private dichotomy is one of these. Carmen Miguel Juan, following Francis Olsen, distinguishes three characteristics of this system of dualisms. First, dualisms are sexualized. One half of the dualisms is considered masculine and the other half feminine. Men have identified themselves with one side of the dualisms, with the rational, the active, the reason, the culture, the universal. Women were identified with the irrational, the passive, the emotion, the nature, the particular. Secondly, the terms of the dualisms are not equal, but constitute a hierarchy. In each pair, the term identified as masculine is privileged as superior. She explains that one side of the dualisms dominates and defines the other. For example, the irrational is defined as the absence of the rational. And finally, law is identified with the hierarchically superior and masculine side of the dualisms.²⁶

Law, created by and for men, has focused on legislating relationships in the public sphere. Rebecca M. M. Wallace and Olga Martín Ortega affirm that the rights of women have traditionally

²⁴ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st edn, Palgrave Macmillan UK 2007) 45.

²⁵ Carmen Miguel Juan, 'Dicotomía público-privado. Mujeres refugiadas: ¿Sujetos o no sujetos del Derecho Internacional de los Refugiados?' (2017) Vol. 2 No. 4 TSN. Transatlantic Studies Network: Revista de Estudios Internacionales 145.

²⁶ Carmen Miguel Juan, 'Dicotomía público-privado. Mujeres refugiadas: ¿Sujetos o no sujetos del Derecho Internacional de los Refugiados?' (2017) Vol. 2 No. 4 TSN. Transatlantic Studies Network: Revista de Estudios Internacionales 145.

been considered ‘private’ and therefore excluded for State intervention. This consideration has not been limited to the international sphere, but has been the generalized position, until relatively recently, in the domestic legal systems of many States, as evidenced, for example, by the reluctance of public authorities to intervene in matters of domestic violence.²⁷

Frances Webber affirms that:

When the Convention was introduced, traditional practices such as forced marriage, female genital mutilation, foot-binding, the self-immolation of widows and ‘ordinary’ domestic violence against women were not considered as ‘persecution’, although they caused serious harm to women and girls, and were carried out on them because of their sex or gender. They were not recognised because for decades ‘persecution’ was seen as something carried out by the state or by rulers, mainly against political dissidents or on a tribal basis. ‘Persecution’ was seen as something which happened exclusively in the public domain. The traditional practices affecting women tend to happen in the home or relate to the domestic or private sphere.²⁸

Following this idea, we can say that in International Refugee Law, as we have already mentioned, persecutory acts against men by the State are prioritized. It is for this reason that several types of persecution that occur in the private sphere against women are not taken into account, even when the country of origin is unwilling or unable to provide proper protection. Gender-based domestic violence is probably the most paradigmatic case involving the public-private dichotomy.

b. Females bodies and fertility control

Societies over the years have wanted to control the body, the sexuality and the fertility of women. The control of women's bodies has been done in order ‘to ensure that their social roles and behaviour conform to the patterns of gender domination established in societies’.²⁹ As mentioned above, women often suffer different forms of persecution than men because of their gender. The vast majority of human rights violations that women suffer because of their gender take place on their bodies, sometimes as a form of correction for not being a ‘suitable’ woman.

²⁷ Rebecca M. M. Wallace and Olga Martín Ortega, ‘La perspectiva de género en los procesos de concesión del estatuto de refugiada en Derecho Internacional’ (2004) No. 11 Revista de estudios de Ciencias Sociales y Humanidades 89.

²⁸ Frances Webber, ‘As a woman I have no country: the denial of asylum to women fleeing gender-related persecution’ <<https://www.refugeewomen.co.uk/wp-content/uploads/2019/01/women-for-refugee-women-the-denial-of-asylum-to-women-fleeing-gender-related-persecution.pdf>>.

²⁹ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st edn, Palgrave Macmillan UK 2007) 53.

Interesting on this point is the position of Silvia Morgades Gil who tells us that there is a difference between the persecution women suffer because of their gender and that which they suffer because of their biological condition, or reproductive capacity. She says that rape, sexual slavery or forced prostitution can be suffered by women as well as men, even if the facts show that the former are more often subjected to this kind of violence. But other forms of sexual violence such as forced pregnancy or forced abortion can only affect women, because of their biological condition.³⁰

In this way, women -regardless of their gender or gender identity- are at risk of persecution because of their biological condition. The simplest example to illustrate this difference is the situation of a transgender man. A transgender man will, depending on the context in his country of origin and his culture, be exposed to persecution on the basis of his 'sexual identity' because he have reproductive capacity (unless he undergoes surgery). Thus, the differentiation between biological sex and gender is again relevant.

3. Different types of gender-based persecution

a. Gender-based domestic violence

Gender-based domestic violence occurs in the private sphere and by a non-State actor (for instance the spouse, the father, the brother, etc.) is generally not considered sufficient to provide international protection to the women who suffer it. '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'.³¹ However, domestic violence is one of the most severe and frequent forms of violation of the human rights of women. 'Physical and mental violence and ill-treatment within the family are a widespread and often gender-specific form of harm'.³² Fortunately, although few, there are some cases where the National Courts have granted asylum to women victims of this type of violence, as long as the State of origin does not provide the necessary protection.

³⁰ Silvia Morgades Gil, 'La protection internationale des femmes pour des raisons liées au genre en droit international. Interprétations récentes des instruments de droit international soutenant des formes de protection subsidiaire' (2013) Vol. 117 No. 1 *Revue Generale de Droit International Public* 37.

³¹ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st edn, Palgrave Macmillan UK 2007) 78.

³² Rodger Haines, 'Gender-related persecution' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 319.

b. Female Genital Mutilation

Female Genital Mutilation (hereinafter ‘FGM’) is another type of harm suffered by women. For many years, FGM has been considered a traditional practice in certain cultures and tolerated under the slogan of multiculturalism. Nevertheless, the trend is changing, and the World Health Organization assert that ‘FGM has no health benefits, and it harms girls and women in many ways’³³ and that ‘it can lead to immediate health risks, as well as a variety of long-term complications affecting women’s physical, mental and sexual health and well-being throughout the life-course’.³⁴ In many cultures, the purpose of FGM is to ensure virginity before marriage and fidelity after marriage. In addition, another aim is to reduce or eliminate sexual desire, ensuring that women exercise their role as mere reproducers of the specie.

It is already an international trend to consider FGM as an unacceptable practice from both a human rights and public health point of view, especially if we consider that this practice must be suffered by girls and young women. Several States already recognise it as a form of persecution under the Convention even if there is a law within the country of origin prohibiting it, if it does not prosecute the practice and ensure protection. And as it is still a current practice in some cultures, we must continue to be aware of it.

Regarding FGM, it is relevant to note something that Jane Freedman explains very well in her book:

Moreover, even when asylum is granted to women on the ground of FGM, the discourse of immigration and other authorities still reverts to the framing of the issue as one of the victimization of these “other” women, using racialised and colonialist images and representations which help to enclose women fleeing this persecution in a state of alterity, and also to reinforce the divisions between different groups of women: white Western women and their African or Asian counterparts.³⁵

This phenomenon occurs not only in relation to the MFG but to all types of gender-based persecution. It is not the aim of this thesis to discuss this particular issue, but it is important to highlight it.

