

GENDER, CULTURE AND EPISTEMIC INJUSTICE

The Institutional Logic in Assessment of Asylum Applications in Sweden

Abstract

Analysing the Swedish Migration authorities' assessment of asylum applications, the article examines how discretionary space is used concerning gender, culture and the possibility of protection in the country of origin. Gendered victims of both sexes are disregarded. Although the verdicts depend on applicants' narratives, the scope of applicants' narrative authority is very limited, and resistance is silenced in favour of authorities' predominant views of culture. Country information is used to sustain one-dimensional views of culture and to exaggerate the possibility of protection in the country of origin, which denies gender-based claims for protection in the asylum country.

Keywords

Asylum assessment • gender • culture • epistemic injustice • credibility

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1 Introduction

[Epistemic injustice] occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word /.../ [or] when a gap in collective interpretative resources puts someone at an unfair disadvantage [in] making sense of their experiences. (Fricker 2007: 1)

'Gender-related persecution' is the predominant expression used in international refugee law to denote, for example family violence, punishment for transgression of social mores and homosexuality (Folkelius & Noll 1998: 611). The (in)ability to handle gender in asylum practice has caused considerable critique internationally. Scholars (e.g. Bhabha 1996: 5; McKinnon 2008) have suggested that human-rights-based arguments are used extensively to condemn 'barbaric' or 'primitive' practices occurring in non-Western states, but not to protect victims of such practices who are seeking refuge in the West. In the present article, the term 'epistemic injustice' (Fricker 2007: 155) refers to the significance given to the applicant narrative in relation to other sources of knowledge within assessment of asylum applications that may be gender-related.

The possibility to try gender-related persecution as a ground for refugee status is quite new in Sweden. The terms 'gender' and 'sexuality' were included in the refugee definition of the Swedish Aliens Act in 2006. Previously, they were tried through subsidiary protection paragraphs, which had limited impact in practice. That the refugee definition now includes gender-related persecution is

unique, but not intended to expand the definition of the internationally agreed-upon 1951 Geneva Convention, rather 'to show clearly that persecution based on gender or sexual orientation *also in the Swedish jurisdiction* shall be accounted for in the definition' (Prop. 2005: 32, emphasis added). The wording points to the celebrated investments in gender equality values in Sweden (Razack 2004: 144; Magnusson *et al.* 2008; Wilton 2009); but is Sweden living up to its international reputation for investing in gender equality in relation to the area of asylum adjudication?

Two aspects can be seen as reinforcing the normative aspects of legal practice concerning assessments of gender-related asylum claims: First, asylum assessments largely rest on *credibility assessments*, as many of the actual conditions related to asylum cannot be proven (Thomas 2011: 134). Secondly, Noll (2006: 498) argues that assessments of persecution by non-state actors associated with gender-related persecution have come to deal with 'habits of culture' and arguments based on normative choice rather than legal arguments. This leaves a relatively unregulated scope of action at the discretion of adjudicators.

The focus of the present article is on how this discretionary space is used by the Migration Board and the Migration Courts in written verdicts concerning asylum applications that may be gender-related. The overall question asked is *whether* and *how* 'gender' is incorporated into Swedish asylum practice with specific reference to the use of the refugee paragraph and the status given to the

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applicant narrative. The article begins with an investigation of how the concept of gender is defined legally. It then proceeds to further explore how previous research views the ability to handle gender in asylum practice. The theory and methodological sections follow. This includes analysis of how three themes are handled by the adjudicators: *Gender and culture*; *The use of country information* obtained to access knowledge on the country in question; and *The possibility of protection in the country of origin*.

2 The legal concept of gender-related persecution

Internationally, the United Nations High Commissioner for Refugees (UNHCR) is one of the main actors providing guidelines for interpreting gender-related persecution (UNHCR 2008). One theme that has been debated concerns whether it is 'women' (and thus the female sex) who are to be protected, or whether protection based on 'gender' – which includes ideological expectations on both men and women – is in focus (e.g. Folkelius & Noll 1998; Oxford 2005; LaViolette 2007; Edwards 2010). In international practice, one strong tendency involves treating 'gender' as equivalent to 'women' and *ideological expectations* placed on women.

According to international and Swedish guidelines, the concept of 'gender', and thus the refugee definition, *shall* be used when it is applicable (SOU 2006:6: 113). If it is not used, the applicant can still be granted a residence permit through subsidiary protection. However, when persecution is not *recognized* as gender-related, the benefits of refugee status are foreclosed. Refugee status, among other things and in contrast to subsidiary protection, entails the right to coverage of costs for family reunification and to travel documents. The symbolic worth of the asylum legislation is also damaged if a majority of applicants are viewed as 'not real refugees' (Wettergren & Wikström 2013/2014).

