

**TURKISH GERMAN UNIVERSITY
INSTITUTE OF SOCIAL SCIENCES
EUROPEAN AND INTERNATIONAL AFFAIRS DEPARTMENT**

**REFUGEE FROM A GENDER PERSPECTIVE:
CRITICAL ANALYSIS OF NATIONAL AND
INTERNATIONAL LEGISLATION ON REFUGEES**

MASTER'S THESIS

Hande SÖYLEMEZ KARA

ADVISOR

Dr. Suna Güzin AYDEMİR DECKER

Istanbul, June 2022

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DECLARATION

I hereby declare that this thesis is my original work. I also declare that I have acted under academic rules and ethical conduct at all stages of the work including preparation, data collection, and analysis. I have duly cited and referenced all the information that is not original to this work.

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ÖZET

Mülteci hukuku, kendi devletleri tarafından korunmayan kişilerin uluslararası korumaya erişimlerine ilişkin uluslararası hukukun dalıdır. Ancak feminist hukuk teorisinin tartıştığı gibi, mülteci hukuku erkek bakış açısıyla yazılmıştır ve kadınların deneyimleri bu sistemin dışında bırakılmıştır. Dünyada yaşanan kadın haklarındaki gelişmeler sayesinde sığınma alanında da toplumsal cinsiyet konusunda olumlu düzenlemeler yapılmıştır. Dünyada en fazla sayıda sığınmacıya ev sahipliği yapan ülke konumunda bulunan Türkiye'nin dokuz yıllık bir geçmişe sahip yeni iltica kanunu ise referans aldığı tüm hukuki enstrümanlara rağmen toplumsal cinsiyet hassasiyetsiz bir kanun olarak göze çarpmaktadır.

Bu tez, feminist hukuk teorisinden ve toplumsal cinsiyet perspektifinden faydalanarak uluslararası ve ulusal (Türk) mülteci hukukunun eril karakterini sorgulayarak toplumsal cinsiyet açısından analizine ve eleştirisine odaklanır.

Anahtar Kelimeler: Kadın ve göç, feminist hukuk teorisi, toplumsal cinsiyet, kadın mülteci, kadın sığınmacı, uluslararası koruma, 1951 Cenevre Konvansiyonu, Yabancılar ve Uluslararası Koruma Kanunu.

ABSTRACT

Refugee law is a branch of international law regarding the access of persons to international protection. However, as feminist legal theory argues, refugee law was written from a male perspective and women's experiences were left out of this system. Thanks to the developments in women's rights in the world, positive regulations have been made in the field of asylum as well. The new refugee law of Turkey, which is home to the largest number of refugees in the world, with a history of nine years, stands out as a gender-insensitive law despite all the legal instruments it takes as reference.

This thesis focuses on gender analysis and critique by questioning the masculine character of international and national (Turkish) refugee law by using feminist legal theory and a gender perspective.

Key Words: Women and migration, feminist legal theory, gender, refugee women, asylum seeker women, international protection, 1951 Geneva Convention, The Law on Foreigners and International Protection.

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LIST OF ABBREVIATIONS

UN	: United Nations
UNHCR	: United Nations High Commissioner on Refugees
WHO	: World Health Organisation
FGM	: Female Genital Mutilation
ExCom	: Executive Committee
CEDAW	: Convention on the Elimination of All Forms of Discrimination
EoC	: European Council
ECHR	: European Convention on Human Rights
ECtHR	: European Court of Human Rights
EU	: European Union
LFIP	: Law on Foreigners and International Protection
TPR	: Temporary Protection Regulation

INTRODUCTION

Feminist legal theory argues that gender is a directly influential variable in the processes of creation (norm construction and revision), implementation and interpretation of law. Therewithal, it aims to make visible the pathological consequences of sexism (lack of equality, freedom and justice) in law. Not content with this, the feminist legal theory discusses the ways of constructing an alternative law in which sexism is eliminated, and in this way contributes to both feminist theory and legal theory. The main argument in the feminist critique of law is that, contrary to the claim of impartiality and abstraction, modern law is actually one of the main sources that perpetuate the patriarchal system. For example, the distinction between public and private spheres envisaged by the modern legal institution is against women. The closure of the private sphere to public intervention as an area of immunity through law made physical, psychological and sexual violence against women permanent and legitimate.

Feminist legal theory is actually in a state of two-way awareness. First, as can be understood from the above statements, law perpetuates patriarchy (sexist hierarchies against women) in the modern age. Second, on the contrary, law is capable of being designed to serve the disintegration of patriarchy, thereby making a tremendous contribution to realizing its own *raison d'être*, namely equality, freedom and justice. In this framework, each legal regulation area or rule-making and implementation can be problematized in the context of gender equality and justice. Refugee law is just one of them.

Although refugeehood¹ is an old concept, the situation of refugees has become an increasingly debated issue in both international relations and international law. The new international social order that started to emerge especially with the establishment of the United Nations has also institutionalized the legal regime regarding refugee law and the right to asylum. The main source of the international protection legal regime for

¹ In this study, the concepts of refugee and asylum seeker are used interchangeably to describe people who have already migrated or intend to migrate and seek protection in the international arena, regardless of their legal status.

refugees seeking asylum is the 1951 UN Geneva Convention on the Status of Refugees. However, refugeehood grounds listed in the Convention have excluded women seeking asylum due to gender-based persecution. While this leads to the invisibility of victims of gender-based persecution, it also reveals that refugee law is a gendered branch of law. On the other hand, with the contribution of feminist criticism, the developments regarding women's rights in the international stage in the last 50 years have also been reflected in refugee law. New legal instruments have been developed to embody women's experiences and gender-based claims for asylum in refugee law. However, there are significant barriers to transferring innovations from international contexts to national contexts.

This study concentrates on the analysis and criticism of “refugee law” with the contribution of feminist criticism of law and feminist theories. It questions refugee law with a methodology that makes gender visible. Refugee law, in its essence, includes regulations that serve to meet the basic human rights- first of which is the right to life- that are not provided by one nation-state, by another nation-state and the international community. It is precisely from this context that the legitimacy and necessity of analyzing the extent to which refugee law does not take into account women's gender-related experiences becomes apparent. To enable a holistic critique, the study addresses both international and national legislation.

The aim of this thesis is to measure the level of sensitivity or insensitivity of refugee law to gender by bringing together legal and asylum literature in the context of gender. Since the issue is the right to a humane life, it will be evaluated to what extent and how the gender-based persecution of women is problematized in international and national refugee law, and by what means there is a tendency to protect women.

The main finding of the thesis is that under the influence of the feminist objection, gender sensitivity in international refugee law, albeit modestly, has begun to emerge, but this has not yet been reflected in Turkey's refugee law.

To facilitate the study process and achieve the objectives, a number of research questions were determined:

1. What is the relationship between law and gender? What is feminist legal theory? At what points does feminist legal theory criticize modern law with reference to feminist theory(s)? What are their contributions to law?
2. What are the types of gender-based persecution that pushes women to seek asylum?
3. What is the feminist critique of international refugee law? What are the developments in international refugee law in the context of gender equality?
4. What are the scope and limits of protection for women in Turkish refugee legislation? How sensitive is the legislation to gender equality in its historical development and actuality? To what extent have the criticisms and improvements developed in international platforms had an impact on Turkish refugee law?

This thesis is based on the following hypotheses:

1. The patriarchy continues to influence the modern legal institution and the fundamental rights violations that women are exposed to are still outside the scope of the law.
2. There are significant developments that weaken the patriarchal influence in the international arena. There are discussions and reforms on the subject, especially at the UN and UNHCR level and regionally in Europe.
3. International developments to ensure gender equality and justice in the context of refugees have not yet been reflected in Turkish legislation.

Theoretical Framework

Despite the important differences and tensions between, all feminist theories are capable of making meaningful contributions to critical readings of refugee law. For this reason, in this study, the legislation was subjected to a triple cross-reading, so to speak, despite the risk of eclecticism. In other words, all texts that are the object of research have been questioned from liberal, radical and post-modern feminist perspectives in order to clearly reveal the sexist injustices in the relevant legislation. In some contexts, it is liberal (thesis developed for women to have equal rights with men), in some contexts it is radical (thesis defending the need for rights categories

specific to the experience of women which are differentiated from those of men), and in some contexts it is postmodern (thesis based on cultural diversity and gender-based arguments arising from the intersection of vulnerabilities).

Methodology

This study will use the common feminist methods "asking women questions" and "critical reading" in the analysis of refugee law.

The flow of the thesis is in the form of; theoretical grounding and exemplification; sharing numerical data and sequencing real-life experiences; and examining and criticizing the relevant international and national legislation.

Both primary and secondary sources were used in the study. International conventions, non-binding legal texts and legal directives on refugee law and other relevant human rights law texts have been used as primary sources. Of course, the primary source of national refugee law was the Turkish asylum law and related regulations.

The answers to the research questions will be examined in four parts in the thesis. In the first part of the study, the criticism of feminism to the legal institution, feminist legal theory and feminist theories will be examined in order to establish the theoretical background on the subject. Despite the differences in approach, all feminist theories agree that the law is structured from a male perspective and that it establishes and maintains sexist hierarchies.

In the second part of the study, after the explanation of the legal terms related to the concept of refugee, current global refugee data will be shared. Then, gender-based persecution will be exemplified by making a detailed analysis of the gender-based asylum grounds of female asylum seekers.

The third part of the study is devoted to the analysis of international refugee law in terms of gender. In this context, the legislation and basic concepts that make up the international refugee law will be discussed. First of all, the criteria for obtaining refugee status in the 1951 Geneva Convention on the Legal Status of Refugees are examined. This convention, which is accepted as the basis of international refugee

law, is scrutinized by subjecting it to a detailed gender analysis. Afterwards, international and regional positive developments regarding women asylum seekers are discussed.

In the fourth part of the study, Turkey's asylum law is examined in the context of gender. In this section, firstly, the historical development of Turkish asylum law and the dynamics in the creation of new legislation are mentioned. Afterwards, the international protection system of Turkish asylum law is explained. Finally, the new Turkish asylum legislation was examined in the context of gender.

At this point, it is necessary to emphasize the limitations made within the scope of the research of the thesis. There are two important issues that are left out of scope. The first is the difficulties experienced by female asylum seekers during the asylum process. Because the experiences on the migration route as well as access to rights and social cohesion in the destination countries are full of gender-specific risks. The second subject left out of the scope of this research is the experiences and relevant legal situation of LGBTIs who, like women, face gender-based persecution.

1. CHAPTER ONE: FEMINISM AND LAW

The first part of the thesis, “Feminism and Law”, consists of three sub-sections: In the first part, the history and the stages of feminism will be briefly mentioned. The second part is devoted to the critique of law with reference to feminist legal theory and different feminist approaches. Feminist critique of law essentially makes visible how the legal institution articulates 'sex' and 'gender' and what kind of pathological consequences this has in terms of equality, freedom and justice. The main argument of feminist legal criticism is that the modern institution of law, which claims to be impartial² and abstract³, is actually one of the main sources that perpetuates the patriarchal system. Over time, feminist critique of law has evolved into an independent legal theory. In this part of the study, answers to the sequent basic questions will be sought: What is feminist legal theory? What does it say about the law? What makes this theory remarkable? What do the different approaches within feminist legal theory say? What brings these different approaches together and distinguishes them from other theoretical views? What is the way of analysis of feminist legal theory? Why does law need a feminist legal theory?⁴ The third part is devoted to the methodology of feminist law. This section will explain why feminist work methods are necessary in scientific work.

Feminist law's contributions to the discipline of law have two contexts: The first is the context of the doctrine (=doctrine) in which the relationship between gender and law is discussed. The second is the analysis and critique of specific legal disciplines based on feminist doctrine(s). In the second context, all gender-related human experiences that are subject to legal regulations are the object of study. The present study has made room for both contexts, and in the second context – with feminist theoretical and methodological instruments – it focuses specifically on the critique of

² It is possible to read impartiality here as an attitude towards conflicting individuals, social groups and/or interests.

³ Abstraction here is the general validity claim without getting involved in individual cases and events.

⁴ Fatma İ. Çağlar, “Feminist Hukuk Teorisine Kısa Bir Giriş”, *Hukuk Felsefesi ve Sosyolojisi Arkivi* No:4 (2002): 82.

“refugee law” and, in a way, analyzes the extent to which refugee law does (and) does not pay regard to the (sexual) gendered experiences of women. For this purpose, it engages in both international and national legislation. Ultimately, it questions refugee law with a methodology that makes gender visible.

1.1. FEMINISM

Before discussing the feminist critique of law and feminist legal theory, it is useful to briefly recall the general framework of feminism (as a concept, theory and social movement).

Feminism is a movement of notion and action that calls for freedom and equality for all women. Although women had struggled to achieve their freedom and rights for a long time, feminism emerged as a movement only in the 19th century in Western countries and expanded to the whole world. There are two points that make feminism different from other movements: its subject is women and it focuses on gender equality.

The starting point of feminism is the critique of patriarchy. Patriarchy is a set of social relations that organizes and reproduces male domination. It indicates the institutional and cultural arrangements and practices that result in the oppression of women. Christine Delphy analyzes patriarchy as a system in which women's labor and bodies are controlled by men, which includes a gender-based division of labor, where sexuality and fertility are regulated against women's will, where women are excluded from or have unequal access to various areas of society, and which is perpetuated by male violence.⁵

The concept of patriarchy reveals that male domination has a deep-rooted and structural feature as a very old phenomenon in the history of civilization. Thus, it allows us to conceptualize the continuity of male dominance in history and the different concrete forms this continuity takes. It also makes it possible to show how systemic and pervasive male dominance is today. It paves the way for the analysis of the oppression of women in connection with each other from different perspectives.⁶

⁵ Gülnur A. Savran, “Patriyarka”, Reference is made to the opinion of Christine Delphy, 05.01.2021, <https://feministbellek.org/patriyarka/> Accessed: 10.01.2021.

⁶ Ibid.

Feminism is a social movement with a history of 200 years, as well as a theoretical and scientific initiative in which patriarchy is deciphered.⁷ It spreads its struggle over a wide spectrum ranging from the material conditions of the society to its mental patterns.⁸

The women's movement is the sum total of organized initiatives for the defense of rights in political, economic, social and cultural contexts.⁹ Thanks to the women's movement, it has been possible for women to adopt alternative forms of existence apart from their spouse and motherhood status.¹⁰ The demand for women to be recognized as citizens and individuals turned into political manifestos in the 19th century. For example, in the time of French Revolution, Olympe de Gouges wrote the Declaration of the Rights of Women and Citizens (*Déclaration des droit de la femme et de la citoyenne*) and criticized the concept of "human" in the 1789 Declaration of Human Rights was actually male, and women were not considered at all. Mary Wollstonecraft's 1792 work named "Vindication of the Right of Women", Elizabeth Cade Stanton's 1848 "Declaration of Sentiments" and John Stuart Mill's 1861 "The Subjection of Women" draw attention on the subject.¹¹

Since its emergence, feminism has progressed in different waves that affect and articulate each other: The first wave of feminism fought for the right to vote, right to education, and right to property. Their aim was to ensure women's presence in the public sphere, because women's presence and efforts were limited only within the private sphere. The main struggle that marked the 19th century was the right to vote of Suffragette movement in Britain. In the 20th century, after the world wars, women had an increased share in politics and economics leading to their integration into the public sphere.

However, despite the developments in the field of human rights since the second half of the 20th century, legal, structural and social equality could not be achieved for

⁷ There is a close relationship between the development of feminist consciousness, which is the ground of the women's movement, and historical developments such as capitalisation, urbanization, industrial and democratic revolutions that create and perpetuate modern life forms.

⁸ Yıldız Ecevit, "Toplumsal Cinsiyet Sosyolojisine Başlangıç" in *Toplumsal Cinsiyet Sosyolojisi*, ed. Y. Ecevit ve N. Karkıner (Eskişehir: Anadolu Üniversitesi, 2011), 3.

⁹ Altan Heper, "Feminizm ve Hukuk", *Hukuk Kuramı* 1, no.5 (2014): 12.

¹⁰ Ecevit, "Toplumsal Cinsiyet Sosyolojisine Başlangıç," 5.

¹¹ Heper, "Feminizm ve Hukuk," 12.

women, so there was a radicalization in the women's movement, and with the period called the second wave, the concepts of “sex” and “gender” have started to be emphasized. Until the second feminist wave, gender has been handled as an ontological topic and equal rights have been claimed for women only in matters just as the right to vote, property and education in the public domain. With the second wave feminism, it was started to be realized that gender is not a biological feature but a social pattern. It was the French writer Simone de Beauvoir who made a starting point for the second wave with her book *The Second Sex*, in which she made a comprehensive analysis of male dominance. Beauvoir's main argument is still very popular as a feminist slogan: One is not born, but rather becomes, a woman. In other words, femininity is a socially constructed identity, thus not an ontological reality or destiny. Second-wave feminism problematizes and criticizes the division between the private and the public sphere and the inviolability of the private area. While first-wave feminism aims to convert public arena by bringing women into this space, second-wave feminism argues that the private sphere should be renovated as well as the public sphere.

One of the most important approaches that developed within the second wave feminism is radical feminism. Radical feminists fight for the complete abolition of patriarchy. Therefore, unlike first-wave feminism, which targets the privileges of men in the public sphere and demands equal rights for women, radical feminism targets the social structure that causes those privileges and the sexist mentality that underpins it. In this sense, the phrase “the private is political” is crucial for second-wave feminism. In this expression, the "private" indicates that what women live "personally" in the "private" space, is actually a part and consequence of the social architecture and can be modified.¹²

The second wave enriched the means of struggle of feminism by examining the private sphere and social structures in depth. Unlike the first wave, the second wave carried the struggle to areas outside of politics. It provided representation of both women and feminist thought and struggle in these areas. He defined male dominance by questioning sexism in fields such as law, culture and philosophy. In addition, in the

¹² Ayşe Düzkan, “Feminizm”, 05.01.2021, <https://feministbellek.org/feminizm/>. Accessed: 10.02.2021

context of patriarchy's relationship with capitalism, the family has been defined as an economic structure based on women's unpaid effort at home.¹³

Another area opened by the second wave is the questioning of heterosexual sexuality. At the same time, during the second wave, women's groups, which determined that the war had different consequences for women, became an important part of the international peace movement. In the light of all these developments, we can conclude that the basis of today's feminism was built up by the second-wave feminist movement.¹⁴

The third wave feminism that appeared in the 1990s made the experiences of non-Western women from other cultures and classes as a fragment of the feminist concern. While second-wave feminism revealed the commonality of the abuse that women are subjected to; third-wave feminism, grounding from post-modern thinking, highlighted the divergencies between women.¹⁵

Feminism is a spectrum that includes many different approaches and has been constantly expanding since its emergence. Each feminist approach has different theoretical foundations and action strategies. However, the common starting point of all feminist approaches is the critique of patriarchal power and domination, which discriminates against women and pushes women to be second-class people. This approach distinguishes feminist theory from other philosophies of thought. Because no theory has focused its criticisms on patriarchal institutions.¹⁶

In feminism, different views and struggles have developed over two main streams, egalitarian feminism and difference feminism. Egalitarian feminists rely on the idea of universal equality. It acts on the thesis that men and women are equal and therefore have the same rights as human-individual-citizen and develops action strategies. On the other hand, differential feminists articulate women's difference as a measure of feminist politics and science, taking into account the divisions of gender-

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Çağlar, "Feminist Hukuk Teorisine Kısa Bir Giriş," 3.

based identities, experiences, and interests. Below, there will be a chance to more closely monitor these divergences in terms of "feminist law".

1.2. THE DISCIPLINE OF FEMINIST LAW

1.2.1. Feminist Legal Critique on Law

Traditional legal discipline sees itself not as the discourse of domination, but as an objective science, which is neutral, abstract and universal. It claims that it treats everyone equally and the same result is reached when the same norm is applied in the same event. Just because of this claim, the discipline of law, like many other disciplines, is criticized by feminists. Accordingly, law is clearly subject to the norms of patriarchal dominance and reproduces patriarchy. The claim of general validity and impartiality of law is unserious. Because in the construction of norms, it only takes into account the masculine lifestyle, values and even prejudices. This means that the social realities of women, who make up half of the population, are ignored in law. The prevailing understanding of law, either remains indifferent to the problem of justice that emerges on the basis of gender or passes over it with the rules of exception. Disclosure of this situation and determining what measures to take in favor of women is a kind of *raison d'être* (reason for being) of feminist legal science.¹⁷

Feminist legal criticism comprehends law as an instrument that establishes patriarchal domination and thus transforms all components of law - from laws, jurisprudence, administrative decisions, legal policy and constitutional theories to legal dogmatics - into objects of study to be criticized from a woman's point of view.

According to feminist criticism, one of the most obvious proofs that law, far from being neutral, is a discipline and institution that is strictly partisan to patriarchy is the subjects of law. There is no diversity in terms of representation of social groups and classes among legislators. The majority of legislators are middle-upper class men. Expressing in a typical feminist jargon, the subject of law is male. Its mentality is also masculine and heterosexual. Therefore, it is alien to the needs and experiences of groups such as women, immigrants, lower social classes etc. In contrast, feminist law demands that pluralistic realities of life be taken into account in the creating and practicing of

¹⁷ Heper, "Feminizm ve Hukuk," 14.

law. This is important; because the equality of all before the law does not mean that the same results will occur for everyone with the implementation of the law. Apart from the equality claim of law, the claim of objectivity is also an invalid assumption for feminist law. Rather, the law is part of a sexist social pattern.

Starting from the end of the 1970s, following feminist theory and struggle, feminist legal criticism puts "gender" at the center of legal readings. Accordingly, gender is defined as roles, hierarchies and/or forms of domination that are culturally and historically established and generally produced by associating with biological gender differences, and therefore differ in time and from society to society. Accordingly, femininity (and of course masculinity) are not inborn identities; they are socially constructed and therefore socially transformable, that is, they can be amendable.

The debate about how (modern) law functions in the construction of femininity as a gender makes an interesting point. Accordingly, the effect of law on the construction of gender is paradoxical. On the one hand, law follows patriarchal, pro-status quo socio-political propositions that legitimize existing inequalities and thus becomes one of the sources of gender inequality. On the other hand, in the construction and application of norms, law as a modern institution has to follow the principles of equality and freedom, which are the two main parameters of legitimacy of modernity. Thus, at the same time, it is an instrument that destroys the status quo, intervenes in society in the direction of gender equality, and changes gender in a positive way.

Today, the norms of law are based on either cultural values or ideological proposals. The attitude of the law towards gender is directly related to its ideological and cultural resources. If the law is derived from patriarchal cultural/ideological judgments, the existing unequal gender understanding in the society is also reflected in the law. In this context, law emerges as the most important tool to maintain patriarchal traditions. From a historical perspective, it is seen that the law fulfills the role of subordinating women. Male control is clearly recognized by legal means. The law has done this with norms that placing only men in the public sphere and without touching the domestic sphere. Men dominate both in the private and in the public realms. The main examples of not giving place to women in public life are that women do not have the right to vote, they are not accepted to certain professions, they are treated unequally

in working life, and they cannot do many things without the permission of their husbands. In the private sphere, on the one hand, the law puts the woman under the domination of her husband by legal means; on the other hand, the law tends not to interfere with the private sphere by not regulating the family relations. This situation reinforced the dependent position of women.¹⁸

Or the law is derived in the light of the human rights values. In this case, gender-related norms are created in a way that is in conformity with justice.¹⁹ In such systems, the law is an institution that ensures gender equality by creating mechanisms.²⁰ In the last half century, the developments in the field of international law have made a progress in women's rights by raising awareness about gender issues all over the world, and it is accepted that they have been successful to some extent. However, no matter how much it depends on human rights values, no country can be said to have fully achieved gender equality or gender sensitivity in the field of law.

1.2.2. Different Examples from the World on Law Reproducing Inequality or Equality in the Context of Gender

Below, examples from different areas of law such as civil law, family law, inheritance law, criminal law of various countries will be given. In this way, it will be possible to examine how law reproduces inequality or equality in the context of gender when it is derived from cultural/religious ideologies or human rights values.