³³ World Health Organization (WHO), ‘Female genital mutilation (FGM)’ <<https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>>.

³⁴ *Ibidem*.

³⁵ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st edn, Palgrave Macmillan UK 2007) 53.

c. Gender-based violence: sexual violence, rape, feminicide, etc.

There are several types of gender-based violence, which can involve persecution under certain circumstances. Sexual violence is a form of serious harm of human rights, and can also be considered torture and a threat to life and freedom of women and girls. Rape and sexual violence against women are often not seen as a form of violence, but as the personal sexual desire of an individual, even if the individual is an agent of the State (for example a soldier). If a woman is raped during a political conflict or after having practiced her religion, it will not be presumed to be due to political or religious reasons but will be seen as an expression of the sexual desire of the persecutor.³⁶ But rape has little to do with sexual desire, but rather with a form of punishment and/or violence against the female body. In addition, regarding the public-private dichotomy we mentioned, rape is seen as a private act, and therefore not worthy of protection. This type of violence is usually condemned when committed in the context of an armed conflict, but massive violations have to take place, as was the case, for example, in the former Yugoslavia (i.e. Rape as weapon of war).

The most severe forms of sexual violence experienced by women are sexual slavery and force prostitution. The Rome Statute of the International Criminal Court states that ‘Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’³⁷ are crimes against humanity and is therefore one of the most serious crimes of concern to the International Community.

And feminicide is the most extreme form of violence against women and girls. Feminicide -or femicide-, i.e. the murder of women, committed by men, for the simple reason that they are women, is the tip of the iceberg of gender-based violence. In general, these murders are usually committed by the husbands or boyfriends of the victims. Jill Radford and Diana E. H. Russel in their book ‘Femicide: The Politics of Women Killing’ defined that feminicide is the misogynous killing of women by men, and they argued that ‘while men are murdered more frequently than women, men are rarely murdered simply because they are men. Even in the rare cases of women killing men, it is unlikely that they kill because the victim is male. Most murders by women are in self-defense...’.³⁸ Feminicide is the most brutal expression of gender-based violence, and when it occurs there is no

³⁶ Carmen Miguel Juan, ‘Una mirada feminista al Derecho Internacional de los Derechos Humanos y al Derecho Internacional de las personas refugiadas’ (2014) Tesis Doctoral Universidad de Valencia.

³⁷ Article 7 Rome Statute of the International Criminal Court, Rome 17 July 1998 (Entry into force: 01/07/2002) United Nations, Treaty Series, vol. 2187, p. 3.

³⁸ Jill Radford and Diana E. H. Russel, *Femicide: The Politics of Women Killing* (1st edn, Twayne Publishers, New York, 1992).

national or international protection that can be claimed. What is possible is to grant international protection -as long as the State is unwilling or unable to provide proper protection- when other manifestations of gender-based violence occur, as these violences also constitute violations of women's human rights and, in the worst cases, can result in femicide; or when there is a threat of femicide.

d. Child and forced marriage

Child and forced marriage 'is a human rights violation and a harmful practice that disproportionately affects women and girls globally, preventing them from living their lives free from all forms of violence'.³⁹ International Human Rights Law recognises the right to marry with free and full consent. Evidently, forcing a woman or girl to marry against her consent is a threat to freedom and a serious violation of her human rights, and should therefore be considered a form of persecution under the Convention. Again, as marriage falls within the private and family sphere, it has not been taken as a serious human rights violation. Many women flee with their daughters because they oppose their daughters being forced to marry, this should also be a reason worthy of international protection for both of them.

e. Discriminatory norms or customs

There are various communities that establish norms or customs that are in themselves discriminatory against women. Many women are forced to comply with certain dress codes, are not allowed to receive an education or to practice certain professions or are denied important civil or political rights.⁴⁰ And when these women rebel against these norms or traditions, they are punished in different ways because they do not adapt to the stereotype of a proper woman according to the culture. The norms or customs have been created as a form of domination and submission for women.

When these social customs are supported by the State and become law, women are often punished by the State authorities. They may be imprisoned or suffer worse punishments such as death by stoning. They may also be castigated by their family and community. Fortunately, the few

³⁹ Office of the High Commissioner for Human Rights (OHCHR), 'Child and forced marriage, including in humanitarian settings' <<https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/ChildMarriage.aspx>>.

⁴⁰ Carmen Miguel Juan, 'Una mirada feminista al Derecho Internacional de los Derechos Humanos y al Derecho Internacional de las personas refugiadas' (2014) Tesis Doctoral Universidad de Valencia.

who are able to escape are generally recognised under refugee status, given that these rules are highly discriminatory against women and their human rights based on archaic customs.

Related to this we also find the so-called ‘honour crimes’ committed against women in the name of honour. Generally, are committed by male members of a family who consider that the women has dishonoured the family.

4. Others significant harms against women

a. Persecution on grounds of gender identity and sexual orientation

According to ILGA World -the International Lesbian, Gay, Bisexual, Trans and Intersex Association- there are still 69 of the countries that continue to criminalize consensual sexual acts between adults of the same sex. Some, such as Saudi Arabia and Iran, impose the death penalty.⁴¹ And there are a bunch of countries where transgender people are explicitly and *de facto* criminalized.⁴² This type of persecution can be directed against both women and men. The persecution of homosexual men, however, is more visible than the persecution of lesbian women. ‘Violence and persecutions against lesbians are often also deeply gendered, resulting in rape and sexual abuse or assault (sometimes with the stated goal of returning them to “normal” models of sexuality)’.⁴³ This is a way of dominating the bodies of women in order to re-accommodate and re-subordinate them.

However, this type of persecution must be analysed and differentiated from gender-based persecution, taking into account the special situation and experience of LGTB+ asylum seekers. The Refugee Sponsorship Training Program affirms that:

Despite the advancement of rights in terms of same-sex unions and joint adoption recognition in some countries, individuals who self-identify as LGBTI are still targets of persecution, death threats, the death penalty and killings, corporal punishment, imprisonment, sexual and gender-based violence, physical assault, torture, forced “corrective therapies” (e.g. institutionalization, sex-reassignment operations, sexual assault and rape, drug injections, hormonal therapy, electroshock therapy, etc.) and accusations of immoral or deviant behavior; face denial of the right to assembly,

⁴¹ ILGA World, ‘State-Sponsored Homophobia report’ (2020) <<https://ilga.org/state-sponsored-homophobia-report>>.

⁴² ILGA World, ‘Trans Legal Mapping Report’ (2020) <<https://ilga.org/trans-legal-mapping-report>>.

