The CJEU's Feminist Turn?

Gender-based Persecution as a Ground for Protection

Silvia Steininger

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In Case C-621/21, the Grand Chamber of the Court of Justice of the European Union (CJEU) held that women in general and women facing domestic violence in their country of origin in particular, qualify as a protected 'social group' under EU Directive 2011/95 and thus avail themselves for refugee status or subsidiary protection in the Common European Asylum System.

The decision from 16 January 2024 had been requested by the Sofia Administrative Court in September 2021. It was enthusiastically welcomed by NGOs and the European Parliament, not only as an "important step towards promoting an inclusive and compassionate approach to asylum policy" (MEP Robert Biedroń) but also as a "very important ruling for the protection of women from domestic and sexual violence" (MEP Terry Reindtke). In contrast to the opinion of Advocate General de la Tour, the CJEU relied heavily on international women's rights instruments, such as the CEDAW, the Istanbul Convention, and UNHCR guidelines. This contribution applies the perspective of feminist approaches to international law to critically analyze what this decision means for women and victims of gender-based violence – in- and outside of the European Union.

Is the Common European Asylum System a Thoroughly Gendered System?

Human mobility is gendered. This also holds true for gender asylum law. Nonetheless, social science research has found that both migration theories and available mobility data have been largely gender-blind or are otherwise disorientating the gendered experiences of the migration process particularly for women and girls – even though a 'feminization of migration' even to Europe is underway. In line with Charlesworth, Chinkin, and Wright, a gendered legal system is characterized by an organizational structure, reflecting the male perspective, and a normative structure, which diminishes the experiences of women, particularly by relegating them to the private sphere. I argue that both is the case in the Common European Asylum System.

In 2022, 29% of asylum applications in the EU were lodged by women. According to the European Union Agency for Asylum, one-third of all asylum cases concerned women and girls, who have been statistically a bit more likely to receive a positive decision vis-à-vis male applicants (45% to 36% of all decisions). In the group of applicants from Latin America, women and girls count for half the applications. Those statistics are in stark contrast to the public debate on migration in the EU where refugees and migrants have been depicted as exclusively masculine (an exception being the influx of female refugees from Ukraine since the Russian invasion of 2022). Populist actors have succeeded in pushing a racialized and gendered image of refugees and migrants, with the trope of the unaccompanied, single black man depicted as the inherent security risk of Western society.

European legislation mirrors the dominantly masculine understanding of refugees and migrants. In the Common European Asylum System, gender-related aspects can be found in Directive 2013/32/EU, which provides for gender-sensitive examination procedures, and Directive 2013/33/EU, which lays down standards for the reception of applications, singling out the vulnerability of pregnant women, rape victims, and women who had experienced female genital mutilation. Ultimately, Directive 2011/95/EU includes the most references to questions of gender, in particular in recital 30 which states that:

> *"It is equally necessary to introduce a common concept of the persecution ground 'membership of a particular social group'. For the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution."*

The gendered nature of the Common European Asylum system becomes visible here too: gender identity, genital mutilation, and reproductive violence are primarily discussed in relation to their public function, as part of traditions and customs that exist in a community. Case C-621/21 thus breaks with the dominant narrative, asking whether gender-based persecution in the private sphere can give grounds for international protection.

Domestic Violence as a Ground for Protection?

The case underlying the request for a preliminary ruling concerns WS, a female Turkish national and Sunni Muslim of Kurdish ethnicity. Forcibly married at the age of 16, she suffered severe domestic violence by her husband before fleeing the marriage and entering into a religious marriage with a new partner to whom she also bore a child. Only after leaving Turkey in 2018, did she divorce her first husband. She entered Bulgaria legally before moving to Germany where she applied for international protection, citing that her former husband's family might kill her if she returns to Turkey.

Her application was rejected in 2020 by the DAB, Bulgaria's State Agency for Refugees, as the authorities argued, inter alia, that domestic violence is not considered a ground for protection. WS filed a new application based on new evidence in 2021 "claiming a well-founded fear of persecution by non-State actors on account of her membership of a 'particular social group', namely women who are victims of domestic violence and women who are potential victims of 'honor killings'" (para. 25). She cited, inter alia, court cases against her ex-husband, statistics on femicide in Turkey and the Turkish withdrawal from the Istanbul Convention. Yet, the DAB again refused, arguing that the Turkish authorities would be willing to protect her against violence threatened by private actors. In the absence of jurisprudence on the question of whether domestic violence might amount to a ground for protection, the Sofia Administrative Court referred five questions to the Court of Justice on the interpretation of Directive 2011/95.