When examining the achievements of women's rights in various countries, it would be appropriate to start with **civil rights**. After the suffragette movement, women's access to the right to vote and to be elected took place at different times in different countries. New Zealand was the first state that obtained women the right to vote in the year of 1883. Finland granted women the right to vote and stand for election in 1906. In the United Kingdom, women first attained their voting rights in 1918 but only above 30 years old and married women could hold this privilege while 21 years old men could vote without any marriage condition. During these years, in many countries, women - ethnicity and color discrimination continued - were given the right to vote and

¹⁸ Gülriz Uygur, "Hukuk," in *Toplumsal Cinsiyet Sosyolojisi*, edited by Y. Ecevit ve N. Karkıner (Eskişehir:Anadolu Üniversitesi, 2011), 157.

¹⁹ Ibid., 156.

²⁰ Ibid., 158.

participate in elections. On the other hand, despite all the developments in the last century, this right was granted to women Saudi Arabia only in 2015.²¹

On the other hand, the fact that the written rules of law grant women rights and freedom does not mean that this is the case in practice. Although voting is a constitutional right in Pakistan, in some regions, women's voting is de facto prohibited by patriarchal traditions. In Afghanistan, photographing at polling stations prevents women from voting because most of them have to enclose their faces.²²

Family law is one of the areas of law where gender inequality is most common. The cultural/ideological codes attributed to the family institution are manifested in gender-neutral laws. The first and clearest example of this inequality is that national laws stipulate different ages for marriage for men and women. The reason for this is that girls/women are thought to get mature earlier for marriage and their traditional roles are accepted as mothers and wives. For example, in Pakistan, Afghanistan, Qatar, Malaysia, Mali, in places where traditional and religious practices are dominant, the legal age of is 16 for girls and 18 for boys and early marriage is also widespread in these countries. According to some international reports some girls almost six years old get in marriage by their parents' consent. In Bahrain where the religious rules are in force, girls marry at the age of 15 and boys at the age of 18. In Bangladesh and India, the legal marriage age is 18 and 21 for women and men respectively, but early marriage is a serious problem. On the other hand, the legal marriage age is 18 both for women and men in the EU and South American countries such as Brazil, Argentina, Chile.²³

Another field of family law is the **right to property** which is vital for a woman's survival. Some countries have discriminatory laws regarding property and inheritance rights and boys receive more advantageous inheritance shares from girls.²⁴

²¹ Zöe Miller, "When women got the right to vote in 25 places around the world," *Insider*, March 8, 2020, <https://www.insider.com/when-women-around-the-world-got-the-right-to-vote-2019-2>. Accessed: 10.04.2022.

²² "Women's Rights," Amnesty International, <https://www.amnesty.org/en/what-we-do/discrimination/womens-rights/>. Accessed: 10.04.2022.

²³ "Marriage Laws Around the World," PEW Research Center, https://assets.pewresearch.org/wp-content/uploads/sites/12/2016/09/FT_Marriage_Age_Appendix_2016_09_08.pdf. Accessed: 23.05.2022.

²⁴ Nayda L. Almodóvar-Reteguis, "Where in the world do women still face legal barriers to own and administer assets?," *World Bank Blogs*, June 18, 2019, <https://blogs.worldbank.org/opendata/where-world-do-women-still-face-legal-barriers-own-and-administer-assets>. Accessed: 10.04.2022.

Customs or religions play a vital role in women's rights to owning property in the countries in where the law governs according to culture/ideology. In Saudi Arabia where Sharia law is conducted, the women can inherit half what a male relative can receive.²⁵ ²⁶ In South Africa, women's land rights depend on their marital status meaning that they get their rights through men in their family. Therefore, women are more likely to lose their rights if they get divorced or widowed.²⁷

Women's freedom over her own body is another field of law where domination of masculinity prevails. Many countries have strict rules on **abortion**. For example, China has outlawed abortion unless it is medically necessary.²⁸ In Argentina abortion was penalized with imprisonment until 2020 when abortion law was liberalized with a new Pregnancy Bill.²⁹ Nigeria has one of the most restrictive countries regarding abortion laws and only permit abortion if the mother's life in danger.³⁰ In South Korea abortion was illegal until 2020.³¹ On the other hand, there are countries like Sweden that allowed women to have abortion on the request until 18th week since 1975.³²

Criminal law is another important area of law in which women's subordination and gender roles are strictly codified. Different countries have different legal approaches to domestic violence and marital rape. Pakistan objects to make a rule for domestic violence in its national law because it is thought to escalate divorces.³³

²⁵ Wafa Hamed Alazmi, "Women's Rights To Accessing And Owning Land In The United States, Saudi Arabia, Brazil, And South Africa" (Master diss., Ball State University, 2016), 4.

²⁶ The logic of the inheritance sharing according to Muslim law is a male is financially responsible for to take care the family.

²⁷ Alazmi, "Women's Rights," 11-14.

²⁸ "China restricts abortions for 'non-medical purposes,'" *Al Jazeera*, September 27, 2021, <https://www.aljazeera.com/news/2021/9/27/china-restricts-abortions-for-non-medical-purposes>. Accessed: 10.03.2022

²⁹ Tom Phillips, "Argentina legalises abortion in landmark moment for women's rights," *The Guardian*, Dec, 30, 2020, <https://www.theguardian.com/world/2020/dec/30/argentina-legalises-abortion-in-landmark-moment-for-womens-rights>. Accessed: 10.03.2022.

³⁰ United Nations, Population Division of the Department for Economic and Social Affairs United Nations Secretariat. Report on "Abortion Policy – Nigeria." <https://www.un.org/esa/population/publications/abortion/doc/nigeria.doc>. Accessed: 15.02.2022.

³¹ Laura Bicker, "S Korea must end abortion ban – court," *BBC News*, April 11, 2019, <https://www.bbc.com/news/world-asia-47890065>. Accessed: 10.04.2022.

³² "Abortion Laws Around the World", PEW Research Center, September 30, 2008, <https://www.pewresearch.org/religion/2008/09/30/abortion-laws-around-the-world/>. Accessed: 12.04.2022.

³³ Sara Brightman, "Rights, women, and the state of Pakistan," *Contemporary Justice Review* 18, no.3 (2015): 334-351, DOI: [10.1080/10282580.2015.1057706](https://doi.org/10.1080/10282580.2015.1057706)

In 2017, countries such as Kyrgyzstan and the African country Liberia in where domestic violence is widespread passed legislations to protect women from domestic violence.³⁴ On the other hand, Turkey in where domestic violence has been increasing rapidly, the government chose to withdraw from the Istanbul Convention - which is the most developed international law instrument to protect victims of domestic violence - in 2021.

Marital rape is clearly penalized in the laws of the many countries such as EU countries, in Latin American countries, Australia, Israel, Mongolia, Russia, Thailand, Turkey, Uzbekistan, United Kingdom. Conversely, the legal rules of Afghanistan, Algeria, Libya, Morocco, Saudi Arabia, South Sudan, Sri Lanka, Syria, Yemen requires a wife to bend her husband, so a woman cannot claim any right in the name of marital rape.³⁵ In the year 2017, Tunisia and Jordan removed the laws allowing a rapist to abstain from proceeding by marrying his sufferer.³⁶ On the other hand marrying with the rape victim is still enforced in Iraq.

Today countries have legal rules that explicitly specify **non-discrimination** on the grounds of sex for attending school.³⁷ However, girls are discriminated explicitly in cases of pregnancy in some countries. For example, Equatorial Guinea or Tanzania continues to maintain laws banning pregnant girls from attending school.³⁸ Moreover, in 2012, Iran announced that 77 fields of study would be cut in the university education for the female students, making them male dominated fields. These female banned areas mostly include sciences and engineering.³⁹ The **male guardianship system** is still the biggest restriction for the Saudi women's right to movement. Women in Saudi Arabia

³⁴ UN Women, "Eight countries that are making historic changes to ensure no woman or girl is left behind." November 24, 2017, <https://medium.com/we-the-peoples/eight-countries-that-are-making-historic-changes-to-ensure-no-woman-or-girl-is-left-behind-dc753920549f> . Accessed: 25.05.2022.

³⁵ Marital rape laws by country, https://en.wikipedia.org/wiki/Marital_rape_laws_by_country#cite_note-8. Accessed: 25.05.2022.

³⁶ UN Women, "Eight countries."

³⁷ UNESCO, Global Education Monitoring Report Gender Review, <https://www.right-to-education.org/resource/unesco-global-education-monitoring-report-gender-review>. Accessed: 20.03.2022

³⁸ European Parliament, Policy Department for External Relations "Discriminatory Laws Undermining Women's Rights," May, 2020, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/603489/EXPO_IDA\(2020\)603489_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/603489/EXPO_IDA(2020)603489_EN.pdf). Accessed: 20.03.2022.

³⁹ "Iran bans women from 77 university majors, including engineering, physics," *Hurriyet Daily News*, August 22, 2012, <https://www.hurriyetaidailynews.com/iran-bans-women-from-77-university-majors-including-engineering-physics--28325>. Accessed: 16.03.2022.

are still banned from traveling without a male guardian. In the labour law, maternal leave for working women is legalized mostly in Western countries.⁴⁰

1.2.3. Feminist Legal Theories

Feminist legal theory emerges as the theory that points out the problems between law and gender. "Feminist legal theory" was first used by Ann Scales in 1978 and her article "Towards Feminist Legal Theory" was published in 1981. Catharine A. MacKinnon, who is considered one of the pioneers of feminist legal discipline, made her debut in 1983 with her article "Feminism, Marxism, Method and State: Towards Feminist Legal Theory".⁴¹

The role of law in the construction, perpetuation and legitimation of social or social hierarchies constitutes the central problematic of feminist law. And it is included in the discussion with woman's perspective. Within the feminist legal theory, there are many views that sometimes contradict each other. Despite this, if we can speak of a "feminist law", we owe it to the existence of a proposition that unites all feminist legal theorists: Modern society and its legal institution did not dissolve the patriarchy by themselves; on the contrary, modern law is responsible for the existence of hierarchies and exploitative relations between women and men, which are contrary to the principle of universal equality.⁴²

There is no single feminist legal theory, just as there is no single "feminism". In this study, liberal, radical and post-modern feminist approaches in feminist thought will be briefly mentioned, considering their effects in the context of refugee law, which is the subject of research. This research will analyze women's experiences in the context of refugee law with an eclectic point of view by making use of these three feminist legal theory approaches, rather than sticking to a single theory in order to enrich the perspective and analysis. Because each approach has its own strong defenses. It is thought that taking the best of what each theory has to offer and not excluding different

⁴⁰ International Labor Organization, "More than 120 Nations Provide Paid Maternity," February 16, 1998. https://www.org/global/about-the-ilo/newsroom/news/WCMS_008009/lang--en/index.htm Accessed: 20.04.2022.

⁴¹ Çağlar, "Feminist Hukuk Teorisine Kısa Bir Giriş," 3.

⁴² Uygur, "Hukuk," 160.

views will deepen the study. The reason for bringing different perspectives together is to expand the ground on which the study is based as much as possible.

1.2.3.1. The Liberal Feminism Approach

The Fundamental Argument Of Liberal Feminism

Liberal feminist theory is the oldest feminist theory, derived from the liberal philosophy of the Enlightenment and based on the concept of *natural rights*. Liberalism focuses on basic ideas such as equality, freedom, individuality, rationality, autonomy, universal rights, equal citizenship and democracy. In the feminist version of liberalism, which gives importance to the *individuals*, it is based on the fact that women are also "human" like men. It is believed that as the value given to human beings and the human rights improve, the situation of women will also improve. It focuses on ensuring the equality of women with men through legal and social policy changes based on individual rights and equality, justice and equal opportunity.⁴³

Liberal feminism is based on the notion of individualism and demand for equal rights. According to this principle every individual has the right to be treated equally, not on any account of gender, religion or race. It embraces the idea that every individual has innate "natural" rights. Since the independence of the individual is important, liberal feminism aims to end the power of domination of men over women.

According to liberal feminism, women are just as rational as men when given equal opportunities. Thus, it determines the line of struggle of the feminist movement in the light of the principle of equality in opportunities and rights. Liberal feminism argues that women are autonomous, rational beings with rights like men, and therefore should have equal opportunities to make their own choices.⁴⁴

It is possible to gather the equality demanded by liberal feminists in three points; equality at work, equality in family life and equality in social life. This approach gives importance to equality of opportunity in education and employment in solving the women's problem. Women will be liberated if they get equal education opportunities

⁴³ Mary Maynard, "Beyond the 'big three': the development of feminist theory into the 1990s," *Women's History Review* 4, no.3 (1995): 260, <https://doi.org/10.1080/09612029500200089>.

⁴⁴ Necla Arat, "Feminist Hukuk," *Kadın Araştırmaları Dergisi* 0, no. 9 (2006):56.

and enter the public sphere.⁴⁵ The reason why women's dependency continues is men's desire to keep women out of the public sphere; women need political equality to protect their own interests.⁴⁶ Throughout history, men have usurped women's rights and reduced women to objects.⁴⁷ Liberal feminists also criticize the idealized social roles of women as married and mothers in the private sphere.⁴⁸

Liberal feminists aim to bring women to the same position with men in the existing legal system. On the one hand they defend the strengths and valuable aspects of liberal theory. On the other hand, they try to reveal the unequal character of classical liberalism which asserts all individuals are equal in social, economic and sexual spheres.⁴⁹

Liberal feminists demand freedom for women in the same way as men. For this to happen, the law must get rid of the patriarchal and moral regulations that limit women. They state that the abstract rights of liberalism do not include women, and that the rights and freedoms granted to men, are not equally granted for women, therefore, the law should be reformed in these respects. According to liberal feminists, the distinction between public and private space is an important obstacle in the realization of women's liberties. The individual and political autonomy of women is possible only if they have a say in the public sphere.

The Public-Private Distinction of Liberal Feminism

One of the most important points in the discussion of feminism is the distinction between private and public sphere. In the 19th century liberal theory understanding, home life, which is called private space, is defined as the space where individuals can be free regardless of social relations and state intervention. In the public sphere, which covers issues such as working life and politics, the state makes various regulations. In

⁴⁵ Mary Wollstonecraft, *A Vindication of the Rights of Woman: with Strictures on Political and Moral Subjects* (New York :G. Vale, 1845) quoted in Josephine Donovan, *Feminist Teori*, trans. Aksu Bora (İstanbul:İletişim Yayınları, 2020).

⁴⁶ John Stuart Mill, *The Subjection of Women* (London: Longmans, Green, Reader, and Dyer, 1878) quoted in Donovan, *Feminist Teori*.

⁴⁷ Elizabeth Cady Stanton "Declaration of Sentiments" (New York, July 1848) quoted in Donovan, *Feminist Teori*, 23-25.

⁴⁸ Betty Friedan, *The feminine mystique* (New York: Norton, 1963) quoted in Donovan, *Feminist Teori*.

⁴⁹ Fatmagül Berktaş, "Kadının İnsan Hakları Hukukunda Yeni Perspektifler," *Ankara Barosu Hukuk Kurultayı*, (2006):22, quoted in Heper, "Feminizm ve Hukuk," 14.

other words, state intervention was limited to the public sphere, and private sphere individuals (men) were left completely free. Thus, the private sphere has become the space of freedom for men.⁵⁰

The discrimination and inequalities that women are exposed to are based upon the distinction between public and private spheres made by liberal theory. Traditional liberal theorists have the idea that a woman belongs to the family under the auspices of her husband. This liberal assumption of women belonging to the home as wife and mother has become universal. Especially with marriage, the existence of women disappeared and a married woman was accepted as the only person legally with her husband.⁵¹ The most critical criticism brought by other feminist movements to liberal feminism is in this context.

The difference of liberal feminists from other feminist movements is the importance they give to the family. While other movements see the institution of the family as an obstacle to women's emancipation, liberal feminists talk about the necessity of preserving the family which is perceived as an institution where men and women do equal work within the framework of mutual respect.⁵² Nussbaum argues that classical liberalism's distinction between public and private spheres should be updated by imposing an obligation on the state to protect the institution of marriage in order to ensure the dignity and well-being of its citizens.⁵³

The Contributions of Liberal Feminism in Law

Liberal feminism is more of a reformist thought. Rather than radically challenging the patriarchal social structure, it demands that women have the same rights as men. Therefore, the demand for equal rights is limited in the public domain.⁵⁴ However, reformist liberal feminist Martha Nussbaum believes that beyond the superficial legal regulations of liberal thought, there are material and legal tools that can

⁵⁰ Donovan, *Feminist Teori*, 4.

⁵¹ *Ibid.*, 4.

⁵² Martha C. Nussbaum, "The Future of Feminist Liberalism," *Proceedings and Addresses of the American Philosophical Association* 74, no. 2 (2000): 59.

⁵³ *Ibid.*, 63.

⁵⁴ Zekiye Demir, *Modern ve Postmodern Feminizm* (İz Yayıncılık: İstanbul, 1997), 47-49, quoted in Erkan Dikici "Feminizmin Üç Ana Akımı: Liberal, Marxist ve Radikal Feminizm Teorileri," *International Journal of Social Science* no.43 (2016):522. <http://dx.doi.org/10.9761/JASSS3100>

eliminate the social conditions creating subordination of women.⁵⁵ After all, the views of liberal feminists have also evolved over time. In the 19th century, liberal feminists focused on issues such as equality before the law, property rights and the right to vote. In the 20th century, they argued on social rights such as maternity and breastfeeding leave for working women given by the state. The current struggle of liberal feminists is mostly in the direction of ensuring gender justice.⁵⁶

The central theme of liberal feminism is human dignity and worth. Based on this, legal arrangements have been made on gender equality, and equality in human rights, labour, opportunities and participation in the political arena. Laws against marital rape, laws protecting consent for marriage, laws that make compulsory and uniform education for all children regardless of gender, laws prohibiting child marriage and child labor, laws supporting girls, laws supporting the financial contribution of the spouse to the family, laws supporting working mothers, laws providing childcare, laws supporting the nutrition and health of girls are the laws that the state gives to its citizens to live in a way that is worthy of human dignity.⁵⁷

The liberal principle also consists of equality in political attendance.⁵⁸ For this reason, legal arrangements are made regarding gender quotas and positive actions in order to increase the number of female political representatives.⁵⁹

Liberal feminists believe women's emancipation is possible when women is economically independent from men. It develops empowerment programs to promote public perception that women are suitable for many different roles in life.⁶⁰ In addition to the principle of equal pay, regulations have been made, such as the obligation of the state to open a kindergarten in the areas where women work, and encouraging women to participate in business life by relieving them of the obligation to take care of children at

⁵⁵ Nussbaum, "The Future of Feminist Liberalism," 56.

⁵⁶ Zekiye Demir, *Modern ve Postmodern Feminizm* (İz Yayıncılık: İstanbul, 1997), 47-49, quoted in Dikici "Feminizmin Üç Ana Akımı," 520.

⁵⁷ Nussbaum, "The Future of Feminist Liberalism," 63-66.

⁵⁸ Susan Wendell, "A (Qualified) Defense of Liberal Feminism," *Hypatia* 2, no. 2 (1987): 70.

<http://www.jstor.org/stable/3810017>

⁵⁹ Nussbaum, "The Future of Feminist Liberalism," 66.

⁶⁰ *Ibid.*, 66.

home.⁶¹ As a result of these changes, women will be liberated and their self-confidence will increase.

In conclusion, the contribution of liberal feminism is clear in the acknowledgment of the sentiment that women are equal with men and should have equal rights. However, it has been criticized for relying on a gender-neutral humanism rather than a gender-focused feminism. Liberal feminists believe that gender inequality will be eliminated through legislative change and education, however not realizing that invisible, structural or cultural barriers hinder these efforts. One of the main problems of liberal feminist approaches is that they only emphasize the struggle for women's presence in the public sphere, and they do not make the private sphere a subject of struggle by not analyzing it deeply. Because liberal feminism assumed that equality will be ensured in the private sphere to the extent that women's publicity is guaranteed by rights.⁶²

1.2.3.2. The Radical Feminism Approach

The Fundamental Argument of Radical Feminism

The most direct criticism that the legal system is patriarchal and must be combated comes from radical feminists. Accordingly, patriarchy is everywhere, including science and art, and women's emancipation will not be possible without patriarchy's elimination from everywhere. The pervasiveness of patriarchy means that the distinction between the private sphere and the public sphere is in an organic unity in terms of the construction and maintenance of sexist domination. For this reason, radical feminism firmly advocates revealing sexual violence, making domestic labor visible, and deciphering the concept of family.

One of the most important contributions of radical feminism to feminist thought is the criticism of violence against women. Going beyond the classical equality reforms, the context of domination relations is analyzed. Radical feminists seek to show how male power is exercised and consolidated in all areas. These areas are child-rearing, marriage and housework, and all kinds of sexual practices – rape, prostitution,

⁶¹ Dikici, "Feminizmin Üç Ana Akımı," 525.

⁶² Ülker Yükselbaba, "Feminist Perspektiften Hukuk," *Journal of Istanbul University Law Faculty* 74, no.1 (2016):131.

pornography, sexual harassment, sex tourism etc... Radical feminist discourse has also profoundly impacted societal perceptions of gender and women's lives. By not accepting the distinction between private and public, they argued that the activities occurred in the private sphere were also political. They brought significant criticism to the institution of the "family", which legitimizes the oppression of women and is the cornerstone of society. In this way, they contributed to the adoption of the view that economic and psychological pressure is also considered violence in addition to domestic violence, partner violence, physical and sexual violence.

Liberal feminism argues that gender inequality is due to the unequal distribution of power. However, according to radical feminism, the domination relationship that women experience is much deeper and more specific than other problems. The women's issue is approached directly from a gender perspective.⁶³ The practical application of liberalism's understanding of human rights based on moral values is in favor of men and against women. Feminist theory should focus primarily on social realities and change.⁶⁴ The social reality is that women experience an oppression stemming from their gender.

Radicals reject the individualism of liberalism and adopt a social outlook by accepting the effects of social conditions and demands which are rooted in social structures to be brought to the surface and changed. Radical feminists propose to view women not as a collection of individuals, but as a group based on shared experience because of the dominance relations to which they are exposed. Otherwise, the social dynamics and structures that establish women as the second class gender will be overlooked.⁶⁵

Radical feminists have a critique of the modern legal institution that seemingly "natural" and overtly unequal social relations are legally established. The distinction between public and private spheres, which works against women, was primarily structured by modern law and is still maintained. This separation is against women, because the closure of the private sphere to state intervention as an area of immunity by

⁶³ Engin Arıkan, "Feminist Düşünce ve Feminist Hukuk için Radikal Bir Kılavuz: Catharine A. MacKinnon." *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, 21, no.2 (2019):665. <https://doi.org/10.33717/deuhfd.642020>.

⁶⁴ Ibid., 666.

⁶⁵ Ibid., 665.

law makes physical, psychological and sexual violence against women permanent and legitimate.⁶⁶

The Arguments of Catharine MacKinnon's Radical Feminist Theory:

The prominent representative of the feminist legal theory movement is the radical feminist Catharine A. MacKinnon.⁶⁷ In practical law, MacKinnon proposes many legal regulations from a woman's point of view for the abolition of patriarchy: the prohibition of pornography, the use of a woman's point of view in the prosecution and punishment of rape, the prohibition of prostitution but not punishing women, the legalization of abortion are examples of these suggestions.

For MacKinnon, sex is a form of power and establishes a hierarchical relationship between men and women. In consequence of this hierarchical power relationship, biological sex assumes a societal meaning. Gender, which is the social expression of biological sex, appears through the sexual objectification of women. Masculinity is depicted as sexual dominance and femininity as sexual submissiveness. Here, women are just objects to please men. MacKinnon sees gender as the basic distinction that determines the relations of domination in society. Gender is both constructed by society and constructs society. Different behaviors and roles regarding gender also arise from this hierarchical relationship.⁶⁸

Inequality, subordination and objectification, which are accepted as appropriate for women's nature, constitute the social status and gender of women.⁶⁹ Gender is a political system based on the condemnation of an entire group of people to systematic humiliation has made this phenomenon a characteristic of women. In this way, women are economically exploited, sentenced to domestic slavery, forced to motherhood, physically abused, used in humiliating entertainments, silenced, forbidden from the right to vote, and removed from social life. Unlike men, women are systematically the

⁶⁶ Çağlar, "Feminist Hukuk Teorisine Kısa Bir Giriş," 10-14.