⁴³ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st edn, Palgrave Macmillan UK 2007) 59.

expression and information, to marry and to adopt children in addition to discrimination in employment, health and education in many parts of the world.⁴⁴

b. Forced abortion and forced sterilization

Forced abortion or forced sterilization is a clear example of control over the biological reproductive capacity of women. These practices, as the name suggests, are carried out without the consent of women and therefore violate their human rights and put their physical and mental health at risk. One of the most illustrative cases occurred in China. This country had a one child policy. ‘Women who become pregnant more than once may be subjected to forced abortion, even at very late stages of pregnancy, and to forced sterilisation.’⁴⁵

It has also often been the case that this type of violence against women has been used to eliminate an ethnicity or race (i.e. using women's bodies to eliminate a particular population). Some authors include this type of violence against women as gender-based persecution, but it is worth remembering the position of Morgades Gil who places it within a persecution based on the sexual identity of women and not on their gender. Regardless of where we place it, the most important thing is to include this type of violence as an act of persecution that affects the life and liberty of women or transgender men and that they are deserving of international protection.

c. Trafficking in women for the purpose of sexual exploitation

Trafficking in women and girls for the purpose of sexual exploitation is perhaps one of the most important global challenges of the century and one of the grossest violations of human rights facing by the International Community. ‘As poverty disproportionately affects women and their children, it is not surprising that, following trends in migration, women would be pushed to migrate in the hopes of acquiring economic security for themselves and their families’.⁴⁶ In this migratory process, they are recruited by criminal organizations that take advantage of their situation and these women end up kidnapped and forced into prostitution or slave labour. According to ACCEM, 98% of the

⁴⁴ Refugee Sponsorship Training Program, ‘Persecution based on Sexual Orientation and/or Gender Identity’ <<https://www.rstp.ca/en/refugees/persecution-based-on-sexual-orientation-andor-gender-identity/>>.

⁴⁵ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st edn, Palgrave Macmillan UK 2007) 54.

⁴⁶ Jenna Shearer Demir, ‘The trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?’ (2003) UNHCR Working Paper No. 80 <<https://www.unhcr.org/research/working/3e71f84c4/trafficking-women-sexual-exploitation-gender-based-well-founded-fear-persecution.html>>.

victims of trafficking for sexual exploitation in the world are women and girls.⁴⁷ There is a tendency of Courts, for example in Spain, to deny asylum and refugee status to women victims of trafficked for sexual exploitation on the grounds that trafficking is criminal conduct rather than persecution. However, persecution may occur when a woman who has to return to her country of origin has a well-founded fear of being recaptured into forced prostitution.

5. Alternative ways to protect women refugees at the International level: the gender guidelines and the protection of women as a ‘particular social group’ within the meaning of Article 1 (A) (2)

At the International level, we recognise that Article 14 of the Universal Declaration of Human Rights grants the right to seek and enjoy asylum from persecution. The Convention on the Elimination of All Forms of Discrimination against Women (hereinafter ‘CEDAW’) is also a relevant international hard law instrument on this issue, because is the International Bill of Rights for women and girls. Article 2 of CEDAW express that the ‘States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women’.⁴⁸

In addition, hard law standards include the Convention and the Protocol. These are two International treaties that are binding on the States that are party to them, and therefore generate obligations that must be respected, always with a human rights perspective. It is again highlighted that:

The system of international laws and conventions which offer protection to asylum seekers and refugees supposedly offers protection to all on a gender-neutral basis. Many critics, however, have pointed to the fact that these laws and conventions were drafted on the basis of the situation of male refugees, and that moreover, their application is often undermined by deeply gendered practices which fail to offer protection to women because their persecution is not recognised as such.⁴⁹

⁴⁷ Accem, ‘Panorama Mujeres Refugiadas 2020’ <<https://mujeresrefugiadas.accem.es/panorama-mujeres-refugiadas-2020/>>.

⁴⁸ Article 2 Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979 (Entry into force: 03/09/1981) United Nations, Treaty Series, vol. 1249, p. 13.

⁴⁹ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st edn, Palgrave Macmillan UK 2007) 69.

These instruments do not cover explicitly gender-based persecution and ‘for a long time, any consideration of gender issues was absent from discourse and debate on refugees and asylum’⁵⁰. Freedman, quoting Spijkerboer, says that:

(...) during the negotiations leading to the drafting of the Convention the relevance of gender was discussed only once, when the Yugoslav delegate proposed that the words ‘or sex’ should be included in article 3, which stipulates that the Convention shall be applied ‘without discrimination as to race, religion or country of origin’. The suggestion was quickly rejected, as it was considered that the equality of the sexes was a matter for national legislation, and then the UN High Commissioner for Refugees, Van Heuven Goedhart, remarked that he doubted strongly ‘whether there would be any cases of persecution on account of sex’.⁵¹

Fortunately, the International Community, better late than never, became increasingly aware of the problems with the wording of the Convention that particularly affected women. This was due to the growing awareness of the importance of women's human rights and the clear lack of protection under International Refugee Law for all forms of persecution suffered by women. ‘Pressure from feminist activists and academics has been a major factor in pushing international organisations to take account of the fact that not all refugees and asylum seekers are male, and to adopt specific guidelines and directives addressing the needs and problems of women within these populations.’⁵²

Silvia Morgades Gil claim that, at the general level, only the soft law acts of the Executive Committee of the UNHCR advocate for the inclusion of persecution of women on the basis of their gender or sexual identity in the definition of refugee of the Convention, insofar as they can be recognised as belonging to a social group.⁵³

Initially, ‘there was an early assumption within UNHCR that the Organization’s protection and assistance policies were gender neutral and reached all relevant population groups, regardless of age

⁵⁰ Jane Freedman, ‘Mainstreaming gender in refugee protection’ (2010) Vol. 23 No. 4 Cambridge Review of International Affairs 589.

⁵¹*Ibidem*.

⁵² Jane Freedman, ‘Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection?’ (2010) Vol. 48 No. 1 International Migration 175.

⁵³ Silvia Morgades Gil, ‘La protection internationale des femmes pour des raisons liées au genre en droit international. Interprétations récentes des instruments de droit international soutenant des formes de protection subsidiaire’ (2013) Vol. 117 No. 1 Revue Generale de Droit International Public 37.

and sex'.⁵⁴ Later, women begin to be treated as a target group, closely linked to children. UNHCR, then, created projects especially targeted for women, but did not integrate women into its overall policy. In my opinion, both are necessary. It is necessary to develop specific policies for refugee women, but it is also indispensable to mainstream a gender perspective into UNHCR programs and policies in general.

Thus, in 1985 UNHCR adopted the Conclusion No. 39 (XXXVI) on Refugee women and International Protection. In the Conclusion the Executive Committee admits that refugee women are exposed to special problems and 'recognized that these problems result from their vulnerable situation which frequently exposes them to physical violence, sexual abuse, and discrimination'.⁵⁵ The Executive Committee expressed that it:

Recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.⁵⁶

Before 1990, we can mention some UNHCR Conclusions that showed its awareness of the problems of refugee women. For instance, General Conclusion on International Protection No. 46 (XXXVIII) in 1987 which recognised that refugee women have special needs; Conclusion on Refugee Women No. 54 (XXXIX) in 1988 which emphasises the problems of refugee women and affirms that they should be included in the planning of assistance and protection programmes; Conclusion on Refugee Women No. 60 (XL) in 1989 which notes that 'the basic rights of refugee women continue to be violated in a number of situations, including through threats to their physical safety and sexual exploitation'⁵⁷ and 'urged the High Commissioner to develop a methodology for systematically addressing gender issues in refugee programmes'.⁵⁸

⁵⁴ UN High Commissioner for Refugees (UNHCR), 'From 1975 to 2013: UNHCR's Gender Equality Chronology' (2013) <<https://www.unhcr.org/protection/women/543b90796/1975-2013-unhcrs-gender-equality-chronology.html>>.

