

Human Rights Brief

Volume 3 | Issue 3

Article 8

1996

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Recommended Citation

Stein, Dan. "Gender Asylum Reflects Mistaken Priorities." Human Rights Brief 3, no. 3 (1996): 12, 14.

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POINT/COUNTERPOINT

Gender Asylum Reflects Mistaken Priorities

by Dan Stein

For any nation's political asylum policy to enjoy sustained public support, it must be both practical and administratively feasible. Under this test, the current move to establish "gender-based" asylum policies ultimately fails.

The reasons must be understood outside the volatile and emotional nature of the topic itself. We can all agree that violence of any kind perpetuated against women is an evil in itself to be avoided if possible. When the motive appears



Photo courtesy of Dan Stein

Dan Stein

to be political, based on some sort of retaliation that exploits a woman's particular vulnerabilities, the violence takes on new dimensions.

But the question arises: What is the purpose of political asylum? Is it to provide permanent resettlement for a large number of people seeking to escape regressive cultural and civil norms, or is it a program providing temporary pro-

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Gender-Based Criteria for Asylum

by Gabriel Eckstein and Gregg Epstein

Since the end of World War II, the subject of women's human rights has expanded far beyond its traditional realm. With this expansion, a debate has emerged concerning whether or not the values and mores championed by human rights activists, primarily of Western origin, threaten the cultural integrity of various peoples around the world.

This debate has become especially vehement in the United States where gender-based violence is a contentious issue in the context of asylum. Those who favor gender-based criteria for granting asylum generally contend that violence against women violates human rights and therefore can never be justified by cultural integrity. Those who oppose gender-based criteria argue that regardless of how onerous the violence may be, asylum must be restricted for true political refugees and must not be made available to those fleeing a social order they do not like.

The authors of this issue's Point/Counterpoint consider whether gender-based violence should be used as a grounds for granting asylum. John Linarelli, a graduate of the Washington College of Law, is partner in the Washington, DC law firm of Braverman & Linarelli. He was counsel in *In the Matter of M.K.*, a case of first impression in which a U.S. Immigration Court granted asylum on the basis of forcible female genital mutilation. Mr. Linarelli is also an adjunct professor at Georgetown University Law Center and Catholic University School of Law.

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tection for those seeking positive political change back home?

The statutory definition of asylum in the U.S. calls for granting protection to those in this country demonstrating a "well-founded fear of political persecution on account of race, religion, nationality, membership in a particular group or political opinion." This definition provides permanent asylum to anyone who meets it. In practice, however, the general statutory definition has proved difficult to implement consistently. And it has an impressive breadth, range, and permanence to it that makes it vulnerable to exploitation by broad-based groups seeking to fit within its umbrella.

A strict reading suggests that entire groups — numbering perhaps in the millions — could qualify for asylum under the legal definition. But providing permanent resettlement to millions seeking to leave countries because of broad-based political, ethnic, or religious persecution is clearly far more

than the American public has bargained for. Polls and focus groups suggest that most Americans are proud of an asylum policy that, they believe, provides temporary protection for those working for positive political change back home.

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At all times, there's an implied expectation that most asylum seekers will go home when it is safe to do so, even though actual asylum grants in the United States are effectively permanent.

In actual practice, few asylees ever go home. Groups, such as Haitians,

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Nicaraguans, Salvadorans, and some Chinese nationals, after entering the United States illegally, have fought vigorously for the same broad-based treatment as asylees as Poles, Jews from the

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former Soviet Union, certain Indochinese ethnic groups, and others who have entered the U.S. as refugees since 1980.

At the same time, the number of new asylum claims has skyrocketed from several thousand a year fifteen years ago to about 150,000 a year now. Backlogs and administrative delays have created incentives for persons entering illegally to use the asylum system to delay deportation.

Fueling further pressure on the system is the on-going effort by various human rights activists to expand the definitions of political asylum to include

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cultural asylum, sexual preference asylum, and, of course, gender-based asylum. All three are potentially open-ended categories unsuited to a case-by-case asylum system under rigorous administrative controls.

Given the growing pressures on the system, the question is whether we can adjudicate hundreds of thousands of asylum claims each year using such broadly defined asylum categories without unleashing a new, sidebar immigration program?

Gender asylum is potentially the biggest of the categories. Asylum advocates claim that there are special considerations for women that make particularized legal standards appropriate. Retaliatory rape, gang rape, beatings,

assaults, and related violence may have a political dimension, they say, that makes it appropriate to consider the decision to flee as a flight from officially-sanctioned persecution. This is especially so, they say, where police refuse to intervene and protect the women in domestic situations. Other forms of gender-based persecution, advocates say, include coercive arranged marriages, coercive abortions, the loss of marriage-based property rights, and cultural practices like female genital mutilation (a centuries-old practice).

Each of these practices should shock the conscience of any student of Western values and civilization. And no doubt these are broad-based civil crimes and cultural norms that can disproportionately affect women over men in these societies, especially where there is a failure of civil society to intervene to protect the woman in abusive domestic situations.

But much as we would like to see these practices halted, is asylum policy the place to fight the battle over changing broad-based civil norms, many of which have been in place for centuries? Where is the line between protecting persons and engaging in cultural imperialism — telling other countries how they should think and behave? And can our asylum policies entertain on an individualized basis claims of this sort without overwhelming the system with fraud and abuse?

I argue no. Asylum is designed to provide people protection from governments, not prevailing cultural norms — no matter how much we may dislike them. Our asylum system should operate to help people who are in fear of their lives or fear politically-oriented reprisals because of past political actions. This “asylum for mankind” (as

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Thomas Paine called it) must also be sensitive to special considerations affecting women. But practical limits in today's world mean that it also must serve only as a place for those needing *temporary* protection while working for positive political change back home. Much as we would like to, we cannot accommodate those who would like to

live under a different system of beliefs and cultural practices, much as we ourselves would like to see them changed.

Much as we would like to, we cannot accommodate those who would like to live under a different system of beliefs and cultural practices.

Nor can we make disagreements with the peculiar anti-woman biases of regressive political and civil systems a basis for granting asylum to a particular woman who believes she is unfairly treated by that system. A criminal offense, rape, for example, does not become political merely because the local political system fails to prosecute the offense — even for political reasons.

Then there is the question of veracity and fraud. Many gender-based claims appear to have fact patterns that make it difficult for the trier of fact to verify the claim. Allegations that local thugs retaliated by rape against a woman because of her brother-in-law's political activities — however much they may tug at the heartstrings — can be very hard to verify, especially if the claimant is from a country where documentary records are poorly maintained. Similarly, a recent surge in claims of fear of past or future coercive abortion and sterilization by claimants from China demonstrate how difficult it is to verify such claims. All too often, ideological advocates are prepared to accept the factual allegations at face value, but how can the trier of fact (the immigration judge) verify this information when the incident took place in a tiny rural village 15,000 miles away?

Again, I would argue that asylum policy is not the place to battle the world's cultural, political, and ethnic fault lines. We should try to spread our Western values through cultural exchange, mass communications, and diplomatic pressure. But we cannot save the world through immigration. It is enough that we try to help those in need by admitting a fair share of refugees each year. We also provide asylum to many who are unable to return home because of past or present political activities. But to open up a new avenue for broad-based asylum claims invites a politicization of the process and a high degree of fraud. 🌐