The Swedish legislature suggests the following understanding of the concept of gender:

In refugee law the term gender [*kön*] should be used in its broadest sense and as such include *not only* the biological difference between men and women, but also socially and culturally determined and stereotyping notions concerning how men and women should behave. (Prop. 2005: 21, emphasis added.)¹

It is further suggested that persecution grounded on prevailing notions of gender (e.g. gender roles and gender discrimination) is 'gender-related'. The Swedish guidelines thus support an interpretation of gender-related persecution as ideological expectations on both men and women, which can be summarized as *gendered expectations and hierarchies*.

For the concept of gender to apply, asylum claims must be *recognized* by the adjudicator [Sv. *bedömare/beslutsfattare*] as gender-related in accordance with the refugee paragraph (Prop. 2005). The persecution must be considered 'serious' and the applicant must have turned to authorities in the country of origin for protection (e.g. by contacting the police or a women's shelter). Furthermore, the authorities must be viewed as not *willing* (legally or otherwise) to offer protection; lack of protection due to inefficiency *cannot* sustain refugee status. However, 'persecution as an obvious consequence of the prevailing political, social, religious and cultural structures /.../ the so-called gender power structure' *can* render refugee status (Prop. 2005: 28).

3 The (in)ability to handle gender-related persecution in practice

Apart from the previously mentioned Folkelius and Noll (1998), Segenstedt and Stern's (2011) study is the only empirical Swedish study that partly considers gender-related persecution. They note that similar cases are treated differently. Further, they discuss the 'actual possibility' to gain protection in the country of origin versus the *assumption* of such an opportunity. Bexelius (2008: 57f) argues that it is the legal practice in Sweden, not the regulation, that is insufficient.

UNHCR (2008: i) mean that women are exposed to particular protection problems related to their gender and their 'cultural' position. International research argues that women tend to fail as political subjects in the asylum process due to failure to pass as rational subjects, though they succeed when using alternative stories that accord with ethnocentric notions (Spijkerboer 2000; Anker 2001; McKinnon 2008: 95f). Oxford (2005: 30) discusses the assumption that men do not experience gender-related persecution; 'women, conversely, are worthy of asylum only in terms of narratives of exotic practices.' Noll (2006: 495) argues that phenomena such as female genital mutilation (FGM) are more easily accepted grounds for protection because host countries in the West do not practice it, while domestic violence is met with greater ambivalence, as this *is* practiced in host countries. A late development, which predominantly concerns homosexual men, is the view on men as victims of gendered stereotypes and violence (rather than only as perpetrators) (Edwards 2010: 22). The assessment of gender and sexuality has also been criticized for lacking the implications of a constructionist view and failing to capture how these categories operate in lived life (LaViolette 2007: 182; Berg & Millbank 2009).

4 Gender and culture in theory

The theoretical implications of persecution based on ideological expectations on gender originate from post-structural theory, which is the overall theoretical perspective in the present article. Post-structural theory implies that gender is primarily a politically and discursively informed category (Butler 1990). This means that the forces that make women and men what they are consist of ideological articulations that are informed by – and that establish – power relations between individual men and women, between men and between women. The emphasis on ideological expectations concerning gender also points at the importance of interpreting the culture that produces gendered persecution in the area of asylum.

Weaving culture into the causality chain of persecution concurrently increases the divide between civilized countries of asylum and uncivilized countries of origin (Noll 2006: 493).

As such one risks getting caught up in the notion of the modernity paradigm of Us/Them in the area of asylum. Postcolonial theory engages with the post-structural critique of the structure(s) shown in the predominant Western right to define the everyday life and character of non-Western subjects (Bhabha 1994; Mohanty 2003). These processes that emanates from the colonial era, are especially evident in the present use of the concept of culture. The colonial/modern version of culture depicts it as a *fixed* entity closely connected with birthplace, where it also appears as an agent and in the singular. The postcolonial perspective regards culture as

situated and traversed by the intersections of class, gender, sexuality and so on (Mohanty 2003; Anthias 2012). This creates difference *within* cultures and thus positions culture as being in motion, and as inconsistent. Agency is constituted through *positioning* in relation to dominant and contested/counter-cultural norms (Hall 1993; Wikström 2007). Two aspects that constitute the applicant's possibilities of *resistance* within the highly structuralistic system of asylum law are how agency is viewed in relation to cultural norms by the adjudicator (Mohanty 2003; Wikström 2007) and how the *narrative authority* of the applicant is situated (Blommaert 2001: 415; Fricker 2007). It can be argued that the lack of (legal) guidance on the concept of culture in the asylum area makes the assessment process more vulnerable to rigid approaches to culture.