⁵⁵ Executive Committee of the UNHCR, Conclusion No. 39 (XXXVI) Refugee women and International Protection, 18 October 1985, 36th session. Contained in United Nations General Assembly Document No. 12A (A/40/12/Add.1) <<https://www.unhcr.org/excom/exconc/3ae68c43a8/refugee-women-international-protection.html>>.

⁵⁶ Executive Committee of the UNHCR, Conclusion No. 39 (XXXVI).

⁵⁷ Executive Committee of the UNHCR, Conclusion No. 54 (XXXIX) Refugee Women, 10 October 1988, 39th Session. Contained in United Nations General Assembly Document No. 12A (A/43/12/Add.1) <<https://www.unhcr.org/excom/exconc/3ae68c4370/refugee-women.html>>.

⁵⁸ Executive Committee of the UNHCR, Conclusion No. 54 (XXXIX).

In 1990 UNCHR has adopted the UNHCR's Policy on Refugee Women. In this document, UNHCR recognised that becoming a refugee affects men and women unequally and incorporated the concept of gender mainstreaming. Furthermore, UNHCR has developed some guidelines that promote a gender-sensitive interpretation of the Convention. In 1991, UNHCR published the first gender guidelines: Guidelines on the Protection of Refugee Women which 'have been prepared to help the staff of UNHCR and its implementing partners to identify the specific protection issues, problems and risks facing refugee women.'⁵⁹ In 1995, UNCHR adopted a guidelines to address the problem of sexual violence, especially against refugee women and children, and in the same year, the Fourth World Conference on Women was held in Beijing: an important milestone for women's human rights.

In 2002, a Guidelines on Gender-Related Persecution Within the Context of Article 1A(2) was published. The Guidelines establish that 'sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men.'⁶⁰ The aim was to establish a gender-sensitive interpretation of the Convention. In the guidelines UNHCR admits that:

There is no doubt that rape and other forms of gender related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.⁶¹

In 2003, UNHCR published a Guidelines for Prevention and Response to SGBV: Sexual and Gender Based Violence against Refugees, Returnees and Internally Displaced Persons. And in 2008 UNHCR issued a Handbook for the Protection of Women and Girls, which replaced the 1991 Guidelines but maintains the same standards and principles. Concerning UNHCR policy, Freedman argues that '...the type of mainstreaming adopted by UNHCR has been more of an 'integrative' approach, which has not fundamentally shifted understandings or representations of refugees and

⁵⁹ UN High Commissioner for Refugees (UNHCR), 'Guidelines on the Protection of Refugee Women', Geneva July 1991, <<https://www.unhcr.org/publications/legal/3d4f915e4/guidelines-protection-refugee-women.html>>.

⁶⁰ UN High Commissioner for Refugees (UNHCR), 'Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', 7 May 2002, HCR/GIP/02/01 <<https://www.refworld.org/docid/3d36f1c64.html>>.

⁶¹ UN High Commissioner for Refugees (UNHCR), 'Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees'.

asylum seekers and, in particular, has not moved away from a discourse concerning the ‘vulnerability’ of women.’⁶²

To sum up, UNHCR has therefore recommended that States should provide international protection to women fleeing their countries because of gender-based persecution through membership of a particular social group. UNCHR affirms that:

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.⁶³

On the other hand, following the recommendation of UNHCR Canada was the first country in the world to elaborate a guidelines on gender-based persecution. ‘This had led to the protection of women fleeing forced sterilization, forced abortion, forced marriage, domestic and societal violence, bride burning, rape and other forms of sexual torture, genital mutilation, and serious violation of other fundamental rights.’⁶⁴ The model of Canada was followed by Australia (in 1996 it adopted the Guidelines on gender issues for decision-makers), the United States (in 1995 it published the Memorandum: Considerations for asylum officers adjudicating asylum claims from women) and the United Kingdom (in 2000 it enacted the Asylum Gender Guidelines).

These countries have also been pioneers in jurisprudential developments with regard to the protection of refugee women and the granting of refugee status on the basis of membership of a particular social group. A paradigmatic case that has served as a basis for determining when we are dealing with a particular social group was *Attorney General v. Ward* where the Supreme Court of Canada ruled that:

The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. (...) identify three possible categories:

(1) groups defined by an innate or unchangeable characteristic;

⁶² Jane Freedman, ‘Mainstreaming gender in refugee protection’ (2010) Vol. 23 No. 4 Cambridge Review of International Affairs 589.

⁶³ UN High Commissioner for Refugees (UNHCR), ‘Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/ or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/02 <<https://www.refworld.org/docid/3d36f23f4.html>>.

⁶⁴ Birthe Ankerbrand, ‘Refugee Women under German Asylum Law’ (2002) Vol. 14 No. 1 International Journal of Refugee Law 45.

- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.⁶⁵

The Courts of the above mentioned countries have ruled following this trend, i.e. recognising the refugee status of women as members of a particular social group, always taking into account the social and political context of their country of origin. Some of these are worth mentioning as examples.

The cases *Islam and Shah* solved by the House of Lords was a landmark case. The applicants were citizens of Pakistan and had suffered violence in their home country from their husbands who had accused them of adultery. They claimed that 'if they are forced to return to Pakistan, they would be unprotected by the state and would be subject to a risk of criminal proceedings for sexual immorality. If found guilty the punishment may be flogging or stoning to death.'⁶⁶ The House of Lords recognised them as a part of a the social group: pakistani women accused of transgressing social mores (in the cases adultery and disobedience to husbands) who are unprotected by their husbands or other male relatives.

In 1996, the United States Board of Immigration Appeals decided a case in which the applicant was a women citizen of Togo and member of the Tchamba-Kunsuntu Tribe who escaped FGM and requested asylum in the United States. The Board of Immigration Appeals settled that 'the practice of female genital mutilation, which results in permanent disfiguration and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution'⁶⁷, and therefore 'young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who

⁶⁵ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, (SCC Case Information: 21937) <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1023/index.do>>.

⁶⁶ *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another; Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999 <https://www.refworld.org/cases,GBR_HL,3dec8abe4.html>.

⁶⁷ *In re Fauziya Kasinga*, 3278, United States Board of Immigration Appeals, 13 June 1996 <https://www.refworld.org/cases,USA_BIA,47bb00782.html>.

have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a “particular social group” within the definition of the term “refugee”⁶⁸.

In 2002, the High Court of Australia solved a case in which the applicant was a citizen of Pakistan suffering from gender-based domestic violence. ‘She was a victim of serious and prolonged domestic violence on the part of her husband and members of his family, that the police in Pakistan refused to enforce the law against such violence or otherwise offer her protection, and that such refusal is part of systematic discrimination against women which is both tolerated and sanctioned by the state.’⁶⁹ The High Court affirmed that women in Pakistan are a particular social group and also recognised that Pakistan failed to provide protection against domestic violence and this omission is considered persecution.