⁶⁷ MacKinnon's works that have attracted considerable attention and have been translated into many languages include: *Toward a Feminist Theory of the State*, *Women's Lives*, *Feminism Unmodified: Discourses on Life and Law*, *Only Words*, *Butterfly Politics*. *Men's Laws, Are Women Human?*

⁶⁸ Mari Mikkola, "Feminist Perspectives on Sex and Gender", *Stanford Encyclopedia of Philosophy*, 2017, quoted in Arıkan, "Feminist Düşünce," 664.

⁶⁹ Catharine A. MacKinnon, *Feminist Bir Devlet Kuramına Doğru*, trans. Türkan Yöney and Sabir Yücesoy (İstanbul: Metis, 2020),165.

target of violence; are deprived of respect, security, and remedy. They are prevented from voicing their problems and representing their interests.⁷⁰ However, despite all those women living in conditions of humiliation, this situation has been ignored, and the demands for equality have only been met in a limited number of situations.⁷¹

MacKinnon's Critique to Liberal Feminism:

Although MacKinnon is not against liberal theory, she draws attention to the gender unequal social structure and draws attention to the fact that the struggle requires deeper approaches and solutions. The author's various criticisms of liberalism are very important in terms of gender issues and the development of women's rights. Firstly, she accuses liberalism of inconsistency due to the public/private distinction and criticizes the historical ideal of liberal feminism to only remove barriers in the public sphere for the emancipation of women. She argues that liberal aims which are reserved for the public sphere should be broadened to the private sphere as well.

MacKinnon asserts the public/private distinction restricts women by positioning them in the private sphere and grounds for women's dependence by separating them from the outside world. The state's non-intervention in the private sphere and the supposedly neutral stance of the law feeds the social oppression of women, making this situation no longer a political issue. Private life becomes an environment of freedom for men and a place of violence and abuse for women.⁷²

Secondly, MacKinnon refuses the classical liberal meaning of equality which is based on the sameness. Although, she admits that formal equality has achieved substantial progress for women, she sees this as insufficient. According to the author, it is not possible to implement liberalism's understanding of equality to gender issues, since the sexes are defined by their opposing characteristics, therefore there would be always a difference between them according to the mere liberal understanding.

Moreover, she claims, gender inequality is actually more of a gender superiority. Society is structured hierarchically and heterosexually, based on the dominance of one sex and the subordination of the other. A certain degree of dominance based on sexual

⁷⁰ Ibid., 189.

⁷¹ Ibid., 280.

⁷² Ibid., 226.

power is actually embedded in society's understanding of an ordinary relationship between women and men. It is socially acceptable to a certain extent for men to oppress women for sexual reasons, thus harm becomes normal.⁷³ In this context, the gender roles attributed to men and women are not only different but also unequal from the very beginning. The acceptance of hierarchy as natural and unchanging supports the tendency to take "differences" between the sexes as normal and natural.⁷⁴

Mere formal equality does not solve the problem. As long as the sexes are socially unequal, and the law is constructed by the understanding of these social structures, the so-called neutrality of laws contributes to women's inequality. Because the existing social and legal structure has already invisibly been supporting male privilege. For this reason, if the laws treat women without considering their gender, the already unequal situation becomes untouched and out of sight.⁷⁵

For these reasons, MacKinnon states that liberalism is inadequate unless it is supported by a feminist critique based on gender realities.⁷⁶ The principles of liberalism treat women as abstract persons with abstract rights and ignore their real-life experiences without considering gender relations.

Thirdly, MacKinnon argues that liberalism's shortcomings can only be corrected by a different epistemological approach. Feminist liberal theory has helped to eradicate inequalities that stem from many stereotypes acknowledged as women's natural roles. But the solution of deep sexual inequalities embedded in social arrangements requires a more detailed perspective.⁷⁷ The male point of view - in other words liberal empiricist epistemology- suggest that everything is in fact natural, rational, unchangeable, and morally correct as it is. As far as the liberal state stays neutral and objective in this perceived natural environment, and shows reluctance to change the unequal social conditions, it reinforces male domination while rendering it invisible.⁷⁸

⁷³ Denise Schaeffer, "Feminism and Liberalism Reconsidered: The Case of Catharine MacKinnon," *American Political Science Review* 95, no. 3 (September 2001): 700.

⁷⁴ *Ibid.*, 701.

⁷⁵ *Ibid.*, 701.

⁷⁶ *Ibid.*, 701.

⁷⁷ *Ibid.*, 702.

⁷⁸ *Ibid.*, 702.

MacKinnon does not disregard liberal principles; on the contrary, she values liberalism's ideals of choice, consent, and protection of individuals from harm and recognizes that "legal guarantees of equality in liberal regimes provide an opening for social change".⁷⁹ But she also points out the limitations of liberalism in its current form. According to author, the most problematic aspect in applying the principles of liberalism to women is that women are not perceived as a social unit like men and are accepted as passive and sexual objects. She aims to sensitize liberalism to its blind spots by criticizing the acceptance of the male standard and underlines how gender is buried in the everyday life social. She believes that only in this way will conditions be created in which women can experience their full humanity.

MacKinnon's Arguments on Law:

The author also challenges liberal law system. When the word "human" in law is implied, it means man and the standard in law is man, according to this standard, women will be considered "different".⁸⁰ Laws that supposedly attempt to protect women, ignore situations in which women are in danger to life. It has been easier to treat women as a special case and to set extraordinary rules for them than to straighten the rule itself.⁸¹

Men exert their social power over women by reproducing social inequalities through law.⁸² The law, which has adopted the male point of view, legitimizes social acceptances and thus renders male dominance invisible. In this way, male dominance appeared to be as a feature of life.⁸³ As a result, the masculine view and the male power over women are also institutionalized.⁸⁴

Masculine law claims neutrality, arguing that the conditions of gender that privileges men also apply to women—that is, there is no gender inequality in reality.⁸⁵ Legal impartiality prevents groups that are socially humiliated and systematically

⁷⁹ Ibid., 707.

⁸⁰ MacKinnon, *Feminist Bir Devlet*, 219.

⁸¹ Ibid., 261.

⁸² Ibid., 278.

⁸³ Ibid., 274.

⁸⁴ Ibid., 198.

⁸⁵ Ibid., 192.

excluded from accessing legal security.⁸⁶ Abstract equality did not include the rights that women most needed and never had. All this has a neutral appearance in the law, because social reality is formed from the same point of view.⁸⁷

MacKinnon's Vision and Impact on Legal Reforms:

MacKinnon created an original theory with different methods and perspectives beyond the previous feminist literature and made important political and theoretical contributions to the feminist theory. By the help of her contributions, it was seen that unique perspectives are needed in order to address, evaluate and solve the women's problem. It is also important that the author has established an epistemological infrastructure on which to base her theory. In this way, an analysis tool is presented on how the male-dominated society distorts reality with a supposedly neutral and objective epistemology and how this distortion can be corrected.⁸⁸

According to MacKinnon, the first step to be taken is to accept the concrete reality of women which is the humiliation of women in private life in the social order. The second step is to perceive that masculine force over women should be legally sanctioned.⁸⁹

The author states that for women's emancipation, gender issues should be addressed first because they are at the center of the domination relationship.⁹⁰ Gender identities and roles, which are at the base of the domination relationship in society, restrict the freedom of women. Women who do not fit into these roles have experienced being shamed, beaten, or raped.⁹¹ The types of persecution that women are subjected to because of their gender cannot be interpreted as a classical wrongful act. This action is directed to a certain group (women) by another group (men). When identifying and interpreting these actions, the law should consider women's experiences rather than men's perspectives.⁹²

⁸⁶ Ibid., 195.

⁸⁷ Ibid., 265.

⁸⁸ Arıkan, "Feminist Düşünce," 688-81.

⁸⁹ MacKinnon, *Feminist Bir Devlet*, 281.

⁹⁰ Nazlı Hilal Demir, "Feminist Perspektiften Düşünce Tarihinin Köşe Taşları ve İdeal Bir Hukuk Anlayış" (PhD diss., İstanbul Kültür Üniversitesi, 2016).

⁹¹ Arıkan, "Feminist Düşünce," 669.

⁹² Ibid., 674.

Furthermore, MacKinnon believe that women are human, but their experiences are inhumane, but this simple truth is feared to be universally accepted.⁹³ She argued that there is insincerity towards women also in international law. For example, women are not included in the scope of international human rights in practice. Problems such as domestic violence, rape, and trafficking in women, which occur even in developed countries, are considered normal and do not become a matter of international law. MacKinnon is of the opinion that the concept of human rights today covers only men or issues that touch men's interests. The debates that emerged as a result of the author's analyzes have led to advances in the consistent use of human rights law by women. In particular, MacKinnon had a significant impact on the treatment of rape as a war crime in international law.⁹⁴ In her book by asking if women are human, then why violence against women still occurs and there is no universal legal or political will to end it. She answers because there is a universal acceptance that women are indeed included in a non-human category.⁹⁵

1.2.3.3. The Postmodern Feminism Approach

The Argument of No Universalism

Postmodernism is sceptical of the assumptions of objectivity and universality. Postmodern feminism remarks that all the claims and imaginations of transcendency (in time and space) that developed with the idea of enlightenment reflect the judgments of white, Western, heterosexual men. The Postmodern feminists expose and criticize the power mechanism based on the values of this group.⁹⁶

Postmodern feminism differs from radical feminism in its rejection of the "female category". According to postmoderns, there is no femininity that is transcendent to time and space, shared by all women. A Western-centered understanding of the "women's issue" is restrictive. However, women's problems depend on determinants as class, race, culture, age, sexual orientation, female identity. MacKinnon states that postmodernism offers feminism a multicultural context of

⁹³ Karima Bennoune, "Why Does It Matter If Women Are Human: Catharine MacKinnon's Contributions to International Law," *Tulsa Law Review*, 46, no.1 (Fall 2010):113.

⁹⁴ Bennoune, "Why Does It Matter," 114-116. quoted in Arıkan, "Feminist Düşünce," 678.

⁹⁵ Bennoune, "Why Does It Matter," 7.

⁹⁶ Çağlar, "Feminist Hukuk Teorisine Kısa Bir Giriş," 16-20.

defense against male violence.⁹⁷ Thanks to the pluralistic perspectives of postmodern feminists, many persecutions under the name of culture or traditional practices in different parts of the world have started to be considered as human rights violations.

The Postmodern Analysis of the Language of Law

Postmodern feminist legal theory is primarily preoccupied with the language of the law. Language has a critical part in the diffusion and reconstruction mechanisms of power. Parallel with radical feminism's critique of law for being masculine, post-modern feminists also examine how androcentrism works in language.

Postmodern scholar Lucinda Finley states that the language of law is supposedly natural, objective and impartial; its reasoning is genderless. However, according to the author, the language of law is masculine and its logic is sexist; because it has a normative character based on the experiences of privileged men and women's perspectives and experiences are excluded.⁹⁸

Various areas of law are constructed by men's experiences. In her work, Finley gave examples from different fields of law and aim to express how the logic of law and the established language are masculine. Men are the standard norm of law. For example, men are the norm for equality law. In human rights law and also in refugee law, the term refugee is envisioned as a male who is suffering from a situation originated from the public sphere activities which are associated with men. On the other hand, oppressions women experiencing does not match with refugee law. The daily experiences of women is still a violation, however does not fit with the version of events that law acknowledge. For the evidentiary law, it is usually not possible for women to demonstrate there is a persecution going on behind closed doors with no objective witness.⁹⁹

Moreover, the fact that law operates in a perceived public/private dichotomy and that it prefers the public as its field of interest leaves the law largely indifferent to what

⁹⁷ Bennoune, "Why Does It Matter," 14.

⁹⁸ Lucinda M. Finley, "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning," 64 *Notre Dame Law Review*, 1989.
https://digitalcommons.law.buffalo.edu/journal_articles/194.

⁹⁹ Finley, "Breaking Women's Silence," 904.

happens to women in the private sphere.¹⁰⁰ In addition, Finley points out the special treatment debate leading to violation of equality by labelling the term “special” because they are not men’s needs showing men are reference-point for equality.¹⁰¹

On the other hand, Finley remarks, law both empower and create limits for women problems. For this reason, critical awareness of the dilemma of legal language is important. We can increase the opportunity to use the force of justice and equality by seeing the gaps or bias in the law from the perspective of those who are silenced or made invisible by the traditional discourse.^{102 103}

Another postmodern feminist writer, Mary Joe Frug¹⁰⁴ analyzed the language of law in her work titled “A Postmodern Feminist Legal Manifesto”. She stated that legal norms attribute certain meanings to the female body “based on the naturalness” of the difference between the sexes. According to Frug, laws and legal discourse describe the female body in three categories.¹⁰⁵

Firstly, legal rules foresee the terrorizing of the female body. This is arised from rules that ineffectively protect women from abuse/violence, leaving them in insecurity and render them seek for a safe sanctuary. Thereupon, legal discourse supports one of the meanings of "female body" as a body that is "terrified", that has learned to flee, cower, and yield.¹⁰⁶ Insufficient rules or poor enforcement of laws regulating sexual violence against women puts women at risk insensibly; resulting women seek refuge in the safety from a man to avoid violence.¹⁰⁷ Moreover, laws that take protective measures by explicitly foreseeing violence also normalize the perception that the female body is the body to be terrorized. For example, in refugee law, a person who has been

¹⁰⁰ Ibid., 899.

¹⁰¹ Ibid., 899.

¹⁰² Ibid., 910.

¹⁰³ Making the invisible visible with critical awareness is important in postmodernist feminism as it is in radical feminism.

¹⁰⁴ Mary J. Frug was a successful feminist scholar and murdered while walking near her home. Her studies were dedicated to ending violence against women. Ironically, her friends believe she have been killed because she was a woman or just simply at the wrong place at the wrong time. Her unfinished study was organized by her husband).

¹⁰⁵ Mary Joe Frug, “A Postmodern Feminist Legal Manifesto,” *Harvard Law Review* 105, no.5 (1992):1049-50.

¹⁰⁶ Ibid., 1049-50.

¹⁰⁷ Ibid., 1064.

sexually assaulted may benefit from special treatment. In other words, the law recognizes the gender aspect only if the person is sexually terrorized.

Secondly, laws encourage the maternalization of the female body. This is brought about by legal rules that recompense women for afterbirth childcare or restrictions forcing women to become mothers, multi-child policies, and rules of domestic relations that favor mothers as parents over fathers and bear more responsibility for children.¹⁰⁸ Then, another meaning of “female body” promoted by law is for maternity.¹⁰⁹ For example, in refugee law, the provision of temporary protective measures for pregnant women is the maternalization of the female body. In other words, the gender situation is only taken into account if the woman is pregnant. Thirdly, there are legal rules that permit or manage the sexualization of the female body by prohibiting commercial sex (prostitution) or same sex practices (homosexuality).¹¹⁰

According to Frug, these three kinds of discourses are naturalized by law, and put the women in the position of “weak, nurturing, sexy”. These kinds of visions attach women to certain visionaries of the female body. The legal discourse helps to rationalize and reinforce these gendered constructs and masculine power on female body.¹¹¹

1.2.4. A Final Assessment of the Feminist Legal Approaches

Consequently, there is no single feminist standpoint. Each feminist movement reveals the oppression of women based on their own approach. Despite their different approaches, the most basic idea that distinguishes feminist theories from other theories is the criticism of patriarchal institutions with a woman's perspective and the rejection of the male-dominated system. Considering the chronological development of feminist theories, it is seen that an important conceptual change occurred in early feminist theory over time. The journey of feminism, which started with women's demands for

¹⁰⁸ There are various rules that prohibit or restrict access to abortion or other birth control applications that block unwanted childbirth and make them mothers against their will. On the contrary, there are also rules that ordain involuntary sterilization of pregnant women. (Frug,1992:1060). In addition to direct inference of law for maternalization of women, there are also rules that are indirect but inward effects that encourage women to abandon workforce in labour law and family law. For instance, state's child support assistance policies such as parental leave, child custody assign mothers more responsibilities and duties to look after the child than fathers. There are also legal rules compelling women's subordination by making them stay married for financial reasons. **See:** Frug, “A Postmodern Feminist,” 1060-61,64.

¹⁰⁹ Ibid., 1049-50.

¹¹⁰ Ibid., 1049-50.

¹¹¹ Ibid., 1049-50.

integration into public life, has evolved into a path in which the realization of the biological gender difference takes on social meaning, and how it creates inequality relations between the sexes is researched and theorized.¹¹²

All of the feminist legal approaches mentioned above build a dimension of contemporary feminist legal theory. Liberal feminist law emphasizes that women are human beings having equal rights with men and equality should be ensured through legal means. Radical feminism criticizes women's experiences on the basis of gender-based oppression and the reinforcing role of law in the patriarchal system. With the understanding of the gender-based hierarchy, it becomes clear that the law is based on and reproduce with the male perspective. It demands the disclosure of gender rules embedded in the social order and the insincerity of law in resolving gender equality. Radical feminism's contribution to recognizing the harm women suffer is important in the development of women's rights. Post-modern feminism emphasizes the masculinity of the legal language. It also advocates pluralism, gender is multidimensional and there are different gender-based problems in many parts of the world, feminist law must be flexible enough to see all of these issues.

Different perspectives within a theory do not indicate that it is inadequate; but it can indicate that it is in touch with the reality and complexity of life. For this reason, the contributions of different feminist theories are considered in this study.

1.3. METHODOLOGY

1.3.1. Feminist Methodology

The methodology streamlines the understanding of truth by presenting different perspectives on knowledge. Choosing a method also means choosing the determining factors. The method is not impartial, it is based on a certain intellectual ground, and assigns the determining factors related to the research, and therefore, it carries theoretical suggestions with it. Theory decides what we should observe. The task of the

¹¹² Fatmagül Berktaş, "Feminist Teoride Açılımlar," in *Toplumsal Cinsiyet Çalışmaları*, ed. Y. Ecevit ve N. Karkıner (Eskişehir: Anadolu Üniversitesi, 2011). 15.

method is to identify the problem addressed by the theory, the social reality that caused this problem, and the approach to solving it.¹¹³

The feminist methodology was created within the framework of criticisms of traditional methodologies. In this framework, the principle of conscious bias, rather than impartiality and indifference towards the research objects, was taken as the basis in order to bring the female experience to the forefront by questioning the masculine character of science and rejecting the contrasts such as subjective/objective, rational/emotional, public/private, which cause women to be subordinated to men. The aim of the feminist methodology is to remove science from being a field where only male experiences are defined and problematized.¹¹⁴ It aims to create strategies for change by seeing women's reality from the inside, confronting the prevalence of masculine power, and criticizing women's living conditions by including all women.¹¹⁵

In this study, by adopting the feminist methodology, the masculine character of refugee law is questioned. The study in your hand, with the "conscious bias" enabled by feminist methodology, will reveal how refugee law is far from women's experiences and will open up the legitimacy of refugee law to debate.

1.3.2. Feminist Methods

One of the important / pioneering studies that combine feminist methodology with legal methodology is Katharine T. Bartlett's article named "Feminist Legal Methods".¹¹⁶ According to Bartlett, feminist legal methods are necessary for feminist debates in order to become a coherent whole and for the clarification of feminism demands.¹¹⁷ The legal regulations, which are considered to be rational and impartial, are brought into discussion through feminist legal methods, revealing that these legal regulations are discriminatory, contrary to what is believed. Akçabay asserts, because it

¹¹³ MacKinnon, *Feminist Bir Devlet*, 131.

¹¹⁴ Fehmiye Ceren Akçabay, "Feminist Hukuk Metodolojisi: Hukuk Uygulaması ve Politika, Hukuk ve Toplumsal Cinsiyet," in *Hukuk ve Toplumsal Cinsiyet Çalışmaları*, ed. Gülriz Uygur&Nadire Özdemir (Ankara:Seçkin,2018):4.

¹¹⁵ MacKinnon, *Feminist Bir Devlet*, 278.

¹¹⁶ Akçabay, "Feminist Hukuk Metodolojisi," 23.

¹¹⁷ *Ibid.*, 23.

is only possible to reach a more rational and objective law by identifying and refuting the false assumptions on which the law is based.¹¹⁸

Feminist legal methods, developed through the criticism of the power relations emphasized by the existing legal rules, *specify the flexibility of the rule and the points that are overlooked during the law application.*¹¹⁹ For this reason, both traditional methods and the specific methods of feminist law are used. The distinctive methods of feminist law are: asking women's questions, feminist practical reasoning and consciousness raising. Feminist practical reasoning is a method used mostly in the process of discussing judicial decisions. It is used to justify concrete events in cases from a woman's point of view. Consciousness raising is the process that enables women to come together and develop a critical perspective by sharing their experiences of oppression in their personal lives. In this way, women question established knowledge and have the opportunity to transform reality in line with their needs and perspectives.

1.3.2.1. Asking the Woman Question

The women question method questions whether a social rule or practice takes women into account by asking a series of women's questions. If social rules or practices do not take women into account or exclude women, how this happens, how it can be corrected, and what kind of difference it can make socially are discussed. In the field of law, the woman's question method, the failure of the law to take into account the experiences and values that are considered unique to women, and the disadvantages that current legal standards may cause for women are discussed. Recognizing that law is not only biased but also masculine, this method exposes this problem and seeks to resolve it.¹²⁰

Bartlett asks the following questions that can be described as women's questions: how much space is given to women's life experiences in the legal field? ; what are the seemingly neutral assumptions about women, men and gender in law? ; what are the inconsistencies between the structures that the law assumes or imposes on women and women's life experiences? ; what patriarchal interests does this disharmony serve? ;

¹¹⁸ Ibid., 43.

¹¹⁹ Katharine T. Bartlett, "Feminist Legal Methods," *Harvard Law Review* 103, no:4 (1990):830-3.

¹²⁰ Akçabay, "Feminist Hukuk Metodolojisi," 24.

what kind of reforms have been made in the field of law related to women's life experiences in order to eliminate these inconsistencies? ; what would women's lives be like in an ideal world? ; how can this ideal world be achieved?¹²¹

The method of asking women questions reveals how legal regulations contribute to women's subordinated status. If the question of women is not asked, all the differences seen as specific to women in law are taken as given and not questioned. In particular, the method of asking the question of women to supposedly objective legal regulations, reveals how the social structure creates norms that make women different and oppressed.¹²²

The feminist method in academic research begins by asking the woman question and investigating the difficulties women face. The method of asking woman questions begins with selecting the research topic and continues through all phases of both doctrinal and theoretical analysis, from posing the research problem, designing the research project, and choosing the data collection tool.¹²³

¹²¹ Ibid., 25.

¹²² Bartlett, "Feminist Legal Methods," 843. ; Akçabay, "Feminist Hukuk Metodolojisi," 27.

¹²³ P. Ishwara Bhat, *Idea and Methods of Legal Research* (New Delhi:Oxford University Press, 2019), 580.

2. CHAPTER TWO: GENDERING THE ASYLUM AND REFUGEE ISSUE

In this part of the study, first of all, the refugee situation, which has gained global importance, will be discussed conceptually and numerically. Then, the types of gender-based violence that women are subjected to in their daily lives will be explained based on numerical data. The first aim here is to reveal that women facing violence do not receive legal or social protection in their own countries, and that even sometimes the social and legal structure in their country itself is the trigger and supporter of violence. The second aim is to reveal women's experiences the reasons for asylum of women will be analyzed in detail and gender-based persecution will be exemplified.

2.1. THE CONCEPTS OF REFUGEE REGIME

While examining human mobility a distinction is made in the current legal regime according to the motivation to act. For this reason, immigrants and asylum seekers/refugees are handled in different statuses in the current legal regime. In this respect, taking into account the reasons and purposes of the movement, the subject of refugees in the literature is examined in the context of forced migration. It would be appropriate to give a brief explanation of what these concepts are, in order to better understand the issues that will be mentioned in the continuation of the study. A more detailed analysis is made in Chapter 3, where international refugee law is explained.

A *migrant* is an inclusive term referring people moving away from internally/internationally her/his residence temporarily or permanently for different reasons, but most of the time economic reasons.¹²⁴

Forced migration or forced displacement is a coercive migratory movement due to different factors making people obliged to flee from conflicts, violence, breach of human rights or natural disasters.¹²⁵

¹²⁴ IOM, *Glossary on Migration*, (2019): 132. Retrieved 15.10.2021, https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf

A *refugee* is a legal term of international law and it is a person who is exposed to the fear of persecution and had to run away from his/her resident country.¹²⁶ Therefore, there must be a persecution that makes the life of the person unbearable. A person can become a refugee in every phase of the life; in the residence country, during journey or in the country she/he moved to.