5 Methodology

The asylum process in Sweden begins with registration at the Migration Board, where an initial decision is reached. Negative decisions can be appealed to the Migration Court and thereafter to the Migration Court of Appeal, which requires leave to appeal. In court, the Board becomes the counterpart to the applicant and his/her lawyer. The assessments focus the reasons for asylum and the credibility of the applicant narrative. Among other instruments, the information given by the applicant is compared with available information on the country in question retrieved by authorities from the *country information databases* (Flärd 2007).

The present empirical material consists of 62 cases in the written decisions from the Migration Board and the Migration Courts. Selection of cases has been made from a total of 250 randomly selected cases from 2009 and 2010, and has been guided by whether I judge that the claimed persecution can be related to *gendered expectations and hierarchies*, as described in the guidelines.²

The 62 cases concern applicants from a wide range of countries; the majority concern women. Five women and one man are accepted as refugees; 27 are given subsidiary protection; and 29 applications are denied. One result of the analysis of these decisions is that, in a large majority of the cases (40) where the term 'gender' *could* have been discussed in the decisions (as in cases concerning mass rape of women being held captives by militia; fatwas to be stoned; rape and/or abuse or torture within the homes of the applicants) it is not. Instead, framings such as 'what has been pleaded in the case' (File 9A: 4) occur in the decisions. In such cases, the reasons for application are *not tried* in relation to gender, and if the applications are approved, it is done through subsidiary protection. This contradicts the intentions expressed in the guidelines. The further analysis looks at the 22 cases in which gender is discussed.

Three themes, which are derived empirically and thus inductively, are elaborated upon in the empirical part: *Gender and Culture*; *The use of country information* and *The possibility of protection in the country of origin*. The themes are interdependent and constitute the cornerstones of argumentation concerning the area of gender-related persecution, non-state actors/culture and protection. The interdependence refers to the highly structuralistic character of the area of asylum law and that certain prerequisites have to be established for the law to apply. The themes are related in that 'gender' is the asylum-ground in the refugee definition; culture is what is viewed as the persecutor in this setting, which is sustained/disqualified by the adjudicators' use of country information; finally, protection in the country of origin is determined before establishing the need for international protection. The examples discussed in

the analytical part are chosen to illustrate the qualities that are not handled sufficiently in accordance with the (theoretical) implications of the preparatory work and to illustrate the *institutional logic* (or lack thereof) of asylum law as well as the consequences of these provisions.

The analysis is conducted using a narrative approach focusing on how gender, culture and protection in the country of origin are constructed and how this is sustained by the use of country of origin information. Narrative analysis focuses on how people create and use culturally connected narratives in their perception of the world (Somers 1994; Talja 1999; Anthias 2005). '[T]alk is studied as an example of more general interpretative practices' (Talja 1999: 459). The analytical fundamental is institutionalized speech and logics that can be connected to culturally informed ways of understanding social life (and law). This discursive macro-level dimension provides single speech acts, or texts, with social meaning on categories such as country/nation, race/ethnicity and gender.³

Narratives order experiences in terms of certain conventional norms, which also serve to locate the subject in accordance with certain understandings (Somers 1994; Talja 1999; Anthias 2005). The narratives used by the narrator go beyond his/her intentions/control, as they are always discursive (in the sense 'social' in contrast to 'private constructions'). The discursive quality of narratives thus exercises power, but individuals also has agency. In assessments of asylum applications, law and bureaucracy shape adjudicators' claims (Heger & Busse 2006). But the discourse of law also communicates with the norms and discourses of the society it is part of. In the assessments, the adjudicators thus choose to use certain narratives. Claim-making, however, relates to both the logic of the area of asylum law and the culturally prevalent discourses concerning gender, culture and other social categories.

Even though the verdicts mainly reflect the voice of the authorities, the analysis aims to locate acts of resistance in, and silencing of, the applicant narratives and thus traces the status given to certain sources of information in the assessments (Blommaert 2001; Fricker 2007).

6 Gender and culture in asylum practice

There is a continuum concerning how gender-related persecution is dealt with, from not recognizing the pleaded persecution as gendered at all, to one case in which gender is viewed as a clear prerequisite. The applicant in the latter case is granted family reunification for her two baby-daughters, who are found to be at risk of FGM and declared as refugees due to gender-related persecution. The risk of FGM seems to be the one single harm that almost automatically renders refugee status (Noll 2006; McKinnon 2008). More contestable cases, mainly relating to norms of honour, will be discussed below.