Another country whose jurisprudence is worth mentioning is New Zealand. Despite the fact that it has not adopted a gender guidelines, it has relevant cases on gender-based persecution. For instance, the case of an indigenous Fijian woman who claims ‘that if she returns to Fiji she will suffer ongoing domestic violence at the hands of her husband and will receive no meaningful protection from police or other state authorities.’⁷⁰ And also ‘if she separates from her husband, he will attempt to persuade her and her family, through traditional means, to return to the marriage and that if she refuses to do so, he will use serious physical violence against her.’⁷¹ The Refugee Status Appeals Authority of New Zealand, after examining the facts of the case, ruled that ‘the specific social and cultural position of women, combined with the absence of effective state protection from police and the judiciary in cases of domestic violence, is such that they are appropriately recognised as a particular social group for the purposes of the Refugee Convention’.⁷²

⁶⁸ *In re Fauziya Kasinga*.

⁶⁹ *Minister for Immigration and Multicultural Affairs v. Khawar*, (2002) HCA 14, Australia: High Court, 11 April 2002 <https://www.refworld.org/cases,AUS_HC,3deb326b8.html>.

⁷⁰ *Refugee Appeal No. 76501*, No. 76501, New Zealand: Refugee Status Appeals Authority, 19 November 2010, <https://www.refworld.org/cases,NZL_RSAA,4d11f1272.html>.

⁷¹ *Refugee Appeal No. 76501*.

⁷² *Refugee Appeal No. 76501*.

6. The situation in Spain with regard to gender-based persecution

a. European Level: the qualification Directive and Caselaw of the European Court of Human Rights

The Charter of Fundamental Rights of the European Union provides the right to asylum: ‘The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.’⁷³ And Article 8 of the Treaty on the Functioning of the European Union provides that ‘In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.’⁷⁴

It is important to highlight that in 1984 -more than thirty years after the adoption of the Convention- the European Parliament of the European Union adopted a Resolution on the Application of the Geneva Convention Relating to the Status of Refugees⁷⁵, which aimed ‘to recognise women who “face harsh or inhumane treatment because they are considered to have transgressed the social mores of the country” as a particular social group under the terms of the Convention’.⁷⁶

In the European Union (hereinafter ‘EU’) context, the Treaty of Amsterdam (1997) provided the basis for the creation of a common asylum system in the Union, as it sought to progressively establish the free movement of persons. In 1999, the European Council held a meeting in Tampere on the creation of an Area of Freedom, Security and Justice within the EU and, taking into account the international obligations of the Member States (all Member States are party to the Convention and the Protocol) the EU has established a Common European Asylum System (hereinafter ‘CEAS’) to provide international protection to people fleeing persecution or serious harm in their country of origin. The aim was to harmonise minimum standards on the right to asylum in the EU, ensuring respect for human rights and the principle of *non-refoulement*. Freedman notes that:

The emphasis of efforts towards harmonisation have been focused on standardisation of the ways in which asylum claims are treated, and of who exactly should qualify for

⁷³ Article 18 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407, (In force) <http://data.europa.eu/eli/treaty/char_2012/oj>.

⁷⁴ Article 8 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390 (In force) <http://data.europa.eu/eli/treaty/tfeu_2012/oj>.

⁷⁵ European Parliament, Resolution on the application of the Geneva Convention relating to the status of refugees, OJ C 127, 14.5.1984, p. 137, (The link is not available).

⁷⁶ Jane Freedman, ‘Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection?’ (2010) Vol. 48 No. 1 International Migration 175.

refugee status, in order to remove existing disparities between national legislation and policies in member states. In effect, EU states have moved towards a harmonisation which aims to keep as many asylum seekers as possible away from European borders, and to reduce the numbers to whom refugee status is granted.⁷⁷

And others authors note that the ‘European immigration policies do not fully integrate human rights and even less women’s human rights dimensions. Their policies are led within the framework of security and border control and are mostly gender neutral.’⁷⁸ Within the EU, in an area without international borders, it was necessary to establish a common system. However, this system, rather than being a system that seeks to protect the human rights of asylum seekers and refugees, is more concerned in prevent potential ‘abuses’ by asylum seekers like secondary movements and ‘asylum shopping’.⁷⁹

In the conclusions of the meeting in Tampere stated that the CEAS should include in the short term:

...a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection.

And in the longer term, a common asylum procedure and a uniform status should be ensured. In the first phase a number of Directives were adopted, Carmen Miguel Juan argues that all the Directives adopted during the first phase of the construction of a CEAS are very weak on the recognition of gender-related persecution.⁸⁰ The EURODAC regulation and the Dublin II regulation were also part of this first phase. In a second phase, the EU Directives were reformed. Currently, three main Directives are in force:

⁷⁷ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (1st Edition, Palgrave Macmillan UK 2007) 136.

⁷⁸ Ariane Alam, Thomas Bauer and others, ‘Migrant, Refugee and Asylum-seeking women and girls in Europe’ (2019) Institute of Political Studies - Strasbourg Produced for the Gender Equality Division of the Council of Europe.

⁷⁹ The submission, by the same person, of multiple asylum applications in different EU Member States.

⁸⁰ Carmen Miguel Juan, ‘Una mirada feminista al Derecho Internacional de los Derechos Humanos y al Derecho Internacional de las personas refugiadas’ (2014) Tesis Doctoral Universidad de Valencia.

- a. Directive 2011/95/EU (the qualification Directive)⁸¹
- b. Directive 2013/32/EU (the asylum procedures Directive)⁸²
- c. Directive 2013/33/EU (the reception conditions Directive)⁸³

Following Carmen Miguel Juan, the positive aspects that the qualification Directive contains for the recognition of gender-based persecution are three. Firstly, in Article 6 includes non-State actors among the actors of persecution or serious harm ‘if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm’⁸⁴. Secondly, in its Article 9 (2) (A) mentions acts of physical or mental violence, including acts of sexual violence as persecutory acts and (F) refers to acts of a gender-specific nature. Thirdly, in its Article 10 (1) (D) in defining a particular social group recognises that ‘Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group’⁸⁵, always taking into account the context in the country of origin.

Besides, with regard the content of international protection, the qualification directive states:

Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.⁸⁶

The qualification of subsidiary protection is also relevant for women flee gender-based persecution. A person is eligible for subsidiary protection where she or he does not qualify as a

⁸¹ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, p. 9–26, (In force) <<http://data.europa.eu/eli/dir/2011/95/oj>>.

⁸² Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60–95, (In force) <<http://data.europa.eu/eli/dir/2013/32/oj>>.

⁸³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013, p. 96–116, (In force) <<http://data.europa.eu/eli/dir/2013/33/oj>>.

⁸⁴ Article 6 Directive 2011/95/EU.

⁸⁵ Article 10 (1) (D) Directive 2011/95/EU.

⁸⁶ Article 20 (3) Directive 2011/95/EU.

refugee but in respect of whom there are substantial grounds for believing that, if returned to his or her country of origin, she or he would face a real risk of suffering serious harm as defined in Article 15 (i.e. ‘(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’⁸⁷).