Case C-621/21: International, Liberal, Intersectional

The response of the Grand Chamber of the CJEU aligns European asylum law with international standards, provides a liberal understanding of the rights of women, and allows for an intersectional approach concerning the rights of women facing domestic violence and femicide. It is noteworthy in three aspects:

First, the Court interpreted the Directive in light of international law, in particular core women's rights conventions. Recital 17 of the Directive binds Member States to "obligations under international law to which they are a party, including in particular those that prohibit discrimination." While taking into account the 1951 Refugee Convention and the 1967 Protocol was relatively evident as both were explicitly mentioned in the Directive, the Court also included the 1979 CEDAW and the 2011 Istanbul Convention in its interpretation. The EU has not ratified CEDAW, but all member states have, and it thus "complements the legal protection regime applicable to women and girls, including in the context of refugees" (para 45). While Bulgaria has not ratified the Istanbul Convention, the EU has acceded to the Convention in 2023 thus incurring "obligations coming within the scope of Art. 78 (2) TFEU" (para 46). This relatively brisk argumentation to align EU law with international women's rights standards contrasts starkly with the opinion of AG de la Tour. He had rejected both CEDAW and the Istanbul Convention as applicable interpretative standards in favour of an autonomous EU standard.

Secondly, the Court clarified under which conditions women would be eligible for international protection adopting a liberal and intersectional approach. It took two cumulative conditions from Art. 10 (1) (d) of the Directive to account for the definition of a "particular social group." First, a member of a social group must share at least one of three identifying features, namely an innate characteristic, a common background that cannot be changed, or a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. Secondly, this group must have a distinct identity in its country of origin because it is perceived as being different by the surrounding society. The Court adopts a broad understanding of the two conditions, relying heavily also on UNHCR Guidelines, and held that:

> *"...women, as a whole, may be regarded as belonging to a 'particular social group', within the meaning of Article 10(1)(d) of Directive 2011/95, where it is established that, in their country of origin, they are, on account of their gender, exposed to physical or mental violence, including sexual violence and domestic violence." (para. 57)*

Even when such general discrimination against women in the country of origin is not established, women facing domestic violence, refusing forced marriages, or engaging in other practices that are disapproved in their surrounding society (the scope can be local) can also be regarded as a particular group in line with the Directive:

> *"As the Advocate General observed in point 79 of his Opinion, women who refuse forced marriages, where such a practice may be regarded as a social norm within their society, or who transgress such a norm by ending that marriage, may be regarded as belonging to a social group with a distinct identity in their country of origin if, on account of that behaviour, they are stigmatised and exposed to the disapproval of their surrounding society resulting in their social exclusion or acts of violence." (para. 58)*

Thirdly, the CJEU caught up with the ECtHR on the issue of state authorities' inaction vis-à-vis domestic violence and non-refoulement. Unsurprisingly, and in line with Art 7 of the Directive, 'actors of protection', i.e., state authorities, must be willing and able to effectively protect the applicant from serious harm including from private actors (see Opuz v. Turkey). Yet, the Court is explicit in pointing out the applicant need not establish a link between the reasons for persecution and the acts of persecution "if a link can be established between one of those reasons for persecution and the absence of protection against those acts by the actors of protection" (para. 70). Furthermore, serious harm includes gender-based violence, for instance in the form of 'honor killing', or threats thereof, committed by private actors as this would amount to execution or torture in line with the ECHR and thus trigger non-refoulment obligations (see N. v. Sweden).

Gender-based Violence in- and outside the EU

The decision might be more of a catch-up with human rights standards than a feminist revolution. Yet, it establishes key benchmarks for future applications for international protection, e.g., from structural situations of gender-based discrimination such as Afghanistan, as well as pending applications. On the latter, a case to watch is another preliminary ruling request, K, L v Staatssecretaris van Justitie en Veiligheid (Persons identifying with the values of the Union, C-646/21). Here the Dutch court of 's-Hertogenbosch asks whether teenage Iraqi girls who lived in the Netherlands for five years and have adopted 'Western' norms, values, and actual conduct, also form a 'particular social group' within the meaning of Directive 2011/95.

Yet, the case can – and should – be criticized, particularly from a feminist-intersectional perspective. For one, as long as the EU does not provide for the possibility to request international protection at embassies or outside of the borders of the Union (see also the case law on humanitarian visa), women, and in particular those women suffering from gender-based violence, will continue to face unsurmountable hurdles to acquire any protection at all. Those most

vulnerable continue to remain excluded from the Common European Asylum System.

Further, the decision's enthusiastic reception in Brussels should not lead us to forget that domestic violence remains rampant within the EU and its effective prosecution remains lagging. There is a data black hole on gender-based violence in the EU, but several country studies suggest that domestic violence and femicides have significantly increased since the pandemic. Against this background, it is particularly deplorable that the EU's proposed new Directive to fight violence against women and gender-based violence had to exclude a harmonized rape legislation after several states, including Germany, raised doubts on the legal competences of the Union in this matter. Gender-based violence does not only affect non-European, racialized, or Muslim women but is experienced by nearly every woman in the EU.

ABOUT THE AUTHOR

Silvia Steininger

Dr. Silvia Steininger, LL.M., M.A. is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and an incoming MASH Research Group Leader at Masaryk University Brno.Dr. Silvia Steininger, LL.M., M.A. is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and an incoming MASH Research Group Leader at Masaryk University Brno.

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