7 Gender

When gender is tried, it may be seen as a sufficient ground for persecution, or it may be negated for a number of reasons. In the following first example, gender is discussed in relation to an adult applicant, Nesrin, but not considered relevant by the adjudicator responsible of the assessment. According to the verdict, Nesrin is of Kurdish origins and from Iraq. She claims to have had a love affair with Omed. Nesrin's family rejected Omed's proposal to Nesrin, as she was promised to a cousin of hers. As a result of the proposal,

Nesrin's family repeatedly abused and threatened her and Omed. While the couple prepared to escape the country, Omed was murdered by Nesrin's family and Nesrin managed to escape through the aid of a women's organization. In its ruling, the Migration Court (MC) states:

MC: Nesrin alleges a well-founded fear of persecution due to her gender and that she should therefore receive protection as a refugee. However, it has not emerged that the threat she refers to has occurred due to her gender. She has herself stated that even the man she has had a relation with has been subjected to violence and was eventually killed because of their relationship. /.../ Nesrin has not made probable that she risks persecution due to her gender. She is therefore not to be acknowledged as a refugee. (Verdict 12: 9)

As such gender is not found relevant because a man, too, was victimized. It indicates that the court equates gender with biological sex and that social expectations on individuals are not gendered if they lead to persecution of both men and women (Butler 1990; Oxford 2005). As such, it fails to capture how ideological expectations (in the persecutory and other environments) *gender* individuals and thus fails to acknowledge how similarities/differences between individuals are created based on the perceptions of biological sex, and not on the difference in biological sex per se. This construction of gender is seen in all of the analysed cases that include explicit reasoning on gender. Another possible construction in this case could have been that gendered expectations prevented Nesrin from leading a life of her choosing and caused the murder of her partner. That her partner was murdered does not necessarily position them as non-gendered victims, they can still be *gendered differently* even if they were both punished. According to the Court, Nesrin is at risk of being the victim of honour-related violence (HV), and she is therefore granted subsidiary protection.

The above-shown understanding of gender seems to echo a modified understanding of what, in the guidelines, is called *gender-specific* persecution.

When the *forms of persecution* take different shapes depending on whether the persecuted individual is a man or a woman, refugee law usually refers to *gender-specific* persecution. (Prop. 2005: 22, emphasis added.)

Gender-specific persecution is *not* a requirement for declaring persecution gender-related (Prop. 2005: 22). What seems to happen in the assessments is that gender derives its meaning from the naturalist notion that the sexes are not alike. This disregards persecution that can affect both men and women and fails to capture the meaning of ideological expectations (namely that it is ideological expectations that *create gender*, rather than a naturalist view on gender as existing prior to various expectations).

Further, when the authorities apply what appears to be the meaning of *gender-specific* persecution, the two prerequisites '*persecution*' (e.g. violence) and the '*for reasons of*' ('gender') seem to become entangled. The version/understanding employed by the authorities thus comes to view gender-related persecution as persecution based on gender on the grounds that women and men are different and that *the persecution must differ between the sexes* (or not occur at all in relation to one of the sexes). The difference in persecution between the sexes is what renders it 'gender-related', rather than the

ideological expectations directed at the applicants. This version rather responds to the formulation that refers to *gender-specific* persecution and as such primarily the implications of biological sex.

The version/understanding employed in the analysis of the present article instead views gender-related persecution on the (theoretical) grounds of ideological expectations as *persecution based on gendered expectations on individuals*. The persecution (e.g. violence) may be similar, but carried out based on different gendered expectations. This latter version seems to better pick up on the wording concerning gender-related persecution based on ideological expectations evident in the guidelines, and also on the theoretical implications of that wording.

Hence, the implications of 'ideological expectations' seem difficult to handle in asylum practice and result in arguments based on biology, according to which the sexes are not alike. This also seems to affect the possibility of viewing *men* as victims of gender-based persecution or even as victims of the very same circumstances in which women are seen as victims:

MC: In the available country information, it can be read that it is mostly women who are affected by HV. In the event men are drawn into the conflicts, it is mainly to restore their own family name [and thereby as perpetrators – not victims]. (File 11A, verdict: 9)

When sex determines victimhood (rather than ideological expectations that *gender individuals differently*), gendered victims of both sexes are discarded. Butler (1990) shows how expectations on gender are established by the dominant matrix of heterosexual desire that reinforces gendered difference within the heterosexual relation. Sex thus receives its meaning through discourse and cannot be separated from gender. This further implies that gender is something that goes beyond women and differences between men and women (e.g. two women can be gendered differently).