It can be interpreted that women who suffer gender-based persecution can apply for asylum on the grounds that their membership to a particular social group, or also when they suffer any of the serious harm listed in Article 15 they can apply for subsidiary protection. It should also be made clear that these Directives must be transposed into the internal legal systems of the EU Member States.

It is particularly relevant the asylum procedures Directive in that it notes that:

With a view to ensuring substantive equality between female and male applicants, examination procedures should be gender-sensitive. In particular, personal interviews should be organised in a way which makes it possible for both female and male applicants to speak about their past experiences in cases involving gender-based persecution. The complexity of gender-related claims should be properly taken into account in procedures based on the concept of safe third country, the concept of safe country of origin or the notion of subsequent applications.⁸⁸

In 2013, the European Commission published the communication ‘Towards the elimination of female genital mutilation’ where admits that ‘the EU’s Qualification Directive ensures eligibility for international protection for women who have a well-founded fear of persecution or who face the risk of suffering FGM’.⁸⁹

In March 2016, the European Parliament published a resolution on the situation of women refugees and asylum seekers in the EU where it accepts that there is a great degree of gender inequality for asylum applicants across the EU and women are subject to specific forms of gender-

⁸⁷ Article 15 Directive 2011/95/EU.

⁸⁸ Directive 2013/32/EU.

⁸⁹ European Commission, Communication From the Commission to the European Parliament and the Council: Towards the elimination of female genital mutilation, 25 November 2013, COM(2013) 833 final <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52013DC0833>>.

based persecution, which is still too often not recognised in asylum procedures.⁹⁰ Besides, it ‘highlights that gendered forms of violence and discrimination, including but not limited to rape and sexual violence, FGM, forced marriage, domestic violence, so-called honour crimes and state-sanctioned gender discrimination, constitute persecution and should be valid reasons for seeking asylum in the EU and that this should be reflected in new gender guidelines’.⁹¹

No cases have been found in the Court of Justice of the European Union (hereinafter ‘ECJ’) concerning gender-based persecution or the recognition of women as a particular social group. However, in the Case *X, Y, Z v Minister voor Immigratie en Asiel* the ECJ recognises that the Article 10 (1) (D) of Council Directive 2004/83/EC must be interpreted as meaning that the existence of criminal laws in countries of origin which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.⁹²

With regard to the European Court of Human Rights (hereinafter ‘ECtHR’), there is a relevant case in 2000, *Jabari v. Turkey*. Mrs. Hoda Jabari was an Iranian woman who was arrested for having a relation with a married man. She entered Turkey illegally, and then she tried to fly to Canada. In France the French police found her with a forged Canadian passport, so she was transferred to Istanbul. In Istanbul she lodged an asylum claim which was rejected. The woman claimed that if she returned to Iran she was at risk of inhuman punishment such as death by stoning, flogging and whipping. In this case, the ECtHR found that proposed deportation of the applicant to Iran would violate Article 3 (Prohibition of torture) of the European Convention on Human Rights⁹³. This case was an important landmark case as it, in a way, recognises gender-based persecution as torture.

Last but not least, in 2010 the Council of Europe adopted the Istanbul Convention. Among other things, it proposes to adopt a gender perspective both in the reading of the Convention and in the asylum procedures. Article 60 (1) of the Istanbul Convention establish that:

⁹⁰ European Parliament, Resolution on the situation of women refugees and asylum seekers in the European Union, OJ C 50, 9.2.2018, p 25-34 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2018.050.01.0025.01.ENG&toc=OJ%3AC%3A2018%3A050%3ATOC>.

⁹¹ European Parliament, Resolution on the situation of women refugees and asylum seekers in the European Union.

⁹² *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12 - C-201/12, European Union: Court of Justice of the European Union (Fourth Chamber), 7 November 2013, ECLI:EU:C:2013:720 <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0199>>.

⁹³ *Jabari v. Turkey*, Application N° 40035/98 (Judgment Date: 11/07/2000) European Court of Human Rights, Court (Fourth Section), ECLI:CE:ECHR:2000:0711JUD004003598 <<http://hudoc.echr.coe.int/eng?i=001-58900>>.

Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection.⁹⁴

b. Spanish Regulatory Framework and Caselaw of the ‘Tribunal Supremo’

Article 13 of the Spanish Constitution states that the law shall establish the terms under which citizens of other countries and stateless persons may enjoy the right of asylum in Spain.⁹⁵ The Convention and the Protocol entered into force in 1978⁹⁶. Spain has also ratified the CEDAW⁹⁷ and the Istanbul Convention⁹⁸. In 1984 was adopted the first Spanish Asylum Law⁹⁹, which was amended in 1994¹⁰⁰ and in 2007¹⁰¹. The latter amendment had included that foreign women who flee their country of origin due to a well-founded fear of gender-based persecution will also be considered as refugees. However, the law currently in force is Ley 12/2009, de 30 de octubre,

⁹⁴ Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series, No. 210, Istanbul 11/05/2011 (Entry in force: 01/08/2014) <<https://rm.coe.int/coe-convention-on-preventing-and-combating-violence-against-women-and-16809e40c8>>.

⁹⁵ Artículo 13 (4) Constitución Española. Publicada en «BOE» núm. 311, de 29/12/1978. Referencia: BOE-A-1978-31229 (Entrada en vigor: 29/12/1978) <[https://www.boe.es/eli/es/c/1978/12/27/\(1\)/con](https://www.boe.es/eli/es/c/1978/12/27/(1)/con)>.

⁹⁶ Instrumento de Adhesión de España a la Convención sobre el Estatuto de los Refugiados, hecha en Ginebra el 28 de julio de 1951, y al Protocolo sobre el Estatuto de los Refugiados, hecho en Nueva York el 31 de enero de 1967. Publicado en «BOE» núm. 252, de 21 de octubre de 1978, páginas 24310 a 24328 (19 págs.) Referencia: BOE-A-1978-26331 <<https://www.boe.es/buscar/doc.php?id=BOE-A-1978-26331>>.

⁹⁷ Instrumento de Ratificación de 16 de diciembre de 1983 de la Convención sobre la eliminación de todas las formas de discriminación contra la mujer, hecha en Nueva York el 18 de diciembre de 1979. Publicado en «BOE» núm. 69, de 21 de marzo de 1984, páginas 7715 a 7720 (6 págs.) Referencia: BOE-A-1984-6749 <<https://www.boe.es/buscar/doc.php?id=BOE-A-1984-6749>>.

⁹⁸ Instrumento de ratificación del Convenio del Consejo de Europa sobre prevención y lucha contra la violencia contra la mujer y la violencia doméstica, hecho en Estambul el 11 de mayo de 2011. Publicado en «BOE» núm. 137, de 6 de junio de 2014, páginas 42946 a 42976 (31 págs.) Referencia: BOE-A-2014-5947 <[https://www.boe.es/eli/es/ai/2011/05/11/\(1\)](https://www.boe.es/eli/es/ai/2011/05/11/(1))>.

⁹⁹ Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado. Publicado en «BOE» núm. 74, de 27 de marzo de 1984, páginas 8389 a 8392 (4 págs.) Referencia: BOE-A-1984-7250 (Disposición derogada) <<https://www.boe.es/eli/es/l/1984/03/26/5>>.

