



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works

Faculty Scholarship

1996

Women, Just Implementation of Asylum Policy, and Our Commitment to Human Dignity and Freedom

John Linarelli

Touro Law Center, jlinarelli@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Comparative and Foreign Law Commons](#), [Human Rights Law Commons](#), [Immigration Law Commons](#), [Law and Society Commons](#), [Rule of Law Commons](#), and the [Social Control, Law, Crime, and Deviance Commons](#)

Recommended Citation

John Linarelli, Women, Just Implementation of Asylum Policy, and Our Commitment to Human Dignity and Freedom, 3 HUMAN RIGHTS BRIEF, 13 (1996).

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

Women, Just Implementation of Asylum Policy, and Our Commitment to Human Dignity and Freedom

by John Linarelli

Female genital mutilation, bride burning, rape, mass rape, sexual abuse, spousal abuse, infanticide, forced marriage, child marriage, slavery, forced abortion, forced pregnancy. These are just some of the atrocities that are inflicted upon women around the world. Many of these atrocities easily rise to the level of torture as defined in the Torture Convention. These atrocities violate fundamental, non-derogable human rights. A woman's defiance of norms imposed upon her by the dominant social order in her country, moreover, may be a serious breach of the



John Linarelli

social and political order in her society, and can result in severe persecution.

The U.S. and other countries are finally acknowledging that these long-standing abuses of women's human rights are grounds for asylum.

Asylum Law Encompasses Persecution of Women

On May 26, 1995, the U.S. Immigration and Naturalization Service (INS) took the momentous step of issuing Gender Guidelines. Recognition of the

Rape or genital mutilation often are forms of political violence designed to subjugate women politically.

plight of women was long overdue. The Guidelines recognize well-established human rights norms condemning persecution of women, as reflected in the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the United Nations Declaration on the Elimination of Violence Against Women, and Guidelines and other international instruments.

Recognition of women's claims in no way expands the scope of asylum law. Although women face unique forms of persecution, their persecution provides no less legitimate grounds for asylum than the persecution men face. Asylum law protects more than the stereotypical male asylum applicant — the educated male elite fleeing communism.

Women face persecution generally on account of political opinion or membership in a particular social group. Political opinion can include a woman's attitude about her government, or her opinion on the treatment of women in her country, culture or social, reli-

gious or ethnic group. Political opinion can include a woman's opposition to a law or custom that oppresses women in her country. Political opinion can be imputed to a woman based on the perception of members of the established socio-political structure that she holds inappropriate views because of her deviation from the prescribed roles.

Women often are prohibited from entering into formal political roles, such as those involving prominence in public affairs or in the military. Their political persecution is accomplished by different means, often through sexual violence. Rape or genital mutilation, for example, often are forms of political violence designed to subjugate women politically.

In many women's cases, the government is complicitous, unwilling to take any action and satisfied with a status quo that harms women. Such government inaction constitutes official persecution.

Often, no clear distinction exists between the personal and the political. Politics must be examined in a comparative context that emphasizes functionality and not formalism. The disci-

Asylum law protects more than the stereotypical male asylum applicant — the educated male elite fleeing communism.

plines of comparative law and comparative politics — disciplines firmly grounded in the curriculums of U.S. law schools and universities — must be used to examine political persecutions. In many countries, the social order and cultural norms take the place of the political system, rule of law, and the judicial system. Binding norms are manifested socially and not politically or judicially. Governments cannot hide behind ignorance of these tenets to deny women's asylum claims.

Women's claims are relatively recent for various reasons. Women have suffered long-standing forms of persecution that are only now being acknowl-

Point/Counterpoint is a regular feature of *The Human Rights Brief*. The purpose of the section is to encourage meaningful, intellectual discussion on contemporary issues in human rights and humanitarian law through the presentation of two diverse, though not necessarily opposing, opinions on the subject at hand. Commentaries for the Point/Counterpoint section are generally solicited by *The Brief*; however, the Editorial Board welcomes all submissions, comments, and suggestions. The newsletter does not facilitate the exchange of the authors' compositions prior to publication. The views expressed in the Point/Counterpoint section are those of the authors and do not necessarily reflect those of *The Human Rights Brief*, the Center for Human Rights and Humanitarian Law, or their Directors or staff.

continued on page 15

edged. Asylum cases have developed on the basis of male experiences. It is often extremely difficult for women to discuss, in the detail necessary to prove their case, some of the physical, mental, and emotional harms inflicted upon them, particularly when they must do so in a foreign country and in a foreign culture before male interpreters, male INS officers, male lawyers, and male family members, often in the cold setting of an administrative courtroom.

Debunking "Cultural Imperialist" Arguments

Grants of asylum to women do not implicate concerns about the imposition of Western values on other cultures.