An *asylum seeker* is someone looking for international protection and whose claim has not yet been decisively settled to obtain legal refugee status. Even if not every asylum seeker is legally recognized as a refugee, every refugee is initially an asylum seeker.¹²⁷

International protection is the protection provided by international and national laws to individuals or groups who are outside of their own country and cannot return for compelling reasons.¹²⁸

Persecution is a threat to life or freedom and other serious violations of human rights.¹²⁹

Refugees and asylum seekers are forced migrants fleeing persecution or conflict, but not voluntary migrants who migrate for economic or other reasons. International protection, as an inclusive concept, is the protection provided by states to these individuals. International protection includes different protection statuses, including refugee status. Refugee status is a legal status. As for, an asylum seeker is a person who has sought international protection but has not yet attained any legal status.

The popular usage tends to refer to any forced individual as a 'refugee'. From this point of view, in line with popular usage, although their legal meanings are different, in this study, the terms asylum seeker and refugee are used in the same sense and/or interchangeably to describe people seeking international protection by fleeing persecution.

¹²⁵ Ibid., 55.

¹²⁶ Detailed legal explanation will be given in the third chapter.

¹²⁷ IOM, *Glossary on Migration*, (2019): 14.

¹²⁸ Ibid., 114

¹²⁹ Ibid., 156.

2.2. THE REFUGEES IN THE GLOBAL WORLD

In the history, people were forced to leave their home due to various reasons such as war and conflict, threats of violence, political instability as well as famines, hunger and natural disasters. However, the concept of refugee has gained a special meaning in the 20th century as a result of the global politics, practical conditions as well as developments in human rights. Today, the world is living in the age of migration. Prolonged conflicts, generalized violence, persecution or human rights abuses in different parts of the world have resulted, in the words of the UNHCR Representative Katharina Lumpp, of "unprecedented levels of forced displacement."¹³⁰

Current data indicate that forced migration has become more widespread, diversified and gaining momentum. According to UNHCR, as of 2021, the number of people displaced worldwide exceeds 84 million, and one in every 95 people in the world is leaving their home because of violence or oppression. While, 35 million of them are refugees and asylum seekers who already fled their countries, 4.3 million people are stateless.

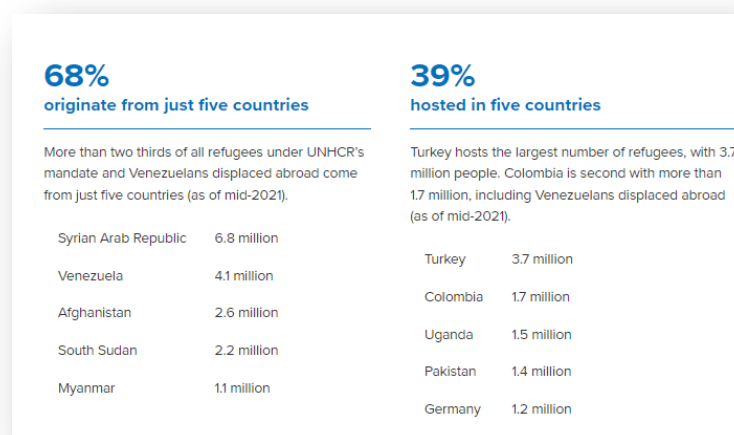


Figure 1: UNHCR, Refugee Data Finder, <https://www.unhcr.org/refugee-statistics/>

Today, 68% of all displaced people around the world originate from Syria, Venezuela, Afghanistan, South Sudan and Myanmar respectively. Besides, 39% of the globally displaced people are hosted in five countries. While Turkey hosts the largest

¹³⁰ Murat Erdoğan, *Syrian Barometer* (Orion Kitabevi: Ankara, 2019). <https://www.unhcr.org/tr/wp-content/uploads/sites/14/2020/09/SB2019-ENG-04092020.pdf> Accessed 15.10.2021.

number of refugees with 3.7 million people, Colombia, Uganda, Pakistan and Germany ranks in the top five refugee hosting countries.¹³¹ On the other hand, all these people who are displaced hold different statuses according to the international and national laws and have diversified rights or access to services in the countries they live in.

2.3. THE WOMEN REFUGEES

One of the features that is worth examining on the increasing displacement phenomenon is asylum seeking women. According to the 2020 reports of the UNHCR, 48% of the forcibly displaced people are women.¹³² However, still the exact numbers of women seeking asylum is unknown and take up less space than men in the refugee population due to the statistics hold by the states and organizations that put women and children into one category. This census, therefore, creates uncertainty between categories, can affect both the international community's view of asylum socially as well as the law and policies to be implemented on this issue.

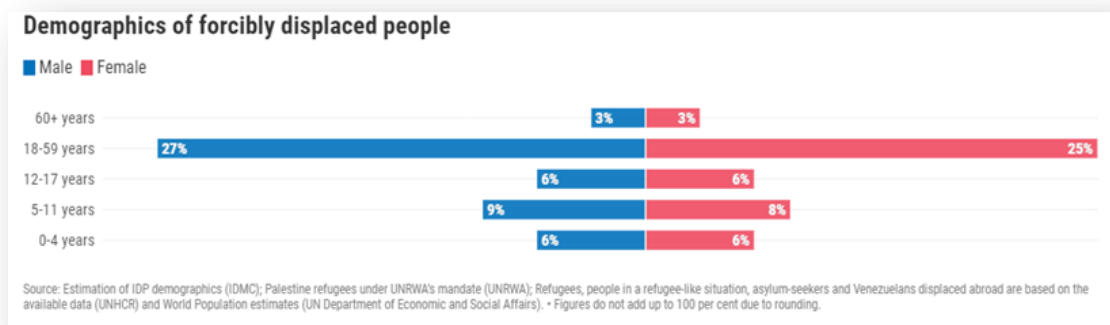


Figure 2: Global Trends Forced Displacement, <https://www.unhcr.org/flagship-reports/globaltrends/>.

There can be many different factors that affect women's decision to flee for better conditions. While this decision is sometimes made due to the individual persecution or discrimination of women based on their gender, and sometimes the decision emerges as a necessity when a safe life becomes impossible due to human rights abuses, violence or war pushing women's gender roles even harder. Refugee

¹³¹ Refugee Data Finder, <https://www.unhcr.org/refugee-statistics/>. Accessed: 15.10.2021.

¹³² Global Trends Forced Displacement, <https://www.unhcr.org/flagship-reports/globaltrends/> Accessed: 15.10.2021.

women may also endure gender-based violence during their journey to a safe country of asylum.

Hierarchical relationship between men and women adopted by society as if they were a 'natural' part of the order; the dependent position of women, the objectification and victimization of the female body are also reflected in the refugee law. For this reason, before examining the refugee law from the feminist point of view, it is vital to analyze the motivations and experiences of women that cause them to become refugees. As a radical feminist, MacKinnon states, that in order to reach a solution, first, it is necessary to examine the real-life experiences of women. In this way, it will be revealed that the humiliation and violence that women are subjected to in the private sphere is actually the social order, which is either legally established by the law or legitimized by the law with a so-called neutral stance.

Being aware that every individual has its own circumstances, one can assume there is a pattern of experiences forcing women to seek asylum stemming from gendered relations of power. In most of the societies women who forced to flee had been made vulnerable by the help of gender inequalities devaluing women and attribute them subordinate positions that legitimate or justify disdain and violence on the grounds of cultural/ideological symbolic codes. These inequalities are normalized and legitimized by the application of legal institutions.

Although the study does not claim to say that every woman experiences the same thing with an essentialist understanding, as radical feminists point out, many women are subordinated and forced into obedience because of their gender, but the violence they experience in the patriarchal system is normalized and they are not protected by their state. In this context, it undeniably emerges that the violence against women creates a special situation. In the literature, a number of categories are used to explain women's gender-based violence that women experience unlike men. As stated in the previous theory section, these categories are actually produced within the framework of gender roles attributed to women, such as sexuality (FGM, sexual orientation, rape etc.), motherhood (forced abortion or forced pregnancy) and oppression (domestic violence, sexual violence, persecutory laws).

2.3.1. Gender Based Persecution

Violence against women is any act of violence that has caused or is likely to cause any physical, sexual or emotional harm to women because of their gender, taking place in the public or private sphere, or the threat or coercion to commit such act, and the arbitrary restriction of freedom.¹³³ According to the 2016 Reports of the UN Commission on the Status of Women, 1 out of every 3 women in the world has been subject of physical or sexual assault in their lives.¹³⁴

Today, in various parts of the world, various forms of persecution occur as a violation of women's rights, security as well as dignity and liberty. Types of persecution due to their economic, social, political positions or just because they are women cause irreparable damages to women and even cause them to lose their lives. These brutal treatments on women usually take place at home, inside family or community where is accepted as the private sphere, thus not recognized as a matter of state intervention and neglected in national and international law.¹³⁵ Most of the time, women are exposed to discrimination, violence, legal sanctions and punishments as well as social exclusion from the society.¹³⁶ All of these forms of violence may compel women to leave their home countries in order to seek safety and protection.

This chapter does not aim to present all forms of violence against women in the world, or to describe every intention of women to migrate. Rather, it aims to explain the gendered nature of types of persecution against women that have similar patterns. These acts of persecution, which are nurtured by gender inequality and supported explicitly or implicitly by masculine legal systems or traditional rituals, reproduce hierarchical relations in society.

This study is aware that it is not possible to list all the types of gender based violence and the forms of persecution may vary according to the ethnic/religious identity of refugee women as well as the traditions and circumstances of the society they

¹³³ Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104 of 20.12.1993

¹³⁴ UN Women, Facts and figures: Ending violence against women, <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>. Accessed 13.04.2022

¹³⁵ Freedman, *Gendering the International Asylum and Refugee Debate* (London:Palgrave Macmillian,2015): 45.

¹³⁶ *Ibid.*, 46.

live in. For this reason, in terms of the post-modern feminist approach, a single definition of persecution based on gender can not be made, and it should be kept in mind that the standards of persecution are fluid varying to every situation, place and time. At the same time, from a pluralistic point of view, it will be disclosed that women are exposed to various forms of abuse and violence under the name of culture or traditional practices in different parts of the world.

First of all, the Gender-Related Persecution Guideline published by UNHCR in 2002 listed the forms of gender-based persecution to be considered for refugee status recognition.

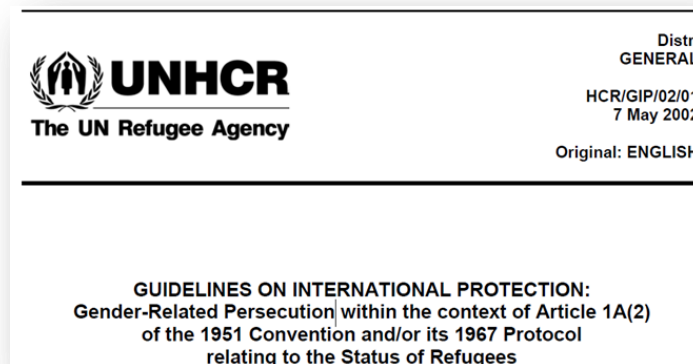


Figure 3: UNHCR Guidelines on Gender-related Persecution.

In addition, gender-based persecution is generally gathered under certain categories in the conventions and texts and reports created by UN agencies such as UNICEF, UNWomen, regional organizations such as the Council of Europe and the European Institute for Gender Equality to combat gender-based violence. The frequency and rates of these types of violence vary in several parts of the world, and some of them are practiced in the context of social/cultural/religious rituals. As advocated by radical feminism, these types of persecution are mainly based on gender differences, aiming at sexual domination, and in the main framework targeting women's bodies and freedom. Since this situation is perpetuated by non-state actors in the private realm, the intervention of the law stays minimal. For this reason, women's issues are marginalized and considered as extraordinary, and the group of women exposed to persecution is ignored.



Figure 4: UNICEF, Çocuk Yaşta Evliliklerin Önlenmesi: Temel Eğitim Programı El Kitabı, UNICEF Türkiye Temsilciliği, 2017.

2.3.1.1. Female Genital Mutilation

World Health Organisation (WHO) defines female genital mutilation¹³⁷ as “a traditional harmful practice that involves the partial or total removal of external female genitalia or other injury to female genital organs for non-medical reasons”.¹³⁸ WHO figured out that in 2021 alone, 4.16 million girls and women worldwide are at risk of FGM¹³⁹ while an estimation is made that 68 million girls and women will be exposed to FGM between 2015 and 2030.¹⁴⁰ This ritual practice is seen in some countries in Africa, Asia and the Middle East or in some communities within the Western countries as well.

While FGM is an infringement of the human rights including children rights and violation of non-discrimination on the basis of sex, it is also accepted as the infraction of rights to security, health, and to be free from inhuman treatment and even the right to life. FGM may have fatal consequences or physical, sexual and mental lifelong effects by creating pain, infections and trauma that risk lives and well-being of women.¹⁴¹

¹³⁷ Hereinafter “FGM”

¹³⁸ WHO, Female Genital Mutilation, January 21, 2022, <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>. Accessed 18.10.2021.

¹³⁹ UNWOMEN, Ending FGM is essential to give girls control over their own lives, February 4, 2021, <https://www.unwomen.org/en/news/stories/2021/2/feature-ending-fgm-is-essential#:~:text=In%202021%2C%204.16%20million%20girls,would%20otherwise%20have%20been%20averted>. Accessed 20.11.2021.

¹⁴⁰ UNFPA, Female Genital Mutilation, February 1, 2022, <https://www.unfpa.org/female-genital-mutilation#summery120402>. Accessed 30.11.2021.

¹⁴¹ WHO, Female Genital Mutilation, https://www.who.int/health-topics/female-genital-mutilation#tab=tab_1 Accessed 20.11.2021.

Derived from cultural and social rules based on gender inequality, young girls and women are subject to FGM as an expression of honor, cleanliness and beauty in order to prove that they are ‘good’ female members eligible for marriage and to avoid social exclusion or condemnation in their society. FGM is a practice contrary to liberal feminist ideals of choice, consent, and protection of individuals from harm. According to radical feminism, this practice is a clear evidence of patriarchal desire of male aiming to have control over women.

Despite the improvements in the international law, these gendered applications continue in the countries of origin or even in the places of immigration. In a report conducted in 2015, 71% of female EU asylum applicants from FGM-practicing countries estimated to be survivors of this harmful traditional practice.¹⁴² Fortunately, FGM has started to be seen as a sufficient reason for providing international protection in some refugee receiving countries such as the United Kingdom and Germany.¹⁴³ However, this protection is still not precisely reliable for granting refugee status for many women fleeing FGM due to visioning the issue within the context of culture instead of human rights by implementers of the refugee law.

2.3.1.2. Forced Pregnancy or Abortion

Manipulation of women’s bodies in order to assure their obedience to the social norms dictated by society also manifest itself on the control of their sexuality based on traditions and legal implementations that aim to control their fertility. The ‘one child policy’¹⁴⁴ of Chinese government allow women to have only one child and force them to have abortions.¹⁴⁵ There may be an institutionalization of the control of the fertility of women by state policies that prevent women to access to contraception and abortion or contrary, limit the number of pregnancies by laws.¹⁴⁶ Both of these enforcements are

¹⁴² Forced Migration Review, FGM and asylum in Europe, <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/climatechange-disasters/FGM.pdf>. Accessed 30.11.2021.

¹⁴³ WHO, Female Genital Mutilation., 2.

¹⁴⁴ The policy was enacted to address the growth rate of the country's population and implemented by the Chinese government between in the years of 1980- 2016. See: Kenneth Pletcher, "one-child policy," *Encyclopedia Britannica*, September 15, 2021, <https://www.britannica.com/topic/one-child-policy>. Accessed 18.04.2022.

¹⁴⁵ Andrew Mullen, “China’s one-child policy: what was it and what impact did it have?,” *China Macro Economy*, June 1, 2021, <https://www.scmp.com/economy/china-economy/article/3135510/chinas-one-child-policy-what-was-it-and-what-impact-did-it>. Accessed 18.04.2022.

¹⁴⁶ Freedman, *Gendering*, 54.

forms of persecutions that aim to restrict women's sexual rights and freedom of fertility. Moreover, in some countries forced abortion may also be used as a discrimination method on the ethnic minorities in order to decrease the population of that community.¹⁴⁷

In addition, systematic attacks and rape on women from opposing ethnic groups may occur in the times of conflict.¹⁴⁸ Ethnic cleansing or forced pregnancy which would demoralize the opposite side by bearing the unwanted children of their enemies was used (in particular the mass and systematic rapes of Rwanda and Bosnia, aimed at the eradication of the ethnic group) as a form of torture, while terrorizing and humiliating an enemy group.¹⁴⁹ For radical feminists, this is a clear sign of the objectification of women during the conflicts.

2.3.1.3. Persecutory Laws

There are various circumstances that make women leave their country to be freed of political violence. Different persecutory legislations strengthen discriminatory and gendered practices that oppress women and LGBTI individuals. In Iran, for example, women are forced to wear in certain dress codes and can get whipped or lashed in case of an inconformity with this law. In Pakistan, according to Hudood Law, the woman who claimed she was raped needs the testimony of four men to prove this situation. Otherwise can be accused of adultery and imprisoned or have a penalty of stoning.¹⁵⁰ Although the law in Pakistan was softened in 2006, still the persecutory rules and enforcements have led to gendered punishments.¹⁵¹ Today, there are still many countries that criminalize sex outside of the marriage, have laws that only punish women even they are the victims of rape and sexual harassment while discounting the

¹⁴⁷ Associated Press, "China cuts Uighur births with IUDs, abortion, sterilization," *AP News*, July 01, 2020, <https://apnews.com/article/ap-top-news-international-news-weekend-reads-china-health-269b3de1af34e17c1941a514f78d764c> . Accessed 18.04.2022. ; Open Society Foundation, *Against her Will: Forced And Coerced Sterilization Of Women Worldwide*, October 4, 2011, <https://www.opensocietyfoundations.org/publications/against-her-will-forced-and-coerced-sterilization-women-worldwide> Accessed: 20.03.2022.

¹⁴⁸ Rosemary Grey, "The ICC's First 'Forced Pregnancy' Case in Historical Perspective. *Journal of International Criminal Justice* 15, no.5 (2017).

¹⁴⁹ Freedman, *Gendering*, 53.

¹⁵⁰ *Ibid.*, 55.

¹⁵¹ Lau, Martin. "Twenty-Five Years of Hudood Ordinances- A Review." *Washington and Lee University Review* 64, no.4 (2007).

marital rape. At the present time, at least 22 countries criminalize adultery¹⁵² while 23 countries do not penalize marital rape¹⁵³ with the laws which seem to be neutral but at the reality targeting women and girls.¹⁵⁴

These kinds of laws preserve biased hierarchical relations and contribute to devalue women with legitimation of oppression both by the society and state.¹⁵⁵ Women who do not comply with expected social rules may be subject to criminal sanctions as well as the risk of social exclusion. The legalization of oppression against women is criticized by all feminist approaches. Laws that explicitly restrict individual freedom are criticized by liberal feminists who embrace the principle of equality in every sense. Discriminatory practices restrict women's human rights and fundamental freedoms. From the perspective of the radical approach, these restrictions on women are seen as a tool to keep women under pressure in a deepened patriarchal system where women are seen as sexual objects. Post-modern feminist authors also criticize the rules that openly restrict and subordinate women.

That kind of discriminatory laws generate a political atmosphere where unequal and unmerciful behaviors on women are emboldened and legalised, so there is no room for any opposition opinion. These kind of legal applications harden the cultural, religious and social prejudices against women that may leave them no other choice but seek for an asylum in other countries where they may feel safer.

2.3.1.4. Domestic Violence – Intimate Partner Violence

One of the most common forms of violence against women is domestic violence, which is perpetrated against a woman in her home by a male partner or relative.¹⁵⁶ According to reports, 26 percent of women over the age of 15 experience domestic

¹⁵² Sexual Right Initiative, The National Sexual Rights Law and Policy Database, <https://sexualrightsdatabase.org/map/17/Adultery> Accessed 18.04.2022.

¹⁵³ Sexual Right Initiative, The National Sexual Rights Law and Policy Database, <https://sexualrightsdatabase.org/map/4/Marital%20rape> Accessed 18.04.2022.

¹⁵⁴ Frances Raday, Adultery as a criminal offence violates women's human rights, United Nations Human Rights Special Procedures, October, 2012, <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/AdulteryasaCriminalOffenceViolatesWomenHR.pdf> Accessed 20.03.2022.

¹⁵⁵ Freedman, *Gendering*, 55.

¹⁵⁶ *Ibid.*, 56.

violence. Again, one out of every four young girls between the ages of 15-19 is subjected to physical or sexual violence by their partners.¹⁵⁷

Despite all these high statistics, more than half of the women exposed to violence hide their victimization and call for support. Only very few victims look for help from state institutions such as police or health facilities due to ignorance or fear of stigmatization.¹⁵⁸ In addition, in many countries complaints of domestic violence do not taken seriously and investigated or perpetrators sentenced to very light penalties. Moreover, according to some religious or societal beliefs, beating female partner when she is believed to cross the boundaries of her ascribed statue or fail to meet men's expectations is accepted appropriate and not even regarded as a crime. Until today, 158 countries have enacted laws on combating domestic violence. However, the presence of laws does not always mean that they are enforced.^{159 160}

Domestic violence is conceptualized as an issue belonging to the private sphere, not the public sphere and shown as an individual situation arising from the relationship between couples. This normalization hides the fact that domestic and intimate partner violence emerges as a permanence of violence constructed by unequal, gendered relations between men and women. Radical feminism's significant criticism of the public/private distinction and the institution of the "family" that legitimizes oppression against women are especially evident in the context of domestic violence. The state's non-intervention in the private sphere and the supposedly neutral stance of the law cause men to have unlimited rights over women in the private sphere, thus fostering domestic violence against women.

Domestic violence is thought that the perpetrator of violence against women is a person, not a state, and therefore issues related to domestic violence do not be included

¹⁵⁷ UN Women, Facts and figures, <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> Accessed 13.04.2022.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid., In 2020, Kuwait and Madagascar introduced specific and comprehensive legislation on domestic violence for the first time.

in the regulation of international policies. This situation has led to the disregard of the demands of women asylum seekers arising from domestic violence.¹⁶¹

2.3.1.5. Honor Killings

Honor killing is an ingrained and another form of domestic violence that results in the murder of a woman by her family or community.¹⁶² This practice is prevail in countries where cultural norms value masculine dominance in regard to patriarchy and the concept of honor is associated with the control of women's body and autonomy by men.¹⁶³ Most of the time, honor killings not become an issue of state intervention due to the belief of violence that occur in the private sphere is perceived as a family matter.¹⁶⁴

Honor based violence continue to be a serious issue mainly in countries like India, Pakistan, Iran and even in the Mediterranean Europe.¹⁶⁵ According to statistics, 5000 honour killings become a fact internationally per year. It is stated that 2000 honor killings out of this number were committed only in India and Pakistan. The real numbers are estimated to be much higher than the given statistics, because there is a tendency for the family and community to obscure murders.¹⁶⁶

2.3.1.6. Dowry Murders

Mostly encountered in India, dowry murder is a practice in which the bride's family is required to give a large amount of money to the groom's family as a dowry. This practice sometimes causes the killing of women by their families who do not have enough money or burning women to death in order to get a new bride for her dowry.¹⁶⁷ Despite the enactment of the Dowry Prohibition Act, there are still many young women and girls risk of dowry murders. In 2020, it was accounted 19 women were killed for

¹⁶¹ Esma Aydan Dikmen Aksoy, "Toplumsal Cinsiyet Bağlamında Kadın Sığınmacılar" (Master diss., Anadolu Üniversitesi, 2019), 108.

¹⁶² V. Meeto and H. S. Mirza, "There is nothing 'honourable' about honour killings": Gender, violence and the limits of multiculturalism," *Women's Studies International Forum*, no.30 (2017):187.

¹⁶³ Alijani Ershad, "Iran: Wife killer's 'walk of fame' highlights horror of 'honour killings'," *The Observers*, February 15, 2022, <https://observers.france24.com/en/asia-pacific/20220216-femicide-iran-honour-killing-beheading> Accessed 16.03.2022.

¹⁶⁴ Freedman, *Gendering*, 58.