¹⁰⁰ Ley 9/1994, de 19 de mayo, de modificación de la Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado. Publicado en «BOE» núm. 122, de 23 de mayo de 1994, páginas 15796 a 15800 (5 págs.) Referencia: BOE-A-1994-11608 (Disposición derogada) <<https://www.boe.es/eli/es/l/1994/05/19/9>>.

¹⁰¹ Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres. Publicada en «BOE» núm. 71, de 23/03/2007. Referencia: BOE-A-2007-6115 <<https://www.boe.es/eli/es/lo/2007/03/22/3/con>>.

reguladora del derecho de asilo y de la protección subsidiaria¹⁰² (hereinafter ‘Spanish Asylum Law’). The new Spanish Asylum Law was enacted to transpose EU Directives, but the directives of the first phase of the CEAS.

The first difference between the new Spanish Asylum Law and the previous one is that the right to seek asylum will only be recognised for non-EU nationals. This is not only a problem for Spain, but for the whole of the EU, since ‘given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters’.¹⁰³ This is criticised by many authors who argue that it does not meet the standards of the Convention, and brings problems for women asylum seekers because the agents of persecution who persecute women are usually non-State actors. The same applies to the famous ‘safe countries’ lists.

The Spanish Asylum Law adopts the refugee term from the Convention in Article 3, apparently including gender or sexual orientation in the grounds of persecution. Article 6 sets out what the acts of persecution (i.e. the acts on which the well-founded fear of persecution is based) should be like. It provides that the acts must be:

- a) sufficiently serious by their nature or repeated nature as to constitute a serious violation of fundamental rights, in particular, those rights which are not subject to derogation under Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or
- b) be a sufficiently serious accumulation of several measures, including violations of human rights, to affect a person in a manner similar to that referred to in point (a).¹⁰⁴

And it immediately tells us that the acts may involve acts of physical or psychological violence, including acts of sexual violence, legislative, administrative, police, or judicial measures that are discriminatory, prosecutions or punishments that are disproportionate or discriminatory, acts of a sexual nature affecting adults or children, etc.

¹⁰² Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria. Publicado en «BOE» núm. 263, de 31 de octubre de 2009, páginas 90860 a 90884 (25 págs.) Referencia: BOE-A-2009-17242 (Entrada en vigor: 20/11/2009) <<https://www.boe.es/eli/es/l/2009/10/30/12>>.

¹⁰³ Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 24) on asylum for nationals of Member States of the European Union, OJ C 115, 9.5.2008, p. 305–306 (In force) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F24>>.

¹⁰⁴ Artículo 6 Ley 12/2009.

Among other changes, a new aspect of the law was the inclusion of the definition of a social group, which ‘includes age, gender and sexual identity as characteristics for identifying a social group in the sense of the refugee definition of the Geneva Convention.’¹⁰⁵

According to the Spanish Asylum Law, a group shall be considered to constitute a particular social group if, in particular, the members of such a group share an innate characteristic or a common background which cannot be changed, or share a characteristic or belief which is so fundamental to their identity or consciousness that they cannot be required to give it up, and such a group has a distinct identity in the country concerned because it is perceived as different by the surrounding society or by the persecuting actor(s).¹⁰⁶ And depending on the circumstances prevailing in the country of origin, it includes persons who flee their country of origin because of a well-founded fear of persecution on grounds of gender and/or age, without these aspects alone giving rise to the application of this article.¹⁰⁷ Thus, the Spanish Asylum Law establishes that gender alone cannot give rise to persecution, but will depend on the ‘circumstances prevailing in the country of origin’, a vague legal concept.

In this sense, Morgades Gil argues that the fact that it is established that gender alone cannot give rise to the application of the notion of particular social group, can be interpreted in the same sense in which the notion of social group was understood in judgments such as *Islam and Shah* of the British House of Lords: it is not strictly the fact of being a woman that determines the existence of a particular social group, but the fact of being a woman in a particular context.¹⁰⁸

Another issue to highlight in the Spanish Asylum Law is the unification of refugee status and subsidiary protection. Many women who suffer gender-based persecution will be able to find international protection through the institute of subsidiary protection. And lastly, with regard to the procedure, it establishes that necessary measures shall be adopted so that, when necessary, the interview is treated differently on the basis of the sex (gender) of the applicant. And also establishes that the vulnerability of the following groups will be taken into account: minors, unaccompanied minors, people with disabilities, elderly people, pregnant women, single-parent families with

¹⁰⁵ Silvia Morgades Gil ‘The Asylum Procedure in Spain: The Role of Language in Determining the Origin of Asylum Seekers’ (2010) *Language and origin: The role of language in European asylum procedures: Linguistic and legal perspectives* 159.

¹⁰⁶ Artículo 7 (1) (E) Ley 12/2009.

¹⁰⁷ Artículo 7 (1) (E) Ley 12/2009.

¹⁰⁸ Silvia Morgades Gil, ‘La protección internacional de las mujeres en caso de migración forzosa: vulnerabilidad especial por razón de género en derecho internacional’ (2013) *Dins: AAVV. VII Congreso Migraciones Internacionales en España. Movilidad Humana y Diversidad Social*. 1 ed. Bilbao: Euskampus (Universidad del País Vasco) (Observatorio de Asuntos Sociales) 3817-3837.

minors, people who have suffered torture, rape or other serious forms of psychological, physical or sexual violence, and victims of trafficking in human beings.

In 2006, the ‘Tribunal Supremo’ solved a case about a Nigerian woman whose asylum claim had been dismissed. She had escaped from a man who wanted to force her to marry him. The Court ruled that according to the applicant's testimony there was gender-based persecution due to harassment and threats from a man who wanted to force her to marry.¹⁰⁹ In 2009, the ‘Tribunal Supremo’ decided another case in which Ms. Delfina was granted refugee status and the right to asylum in Spain. Ms. Delfina was a Nigerian women who was forced to undergo FGM and forced marriage.¹¹⁰

In 2011, the ‘Tribunal Supremo’ recognises the right of asylum of a woman, national of Algeria, who had been forced to marry and who had been subjected to continuous aggression and harassment characterised by continuous physical and psychological abuse by her husband, which has had repercussions on her children (i.e. gender-based domestic violence). The Court took into account the situation of women in Algeria, the country's lack of protection and the sufficient evidence provided by the applicant.¹¹¹

In these cases the ‘Tribunal Supremo’ insists that a situation of lack of protection and social, political and legal marginalisation of women in their country of origin, which clearly and seriously violates their human rights, is a ground for asylum.¹¹² Provided that it can be established that the persecution is individualised, that the woman is part of a particular social group in a particular context and that the country of origin is not providing adequate protection.

An analysis of the jurisprudence of the ‘Tribunal Supremo’ shows the tendency of the administration and the Court itself to provide protection to women who suffer persecution on the basis of their gender within the institutes of subsidiary protection or humanitarian visa¹¹³, but not

¹⁰⁹ Tribunal Supremo (Sala de lo Contencioso, Sección 5ª). Sentencia núm. 1172/2006 de 28 de febrero (recurso núm. 735/2003) ECLI:ES:TS:2006:3827 <<https://www.poderjudicial.es/search/openCDocument/47c54a4d73e1a19662311c6bec9f7dce021301cf31498ffe>>.