Human rights are universal. They are to be enjoyed equally by the man in New York City and the woman in Lagos. Broadly accepted human rights instruments provide that culture cannot justify persecution of women. Much of the persecution of women is incredibly harmful and traumatic, physically, mentally, and emotionally. In the words of Alice Walker, "torture is not culture." Arguments that the forcible cutting off of a girl's clitoris and removal of her labia minora by an intoxicated adult with a dirty razor should be a protected cultural practice is a particularly noxious argument. Such violence in any legal, political, cultural, or social system is wrong.

Applying asylum law consistently with international human rights obligations does not result in any imposition of our values on others. In the asylum context, the asylee has chosen to espouse values different from her own society and to flee persecution. Women asylees are not saying "change conditions in my country." They are simply saying "please do not send me back to be persecuted." Abstract theoretical concerns about imperialism should not have a privileged position over the pleas of women for protection. Responding to their pleas is the least the U.S. can do.

Whether or not gender-based claims were considered in the promulgation of the Refugee Convention or of domestic implementing law is irrelevant. The Refugee Convention was drafted at a time when the memories of the Holocaust were fresh in the minds of the international community, and the Cold War was in its early, more frightening stages. Circumstances change. Slavery, for example, was once upheld in the

law of many U.S. states. The Thirteenth Amendment to the U.S. Constitution abolished slavery, and the Fourteenth Amendment granted equal protection to the former slaves and their descendants. Still, civil and political rights were a long time coming. The Fourteenth Amendment was ultimately applied to require equal protection of women. So too, human rights law has evolved to recognize that universal human rights

The argument for gender-based asylum is based, at least in part, on the idea that there are wrongs that cannot be justified under the mantle of culture.

encompass women's rights. It has been a long time coming, but asylum statutes are now being properly interpreted to recognize persecution that has always existed but which has been improperly ignored.

Those who assert cultural imperialism deny the validity of American values grounded in human dignity and freedom. Cultural relativist defenses to human rights abuses are typically articulated by oppressive nondemocratic regimes. Established tenets of Western Civilization mandate clear distinctions between right and wrong. The argument for gender-based asylum is based, at least in part, on the idea that there are wrongs that cannot be justified under the mantle of culture. This is a peculiarly American ideal. We have been the leaders in the human rights movement and in bringing morality, ethics, and openness to relations between nations. These American ideals should not be abandoned to avoid our international and domestic legal obligations towards persecuted women.

Refuting "Floodgate" Arguments

The argument that recognizing the persecution of women in the asylum law would cause a massive flight of women to the United States is unfounded.

Canada promulgated gender guidelines in March 1993. Since then, there has been no increase in the number of women's asylum claims in Canada, despite the fact that Canada provides a more hospitable country for asylees than the U.S. Similarly, since the promulgation of the INS Gender Guidelines, no real increase has occurred in the number of women asylum claims in the U.S.

Asylees on the whole probably comprise the smallest group of immigrants.

Asylum is an individualized remedy. The size of the group being persecuted is irrelevant. The number of males fleeing political oppression during the Cold War, for example, was very large. Grants of asylum came relatively easily to these men, despite the large numbers of male dissidents living under oppressive regimes. Great numbers of similarly situated persons corroborate an asylum claim, rather than detract from it.

The requirements of U.S. asylum law are stringent. Contrary to misperceptions about asylum, one cannot simply walk into the INS and say "I want asylum." Asylees must prove, among other things, a well-founded fear of persecution, or severe past persecution, on account of membership in a particular social group, or on account of political opinion, race, nationality, or religion. The INS has reviewed women's cases rigorously.

The overwhelming majority of women around the world cannot flee their regions of persecution. Many women are unable or unwilling to depart from their country, while others may not feel that they have been persecuted. Those able to flee may seek lawful immigration through employment or family ties. When the stringent requirements for asylum are examined in the context of the extremely sensitive nature of a woman's claim, women will likely view asylum as a last resort and claim asylum only if they have a well-founded claim and are serious about it. This is particularly so when experienced counsel is involved.

Arguments that women may obtain asylum through fraud are demeaning and inappropriate. Why should a higher standard be applied to women? Why are women more dishonest than men? It is impossible to fake physical trauma such as a genital mutilation. The INS has stringent standards and procedures designed to discover fraud in any claim before it, regardless of whether it is for asylum or for a visa for a renowned scientist. These standards should be applied fairly to all applicants regardless of their status in life.

America is an immigrant nation. Recognizing the plight of immigrant women is just one chapter in our long history of promoting the freedom and dignity of the individual. There is nothing more American than this. I can think of no better way to celebrate our American values than to hear the pleas of women facing persecution. ☉