The process of gendering in the case of HV entails that the required heterosexuality demands different actions and positions from different individuals depending on how biological sex is understood (Butler 1990), as well as that *both* women and men follow these requirements. The fact that both sexes can be victimized should thus not result in a de-gendering but highlight the issue of gender in relation to norms of honour in the asylum context. Furthermore, that it is 'mostly' men who act as perpetrators in the name of honour does not exclude the possibility of them also being victims. This means recognizing that a position of power in one context may mean oppression in another (Anthias 2012). In the next example, men are presented as victims. However, the wording of the court eludes the interpretation that men can suffer *gender-related* persecution:

MC: "Honour killings" *are not always related to gender* and there may be cases in which men run the same risk as women of being killed as a result of a practice that is considered to have brought shame upon the family. (Verdict 33: 16, emphasis added.)

This further demonstrates the inability of grasping the meaning of gender as *anything but* an immutable difference between men and women; and that the persecution must differ and therefore be *gender-specific*. The above-mentioned illustrates epistemic injustice as it represents 'a gap in collective interpretative resources' concerning the use of the concept of gender (Fricker 2007: 1). The failure to handle ideological expectations will be further discussed below.

8 Culture

Arguments concerning 'habits of culture' (Noll 2006) are prevalent in all the analysed cases in which gender is discussed, as could be seen above in the discussions on honour norms. The postcolonial view on culture stresses that:

[C]ulture is not a real thing, but an abstract and purely analytical notion. It does not cause behaviour, but summarizes an analytical abstraction from it, and thus is neither normative nor predictive. (Bauman 1996: 11)

Culture can only appear as contradictory/inconsistent and in the plural, as dominant versus contested/counter-cultural norms. In the case of Afya, the 'cultural roots' of HV in Syria are described as follows:

MC: HV occurs in Syria as in other countries in the region. It occurs among all strata of society. It has deep cultural roots that stem from ancient clan or tribal systems. /.../ The police see threats and less serious offences as part of upbringing. Issues related to HV in the family have not been a high priority. (Verdict 24: 9)

Culture (or 'tribal systems'), in this sense, is connected with ancient times and signifies the opposite of modernity as well as the opposite of agency on the part of institutions in the region (Hall 1993; Bhabha 1994). Institutions such as the police force and the judicial system have not (yet) transformed such deeply rooted, pre-modern customs. As such, the agency of institutions as well as of individuals seems to be negated in favour of the dominant culture-as-agent. Because the reasoning on gender is so closely connected to arguments concerning culture, applicants' claims that are negated using clear references to culture are further analysed in the next two examples to discern how arguments of culture operate.

Sara is an applicant of Kurdish decent and from Iraq. She claims that her family arranged for her to be married against her will. Despite this, she had a sexual relation with a work colleague of hers. One day Sara's brother caught the couple in her family's residence and a fight and shooting ensued. Sara fled and went to the police. An officer told her he would have killed her himself had she been his sister, and that the police could not do anything 'since it was an honour-related crime' (Verdict 15: 2). The Board (MB) turned Sara's application down because it did not find her credible:

MB: It is odd and not very likely that she would initiate a sexual relation with another man when she knows she is going to marry her cousin. /.../ That she would be so blinded by love and disregard the consequences is not a reasonable explanation, with the culture that is prevalent in northern Iraq and with her family traditions in mind. /.../ Furthermore it must be considered striking that, at her age, an arranged marriage has not occurred earlier (Verdict 15: 3).

Here, the predominant conception of culture is portrayed as governing what emotions can occur, how strong they can be and whether it is likely one would act on them. While the Board contradicts 'knowledge' or a cognitive dimension ('when she knows') and 'emotions' ('blinded by love'), it denies the agency of the applicant

as well as her resistance to dominant norms. The Board's view of culture is that dominant norms not only work as agents, but also works as absolutes. Seen in relation to the broader understanding of persecution, the Board's line of reasoning largely excludes the very grounds for the existence of persecution (if there were no transgression of norms, there would be very little persecution). At the same time, as it is resistance that gives applicants political subjectivity in accordance with the requirement of the law, resistance is constantly negated in the assessments (Wettergren & Wikström 2013/2014). The message thus can also be read as an instruction to obey one's oppressors.

By using the wording 'relation with *another* man', the Board also makes it sound as though Sara is unfaithful, in this way adopting the view of her persecutors. This is also accomplished through certain expressions, such as that it is 'striking' that no marriage has taken place earlier (which also brings age into the equation). Here, the Board is positioned as 'knowing how *the* culture' works, what it implies and what is likely to occur' (Bauman 1996; Mohanty 2003).