¹⁶⁵ Honour Based Violence Awareness Network, International Rescue Centre, <http://hbvawareness.com/history/>. Accessed 16.03.2022.

¹⁶⁶ Ibid.

¹⁶⁷ UNICEF, *Çocuk Yaşta Evliliklerin Önlenmesi: Temel Eğitim Programı El Kitabı*, UNICEF Türkiye Temsilciliği, 2017, 57.

dowry related matters per every day¹⁶⁸ and there were nearly seven thousand reported dowry death cases in India.¹⁶⁹ This practice is a clear violence which put women in subordinate position, treating them as a commodity.

2.3.1.7. Acid Attacks

Acid attacks are a type of violence that is more commonly seen in South Africa and leaves physical, psychological and social traces on women. It is known that these attacks, which are generally carried out in the form of spraying acid on the visible areas of women, especially on their faces, are mostly carried out with excuses such as refusing the spouse's request for sexual intercourse, dowry fights, and taking revenge.¹⁷⁰

Honor killings, dowry murder, and acid attacks are practices where women's fundamental rights and freedoms such as life and body integrity are put under pressure by fear. Such practices are against human dignity and although they are prohibited by the law, due to gender stereotypes creating gender-based superiority in the society, men consider themselves that they are entitled to carry out such murderous acts on women.

2.3.1.8. Persecution on the Grounds of Sexual Orientation

Persecution against women and men on the grounds of sexual orientation is another widespread form of violence reasoned due to incompatibility to the prescribed patterns of masculinity or femininity.¹⁷¹ Still, 71 countries in the world have laws against homosexuality¹⁷² and there are many other countries where violence against LGBTI persons are condoned and non-assisted by the police or even backed by the government institutions.¹⁷³ The penalties for homosexuality range from fines to the death penalty. While imprisonment is a typical form of penalty, punishment of beating

¹⁶⁸ “19 women were killed for dowry every day in 2020,” *CNBCTV18*, September 16, 2021, <https://www.cnbctv18.com/india/19-women-were-killed-for-dowry-every-day-in-2020-ncrb-10758421.htm> Accessed 25.03.2022.

¹⁶⁹ Sanyukta Kanwal, “Total number of reported dowry death cases in India from 2005 to 2020,” Statista, September 20, 2021, <https://www.statista.com/statistics/632553/reported-dowry-death-cases-india/> Accessed 25.03.2022.

¹⁷⁰ UNICEF, *Çocuk Yaşta Evlilikler*, 58.

¹⁷¹ Freedman, *Gendering*, 59.

¹⁷² “71 Countries Where Homosexuality is Illegal,” Erasing 76 Crimes, March 2022, <https://76crimes.com/76-countries-where-homosexuality-is-illegal/> . Accessed 25.03.2022.

¹⁷³ Freedman, *Gendering*, 59.

is also common.¹⁷⁴ Apart from criminalization by legal system of the state, attacks against LGBTI individuals may be reinforced during conflicts/wars.¹⁷⁵ While radical feminists criticize the heterosexual nature of the patriarchal system, postmodern feminists criticize the law's overt punishment of homosexuality.

2.3.1.9. Sexual Violence

Sexual violence is any uninvited offensive sexual behavior and can be seen in the form of glances, innuendos, jokes, words, bullying, and requests for sexual approach. Forcing a woman to have sexual intercourse against her will is rape. It is difficult to gather clear information about rape cases since most of the victims of sexual violence do not report their grievances based on embarrassment, exclusion, or fear of death. In addition, laws against sexual assault in many countries are inadequate and not properly enforced causing victims to remain silent.¹⁷⁶ Overall, an estimated 6% of women have experienced sexual violence at least once in their lifetime.¹⁷⁷ The consequences of sexual violence faced by the women may lead them to flee to seek for a life where she can feel safer and not stigmatized.

Sexual violence is against liberalism's ideals of human dignity and consent. This behavior applied against the consent of the woman is a clear violation of women's rights. Sexual violence and rape is the concept that radical feminists argue most seriously. They argue that the state does not adequately protect victims of sexual violence and rape, and in a way encourages the perpetrators. It is also because of this insufficient protection that most women who have been subjected to sexual violence do not report the violence they have experienced. At the same time, as the post-modern feminist Frug states, one meaning of the female body is the body that has been terrorized and subjected to violence. The sexual violence experiences of women should

¹⁷⁴ Paula Gerber, "How many countries currently criminalise homosexuality?," Countries that still criminalise homosexuality, December 22, 2020, <https://antigaylaws.org/> Accessed 25.03.2022.

¹⁷⁵ Although this study is women-centered, gender-based violence not only affects women or LGBTI individuals negatively, but also men (as emphasized in various parts of this study) and may cause possible forced migration for them as well. Men in different parts of the world may be obliged to flee due to forced military enrollment by armed forces both in the case of a conflict or legal obligation. Forced military recruitment which is usually particularly directed against men should also be seen as a form of gender-based violence. **See:** Ulrike Krause, "Escaping Conflicts and Being Safe?," in *Gender, Violence, Refugees*, ed. Susanne Buckley-Zistel and Ulrike Krause (New York: Berghahn Books, 2017), 180.

¹⁷⁶ World Population Review, Rape Statistics by Country 2022, <https://worldpopulationreview.com/country-rankings/rape-statistics-by-country>. Accessed 18.04.2022.

¹⁷⁷ WHO, Violence Against Women Prevalence Estimates, 2018, sf.15

not be accepted as the subject of individual action in the private sphere, on the contrary, it should be seen as the state's failure to fulfill its obligation to protect.

2.3.1.10. Wartime Sexual Violence and Rape

Rape is used as a kind of weapon during the war and performed in front of the women's husbands, and is seen as a way for the 'enemy' to humiliate their masculinity. Today, women are commonly raped in wars. In addition to psychological harm, women exposed to sexual violence may be forced to keep quiet about their experiences or rejected by their relatives and society on the grounds that they bring shame. Moreover, they have to cope with unwanted pregnancies and serious health problems.¹⁷⁸

On the other hand, throughout the history sexual violence in conflictual areas was considered as an individual act of warriors as a 'sexual urge' and male nature that justify violence as a 'regrettable side effect' of conflicts.¹⁷⁹ However, today wartime rape and sexual harassment is accepted as a war strategy in order to ensure domination over the opposing parties by degradation¹⁸⁰ while terrorizing civilians and to supporting 'ethnic cleansing'. Rape in conflictual times should not be considered as an 'ordinary' violence of an individual lust, but should be seen as a systematic atrocity that has gendered and nationalist perceptions.¹⁸¹

UN officials stated that during the civilian wars in Africa, planned sexual assault has been used as a war missile, with perpetrators get away from punishment and the victims are faced to be labeled or penalized for extramarital pregnancy.¹⁸² Human Rights Watch reported that in order to create terror, sexual violence was enforced women, men or children in the conflict in Syria; while the International Rescue

¹⁷⁸ UNICEF, *Çocuk Yaşta Evlilikler*, 58.

¹⁷⁹ Krause, "Escaping Conflicts," 189.

¹⁸⁰ Cynthia Enloe, *Bananas, Beaches and Bases: Making Feminist Sense of International Politics*, (University of California Press, 2014).

¹⁸¹ Freedman, *Gendering*, 62.

¹⁸² Warren Hoge, "U.N. Relief Official Condemns Use of Rape in African Wars," *The New York Times*, June 22, 2005, https://www.chicagomanualofstyle.org/tools_citationguide/citation-guide-1.html. Accessed 18.04.2022.

Committee notified the prevalence of rape as a “prominent and worrying feature of the Syrian war.”¹⁸³

Furthermore, women still remain vulnerable after armed conflicts in which domestic violence, sex trafficking, and forced prostitution increase. Studies conducted after the Bosnian and Rwandan War show that, women who were tortured by sexual violence during the war continued to face structural and physical violence by exclusion within the family, experiencing serious psychological problems, loss of social support and sense of belonging.¹⁸⁴ MacKinnon attributes the rape incidents during wartime to the objectification of women as sexual objects. According to the author, women in this situation are systematically made the target of violence and humiliation and are deprived of respect, security and remedy.

Sexual violence in war and armed conflict is a serious violation of human rights. As a result of sexual violence and the social consequences it brings, many women may feel to seek asylum. However, sexual violence in conflict has not always been seen as a justified cause of persecution. Women's claims for refugee status were refused, due the perception that rape is an individual sexual act of violence and in wartime is a common fate for women.¹⁸⁵ Unfortunately, this perspective normalizes rape and ignores women's experiences and needs of international protection.

2.3.1.11. Forced & Child Marriage

Child marriage as force of children to marry and organize their future is a violation of human rights (in which the consent of child is unquestioned). Child marriages confront women with the obligation of motherhood and being a domestic worker prevent them from living their childhood, without reaching the right to education which deepens the violence. It is estimated that around 15 million girls around the world are married before the age of 18 each year. In other words, 1 out of every 4 girls in the world gets married before the age of 18. 1 in 3 girls in developing

¹⁸³ “Sexual violence by force of arms against women in Syria,” Women’s International League For Peace And Freedom, January 10, 2022, <https://www.wilpf.org/wp-content/uploads/2020/10/Sexual-violence-by-force-of-arms-against-women-in-Syria> Accessed 21.04.2022.

¹⁸⁴ Özgür Baklacioğlu, *Uluslararası Sınırların Gölgesinde Mülteci Kadınlar* (İstanbul: Der Yayınları, 2017), 126.

¹⁸⁵ B. Ankenbrand, *Refugee Women under German Asylum Law*, *International Journal of Refugee Law*, no.14 (2002): 48–49., quoted in Freedman, “*Gendering*” 78.

countries marry before the age of 18, while 1 in 9 girls marry before the age of 15. UNICEF predicts that if child marriages do not decline, 1.2 billion girls will be married as children by 2050.¹⁸⁶

One of the most important issues of liberal feminists is the right to equal education which leads women have a say over their future. However, girls who are married at a young age and women who are forced into marriage are deprived of their right to benefit from equal opportunities.

2.3.1.12. Human Trafficking

The journey of forced migration takes in dangerous places such as national borders in where masculine domination prevails. Because many asylum seeking women are lack of official documents, passing the borders illegally causes perilous consequences which leads to exploitation by the illegitimate market. There is high risk many women of abuse such as women trafficking, forced sex labor through indebtedment, slavery and organ trafficking.¹⁸⁷ UNFPA reports that an average of 700,000-2,000,000 women and children are smuggled across international borders each year. Human trafficking is the most brutal and lethal area of the illegitimate market for women. Women whose documents were seized by the traffickers are enslaved to work in inhumane conditions and become dependent on these smugglers. As a result of this vicious cycle these women become vulnerable to every kind of abuse and torture.¹⁸⁸ Moreover, these women become afraid to go to police because of their illegal status which might led to detention and refolement. Today, there are many refugee women trapped in the hands of human traffickers are sold for insecure and cheap labour, forced marriage and sex slavery.¹⁸⁹ According to the UNODC Global Trafficking in Persons Report, %50 of the victims who are usually women were smuggled for sexual abuse and they are often subjected to physical and psychological violence as well.¹⁹⁰

¹⁸⁶ UNICEF, *Çocuk Yaşta Evlilikler*, 10.

¹⁸⁷ Baklacioğlu, *Uluslararası Sınırlar*, 110.

¹⁸⁸ *Ibid.*, 113.

¹⁸⁹ *Ibid.*, 120.

¹⁹⁰ UNODC, Global Report on Trafficking on Persons, 2020, 12, <https://www.unodc.org/unodc/data-and-analysis/glotip.html>. Accessed 15.04.2022.



FIG. 3 Share of detected trafficking victims, by form of exploitation, 2018 (or most recent)



Source: UNODC elaboration of national data.

Figure 5 & Figure 6: UNODC, Global Report on Trafficking on Persons, 2020, <https://www.unodc.org/unodc/data-and-analysis/glotip.html>.

2.3.1.13. Gender-Based Violence Throughout the Refugee Phase

Justified persecution that requires international protection includes not only the acts suffered in the country of origin, but also the violence that may happen throughout the asylum procedure. Women may face up challenges during flight, at the border crossings, in refugee camps or detention centers as well as in transit countries or even in target countries. Gender based violence can occur at any phase of the refugee process. The lack of financial conditions and the subordinated social status of women may make women asylum seekers more vulnerable to abuse. Therefore, the international protection demands of women exposed to gender based violence during the asylum process should be taken into consideration by the states.

3. CHAPTER THREE: CRITICAL ANALYSIS OF INTERNATIONAL REFUGEE LAW FROM FEMINIST PERSPECTIVE

3.1. THE RESOURCES OF REFUGEE LAW

The international legal regime in regards to refugee protection is composed of international refugee law, international human rights law¹⁹¹, international humanitarian law¹⁹² and international criminal law¹⁹³. This regime is also fed from different legal sources. These resources are: treaties, customary international law¹⁹⁴, general principles of law, judicial decisions¹⁹⁵/doctrine and soft law¹⁹⁶.

This chapter of the study is devoted to the refugee law. In the first part of this chapter, how the 1951 Geneva Convention on the Legal Status of Refugees, which is accepted as the cornerstone of refugee law in the international arena, defines refugee and feminist criticisms made against this definition will be examined. The development of women's rights in the world naturally had reflections on refugee law. In the second part, the development of refugee law in the international and regional (European) field on the context of gender will be analyzed. Here, within the framework of the thesis subject, the Conventions, Recommendations, Guidelines and also the EU's legislation as a supranational formation were examined. On the other hand, in order not to broaden the

¹⁹¹ The Universal Declaration of Human Rights (1948); The International Covenant on Civil and Political Rights (1966); The International Covenant on Economic, Social and Cultural Rights (1966); The International Convention on the Elimination of All Forms of Racial Discrimination (1965); The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). For more detail see: UNHCR, *An Introduction to International Protection* (Switzerland:UNHCR, 2005): 25-39, <https://www.unhcr.org/3ae6bd5a0.pdf>. Accessed 02.02.2021

¹⁹² The four Geneva Conventions (1949) and their two Additional Protocols (1977). For more detail see: UNHCR, *An Introduction to International Protection*, 2005, 25-39.

¹⁹³ The Statute of the ICC (1998) **For more detail see:** UNHCR, *An Introduction to International Protection*, 25-39.

¹⁹⁴ The principle of non-refoulement; the prohibition on returning any person to the risk of torture. For more detail see: UNHCR, *An Introduction to International Protection*, 2005, 28-33.

¹⁹⁵ The judgements of States' superior courts.

¹⁹⁶ Soft laws include: the UNHCR Guidelines, the commitments made by States that are not legally binding but indicate progress such as: Declarations, Conclusions, Recommendations, Principles. **For more detail see:** UNHCR, *An Introduction to International Protection*, 29-30.

scope of the subject, the Court decisions are mentioned in a very limited manner only for information purposes.

3.2. 1951 UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES

The 1951 United Nations Convention Relating to the Status of Refugees^{197 198} (known as the 'Refugee Convention' or 'Geneva Convention') and its Protocol of 1967, is currently acknowledged as the basic principle of the international refugee and asylum regime in the vast majority of the countries in the world¹⁹⁹. It is the only universally accepted treaty regulating the international legal protection regime.²⁰⁰ States that have ratified the 1951 Geneva Convention are deemed to have accepted to protect refugees in their territories under the provisions of the Convention.²⁰¹

The 1951 Geneva Convention can be seen as a fruit of the era it was drawn up, highly influenced by the atmosphere of the end of World War Two and in the ambience of the beginning of the Cold War. It was mainly developed to provide practical solutions to events occurring at a particular time and place. The first consideration of the drafters was the mass population movements resulted from the atrocities happened in Europe during the Second World War and compelled European States to determine the fate of these displaced people and to design legal standards on the subject. The second motivation was the effort of Western States to gain moral superiority on Communist Bloc by protecting the dissidents who fled these regimes. Therefore, the 1951 Geneva Convention largely echoed the necessities of the international relations of the Cold War time. The priorities of the Western allies were dominant in the negotiations for the draft Convention, and the humanitarian needs of the refugees were

¹⁹⁷ Adopted on 28 July 1951, 189 UN Treaty Series 137.

¹⁹⁸ Hereinafter referred to as the " 1951 Geneva Convention ".

¹⁹⁹ Ratified by 145 countries.

²⁰⁰ Freedman, *Gendering*, 70-72.

²⁰¹ In the UN Universal Declaration of Human Rights of 1948, a refugee definition was not given, but the Article 14 of the declaration mentions that "*Everyone has the right to seek and benefit from the opportunity of asylum in other countries in the face of persecution.*" Therefore, the right to asylum has been declared as a fundamental human right. However, the international refugee regime was regulated by the 1951 Geneva Convention which designed the right to recognition of refugee is under the sovereignty of national states.

neglected.²⁰² At the end, the legal regime was created to deal with the refugee crisis emerged especially in Europe, thus the generated Convention was remarkably limited in its area of application and from the very beginning, as Rafiqul indicates, was Euro-centric.²⁰³

The Legal Definition Of Refugee

The term refugee is regulated in Article 1A(2) of the 1951 Geneva Convention as follows: “As a result of events occurring before 1 January 1951 and owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his[/her] nationality and is unable or, owing to such fear, is unwilling to avail himself[/herself] of the protection of that country; or who, not having a nationality and being outside the country of his[/her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

To better understand the concept of **refugee**, we need to analyze the terms mentioned in the definition. The Article 1 A (2) identifies the limited cumulative criteria that must all be met for a person to qualify as a refugee: “**a person having well-founded fear of being persecuted** due to the reasons of **race, religion, nationality, membership of a particular social group or political opinion** and **outside of the country of nationality/former habitual residence** and **unable or unwilling to seek that country’s protection.**” If a person has got the circumstances mentioned in the Article, he/she is actually a refugee. In this context, the status recognized by the state is only a declarative process that qualifies as the recognition of the actual refuge-hood.²⁰⁴

The emphasis on ‘*person*’ in the description highlights the evaluation of status of granting refugee is based entirely on the personal situation and experience of the asylum seeker.²⁰⁵

²⁰² Freedman, *Gendering*, 71-72.

²⁰³ Rafiqul Islam, “The Origin And Evolution Of International Refugee Law,” in *An Introduction To International Refugee Law*, ed. Rafiqul Islam and Jahid Hossain Bhuiyan (Boston: Martinus Nishoff Publishers, 2013), 14-17.

²⁰⁴ Bülent Çiçekli, *Yabancılar ve Mülteci Hukuku* (Ankara: Seçkin Yayıncılık, 2016).

²⁰⁵ Islam, “The Origin,” 20.

The concept of *persecution* constitutes the core of the definition of a refugee. The meaning of persecution is not defined in the Geneva Convention and also there is no universally accepted definition of persecution.²⁰⁶ Serious human rights violations, systematic damages, murder, torture, physical, psychological, sexual aggression, unjust imprisonment, limitation of political and religious actions can be exemplified as persecution.²⁰⁷ In addition, minor forms of damage turning into cumulatively persecuting or discrimination that has an intolerable effect is also considered as persecution. The question of which action constitutes a persecution or not may vary according to the particular situation of each person. The cause of the persecution may be the direct actions of the authorities of the State or be derived from non-state agents' actions in which the state cannot prevent the existing situation due to its weakness or unwillingness.²⁰⁸

The term “*well-founded fear of being persecuted*” accounts on the situation of each individual case, consisting of both a subjective and an objective component. These two elements are required to be together in the applicant’s statements. The subjective element is the person’s fear that depends on the personal background such as age, gender, views, feelings and psychological condition²⁰⁹ and experiences, while the objective element is the external evidence and information “justifying” this fear such as the ongoing political or social conditions of the country of origin.²¹⁰ Identifying the “well-founded fear of persecution” involves a process that gives broad discretion to the state authorities, based on the assumption of what might happen to the applicant if she/he were to return to his country of origin.²¹¹

The 1967 Protocol of the Convention removed the phrase "events that occurred before January 1st, 1951" from the text, thus ending the limitation in terms of time. On the other hand, although the right to make reservations regarding the geographical

²⁰⁶ The UNHCR mentions that the concept of persecution is not deliberately defined in the Convention because in this way the flexibility and interpretation capacity could remain to include different forms of persecution that may arise over time. **See:** UNHCR, *An Introduction to International Protection* .

²⁰⁷ UNHCR, *An Introduction to International Protection*, 56.

²⁰⁸ Frances Nicholson and Judith Kumin, A guide to international refugee protection and building state asylum systems, Handbook for Parliamentarians, UNHCR, No: 27, (2017): 133. <https://www.refworld.org/docid/5a9d57554.html> Accessed 05.02 2021. ; Ersan Barkın, “1951 Tarihli Mülteciliğin Önlenmesi Sözleşmesi,” Ankara Barosu Dergisi no.1 (2014):340.

²⁰⁹ Işıl Özkan, *Göç, İltica ve Sığınma Hukuku* (Ankara: Seçkin Yayıncılık, 2016):90.

²¹⁰ Nicholson, A guide to international refugee protection, 33.

²¹¹ Islam, “The Origin,” 20-21.

limitation with the additional protocol has been abolished, the rights of the countries that have signed the Convention with this reservation are conserved; that is to say, the geographical restriction is left to the "choice" of the states. Today only four countries in the world, Madagascar, Monaco, Democratic Republic of Congo and Turkey preserve their geographical reservation. Çiçekli states, even though only terminologically, not practically, the removal of time and geographical limitations scaled up the Convention's application.²¹²

The Principle of Non-Refoulement

An important point of the protection regime, the principle of non-refoulement has been included in the Article 33 of the 1951 Geneva Convention regulating “*no contracting state shall expel a refugee to the frontiers of territories where his/her life would be threatened on the grounds of his/her race, religion, nationality, membership of a particular social group or political opinion*” The rule of non refoulement, which is commonly held as a fundamental rule of international customary law, was written down in the 1951 Convention as a main rule of refugee law and constituted the precondition of all assurances – but again in limited grounds- regarding refugees and, in this respect, the essence of international protection.

The Current Arguments on the 1951 Geneva Convention

The Refugee Convention did not contain a provision for the establishment of a neutral third body for the decision-making procedure on international protection status. The Contracting States have absolutely guaranteed their sovereign rights to decide who could live in their territories. In addition, by not including the right to asylum in the Convention, they exempted themselves from possible future obligations to accept any asylum seeker who came to their borders.²¹³ The Western States determined the standards of accepting a person as refugee according to their national interests and from their view of world.²¹⁴

²¹² Çiçekli, *Yabancılar*, 24.

²¹³ Islam, “The Origin,” 21.

²¹⁴ The concept of persecution mentioned in the definition is related to the breach of political rights established according to the European perspective, economic and social rights such as food, shelter, health care, and education are left out of the scope. The social problems that arise or may arise in the future have not been addressed. See: Özkan, Göç, İltica, 79.; Islam, “The Origin,” 23.

Consequently, the conceptualization of refugee and their protection under the Convention is too narrow and restricted to only those who can prove the limited persecution grounds. The protection regime fails to protect people facing violation due to other reasons which were not listed in the definition. While there is a right to seek asylum according to the Universal Declaration of Human Rights, in practice, it cannot be alleged as a matter of right. States are not obliged to accept individuals as refugees and ensure protection as an absolute positive liability.²¹⁵ The Convention grants wide discretionary power to the states, therefore, the international protection claims of many asylum seekers may be unmet or rejected. In the last decade, there are growing criticisms on the position of the international protection framework that it moves away from a modern and realistic perspective by its narrow point of view and ignorance of violations stemming from social, economic and cultural rights, as well as disregarding to the problems of collective insecurity are certainly the reasons why displaced persons around the world encounter so much difficulties in achieving their refugee status or at least protection under international asylum law based on the 1951 Geneva Convention.²¹⁶

3.3. THE ANALYSIS OF THE 1951 GENEVA CONVENTION THROUGH GENDER LENS

The significance of the 1951 Refugee Convention is that it is the main doorway to develop a comprehensive international legal protection regime by stating a globally accepted definition of refugee. However, the Convention mainly indicated the political problems and expectations of Europeans at that time, as well as the certain concerns of its drafters - white, middle-class, Western men.²¹⁷ According to this legal framework, the refugee was an individual faced with persecution under a totalitarian regime because of her/his political opinions. On the other hand, mass groups of people running from international/civil conflicts or exposed to violence due to societal conditions were not mentioned under this Convention. These constraints still have a wide scope of exercise today and restricts asylum seeking women to procure refugee status. It can be claimed

²¹⁵ Islam, "The Origin," 24.