¹¹⁰ Tribunal Supremo (Sala de lo Contencioso, Sección 5ª). Sentencia núm. 2781/2009 de 11 de mayo (recurso núm. 3155/2006) ECLI:ES:TS:2009:2781 <<https://www.poderjudicial.es/search/openCDocument/47c54a4d73e1a196d8fc95460696700b2da01fda918e6457>>.

¹¹¹ Tribunal Supremo (Sala de lo Contencioso, Sección 3ª). Sentencia núm. 4013/2011 de 15 de julio (recurso núm. 1789/2009) ECLI:ES:TS:2011:4013 <<https://www.poderjudicial.es/search/openCDocument/47c54a4d73e1a19662311c6bec9f7dce021301cf31498ffe>>.

¹¹² Tribunal Supremo (Sala de lo Contencioso, Sección 5ª). Sentencia núm. 2781/2009 de 11 de mayo (recurso núm. 3155/2006) ECLI:ES:TS:2009:2781.

¹¹³ For example: Tribunal Supremo (Sala de lo Contencioso, Sección 3ª). Sentencia núm. 124/2016 de 25 de enero (recurso núm. 2133/2015) ECLI:ES:TS:2016:124 <<https://www.poderjudicial.es/search/openCDocument/47c54a4d73e1a19662311c6bec9f7dce021301cf31498ffe>>.

with the status of refugee. Or in the worst scenario, not to grant protection because they consider the women's testimonies to be unreliable due to lack of evidence or contradictions in the initial interviews. Spain is also, unfortunately, famous for its failure to examine applications for international protection in depth.

7. Concluding reflections

I will organise the conclusions into different points in order to systematise and make clear what my final reflections on the research topic were:

- a. Gender-based persecution is not currently a legal concept, but can be defined as a severe threat to life or freedom and the systemic failure of State protection in relation to the human rights of women and girls because of their gender and the roles assigned to their gender by an unequal society which is organised in gendered power relations. Agents of persecution are generally, but not exclusively, non-State actors. The violation of human rights and serious threats to women and girls involving persecution are, but not exclusively: gender-based domestic violence, FGM, gender-based violence (including sexual, physical, psychological violence, femicide, among others), child and forced marriage, discriminatory law and social customs. Other serious threats such as trafficking in persons may be considered persecution under certain circumstances. Generally, in gender-based persecution, the persecutory acts are also deeply gendered. But it should not be forgotten that women are not exclusively persecuted on the basis of their gender; they are also persecuted on the grounds set out in the Convention. Persecution on political grounds deserves a special mention, as many women are persecuted for their political opinions, but because of the public-private dichotomy these acts are generally not seen as political acts. In addition, it is appropriate to distinguish gender-based persecution of persecution on the basis of the sexual identity and persecution on grounds of gender identity and sexual orientation. Regarding the first, this type of persecution is based on the woman's reproductive capacity, as a biological matter. And as for the second, for this type of persecution it is necessary to make a further analysis of the experiences of LGTB+ asylum seekers, where some women are included but with other needs and experiences. I think the main challenge today is how to incorporate gender-based persecution as an autonomous ground within the Convention.
- b. While the protection of women refugees as a 'particular social group' within the meaning of Article 1 (A) (2) has provided a 'quick' but weak response to the gender-based persecution experienced by women, I believe that we should currently think of another way of recognising

gender-based persecution. Because women are not a 'particular social group', they are half of the global population, whose experiences and needs are not sufficiently taken into account in International Refugee Law. And the problem with this idea, in conjunction with the idea of women as a 'vulnerable group' and the images we have of the refugee movements (images of men fleeing), is that refugee women are seen with many prejudices: as mothers, as vulnerable people who cannot survive alone, as docile and obedient to their archaic traditions, and so on. In other words, a reinforcement of gender stereotypes. I believe that International Refugee Law, as I stated at the beginning, is androcentric. And categorising women with well-founded fear of being persecuted for reasons of gender in a particular social group follows this same line, putting men as the paradigm of the universal and women in the particular, in the 'particular social group'. Obviously the political and social context of the women's country must always be taken into account, but in the same way that it can be taken into account when a man requests protection because of his political opinions. This is not to say that International Refugee Law needs to be completely recast, indeed we must value the rights established in the Convention and 'fulfilled' by States, such as the *non-refoulement*. But, in my opinion, it is essential to recognise gender-based persecution as an autonomous ground for claiming refugee status. One of the obstacles is the unwillingness of States to incorporate gender-based prosecution, perhaps because it is not considered important enough. But if States, especially EU Member States, are afraid of that because 'all women will seek asylum for well-founded fear of gender-based persecution', it probably means that the human rights of women in the world are being violated on a massive scale and no one wants to take responsibility for it.

c. I would like to make a few recommendations, which I do not claim to be the right thing to do, but suggestions. At the International level, a hard law instrument that recognises gender-based prosecution is needed. Ideally, the Convention should be modified, otherwise it would remain androcentric. But because of the complexity of reform and the threat it would imply, an additional Protocol to the Convention could be adopted which recognises gender-based persecution as a sixth ground. International organisations, feminist groups and States should then lobby for this instrument to be adopted by as many States as possible. The EU should take a leading role in supporting women's human rights. At the EU level, a Directive should be adopted recognising gender-based persecution as an autonomous ground, as well as guidelines on how to interpret acts of persecution and situations of well-founded fear of being persecuted on the basis of gender. The list of 'safe countries' and the possibility for EU nationals to apply for asylum must be reconsidered. Programmes and campaigns to raise awareness among EU

Member States of this type of persecution are also necessary. And at the Spanish level, I would recommend to incorporate gender-based persecution into national legislation as an autonomous ground, specifying what the types are and what the persecutory acts are. Also all persons in charge of processing asylum applications, and judges who have the final decision, should be trained in gender mainstreaming so that they carry out asylum procedures from a gender perspective, which allows them to observe, among other things, the difficulties women face in relating their story and to become aware that they were victims of gender-based persecution. I believe it would also be good to have a special information leaflet for women asylum seekers where it is clearly explained what is gender-based persecution, so they can request asylum on this ground if they find themselves in situations of gender-based persecution. Giving information to asylum seekers and refugees women is a way of empowering them.

The challenges ahead are many for women refugees. Action is urgently needed. Law is a reality-transforming mechanism and through it we can take measures to change the paradigm for refugee and asylum-seeking women, and thus recognise their fundamental rights and provide them with the protection they deserve and have been denied for years.

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International Regulatory Framework

Hard Law

Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979 (Entry into force: 03/09/1981) United Nations, Treaty Series, vol. 1249, p. 13

Convention Relating to the Status of Refugees, Geneva, 28 July 1951 (Entry into force: 22/04/1954) United Nations, Treaty Series, vol. 189, p. 137

Protocol relating to the Status of Refugees, New York, 31 January 1967 (Entry into force: 04/10/1967) United Nations, Treaty Series, vol. 606, p. 267

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