Sara responds to a number of things she claims the Board has misunderstood, she also states that: 'It is not strange for women to initiate secret relationships' (Verdict 15: 4). By making such a statement, she defends her agency and a more complex view of what culture can also be and gives an account of what could be called cultures in the plural. Her statement indicates that prefabricated 'cultural' models of expected behaviour are inadequate. This kind of voicing of resistance is rarely made explicit in the decisions and thus silenced, further it does not influence the rulings.

The narrative of Bejin is also rendered non-credible on the basis of arguments about culture:

MB: There are credibility issues in terms of how the couple could meet when Bejin lived in such a traditional milieu. (Verdict 63: 10)

MC: It is not credible that she, at her young age and despite this strong control, would have had the opportunity to meet [her partner] alone and have a sexual relation with him (Verdict 63: 26).

Moreover, Bejin contests the 'cultural model' imposed on her, explaining that the couple could meet because her partner frequently visited the family of her friend and because they used to walk home from school together (Verdict 63: 15). This can be read as yet another argument in which 'lived experience' meets fixed models of expected behaviour.

The authorities' reasoning on culture fully supports what Noll (2006) calls arguments based on normative choice rather than legal arguments, where the predominant view of culture discussed as a persecutor is made the governing agent of individual behaviour (Hall 1993; Bhabha 1994). Epistemic injustice becomes evident as the reasoning of the authorities shows how arguments of culture are primarily used to negate individual claims, and in that resistance to and deviations from dominant cultural norms are not seen as credible (Fricker 2007). Thus, applicants' 'lived reality'/agency tends to be accorded value *primarily* when it corresponds with the fixed 'cultural models' in use. Arguments concerning how culture works in other countries are not the adjudicators' private constructions but are also sustained by the use of country information, which will be discussed below.

9 The use of country of origin information

The adjudicators' use of country information is intended to help them discern whether the situation in the country of origin supports the narrative of the applicant, deeming it plausible or not (Flärd 2007). In these evaluations, authorities construct and deconstruct narratives of countries/specific areas, as well as the culture of these areas. However, the institutional beliefs of migration authorities are based on a realist/positivist paradigm:

The approach to, and nature of, Country of Origin Information in Sweden is factual. /.../ Lifos [database] is a compilation of "facts". The idea is that there are a number of observable facts about countries and societies that can be captured and structured in a database. The underlying logic seems to be that anyone /.../ can use these facts to come to the right (and thus the same) conclusion. (Flärd 2007: 38)

As discussed, the legal categorization depends on whether lack of protection in the country of origin is referred to the *legal system* or to arguments concerning the influence of *culture* (Prop. 2005). However, what should be referred to the 'legal system' versus to culture seems to be contestable, and largely a question of *how* the country information is used. Two cases are used to illustrate this.

Almas and Afya are both from Syria; they both refer to HV and claim to have been severely abused by their families and threatened to death; they applied for asylum during the same period of time. In the case of Almas, the ruling of the Court relies on six both national and international country reports, based on which the Court concludes that the lack of protection in the country of origin is established by law:

MC: HV and murders take place all over Syria. *Syrian law statutes impunity or punishment mitigation* in honour-related violations. The State indicates that 30 such murders take place each year. NGOs put the number at 2000–3000 such cases. (Verdict 21: 7, emphasis added.)⁴

The case of Almas is awarded refugee status. In the case of Afya (Verdict 24), only the internal report from the Swedish Board is used as country information. The Board, which in its claim stresses the *equal legal status* of murders with and without honour motives, states:

MB: Generally considered, the number of honour killings has gone down in the country in recent years. It is said that people have become more enlightened and changed their attitudes in this matter. Men more often refrain from killing in the name of honour because they know they will be sentenced to harsh prison terms when they are not granted sentence reductions. (Verdict 24: 4)

This is contradictory to statements made in the case of Almas (Verdict 21). It also differs from what the *Court*, in the case of Afya (Verdict 24: 7), chooses to stress regarding the same country information, namely that HV is said to have 'deep cultural roots', that the 'police see threats and less serious offences as part of upbringing' and that HV has not been a high priority. The Court also states that:

MC: Any deviation from the family's rules can lead to punishments. Sometimes you kill the person wronged. Many young women are

married off to older men in return for payment. /.../ NGOs report that between 200–300 women are killed in the name of honour each year. The authorities, however, believe that the number is 30–35. (Verdict 24: 9)

The court refers lack of protection in the country of origin to 'habits of culture', and Afya is granted subsidiary protection. The choice of what to emphasize and what information to use is at the authorities' discretion and does not follow from the cases per se. Here, these choices also lead to different legal statuses.