²¹⁶ Ibid., 24.

²¹⁷ Nahla Valji, "Women and the 1951 Refugee Convention: Fifty Years of Seeking Visibility," *Refuge: Canada's Journal on Refugees* 19, no.5 (2001): 26. <https://doi.org/10.25071/1920-7336.21227>.

that the Geneva Convention, like all other international human rights treaties, was penned from a male point of view and the experiences and rights of women were overlooked.²¹⁸

Spijkerboer remarks that during the deliberations of drafting the Refugee Convention, the relevancy of gender was debated only once offering that the word “sex” could be added as a cause of discrimination. The proposal was returned swiftly as it was regarded that “the equality of the sexes was an issue for national legislation”. Moreover, the then UN High Commissioner for Refugees, Van Heuven Goedhart quarrelled that he could not imagine a case of persecution based on sex.²¹⁹ These views reflect the typical feature of that period in which the Convention was drafted, when the debate of sex and women's rights issues were far from the agenda of international politics, however it was still notable that such a matter had been mentioned. On the other hand, the High Commissioner’s statement that he could not imagine a persecution on the basis of sex seems to be permeated into the interpretation of the Convention, while its implementation according to the male angle of rights on which it is based has not been contested for a long time. Only 30 years after the Convention would gender-based persecution come to the fore²²⁰ under favour of liberal feminism advocating equal opportunities for men and women as well as radical feminism promoting gender issues in every aspect of life.

3.3.1. The Critique of the Definition

The "exclusion from the spectrum" can be considered as the point of departure for the feminist critique of refugee law.²²¹ Neither “sex” nor “gender” was touched on in the refugee definition while giving any reference to gender identity, sexuality or family status.²²² Moreover, the text have a gendered use of “his” and “himself” which is an explicit reflection of the refugee definition has historically been explicated the scheme

²¹⁸ Freedman, *Gendering*, 72.

²¹⁹ Thomas Spijkerboer, *Gender and Refugee Status* (Aldershot: Ashgate Publishing, 2000), 1.

²²⁰ Spijkerboer, *Gender*, 1. ; Freedman, *Gendering*, 72.

²²¹ Efrat Arbel, Catherine Dauvergne, and Jenni Millbank, *Gender in refugee law: From the Margins to the Centre* (New York: Routledge, 2017), 3.

²²² Arbel, *Gender in refugee law*, 3. ; 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, suprapara. 5. May 7, 2002, <https://www.refworld.org/docid/3d36f1c64.html> Accessed 15.03.2021.

of male experience.²²³ According to the post-modern feminist approach, the use of the words him and himself by law has been a clear masculine language choice.

There is a discussion in the literature whether to include gender as a separate category or not. Some theorists argue adding a separate cause as sex/gender may result in the inclusion of all types of persecution against women into one category, creating the perception that persecution faced by women is always different—and less serious—from men.²²⁴ According to radical feminists, gender-based persecution should be added as a separate ground. The post-modern approach, on the other hand, emphasizes the fluidity of gender experiences by drawing attention to the danger of creating a single category of women.

Secondly, the term “well-founded fear of persecution” is a highly subjective concept. Since there is no universally agreed meaning of “persecution”, the decision to seek asylum is left to the subjective opinions of immigration experts who makes their decisions by examining mainly the information of political situation in countries that do not include gender-based persecution.²²⁵

The apprehension of feminists is not limited to the words that make up the definition of refugee. The first point where radical feminists criticize liberals is structural changes rather than simple equality on paper. As will be analyzed in the following sections, feminist refugee law draws attention to the fundamental and implicit fundamental political/economic and public/private dichotomies that constitute the stem of gender-related claims.²²⁶

²²³ Hilary Foulkes and Melis Acuner, Report on the Legal Rights of Women and Girl Asylum Seekers in the European Union (Istanbul: UN WOMEN, 2017): 10, https://eca.unwomen.org/sites/default/files/Field%20Office%20ECA/Attachments/Publications/2017/WOMEN%20AND%20GIRLS%20ACCESS%20TO%20ASYLUM%20IN%20THE%20EUROPEAN%20UNION_for%20web.pdf. Accessed 20.03.2021. ; UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution, suprapara. 5.

²²⁴ Freedman, *Gendering*, 75).

²²⁵ *Ibid.*,74.

²²⁶ Linda Kirk, “Gender related persecution and the Refugee Convention Art 1A(2),” *International Refugee Law and Human Rights*, Research Paper, (2016):4. https://www.iarmj.org/images/stories/papers_to_be_published/101025_linda_kirk_-_research_paper-final.pdf Accessed 29.04.2022.

3.3.2. The Distinction Between Public/Private Spheres

The distinction between public and private spheres, most debated by feminists, is also present in the 1951 Geneva Convention. In the definition of refugee, political thought is stated as a ground for persecution. What constitutes the political opinion on the protection regime is determined by the traditional public/private distinction of liberal theory, which is the subject most debated by feminists. Liberal traditional law has accepted the activities and expressions taking place in the male-dominated public sphere - the army, politics, the market - as political views. On the other hand, the views and actions related to the private area – domestic relations, family affairs, culture - in which women lives, which are the biggest threats to their personal security, were not accepted as political and excluded.²²⁷

The international protection scheme, drawn up in the early 1950s- a period when there was no interest in women's problems - the refugee term was predominantly based on the experiences of men who were dominant in public activities. Therefore, classical refugee law does not accord with the experiences of women which are mainly associated with private. The Convention puts the state to the fore as the only persecutor in the public sphere, leaving the persecution in the private area outside the scope of refugee law.²²⁸

Liberal human rights discourse of the Geneva Convention, contributed to strengthen the division between public and private.²²⁹ The feminist leg of liberal law could not find a solution to the distinction between public and private spheres. Liberal feminists failed to see the problems arising from the private sphere, and although everyone seems equal before the law, the liberal view alone has not been successful in making the extraordinary inequalities visible in the private sphere.

As a result of this division, various discriminations and violations to women occurring within the private setting have been seen as unrelated to asylum law. Mistreatments such as forced marriage or FGM may be perceived as a family issue and considered not one of the grounds of granting asylum.²³⁰ Similarly, the persecution of

²²⁷ Valji, "Women and the 1951 Refugee," 27.

²²⁸ Arbel, *Gender in refugee law*, 3.

²²⁹ Freedman, *Gendering*, 77.

²³⁰ *Ibid.*, 77.

women as a result refusal to obey with certain dress codes may not be considered sufficient to be granted refugee status.

This private-public distinction becomes even more serious in situations of domestic violence. International protection allegations of women who have been subjected to domestic violence are generally rejected as irrelevant, even when these women do not get protection from the state officials of their country of origin. Since domestic violence is perpetrated by family members in the private sphere, it is perceived as less important than the types of violence that occur in the public sphere.²³¹ For this reason, a woman who is seriously abused by her husband or father is less likely to receive a protection from the officials or judge evaluating her application than a woman mistreated by the police in the home country.²³² There is a perspective of violence occurring inside home is accepted less 'serious' deserving less elaboration than other types of violence. However, there is no practical difference in terms of persecution between a woman who is subjected to domestic violence at home every day and a political prisoner who is beaten by security force in the prison cell.²³³ The discourse of radical feminists that the private is political comes into play here again. Because the situation of a woman who has been mistreated by a state official and a woman who has been subjected to violence by her husband at home is essentially the absence of the same state protection.

From the same angle, sexual violence and rape does not be treated on the same degree as other forms of assaults, as they are perceived as 'private' as a result of 'personal' feelings of desire. As discussed in the previous section, sexual violence is normalized as the established domination of men over women and as part of the universal relationship between the sexes. This perspective leads to the rejection of asylum applications based on sexual violence by taking them less seriously. Despite the extensiveness of sexual violence and their destructive effects on women, these acts are not considered as a form of 'serious harm' under the provisions of the Geneva Convention, making it very challenging to obtain refugee status for women who have

²³¹ Freedman, *Gendering*, 78.

²³² *Ibid.*, 78.

²³³ *Ibid.*, 78.

been subjected to such violence.²³⁴ Even worse, there is a global phenomenon of the acknowledgement that prevalence of rape by the opponent side perceived as the typical fate of women in conflictual areas, thus, is not regarded as persecution.²³⁵ Radical feminists, on the other hand, argue that it is in the interest of the patriarchal system to normalize and ignore the systematic persecution of women, especially in areas of conflict. Radical feminism had important contributions in improvement of the feminist analysis of refugee law through revealing the implicit perception of public/private divide that leads to rule out womanly risk of persecutions around the world. This move focused on the missing interpretations of the Convention on the concept of persecutor which could be only the states, but presented other harms as well could be an issue of sociocultural private sphere that was alienated in asylum regime.²³⁶

The Personal is Political

The distinction between the public sphere and the private sphere is related to how the concept of political is defined. Due to gender roles, the basic perception is that women's actions will not be seen as 'political' as men's. In this context, many activities of women are considered as non-political in the asylum law and their protection demands are rejected. Women are considered to have participated in political activities only "indirectly", taking on "supporting" roles such as delivering messages, providing food, care or hiding people.²³⁷

In fact, when objectively examined, many forms of gender related persecution are strongly related with political action or expression. For example, women who refuse to abide by discriminatory rules in their countries express a political view against oppressive regimes. This refusal should not be seen as a private matter, but rather as a purely political act in which women demand equality and freedom. Freedman argues that a similar situation applies to Chinese women who oppose the one-child policy based on forced abortion and sterilization by the state.²³⁸ According to radical feminists,

²³⁴ Ibid., 79.

²³⁵ Ibid., 83.

²³⁶ Arbel, *Gender in refugee law*, 3.

²³⁷ Freedman, *Gendering*, 81.

²³⁸ Ibid., 81.

established gender roles limit the political perception of women's activities and expressions, because the women remain outside the scope of the public sphere.

3.3.3. The Persecution by State or Non-State Agents

Another obstacle in reasoning gender-based persecution for granting refugee status is that these forms of persecution are usually perpetrated by private individuals and not by state officials.²³⁹ If interpreted in the traditional way, the Convention only protects citizens from the misconduct of their own states. This interpretation ignores women's experiences of being persecuted by non-state actors. The Convention has been originated only as a means of protecting citizens from the misbehavior of their own state, thus ignoring women's experiences of persecution by non-state actors.

In cases where the state's influence on the violence cannot be proven directly many refugee applications are rejected. However, the state has a negative obligation not to violate the rights of its citizens, but also a simultaneous positive obligation to respect and protect these rights. In the face of systematic violence by non-state agents against a part of the society, the state's failure to protect that group should be seen as conscious inaction, and the refugee application should be evaluated in this way, considering that the state did not act in accordance with its positive obligations to prevent/punish non-state perpetrators. While there are some positive developments both in international and national laws, today, many states tend to reject asylum claims under the Geneva Convention when acts are committed by non-state actors²⁴⁰, and therefore do not see many forms of gender-based persecution as grounds for gaining refugee status.

3.3.4. Cultural Difference and Non-Recognition of Persecution

Another obstacle to the realization of gender-based persecution in the definitions and interpretations of the Geneva Convention is that such acts are often prevalent in 'Third World' countries, so these practices are associated with 'cultural difference' rather than human rights violations. Gender roles and the patriarchal system are so embedded in cultural traditions that violence against women is imposed through the veil of 'tradition' and 'culturalism'. This is the normalization of persecution by perceiving harmful practices as part of the order in the countries of origin and as cultural

²³⁹ Ibid., 83.

²⁴⁰ Ibid., 83.

differences. If these harmful practices are normalized as cultural differences, asylum claims resulting from this persecution will be dismissed as unjustified.²⁴¹ The universality of the definition of persecution is questioned, based on the defense of the post-modern feminist movement. It should not be explained what constitutes persecution from a single point of view. Because many harmful practices seen in different parts of the world are normalized and human rights violations of women are considered reasonable by accepting them as cultural differences, not persecution.

3.3.5. The Distinction Between Political Rights-Economic Rights

In the definition, it is seen that only political reasons are taken into account by making a hierarchical distinction between asylum claims based on political and economic reasons. However, Valji states that this line cannot be drawn easily, especially in the case of women because the relationship between economic oppression and other types of persecution cannot be easily separated.²⁴² In many parts of the world, women face discriminatory practices in economic life, many women may have to live in a country in where they are excluded from economic activities²⁴³ because of their gender. The economic disadvantages of women make them vulnerable and open to exploitation and violence both in society and in the family. A woman who is lack of material opportunity to maintain her life and meet her basic needs may have no choice but to flee the country.

3.3.6. The Persecution on the Grounds of Membership to a ‘Particular Social Group’

The legal debates about including gender-specific persecution within the scope of the Refugee Convention in the most practicable way are centered on the concept of “a particular social group”²⁴⁴ stated in the definition.²⁴⁵

²⁴¹ Ibid., 82.

²⁴² Valji, “Women and the 1951 Refugee,” 27.

²⁴³ For example, in Afghanistan, women are not allowed to work for a livelihood. **See:** Hector Retamal, “Afghanistan: Taliban Deprive Women of Livelihoods, Identity,” *Human Rights Watch*, January 18, 2022, <https://www.hrw.org/news/2022/01/18/afghanistan-taliban-deprive-women-livelihoods-identity#:~:text=%E2%80%9CThe%20Islamic%20Emirate%20%5Bthe%20Taliban,paid%20work%20with%20the%20home>. Accessed 10.09.2021.

²⁴⁴ Here in after as “PSG”

²⁴⁵ Freedman, *Gendering*, 84.

Persecution on the ground of membership of a particular social group stated in the Refugee Convention, constitutes the most ambiguous element of the definition of refugeehood. Neither the Convention itself nor the Handbook on the Criteria and Procedures to be applied in Determining Refugee Status published by the UNHCR do not contain satisfactory explanations on this matter.²⁴⁶ Some scholars state that this category was added to provide flexibility to respond to the needs of possible future persecution groups that were not foreseen at the time the Convention was written. Some scholars note that this category was added as a general term to allow flexibility to respond to the needs of possible future persecution groups that were not foreseen at the time the Convention was penned. Thus, it will be possible to make a comment within the framework of human rights.²⁴⁷

Persecution on the ground of membership of a particular social group is the most common ground that is used as a causal link for granting women international protection around the world.²⁴⁸ However, it is also the most criticized persecution ground. Firstly, in practice in their asylum application, women had to prove both that they have been persecuted because of their membership in a certain social group and that the state which they are citizens of does not fulfill its obligation to protect.²⁴⁹ Due to the lack of a uniform legal framework and the ambiguity of the meaning of the term "a particular social group", the assessment of women's asylum applications due to

²⁴⁶ Recep Doğan, "Kadının Toplumsal Cinsiyete Dayalı Şiddetten Kaynaklanan Sığınma Hakkı," TBB Dergisi no.130 (2017):167.

²⁴⁷ Valji, "Women and the 1951 Refugee," 26.

²⁴⁸ Some positive examples of Jurisprudence on PSG are: The leading decision that first to accept that women can form a specific social group solely because of their gender in countries in where the government applies discriminatory policies or reluctant to prevent social discrimination against women: *Shah and Islam (Reg. v. Immigration Appeal Tribunal, Ex-parte Shah [1998] 1 W.L.R. 74.)* & the first decision explaining the concept of PSG as members that have certain characteristics that cannot be changed by their own will in the decision: *Acosta (1985) 19 I. & N. 211* See: Hooper, genbased, 32 ; The decision accepting women faced with forced abortion as a PSG: *Cheung v Canada (Minister of Employment and Immigration) [1993] 102 D.L.R. (4th) 214*; Decisions referring gender and sexual orientation can be considered a PSG: *Attorney-General of Canada v. Ward (1993) 103 D.L.R. (4th) 1. s.34. and Re G.J. [1998] 1 N.L.R. 387.*); Decision referring on women suffering domestic violence in Pakistan forms PSG due to inaction of state: *Minister for Immigration v Khawar [2002] HCA 14*; See: Doğan, Sığınma, 168-173 ; The decision referring women suffering FGM may form PSG: *Fornah v Secretary of State for the Home Department 2006* ; The decision concluding that single women living in Afghanistan who accused of violating the strict Islamic social mores because they work may be considered as PSG: *German Administrative Court Frankfurt am Main, Oct. 23, 1996, 5 E 33532/94*. See: Andrea Binder, "Gender and the Membership in a Particular Social Group Category of the 1951 Refugee Convention," *Columbia Journal of Gender and Law* 10, no. 2 (2001): 178.

²⁴⁹ Doğan, "Kadının Toplumsal Cinsiyete...", 174.

gender-based persecution is left to the discretion of the decision makers²⁵⁰ leaving many women unprotected, despite having well-founded assertions.²⁵¹

Secondly, the major criticism made to the PSG ground is that it perpetuates the public-private distinction, strengthen the idea that gender based persecution is less important than other types of persecutions because they do not fit with the theme of political domain and these women are not recognized as actors in the public sphere. Instead their status is described as ‘private’.²⁵²

Thirdly, the social group ground envisions women's activities as social or cultural, trying to connect women to the refugee regime from the social sphere. Therefore, this attitude reconstructs the perception that women's problems are always personal and not political.²⁵³ As discussed above, although many of the claims of women can be categorized as political action, there is reluctance to ground them as political thought and a tendency to place women's issues culturally and located in the 'social group' category. However, according to radical feminist theory, the sexist construction of society is political from the core. Women have been marginalized from the very beginning by the power relations created by the state, which put women in the private sphere. Women opposition to female genital mutilation, dress codes or other discriminatory prohibitions in the asylum regime is not considered as a political statement.

Fourthly, Spijkerboer and Kneebob point out PSG ground helps to establish refugee women as vulnerable dependents and victims whose struggles are depoliticized. Women in the asylum regime are largely framed as dependents on the family. This dominant attitude portrays women as victims or potential victims according to their fragility in patriarchal society, where they are inferior and secondary to men and belong to a different group different than men. This perspective also reinforces the universal perception that women are stereotypical mothers and men are the head of the family.²⁵⁴

²⁵⁰ Binder, "Gender and the Membership," 178.

²⁵¹ Binder, "Gender and the Membership," 181.

²⁵² Susan Kneebob, "Women Within the Refugee Construct: 'Exclusionary Inclusion' in Policy and Practice – the Australian Experience," *International Journal of Refugee Law* 17, no. 1 (2005): 41, doi:10.1093/ijrl/eei002.

²⁵³ *Ibid.*, 37-39.

²⁵⁴ Spijkerboer, *Gender*, 2. ; Kneebob, "Women Within the Refugee," 22.

These women are pictured into social group as a 'woman at risk' that overemphasize their vulnerability and dependency rather than their political status and struggle against political exclusion.²⁵⁵ Many gender-based violations are still left outside of the meaning of persecution that lead asylum seeking women cannot grant an international protection. Asylum seeking women are mainly recognized as a member of a family rather than an individual in the refugee law and therefore, granted refugee status as dependent to their male family members who have succeeded in their asylum claims based on political grounds. According to the language analysis of post-moderns, the direct representation of women as a social group in legal rules and decisions will create an acceptance that removes the problems related to women from being public. As the radicals support, such a practice will also help to keep women in a subordinate position by avoiding the recognition of the deepened gender hierarchy.

The last criticism is whether the generalization of women refugees as a particular social group would be beneficial in the context of universal women's rights and gender sensitivity. Post-modern feminists argue that every woman has different conditions in different geographies and cultures, so they do not form a uniform social group. Efforts on defining women as a particular social group can lead to normalizing sexist binaries. Moreover, because many refugee women come from Third World countries, assigning PSG ground to refugee women may lead to portraying them as sufferers of "barbaric" Third World cultures and causes a conflict between 'Western women' and 'other women' that ignores the problems stemming from the universal structural problems of gender inequality.²⁵⁶

On the other hand, while the dangers of reducing the problems of female refugees to a single category are discussed in the literature, practically, there is also a reluctance to accept that women belong to a particular social group in a particular country where gender-based persecution is prevalent in the world.²⁵⁷ Experts believe the reason for this reluctance stems from the Western refugee-receiving states' concerns

²⁵⁵ Kneecobe, "Women Within the Refugee," 26.

²⁵⁶ Freedman, *Gendering*, 85; Natalie Oswin, "Rights Spaces: An Exploration of Feminist Approaches to Refugee Law," *International Feminist Journal of Politics* 3, no. 3 (2010): 347-364, DOI: 10.1080/14616740110078176.

²⁵⁷ Freedman, *Gendering*, 80.

about the possible influx of women refugees from various parts of the world to the West.²⁵⁸

In summary, the problem faced by refugee women is the narrow interpretation of the definition of refugee, excluding women's claims on the grounds that it is not political, and the tendency to regard women's experiences as private and cultural. This basic public-private structure does not comply with the human rights notion of refugee law, which is grounded on the equal protection of all refugees. The experiences of women refugees are constructed as apolitical. In refugee law, women are also largely structured as dependent persons in a patriarchal society conforming to stereotypical perceptions of the role of women.²⁵⁹

3.4. THE EVOLUTION OF THE INTERNATIONAL REFUGEE LAW THROUGH GENDER LENS

Over time, by the help of different branches of feminist legal theories the development of women's rights in the global arena led to the visibility of women's experiences and problems in the field of asylum as well. As a result of recognizing the specific problems of asylum seeking women, many international and regional contributions have been commenced in the field of asylum regime.

3.4.1. The Related Contributions of the United Nations

The United Nations is the largest institution influencing international law and politics. The feminist studies have had an important impact on the policies of the United Nations. With the aim of ensuring human dignity, individual freedom, the principle of equality and non-discrimination, important developments have been experienced in women's rights under the leadership of liberal feminists. Likewise, radical feminists' emphasis on patriarchy and gender has revealed deep structural deficiencies in solving women's problems in the context of human rights. The first World Conference on Women was held in Mexico City in 1975 but, after the early 1990s, significant progress has been observed in the development of women's rights and gender issues compared to previous periods. The 1993 Vienna Declaration stated the rights of women and girls are

²⁵⁸ Kneecobe, "Women Within the Refugee," 28. ; Freedman, Gendering, 84-85.

²⁵⁹ Kneecobe, "Women Within the Refugee," 25-26.

an integral, indivisible and part of human rights and expressed the elimination of all forms of discrimination based on sex.²⁶⁰ In the same year, the UN General Assembly adopted the "Declaration on the Elimination of Violence Against Women" emphasizing the women should be treated in accordance with equality, liberty, integrity and dignity.²⁶¹

In 1995 Beijing Declaration, the UN adopted its policy of promoting gender equality in various fields (such as: education, health, environment, economy, media, institutional mechanisms and decision-making processes, armed conflicts, and women's human rights.) aimed to integrate all decision and implementation processes with gender-sensitive norms. Concordantly, the goal of gender equality has commenced to be integrated in every policy of the institution and the norm of gender equality has begun to affect the policies of all UN organs.²⁶²

The gender policies of the United Nations also have some very important outputs for asylum-seeking women. The UN Resolution 1325, signed by the Security Council in 2000, can be regarded as an important step taken in terms of the relationality of women and armed conflict, especially in the context of gender.²⁶³ The document mentioned the situation of women during and after armed conflicts, referring to the obligation of states to protect women taking into account the gender-based needs during wartime, to recognize that women and girls are affected by the war, to protect them from gender-based violence and punish the acts of violence. The Resolution was criticized because it interpreted women from a gendered perception of the protector/protected by referring traditional gender roles of women by focusing on their

²⁶⁰ The 1993 Vienna Declaration Article No.18.

²⁶¹ UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, <https://www.refworld.org/docid/3b00f25d2c.html>

²⁶² Aksoy, "Toplumsal Cinsiyet," 77-79.