The processes described above show the arbitrary nature of the use of country information prevalent in the assessments (Flärd 2007). They also illustrate that while 'habits of culture' are widely used in the authorities' argumentation, the assessments do not pick up on the fact that 'persecution as an obvious consequence of the prevailing political, social, religious and cultural structures' can render refugee status (Prop. 2005: 28.). Instead, the prerequisite asserting that the state must (openly) oppose/not be willing to offer protection is more widely used by far. This is seen also in the case of Sara (Verdict 15), which we became acquainted with above. The court finds that Sara risks HV, and they try her case in relation to gender in the refugee paragraph. However, because the protection is said not to be *openly opposed* by the authorities in the region of northern Iraq, the Court grants Sara subsidiary protection – even though her claims are acknowledged as gendered. Segenstedt and Stern (2011: 36) suggest that 'legal reasons' and 'cultural reasons' for lack of protection in the country of origin may be interwoven; legal protection may not be prioritized *because of* 'cultural reasons'. The authorities, however, choose to revert to the 'non-legal' argument and subsidiary protection. In the next section, we will look further into the reasoning on protection in the country of origin.

10 The possibility of protection in the country of origin

The reasoning on the protection in the country of origin is characterized by that the authorities' 'own' arguments, or use of country information (that establish the possibility of protection), generally are given precedence over the applicant narratives (Fricker 2007). As such, epistemic injustice is shown in that the applicant narratives are given a deflated level of credibility and in their low status in relation to other sources of information. The first example shows how the authorities simply choose to call the protection good-enough. We return to the case of Nesrin, where the Board finds the protection of abused women in northern Iraq satisfactory:

MB: For abused women there is generally a possibility of good enough protection against HV (Verdict 12: 4).

They further state that:

MB: Nesrin did not make contact with the police, other authorities or alternative mediation institutions in Iraq [for her protection] before seeking international protection (Verdict 12: 5).

To maintain their 'good-enough-protection-argument', the Board ignores the information that Nesrin's brother, uncle and a cousin – the very same persons said to have posed threats to Nesrin – are said to be employed by the police. The Board also ignores Nesrin's claim that it was a women's shelter that helped her to escape. This

somewhat strange 'ignoring technique' is frequently used to deny the right to international protection and to maintain that protection in the country of origin is sufficient (see also Segenstedt & Stern 2011: 36). Previously (in the verdicts 15 and 63 concerning Sara and Bejin above), the authorities used a narrative, which defends the view of the extremely oppressive culture in Northern Iraq. Here, it is replaced by a narrative that positions the very same culture as offering 'good-enough-protection'. The narrative of the oppressive culture is thus not met with a decision to provide international protection (see also Bhabha 1996).

The Court in this case uses another line of argumentation, which gives Nesrin subsidiary protection. It claims that, according to the country information, the authorities in the Kurdish area have made several efforts to stop HV and murders, but that the protection is *not* necessarily good enough.

MC: Despite these efforts, mainly women are murdered, or subjected to violence and abuse in the name of honour. The political parties and tribes still influence the judicial system. When a woman is being threatened, the authorities and NGOs first try to mediate between the woman and the individuals threatening her. For the woman to return home, the family has to sign a contract not to hurt her. Still, it happens that families murder women or subject them to abuse if they return home. /.../ The protection offered by women's shelters is only temporary. There are cases that the authorities cannot solve and where women are sent abroad for effective and long-term protection. (Verdict 12: 9-10)

There are several examples of how, based on the same country information, protection can be viewed differently by different parties. How efficient protection is interpreted is further discussed in the case of Ajwan, which has been appealed to the Migration Court of Appeal (MCA):

MB: The question is what effective protection means and how to evaluate the information. It is clear that the Court makes a different assessment of the situation in Iraq than does the Board, despite use of the same country information. Based on the country information from LIFOS, it is not clear that the authorities in the area fail to take any action or that the judicial system is inefficient. Nor is it clear that protection is refused because of cultural structures. There is no general information showing that the authorities in northern Iraq generally fail to offer protection from persecution related to "HV". (Verdict 33: 8)

Basically, the Board alleges that it is not *clear* that there is no protection and therefore concludes there may be some protection. The Court of Appeal states that the country information is ambiguous, that the measures for protection have been taken and that discussing violence against women is not such a taboo in society, however:

MCA: At the same time, the number of so-called honour killings has increased and this remains a serious problem. Many cases end up with no penalty being imposed, and most women at risk of becoming victims of such killings do not report this to the police because of fear of retaliation or of bringing further shame upon the family. Some policemen are not willing to take action. Furthermore, shelters for women are primarily run by private initiatives, and cannot be included as part of the security the authorities are likely to offer. /.../ The overall impression is that

there is a possibility of protection /.../ But the situation seems to be very fragile and it is therefore not possible to say that the protection generally achieves such a level that one can assume that effective protection exists. (Verdict 33: 20-21)

Absolute protection from violence within the family does not exist anywhere. Therefore, what is discussed is the *degree* of failure of the protective system. This call from the Court comes the closest to actually trying to portray how societies may work, as opposed to the seemingly imaginary models of societies that generally appear in the assessments. The wording of the Court accounts for the fact that something else *might* take place. This acknowledgement of *risk* is crucial in relation to the prohibition against sending individuals back to a country where they may risk persecution (*non refoulement*). The reasoning also recognizes the provisional and contingent link between the country information and what can and cannot occur in the life of individuals (Bhabha 1994). This more general argument does not seem to be the point of the Court, however, which instead aims to signify that every individual case needs 'further inquiry' (to establish a desired certainty that may actually not exist). This, in turn, stresses the status of the individual narrative. *Either* the individual narrative is taken seriously, even though it cannot be fully supported by the interpretation of the country information and 'cultural models' used, *or* the (interpretation of the) country information and/or 'cultural models' used are taken as the 'truth' and ambiguities concerning what *might* be the case are ruled out. The latter is what is seen in the majority of cases. As mentioned initially, this is an illustration of epistemic injustice, where the status of the individual narrative is rejected in favour of the institutionalized narratives in use (Blommaert 2001; Fricker 2007). This positivist institutional logic also supports the view through which 'the dominant culture' becomes an agent.

Finally, one deviant case is provided to illustrate when the applicant narrative *is* recognized and when culture-as-persecutor renders refugee status with reference to (female) gender:

MC: It is clear from Sabeena's *story* that she harbours a serious fear for her life on return /.../ The authorities' unwillingness or inability to protect her is based on *social and cultural structures*, and due to the fact that Sabeena is a *woman*. (Verdict 67: 9, emphasis added.)

Based on the present analysis, I argue that adjudicators have a choice either to use the vocabulary evident in the law or not to use it.

11 Concluding remarks and discussion

Asylum based on gender-related persecution is shown to be rare and grounded on constructions of culture, the use of country information and reasoning on the possibility of protection in the country of origin. In the present analysis, Western condemnation of 'barbaric' practices in non-Western states (Bhabha 1996) is visible in relation to the use of subsidiary protection versus the refugee definition rather than rejection of the application. The arbitrary quality of the practice in terms of how decisions are reached is clearly shown.

While gender is given meaning based on gender-specific persecution (in contrast to gender-related) and the sexes not being alike, ideological expectations that create gendered victims of both sexes are disregarded. In the institutional logic, the dominant culture becomes an agent and determines the

credibility of narratives. Country information is used to reinforce such prefabricated models of culture, which gives the impression that it is possible to *foresee* individuals' actions. The notion of good-enough-protection seems to be largely a matter of choice of argumentation: how categorizations are made, what is emphasized in the case, which country information is used and how it is used. The reports are initially not exhaustive descriptions of the situation in a region/country, also is the relation between country information and what has possibly occurred in the life of the applicants highly unstable. Still, the country information is treated as 'facts' and given considerable weight when establishing rulings. Taken together, these factors can be used as stretchable arguments to make sense of negative rulings, as such, the understanding of culture as brutal is negated by constructions of what constitutes good-enough-protection.

Altogether the above analysis points to that the significance given to the applicant narratives is very low and shows the epistemic injustice of institutional logic. It shows that even though the verdicts depend on applicant narratives, the scope of applicants' narrative authority (Blommaert 2001) is very limited in contrast to the standing of the authorities' view of gender, the use and interpretation of country information, the 'cultural models' and constructions of the possibility of protection in the country of origin. It is further shown how acts of resistance become signs that narratives are not credible. This indicates that the institutional logic in this area of law do not apprehend the qualities that might constitute a lived life (also in non-Western countries). To strengthen the applicant's narrative authority and bring individualized circumstances to the fore, while fulfilling Sweden's celebrated investments in gender equality, the implications of the post-structural and postcolonial approaches need to be taken seriously. Women from Iraq do fall in love. As are resistance to dominant norms part of everyday life (also) in non-Western countries.

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Notes

1. The Swedish word for 'gender' (*kön*) signifies both 'the social construction of gender' and 'biological sex'.
2. The 250 cases consist of 100 case files from the Board; and 150 verdicts from the Courts; they contain an equal distribution of negative and positive decisions and of applicant gender.
3. In this way of putting it, the single speech acts that occurs in the verdicts represent a micro-dimension, while they receive a/ their generalized meaning from a macro-dimension; thus from discourse.
4. The country report from which the number is taken reads '200-300' such cases, not 2000-3000, indicating that the Court misrepresented the number in this citation.

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