²⁶³ Following the UN Security Council Resolution 1325; UNSC has continued to make decisions in the context of women and armed conflict in various years. For example; Resolution 1820 of 2008 focuses on the use of sexual violence in conflict as a war strategy, while Resolution 2106 of 2013 focuses on issues related to punishment of offenders and provision of services to victims in relation to sexual violence. Finally, the Decision numbered 2122 of 2013 places women's economic empowerment and gender equality at the center of international "peace and security" and includes effective measures to integrate women into peace-building and conflict prevention processes. **See:** Aksoy, "Toplumsal Cinsiyet," 81.

motherhood and put an emphasis only on states, leaving out non-state agents, especially militia forces and terrorist organizations threatening women's security.²⁶⁴

3.4.2. The UN Convention for the Elimination of All Forms of Discrimination against Women and Its General Recommendation No. 32

The UN Convention for the Elimination of All Forms of Discrimination Against Women^{265 266} is accepted as the international declaration of rights for women and is practiced as another fundamental international legal document that protects the rights of women refugees.²⁶⁷ CEDAW defines discrimination against women as "*...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*"²⁶⁸ CEDAW requires states parties to take all measures to eliminate gender inequalities and end discrimination.²⁶⁹

In 1993, the UN issued the Declaration on the Elimination of Violence against Women²⁷⁰ that clearly defines "*...violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women...*"²⁷¹ and further describes the forms of gender-based violence without limitation and regardless of occurring within public or private.²⁷²

Although the UN Universal Declaration of Human Rights is a convention prepared for the protection of the rights of all people, the violation of women's rights in all areas and the discrimination against them were so widespread and systematic that the UN realized that this convention was insufficient to protect women's rights and prepared

²⁶⁴ Gizem B. Aytaç, "Feminist Yaklaşım Çerçevesinde İnsan Güvenliği: Sivil Toplum Gözüyle Irak Örneği," Marmara Üniversitesi Kadın ve Toplumsal Cinsiyet Araştırmaları Dergisi 2, no.1 (2018):21, DOI: 10.26695/mukatcad.2018.12

²⁶⁵ The UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol.1249, p.13.

²⁶⁶ Hereinafter "CEDAW"

²⁶⁷ Foulkes, "Report on the Legal Rights," 11.

²⁶⁸ CEDAW Article No. 1.

²⁶⁹ CEDAW Article No.5(a).

²⁷⁰ Hereinafter "DEVAW"

²⁷¹ DEDAW Article No. 1.

²⁷² DEDAW Article No. 2.

CEDAW. Berkday attributes the formation of CEDAW to gender sensitivity.²⁷³ The reason that led the UN to prepare this convention was the inequalities and discriminatory practices between women and men in almost every country. CEDAW is a very important breakthrough for liberal feminists in the context of gender equality.

In 2014, the Executive Committee of CEDAW issued a General Recommendation No.32²⁷⁴ that spells out the gender-related aspect of refugee status and asylum seeking women. The CEDAW Recommendation No. 32 recommends “*States parties should interpret the definition of a refugee in the 1951 Convention... in line with obligations of non-discrimination and equality; fully integrate a gender-sensitive approach while interpreting all legally recognized grounds;... use gender as a factor in recognizing membership of a particular social group for purposes of granting refugee status under the 1951 Convention and further introduce other grounds of persecution, namely sex and/or gender, into national legislation and policies relating to refugees and asylum seekers*” Although CEDAW Recommendation No. 32 is a non-binding instrument, it is still an important guidance specifically targeting refugee women.

3.4.3. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime²⁷⁵

As many asylum seeking women are in risk of being a victim of human trafficking in their journeys, this Protocol is an effective international instrument that addresses the issue and ensure to take action in order to prevent and combat trafficking, specifically indicating the situation of women and children. It obliges state parties to adjust legislative and other precautions for protection of victims of trafficking in persons. These measures include counselling in the language that the victim understands; medical, psychological and material assistance, the physical safety while considering the age, gender and special needs of victims of trafficking in persons and protect them from revictimization.²⁷⁶ Each state party shall take measures for the

²⁷³ Berkday, “Feminist Teoride Açılımlar,” 6.

²⁷⁴ The UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 32 on the Gender-related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, 5 November 2014, CEDAW/C/GC/32, para. 38.

²⁷⁵ Adopted by General Assembly Resolution 55/25 of 15 November 2000 and entered into force on December 25, 2003. As of May 2020, it has been ratified by 176 parties.

²⁷⁶ Protocol to Prevent Human Trafficking Article No. 6

training for the immigration personnels in combatting with trafficking in persons and take into account the gender-sensitive issues.²⁷⁷

3.4.4. Gender-Sensitive Evolution within the UNHCR Regulations and Practice

The United Nations High Commissioner for Refugees²⁷⁸ was established²⁷⁹ in 1950 as a global institution missioned with coordinating international actions to protect the rights and well-being of refugees.²⁸⁰ The UNHCR is presently tasked with providing international protection to refugees on a non-political and humanitarian basis and seeking durable solutions for them in the field as well as contributing to the evolution of asylum law and practice.²⁸¹

UNHCR's policies regarding women asylum seekers, which have developed over the last 35 years, basically started with the examination of the problems of women asylum seekers and continued with the application of gender norms in all aspects of the asylum regime. In addition to providing humanitarian aid, improving the situation of women in refugee camps, ensuring women's access to services in the countries they live in, the UNHCR also contributes to refugee law. Also taking into account the vulnerable situations of some women refugees in risk of human trafficking and sexual violence, the guiding principles of the UNHCR had been published on the evaluation of women's international protection demands in the context of the Convention, led to many international and national developments. Considering that half of the refugee population is women, the strategies developed by the UNHCR on gender should be considered as very important innovations for the development of the asylum regime as a whole and particularly for the gender-sensitive asylum law.

From the UNHCR's establishment until to the CEDAW's adaptation, the policies of the institution were assumed to be gender neutral. Therefore, relevant with feminist liberal theory based on the principle of concrete equality, the programs did not differentiate between men and women. As parallel with the global developments supported by radical feminists on the women's rights, gender issues became visible in

²⁷⁷ Protocol to Prevent Human Trafficking Article No. 9

²⁷⁸ Hereinafter " the UNHCR "

²⁷⁹ The UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V)

²⁸⁰ Foulkes, "Report on the Legal Rights," 10.

²⁸¹ Islam, "The Origin," 19.

the UNHCR policies. The institutions' scheme regarding female asylum seekers has progressed in chronological context, starting with protection measures that perceive asylum seeking women vulnerable, following through to analysis of gender roles and gender equality, and finally transforming to acknowledging the age, gender and diversity aspects of migration.²⁸² The notable thing here is, the evolution of feminism's focal issues and UNHCR's awareness of gender equality went parallel with each other.

Since 1985, the UNHCR has started to approach the special protection needs of women refugees regularly. In its Conclusion No. 39 the UNHCR Executive Committee²⁸³ agreed upon that States "*are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to... the social mores of the society in which they live may be considered as a 'particular social group.'*"²⁸⁴

In fact, in the early years of 1990s, the focus was still on women, not on gender. The policies were made in the context of traditional roles, considering women as persons to be protected, especially in times of war and conflict.²⁸⁵ In 1991, the UNHCR issued "*Guidelines on Protection of Refugee Women*" aiming protect refugee women by addressing their problems. In 1992, it launched the People Oriented Training Program focusing on different socio-economic roles of women and men.²⁸⁶ The 1993 ExCom Conclusion titled "Protection of Refugees and Sexual Violence" was the first that put clear emphasis on the rights of refugee women in the human rights framework.²⁸⁷ The Conclusion urged for: new protection policies for refugee women; the recognition of women's claims of sexual violence within the meaning of 'fear of persecution' in the refugee definition; considering the experiences of women may be different from men's; paying special attention to refugee status determination for asylum seekers who have faced sexual violence.²⁸⁸ In 1996, in its Resolution 79, the ExCom recalled the

²⁸² UNHCR, From 1975 to 2013: UNHCR's Gender Equality Chronology, 3 July 2013, <https://www.refworld.org/docid/53a2a5f54.html> Accessed 25.04.2021.

²⁸³ Hereinafter " ExCom "

²⁸⁴ A year earlier the European Parliament featured a similar provision. See: European Parliament, Resolution on the Application of the Geneva Convention Relating to the Status of Refugees, 1984 O.J. (C 127)

²⁸⁵ Alice Edwards, "Age and gender dimensions in international refugee law," in *Refugee protection in international law UNHCR's global consultations on international protection*, ed. E. Feller and F. Nicholson (Cambridge: Cambridge University Press,2003), 52.

²⁸⁶ UNHCR, "From 1975 to 2013," 4.

²⁸⁷ Kneecobe, "Women Within the Refugee," 15.

²⁸⁸ Aksoy, "Toplumsal Cinsiyet," 119.

governments to support their efforts to develop guidelines in response to persecution of women.²⁸⁹

Towards the end of the 90's, the UNHCR started to take the concepts of 'gender analysis' and 'gender equality' into its agenda. In 1998, it improved a Strategy to Extend Gender Equality into UNHCR's Protection and Programs aiming to eliminate the discrimination between men and women, including the personnel of the institution, to create a gender sensitive culture and to bolster the participation of women in the solution of problems.²⁹⁰

Despite of important developments that the UNHCR received in this period, these strategies on women asylum seekers received various criticisms from the international community and post-modern feminists. Many argued that the strategies developed by the institution for women asylum seekers only essentialize the differences between sexes in a very basic assumption that ignores the ethnicity factor as well as the social and cultural structure asylum seekers live in. In line with the criticisms contributed for progress, in 2002, the Guidelines on Gender-related Persecution²⁹¹ was published emphasizing certain elements of the Convention, in particular the international protection status, should be interpreted and evaluated through a gender-sensitive manner. Further, the Guideline emphasized that the laws or traditional practices of some states may have the characteristics of persecution that should be taken into consideration for gaining the status of refugee for women asylum seekers.²⁹² Furthermore, if there are discriminatory laws or if the regulations that are neutral on paper are applied disproportionately in relation to gender, or the state do not fulfill its obligation to protect, this should also be interpreted as the existence of a justifiable fear of persecution.²⁹³

It should be borne in mind that, not every application for international protection of women asylum seeker may be due to sex or gender-related violation. However, in many cases, the gender of the applicant is an important factor.²⁹⁴ Therefore, while

²⁸⁹ UNHCR, "From 1975 to 2013," 5.

²⁹⁰ *Ibid.*, 5.

²⁹¹ UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution*.

²⁹² *Ibid.*, par 10.

²⁹³ *Ibid.*, par 11.

²⁹⁴ *Ibid.*

determining the status of refugee women, it is important to make a gender analysis of their claims and to associate the causes and justifications of the persecution with gender aspect so that women do not lose their rights. On the other hand, the necessity of a gender sensitive interpretation of the Convention does not mean that every female applicant will automatically obtain refugee status.²⁹⁵ Since gender is not accepted as a cause of persecution in the Convention, a woman claiming status must “show that she has a well-founded fear of persecution because of her race, religion, nationality, membership of a particular social group or political opinion”.²⁹⁶ Pursuant to the guide, the decision process of refugee status should be evaluated from a holistic perspective and generalizations regarding gender roles should be avoided. A comprehensive approach should be made, including reviewing the specifics of the concrete case, the personality traits, background and personal experiences of the asylum seeker, as well as the historical, geographical and cultural specific conditions of the country of origin.²⁹⁷

Another important text published in 2002 was “Guidelines on Membership of a Particular Social Group”²⁹⁸ stating that gender could be interpreted within the category of “membership to a certain social group” in refugee definition of the 1951 Geneva Convention. According to the guide, people in a particular social group share a common feature apart from the risk of being persecuted, and this distinguishes them from others. The trait will usually be one that is innate, unalterable, or essential to human dignity.

In 2008, the UNHCR published the Handbook for the Protection of Women and Girls²⁹⁹ arranging legal standards that guide the protection of refugee women and girls. There are other important guidelines issued by the UNHCR regarding gender dimension of asylum regime. These are: Guidelines for Prevention and Response to SGBV against Refugees, Returnees and Internally Displaced Persons (2003); Guidelines relating to Victims of Trafficking and Persons at Risk of Being Trafficked (2006); Guidelines on Refugee Claims relating to Female Genital Mutilation (2009); Guidelines on Child

²⁹⁵ Ibid., 2.

²⁹⁶ Ibid., par 2.

²⁹⁷ Ibid., par 7.

²⁹⁸ 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> Accessed 27.04.2022.

²⁹⁹ UNHCR, *Handbook for the Protection of Women and Girls*, January 2008, <https://www.refworld.org/docid/47cfc2962.html> Accessed 27.04.2022.

Asylum Claims detailing the special circumstances of asylum-seeking children; Guidelines on ‘Claims to refugee status based on sexual orientation and/or gender identity’; Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action requiring the actors should start from the assumption that gender-based violence occurred and take action without seeking concrete evidence.³⁰⁰

The Guidelines of the UNHCR underlines that the definition of a refugee in the 1951 Geneva Convention should cover allegations of gender-related persecution, if “properly interpreted,” and thus there is no need to amend the Convention and add new persecution grounds. In addition, the claims of gender-based persecution of women refugees can be considered within the broad interpretation of the “membership of a particular social group” criterion. However, there have been ongoing debates on whether sex or gender should be included in the definition of a refugee as a sixth ground. According to some experts, there is no need to amend the agreement because the consciousness of progress has already gone beyond simply adding a word.³⁰¹ On the other side, experts signify that claims arising from gender-based persecution are still denied by national immigration officers or judges.³⁰² In this context, they argue that if sex or gender is included as a category, it will be binding for states and will prevent many problems faced by women refugees.³⁰³

Although the UNHCR provides advice and legal interpretive guidance, it does not have any force on the way the Convention is applied at the national state level.³⁰⁴ Still, there are no barriers for states to enact gender-sensitive asylum laws or even include gender as a cause of persecution.³⁰⁵ Moreover, the guidelines of UNHCR are not binding texts at the level of international law because they are not included in the Convention and the UNHCR lacks of a judicial mandate, it is more of an institution

³⁰⁰ Rosamund Shreeves, *Briefing: Gender aspects of migration and asylum in the EU: An overview*. European Parliamentary Research Service (March, 2016):7, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/579072/EPRS_BRI\(2016\)579072_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/579072/EPRS_BRI(2016)579072_EN.pdf). Accessed 23.04.2022.

³⁰¹ Arbel, *Gender in refugee law*, 4.

³⁰² Freedman, *Gendering*, 76.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ Canada, USA, Norway, South Africa, Australia, England, Netherlands, are the countries adjusted gender sensitive regulations in their domestic refugee law. In addition, Ireland, South Africa, Venezuela and Panama, have regulated gender, gender and / or sexual orientation as a direct reason for seeking refugee status. **See:** Edwards, “Age and gender,” 55-56.

responsible for the policy-making and implementing, it cannot enforce states to follow the rules or penalize in case of a violation. States continue to retain their absolute national sovereignty arising from the asylum law, and they can often act against the rules of international law without a legal punishment. On the other hand, the guidelines of the UNHCR on gender still are very important signifiers of an evolution. These guidelines address gender-based persecution and attempt to explain what does it mean as well as recommend states to make asylum assessments in this direction by taking refugee's concerns seriously.³⁰⁶ These guides have looked at the problems that different approaches of feminist theories have focused on and have touched on different issues to find solutions to them.

3.5. THE EVOLUTION OF THE REGIONAL REFUGEE LAW THROUGH GENDER LENS

Apart from the 1951 Geneva Convention at the international level, different regional legal texts have been prepared to resolve the issue by taking into account the conditions of their own region. Below, the legal texts regarding refugees in Africa, Asia and America will be briefly discussed in terms of gender. Then, the legal texts on refugees in the European continent will be examined in more detail in terms of gender.

3.5.1. The Regional Legal Texts Regarding Refugees in Africa, America and Asia in Terms Gender

The OAU Convention on the Specific Aspects of Refugee Problems in Africa is also based on the 1951 Geneva Convention, but it expands the scope.³⁰⁷ From the gender perspective, the African Convention covers gender-based persecution more comprehensively than the 1951 Geneva Convention by including the grounds of civil wars and extensive violence which are the circumstances that many asylum seeking women flee from.³⁰⁸

³⁰⁶ Arbel, *Gender in refugee law*, 4.

³⁰⁷ The OAU Convention on the Specific Aspects of Refugee Problems in Africa Article No.1 (2) : "...any person compelled to leave his or her country because of "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his [or her] country of origin or nationality."

³⁰⁸ UNHCR, *A guide to international refugee*, 19.

The Cartagena Declaration of America has a wider coverage of the definition than 1951 Convention emphasizing on human rights violations stemming from the activities of military regimes that commonly seen in the continent. The Declaration expand the definition of refugee by including "... persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."³⁰⁹

The Bangkok Principles on the Status and Treatment of Refugees³¹⁰ of Asia broadens the reasons for persecution in the refugee definition by expressly adding the wording of "gender" so as not to leave room for interpretation. According to the Bangkok Principles "*A refugee is a person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group.*"³¹¹

3.5.2. The Regional Legal Texts Regarding Refugees in Europe in Terms of Gender

Among the most effective regional structures, two organizations established in the European continent stand out. The first is the Council of Europe aims to subject democracy and human rights above the states in the European region. Another organization that allows the formation of a common opinion for the continuation of regional stability and prosperity by political, economic and legal unity in Europe under the control of a supranational structure is the European Union. The arrangements made by these two organizations have made valuable contributions to international human rights and led the member states to strengthen their national laws on the basis of human rights. The most comprehensive regional developments have been achieved in Europe also in the context of international protection regime.³¹²

Europe is one of the most popular asylum destinations for many refugees around the world. According to EU 2021 data, 230,500 asylum applications from 140 countries were made to the region, and 257,000 of them were granted protection in various

³⁰⁹ The Cartagena Declaration of America Chapter 3, Recital 3. Most of the Central and South American countries have adopted this definition into their national laws.

³¹⁰ Adopted by the Asia-Africa Legal Advisory Organization in 2001.

³¹¹ Bangkok Principles on the Status and Treatment of Refugees Article No. 1

³¹² UNHCR, *A guide to international refugee*, 22.

statuses.³¹³ In the same year, 69.1% of those who applied for asylum were men and 30.9% were women.³¹⁴

3.5.2.1. The Council of Europe

The Council of Europe is a regional political organization consisting of 46 member states³¹⁵ aiming to institutionalize norms based on universal values in Europe. It was founded in order to uphold human rights, democracy and the rule of law and aims at the domination of a European Law in its region through the agreements to be created with the participation and negotiations of the member states. The Council of Europe is far ahead of other regional political organizations in the world and has been able to put into practice a political-legal structure that can serve as a role model.

3.5.2.1.a. The European Convention on Human Rights

The European Convention on Human Rights³¹⁶ is another important reference in the field of human rights after the United Nations Universal Declaration of Human Rights. The ECHR is an important legal instrument for liberal feminists as it advocates the equality of all people without any discrimination. The ECHR underlines that sex cannot cause discrimination in any way³¹⁷ and all people are equal before the law and have the right to equal protection by the law.³¹⁸

Although there is no direct article on the "right of asylum" in the ECHR, it secures a wider scope of application area for asylum seekers than the 1951 Geneva Convention.³¹⁹ Contrary to strict requirements of the 1951 Convention, neither the refugee definition nor the principle of non-refoulement in the ECHR is subject to any restrictions. Firstly, the ECHR does not require "being outside of the country" or "lack

³¹³ European Commission, Statistics on Migration to Europe, https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#:~:text=Refugees%20in%20Europe,-Based%20on%20data&text=26.6%20million%20refugees%20in%20mid.at%20the%20end%20of%202020. Accessed 21.05.2022.

³¹⁴ Eurostat, Annual asylum statistics, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558181#Age_and_sex_of_first-time_applicants. Accessed 21.05.2022.

³¹⁵ The Russian Federation was excluded from the Council in March 2022.

³¹⁶ Hereinafter "the ECHR"

³¹⁷ The ECHR Article No. 14

³¹⁸ The ECHR Protocol No. 12 Article No. 1

³¹⁹ Neslihan Özkerim Güner, "Avrupa İnsan Hakları Mahkemesi'nin Mültecilerin Haklarının Korunmasındaki Rolü," *Göç Araştırmaları Dergisi* 2, no.2 (July,2016): 212).

of state protection”. Secondly, while the 1951 Geneva Convention limits the grounds for fear of persecution, the ECHR provides protection to a person who will be subjected to inhumane treatment regardless of the cause of the fear.³²⁰

Certain articles of the ECHR are particularly important for asylum seekers to benefit from protection. In case of violation of these rights, an application is made to the European Court of Human Rights.³²¹ The articles related with the rights of asylum-seekers in the ECHR are: “right to life” (Article 2), “Prohibition of torture” (Article 3), “Right to liberty and security” (Article 5), “right to respect for private and family life” (Article 8). “right to effective remedy” (Article 13), “prohibition of discrimination” (Article 14); as well as Article 4 of Protocol No. 4 to the Convention on the “Prohibition of collective expulsion of aliens”; Article 1 of Protocol No. 7 to the Convention on “procedural safeguards relating to expulsion of aliens”. The strongest organ of the Council of Europe is the European Court of Human Rights enforces the ECHR and it is considered as an efficient institution in the protection of the rights of asylum seekers, especially with the decisions made within the purview of the above-mentioned articles. Moreover, the Court creates a wider field of application than the 1951 Convention by examining the provisions of other treaties to which the Contracting States are parties.³²²

Especially the Article 3 of the ECHR regulating the ‘prohibition of torture’³²³ is related to the principle of non-refoulement and provides effective protection for women asylum seekers. The ECtHR states that if the asylum-seeker is returned to a country in where it is at least probable that he/she will be subjected to torture, ill-treatment or inhuman treatment, and then it decides that state parties should not return the asylum-seeker and protect them from a possible risk.^{324 325}

³²⁰ Ibid., 214-15.

³²¹ Hereinafter “ the ECtHR ”

³²² Güner, “Avrupa İnsan Hakları Mahkemesi,” 214.

³²³ The ECHR Article No. 3; “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*”.

³²⁴ Güner, “Avrupa İnsan Hakları Mahkemesi,” 220.

³²⁵ For detailed information on the jurisprudence of gender-related claims of the asylum seekers **See:** Lourdes Peroni, “The protection of women asylum seekers under the European Convention on Human Rights: unearthing the gendered roots of harm,” *Human Rights Law Review* 18, no.2 (2018): 347-370.

3.5.2.1.b. The Council of Europe Convention on Action Against Trafficking in Human Beings³²⁶

The risk of being a victim of human trafficking is another aspect of the asylum process. Many women may experience exploitation and abuse during their travels or after arriving in their country of asylum and a fear of persecution may be emerged related to this reason. Likewise, being returned to a place where he/she is a victim of human trafficking is considered a violation of Article 4 (prohibition of slavery and forced labor) and Article 2 (right to life) of the ECHR.³²⁷

The Council of Europe issued the Convention on Action Against Trafficking in Human Beings that imposes obligations on all Contracting states parties to prevent and combat trafficking in human beings in a nondiscriminatory manner taking gender equality into account, to use gender mainstreaming through the policies, and to identify victims in a process with a consideration of the special circumstance of women and child victims.

3.5.2.1.c. The Council of Europe Convention on the Prevention and Combating of Violence against Women and Domestic Violence

The “Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence”³²⁸ signed in Istanbul in 2011 provides a clear definition of what gender-based violence and domestic violence mean. It sets legally binding principles and preventive/protective minimum standards to prevent and combat violence against women.³²⁹ It aims to build mechanism to ensure its effective implementation by States Parties.³³⁰ Unlike other conventions and international regulations, the Istanbul Convention also comprises girls under the age of 18 in the definition of women.³³¹

³²⁶ Europe Convention on Action Against Trafficking in Human Beings, 2005, www.coe.int/en/web/anti-human-trafficking/about-the-convention.) Ratified by 47 States.

³²⁷ *Rantsev v. Cyprus and Russia (Application No. 25965/04 (2010))*, <http://hudoc.echr.coe.int/eng?i=001-96549>) See: Louise Hooper, *Gender-Based Asylum Claims And Non-Refoulement: Articles 60 And 61 Of The Istanbul Convention*, The Council of Europe, (December 2019): 14.

³²⁸ Hereinafter the “ Istanbul Convention ”

³²⁹ Hooper, “*Gender-Based Asylum Claims*,” 7.

³³⁰ The Istanbul Convention also establishes a special monitoring called GREVIO which publishes the evaluation assessments of states parties if they comply with their Convention obligations.

³³¹ Istanbul Convention Article No. 3/f.

Articles 33 to 40 of the Istanbul Convention provide a guide to the sorts of harm that may constitute persecution, which should be regarded as “gender-based violence”. The Convention covers the most common offences - but does not count them as numerous clauses (not limited) - such as psychological, physical, sexual violence, forced marriage, female genital mutilation, forced abortion and forced sterilization, sexual harassment as forms of gender-based persecution. All these forms of mistreatments envisaged by the Convention must be recognized by the states as persecution in any case of the relationship between the victim and the perpetrator³³², and without of any justification stemmed from culture, tradition or so-called "honor".^{333 334} The Istanbul Convention is a text that can meet many expectations of feminists from all approaches. Its emphasis on domestic violence and gender is the success of radical feminists while the comprehensive content of the text covering different aspects of the problems women facing is the reflection of post-modern feminist understanding.

Created as an instrument to prevent and combat all forms of violence against women, Istanbul Convention requires that “*protection must be provided to women without discrimination on any grounds, including 'migrant or refugee status, or other status'*”³³⁵ and contains two particular articles (60 and 61) relating to asylum-seeking and refugee women.³³⁶ These articles contain clear provisions for refugee women who claim refugee status due to gender-based persecution.

According to the article 60, “*State Parties shall take necessary legislative or other measures to ensure;*

1. ... that ***gender-based violence against women may be recognized 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.***
2. ... that a ***gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.***

³³² Istanbul Convention Article No. 43

³³³ Istanbul Convention Article No. 42

³³⁴ Hooper, “*Gender-Based Asylum Claims,*” 14.

³³⁵ Istanbul Convention Article No. 4/3

³³⁶ Hooper, “*Gender-Based Asylum Claims,*” 5; Shreeves, “*Briefing: Gender aspects,*” 7.

3. ... to develop *gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.*”

The first paragraph clearly articulates considering gender-based violence as a cause of persecution within the framework of Article 1A(2) of the Geneva Convention and as a form of serious harm that requires complementary/secondary protection. The second paragraph underlines the importance of interpreting each of the grounds of persecution exhausted in the 1951 Convention in a gender-sensitive manner. A gender-sensitive interpretation means accepting and recognizing the impact of gender on persecutory behavior.

Pursuant to the Explanatory Report of the Istanbul Convention a gender-sensitive interpretation of the grounds necessitates the consideration of the experience of persecution from many aspects. Persecution on the grounds of political opinion can involve violations stemming from opposing traditional gender roles assigned by society. For example, their attitudes towards divorce, relationships, sexual behavior; defiance to prescribed rules such as certain dress codes or discriminatory laws should be viewed as political presence rather than ‘personal’ issues of choice.³³⁷ With regard to persecution on the basis of race or nationality particular types of persecution may occur that specifically affect women. For example, sexual violence and reproductive control in cases of racial and ethnic cleansing³³⁸ or inability to transfer her citizenship to her child can also be considered as ill-treatment³³⁹. Regarding persecution on the basis of religion women may be subject to violation because they do not abide by religious rules. The examples of these kinds of violations are: honor killings, being perceived as committing a crime called adultery; wearing or not wearing veils; being an LGBTI who is considered to be unreligious.^{340 341}

³³⁷ Istanbul Convention Explanatory Report, par. 313. ; Hooper, “*Gender-Based Asylum Claims*,” 29.

³³⁸ Istanbul Convention Explanatory Report, par.313.

³³⁹ Hooper, “*Gender-Based Asylum Claims*,” 30.

³⁴⁰ Hooper, “*Gender-Based Asylum Claims*,” 31. ; Istanbul Convention Explanatory Report par. 313.

³⁴¹ Istanbul Convention Explanatory Report, par. 313 also expresses, Parties may, if they wish, extend their gender-sensitive interpretations of the grounds of Geneva Convention by including LGBTI individuals who are subject to gender-related coercion and violence. It can be said that leaving the issue of persecution to LGBTI persons to the discretion of the states' parties is a major deficiency for a very far-sighted Convention.

The provisions of the third paragraph are planned to reduce the risk of further violence against women and girls during the asylum process.³⁴² It requires obligations to arrange gender-sensitive asylum procedures, support services and reception conditions, taking into account differences in experience and special protection needs between men and women.³⁴³ Since many women refugees may be vulnerable due to the exploitation they are exposed to, support services should be provided to meet their special needs.³⁴⁴ The article also advises to develop and implement gender guidelines that are sensitive to cultural and religious sentiments or individual circumstances as well as awareness of trauma.³⁴⁵

Moreover, the paragraph stipulates gender-sensitive asylum determining process including informing women on asylum procedures; providing the opportunity for women to have a personal interview without the company of other family members; enabling separate applications for international protection by giving women the opportunity to independently voice their protection needs and gender-related reasons; the determination of international protection in the light of gender-related guidelines. Moreover, the provision comprises gender-sensitive interviews conducted by same sex interviewer and translator while respecting the confidentiality of the information obtained during the interviews.³⁴⁶ The fact that women can make their international protection claims independently of the male members of the family can be stated as the contribution of liberal feminism, which advocates the right to self-determination.

According to the Article 61 (2):

*“Parties shall take the necessary legislative or other measures to ensure that victims of violence against women ... regardless of their status or residence, **shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.**”*

In accordance with the provisions of principle of non-refoulement of the 1951 Geneva Convention and the prohibition of torture of the ECHR, states will not return or expel any asylum seeker to any country where his/her life or freedom is in danger or to

³⁴² Hooper, “*Gender-Based Asylum Claims*,” 32.

³⁴³ Istanbul Convention Explanatory Report, par. 314.

³⁴⁴ Ibid., par. 315.

³⁴⁵ Ibid., par. 316.

³⁴⁶ Ibid., par.316.

a place where they may be subjected to torture, inhuman or degrading treatment or punishment.³⁴⁷ The article 61 (2) of the Istanbul Convention strengthens the obligation to take legal measures to ensure that victims of gender-based violence- even if their refugee claim is denied - are not, under any circumstances, returned to a place where there is a risk of death or torture. Additionally, it is vital to evaluate individual circumstances of each asylum seeking women in the case of removal to 'third safe country'. This can be particularly important if: they are fleeing from an abusive husband, partner or other family member; when they are exposed to domestic violence; they should not be sent back to countries that do not have an effective gender-based asylum procedure in the asylum process.³⁴⁸

In summary, the Istanbul Convention strengthens existing international protection frameworks for refugee women. The details provided in the Explanatory Report to the Convention provide guidance for comprehending the essence and impact of gender-based violence. The relevant articles demand that states recognize gender-based violence as a form of persecution and to read asylum claims in a gender-sensitive attitude. It also envisages gender-sensitive admission measures in order to prevent the danger of further damage to women during asylum and to freely voice their asylum claims.³⁴⁹

3.5.2.2. The European Union

The European Union³⁵⁰ is a union of 27 member states that come together under the common EU law system (*acquis communautaire*) in specific policy fields in which regulated by directives and decisions of the EU Court. The EU member countries are one of the top asylum destinations in the world. Of the 535 000 people who applied for asylum in Europe in 2021, 30.9% were women.³⁵¹

Both the EU asylum law and the national asylum laws of the member states are basically based on the 1951 Geneva Convention. Since 1999, the EU has established a

³⁴⁷ Ibid., par.319, par.320.

³⁴⁸ Hooper, “*Gender-Based Asylum Claims*,” 47.

³⁴⁹ Ibid., 47.

³⁵⁰ Hereinafter “the EU”

³⁵¹ Eurostat, Annual asylum statistics, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558844#Age_and_sex_of_first-time_applicants Accessed:10.05.2022.

Common European Asylum System³⁵² to facilitate a collective asylum system for those who seek refuge within the EU territories. CEAS lay down common principles for the equal treatment of asylum seekers in every member state. The system is governed by different instruments which are: **The Qualification Directive**³⁵³ clarifying the grounds for granting international protection; **The Asylum Procedures Directive**³⁵⁴ set out the conditions for asylum decisions and to ensure that refugees with special needs obtain the necessary support; **The Reception Conditions Directive**³⁵⁵ arranging standards for reception conditions; **The Temporary Protection Directive**³⁵⁶ regulating the protection to be provided in the in the cases of mass influx of people in the border.

The developments on gender issues in international asylum law also contributed for the gender aspects of the EU asylum law. Actually, it was the European Parliament that first put forward the recognition of the victims of persecution because of their sex as a particular social group under the terms of the Geneva Convention as a solution in its Resolution as early as 1984. This idea was also supported by the UNHCR and paved the way for the UNHCR Guidelines.³⁵⁷ The EU has adopted regulations that incorporated gender-sensitive elements in its asylum system.³⁵⁸

3.5.2.2.a. The Qualification Directive

The Qualification Directive is the most important asylum law instrument in the EU law, as it details the elements of the refugee definition under the 1951 Geneva Convention.³⁵⁹

The Directive has gender-sensitive provisions that take into account the special needs and experiences of women, girls and LGBTI in respect to the context of persecution and persecutor, the amount of serious harm, the assessment process of international protection, including subsidiary protection and family membership. It is possible to divide the gender sensitive provisions of the Qualification Directive into four main headings. These provisions are about: gender-sensitive evaluation of refugee

³⁵² Hereinafter “CEAS”

³⁵³ Directive 2011/95/EU of the European Parliament and of the Council, 13 December 2011.

³⁵⁴ Directive 2013/32/EU of the European Parliament and of the Council, 26 June 2013.

³⁵⁵ Directive 2013/33/EU of the European Parliament and of the Council, 26 June 2013.

³⁵⁶ Council Directive 2001/55/EC, 20 July 2001.

³⁵⁷ Freedman, *Gendering*, 84.

³⁵⁸ Shreeves, “*Briefing: Gender aspects*,” 8.

³⁵⁹ Foulkes, “*Report on the Legal Rights*,” 12.

status; broad interpretation of family members in the context of gender and culture; gender-sensitive examination of persons to be provided with subsidiary protection; the services to be provided for vulnerable people.

Firstly, the Qualifications Directive clarifies that besides gender, gender identity and sexual orientation, should also be taken into account when defining particular social group.³⁶⁰ In addition, actors of persecution include both state and non-state actors when the authorities are unable to provide protection against persecution or serious harm.³⁶¹ This explicit statement is an important step for the acceptance of gender-related persecution by going beyond the separation between public and private which weakens the efforts to recognize forms of persecution specific to gender, especially the persecutions occurring in domestic sphere by non-state actors.³⁶² This is an important step for radical feminists, as the provision clearly mentions non-state agents as perpetrators of the persecution, thus the persecution took place in the private sphere would be taken into consideration in the refugee determination process.

According to Article 9 (2) : “... *act of persecution within the meaning of Article 1(A) of the Geneva Convention, can inter alia, take the form of:*

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(f) acts of a gender-specific or child-specific nature.”

According to Article 10 (1) that details the elements to be taken into consideration when assessing the reasons for persecution: “*(d) a group shall be considered to form a particular social group where in particular members of that group share an innate characteristic, as well as a distinct identity.....perceived as being different by the surrounding society.*”

Moreover, there is an explicit provision in the same article of the Directive regarding the membership of LGBTI individuals to a particular social group, stating “... *a particular social group might include a group based on a common characteristic of sexual orientation ... Gender related aspects, including gender identity, shall be given due*

³⁶⁰ The Qualification Directive Recital No. 30.

³⁶¹ The Qualification Directive Article No. 7.

³⁶² Freedman, *Gendering*, 141.

consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.”

According to Article 4 (3): *“The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm; and (d) whether the applicant’s activities since leaving the country of origin ... creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country.”*

Article 5(1) mentions that international protection needs may arise sur place- in the place where they presently live-: *“A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.”*

Secondly, within the context of gender-sensitivity, the Directive mentions the need for a broad interpretation of the concept of family membership that takes cognizance of the different factors of dependency and the best interests of the child.³⁶³

Article 2 (j) mentions family members as follows: *“(j) ... the following members of the family ... :*

-the spouse or ... unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals;

-the minor children of the couples regardless of they are married or unmarried;

-the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried;”

Article 23(5) aims to maintain family unity: *“Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time*

³⁶³ The Qualification Directive Recital No. 19.

of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.”

Moreover, Article 23 aims to assure that family unity can be maintained by the member states as a fundamental right.

Thirdly, the Directive aimed to put forth a common standard on the definition and content for the subsidiary protection³⁶⁴ and aims the beneficiaries of subsidiary protection status are given the same rights and benefits that refugees enjoy.³⁶⁵

Article 2(f) gives definition as: “*‘person eligible for subsidiary protection’ means a ... person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm...*”

Article 15 provisions the qualification of subsidiary protection: “*Serious harm consists of: (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.*”

Lastly, the Article 20(3) emphasizes that the services to be provided will take into account the special situation of vulnerable persons by provisioning: “*... 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.*”

The Directive provisions the general rules will be provided by the member states that apply both to refugees and persons eligible for subsidiary protection as follows: family unity, access to accommodation and residence permits, social welfare, healthcare, access to employment, access to education, travel documents and freedom of movement, recognition of qualifications, access to integration facilities.³⁶⁶ The Article

³⁶⁴ The Qualification Directive Recitals No. 33-34.

³⁶⁵ The Qualification Directive Recital No. 39.

³⁶⁶ The Asylum Procedures Directive, Articles No. 20 to 34.

30(2) provisioned gender-sensitive healthcare services shall be provided: “.... *adequate healthcare, to beneficiaries of international protection who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.*”

3.5.2.2.b. The Asylum Procedures Directive

The Asylum Procedures Directive consists of a number of important arrangements regarding the asylum application process that will benefit women and girls, and in particular victims of gender-based violence. The Directive underlines that some asylum seekers may need special procedural safeguards depending on their gender or as a result of being subjected to serious psychological, physical or sexual violence. For this reason, member states should detect those with special needs as soon as possible and exclude them from the accelerated procedure.³⁶⁷

The Member States shall inform asylum seekers that each applicant has the right to make their own, individual, separate application for international protection and to be informed about the consequences of being dependant on the primary applicant.³⁶⁸ In case of dependency, a single decision could be made unless it endangers the dependant's interest, particularly in cases involving gender-based persecution.³⁶⁹

Each dependent shall be given the opportunity of a personal interview without the presence of family members. In order to present their case in a comprehensive manner; member states must provide the interviewing staff should take into account the specific circumstances of the applicant, such as the applicant's culture, gender and sensitivities, and the applicant should be given the opportunity to select interviewers and interpreters of the same gender.³⁷⁰

³⁶⁷ The Asylum Procedures Directive Recitals No. 29 to 32.

³⁶⁸ The Asylum Procedures Directive Articles No. 7 and No. 8.

³⁶⁹ The Asylum Procedures Directive Article No. 11(3).

³⁷⁰ The Asylum Procedures Directive Articles No. 14 and No. 15.

3.5.2.2.c. The Reception Conditions Directive

The Reception Conditions Directive requires female asylum seekers to be detained separate from males³⁷¹; underlines the measures to take into account the specific situations of vulnerable persons³⁷². Vulnerable person is defined as “*pregnant women, single parents with minor children, victims of human trafficking and persons who have been subject to torture, rape or serious sexual violence, including FGM.*”³⁷³ Member States shall procure essential assistance for vulnerable persons.³⁷⁴ The special provisions for victims of torture, rape and other serious acts of violence regulates to provide the necessary medical and psychological care ensuring that the personnel is properly trained.³⁷⁵

3.5.2.2.d. The Temporary Protection Directive

The Temporary Protection Directive was adopted to provide immediate temporary protection in cases of mass influx of displaced persons.³⁷⁶ Some articles of the Temporary Protection can be analyzed through gender dimension.

Article 3 and 17 enable persons under temporary protection to seek international protection status which will grant them permanent rights. Therefore, women and LGBTI refugees may apply for refugee status if they have fear of persecution stemming from the grounds in 1951 Convention.

Article 3(1): “*Temporary protection shall not prejudice recognition of refugee status under the Geneva Convention.*”

Article 17(1): “*Persons enjoying temporary protection must be able to lodge an application for asylum at any time.*”

Article 13(4): “*The Member States shall provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence.*”

³⁷¹ The Reception Conditions Directive Article No. 11.

³⁷² The Reception Conditions Directive Article No. 18.

³⁷³ The Reception Conditions Directive Article No. 21.

³⁷⁴ The Reception Conditions Directive Article No. 19.

³⁷⁵ The Reception Conditions Directive Article No. 25.

³⁷⁶ The Temporary Protection Directive Recitals No. 1, 2, 4.

Article 15 takes into consideration the sociocultural structure of the displaced people under temporary protection and provisions: *“in cases where families already existed in the country of origin and were separated due to circumstances surrounding the mass influx, the following persons shall be considered to be part of a family:*

(a) the spouse of the sponsor or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens; the minor unmarried children;

(b) other close relatives who lived together as part of the family unit at the time of the events leading to the mass influx, and who were wholly or mainly dependent on sponsor at the time.”

In addition to underlying the members of the family unit, the Directive urges member states to ensure family unification with other members of the family who are in need of protection regardless of being present in the EU territory or not and in the cases of extreme hardship.³⁷⁷

Consequently, although the existing key Directives of the common EU Asylum Law are designed to implement the system in a gender-sensitive manner, various sources report that the practice does not yet guarantee stable and gender-sensitive treatments applied in the same way by all member states. On the other hand, albeit the harmonization has not been achieved yet at the level of member state, it would not be wrong to say that steps have been taken at the EU level to include more gender sensitive assessment and procedures. The awareness on this issue which is reflected in the legislation of the union law shows that gender sensitivity is at least achieved in the first step of the EU international protection law.

The 1951 Geneva Convention outlined the boundaries of refugee law in the international arena. However, as discussed in the theory chapter, like the all other law fields, refugee law also was written from a male perspective and women's experiences were excluded. Thanks to the developments in women's rights, positive regulations with respect to gender issue have been made in the field of asylum as well. Despite of promising developments in many countries, the question of whether this "progress experienced in the international arena is applied at the national level in the same way" comes to the fore. As the development of mere legal texts that recognize gender-based

³⁷⁷ The Temporary Protection Directive Article No. 15 (2) & 15 (3).

violence does not guarantee that these rules are also applied by states in practical life, the feminists will carry on their criticisms in order to reach a solid solution. In accordance with this research question, the next chapter is devoted to analysis of Turkish refugee law in the context of gender and the extent to which the international developments examined in this section have been adapted to national law in the case of Turkish refugee law.

4. CHAPTER FOUR: CRITICAL ANALYSIS OF TURKISH REFUGEE LAW FROM FEMINIST PERSPECTIVE

Turkey is located on important transit routes where the continents of Europe, Asia and Africa intersect. This geography has hosted intense migration flows and population movements throughout the history. Based between Eastern countries, where political instability, oppressive regimes, human rights violations and human rights standards are high, for man asylum seekers and refugees, Turkey, has been regarded as the first safe haven, a gateway to Europe, or a shelter for a living.

In this section, first of all, the history of the codification process of the Turkish asylum law will be briefly mentioned, and then the aims and content of the new asylum law will be explained. This law is crucial as it is the first legal framework that comprehensively regulates the rights of migrants and refugees by enriching institutional capacity in line with the EU and international standards.³⁷⁸ In this way, it is aimed to understand the sources and references of the law. In the last part of this section, the sensitivity of Turkish asylum law and related regulations on gender in the context of international protection will be examined. Different international protection statuses, interview phase, special needs ownership, temporary protection and other procedures will be followed and evaluated for differences and similarities with reference texts (Istanbul Convention, the EU law, the UNHCR principles). On the other hand, other issues of the law, such as the admission of asylum seekers, detention center procedures, social cohesion and illegal immigration are issues that will not be mentioned.

³⁷⁸ Derya Aşıkoğlu, “*The Interplay Of External And Domestic Factors: Why The Turkish Government Prepared A Law On Foreigners And International Protection,*” (Master diss., Izmir University Of Economics, 2013), 37.

The first major refugee movement in Turkish Republican era is considered to be the refuge of Jewish artists and scientists during the Second World War.^{379 380} As a result of the events that took place in neighboring countries since the 1980s, the number of people seeking asylum in Turkey has started to increase gradually. During the disintegration of the USSR, the Islamic Revolution in Iran, the Gulf Crisis, the Iran-Iraq War, the Yugoslavian civil war and the Kosovo crisis, the country suffered from intense population influxes.³⁸¹ The military interventions of the USA in Afghanistan and Iraq in the early 2000s caused political problems in these regions. The Syrian Civil War, which has been going on since 2011, and the intense conflict and humanitarian drama in the region have caused millions of Syrians to seek refuge in Turkey. In addition, many asylum seekers from the African region seek international protection in Turkey today. Today, Turkey is the country that hosts the highest number of asylum seekers and refugees in the world.³⁸² According to the authorities' statement, there are 320,000 asylum seekers (mainly coming from Afghanistan, Iran and Iraq)³⁸³ and 3.762,686 million Syrians under temporary protection in Turkey.³⁸⁴ As a result; Turkey, in its geographical location, is faced with intense migration flows and asylum requests from various regions, especially from the East and South, and provides these people with international protection according to its own national legislation.

³⁷⁹ Bülent Çiçekli and Oğuzhan Ömer Demir, *Türkiye Koridorunda Yasadışı Göçmenler* (Ankara: Karınca Yayınları, 2013): 37.

³⁸⁰ Between 1933 and 1945, scientists from Germany and Austria were shunned by Nazi Germany for being Jewish. The total number of those who were prosecuted and took legal refuge in Turkey is around 550. Of these, 40 scientists and 100 people with their families lived in Turkey for less than two years. These academicians provide consultancy services to the state in different fields (professors, institutes, administrator, consultant, lecturer, assistant, research assistant, laboratory assistant). **See:**

<https://encyclopedia.ushmm.org/asset/10363> Accessed: 10.05.2022

³⁸¹ Nuray Ekşi, *Yabancılar ve Uluslararası Koruma Kanunu* (İstanbul: Beta Yayınları, 2014): 2.

³⁸² UNHCR Turkey, Stats, <https://www.unhcr.org/tr/en/unhcr-turkey-stats>

³⁸³ European Council on Refugees and Exiles, Asylum Information Database: Statistics Turkey, <https://asylumineurope.org/reports/country/turkey/statistics/>

³⁸⁴ İsa Tatlıcan, “En yetkili isim açıkladı: İşte mültecilerle ilgili yalanlar ve gerçekler!,” Sabah, May 9, 2022, <https://www.sabah.com.tr/gundem/2022/05/09/goc-idaresi-baskanligi-genel-muduru-gokce-ok-siginmacilar-konusunda-buyuk-bilgi-kirligi-var-1652078766>. Accessed 10.05.2022.

; Fevzi Kızılkoyun, “İçişleri Bakan Yardımcısı tek tek açıkladı! Rakam rakam Türkiye'nin sığınmacıları,” Hürriyet, May 8, 2022, <https://www.hurriyet.com.tr/gundem/icisleri-bakan-yardimcisi-tek-tek-acikladi-rakam-rakam-turkiyenin-siginmacilari-42058226#:~:text=%C3%87atakl%C4%B1'n%C4%B1n%20verdi%C4%9Fi%20bilgilere%20g%C3%B6re,4%20milyon%2082%20bin%20693.&text=S%C4%B1%C4%9F%C4%B1nmac%C4%B1lar%C4%B1n%20i%C3%A7indeki%20ge%C3%A7ici%20koruma%20alt%C4%B1ndaki,3%20milyon%20762%20bin%20686>. Accessed 10.05.2022.

4.1. THE FIRST ERA OF TURKISH REFUGEE LAW

Asylum Law in Turkey is based on the 1951 Geneva Convention on the Legal Status of Refugees. After ratifying the 1951 Convention and joining the 1967 New York Protocol on the Status of Refugees, Turkey did not make a fundamental legal regulation in the field of international protection in its domestic law for a long time.³⁸⁵

The 1994 Regulation on Asylum and Collective Asylum was adopted in order to solve the increasing asylum demands as a result of the security problems in the region in the following years.³⁸⁶ This Regulation only consisted of an administrative adjustment based on the 1951 Convention. Besides, the aforementioned 1951 Refugee Convention only determines the elements of refugee, but does not include the procedural rules regarding the process of obtaining this status or the use of rights related to the status, leaving these issues under the national jurisdiction of the state's parties, revealing it as a legal area in which each state must explicitly regulate the issue by law. In this period, the arrangement of the field of international protection in Turkish law by a regulation that did not provide sufficient assurance to asylum seekers created a wide margin of appreciation left for the administration.³⁸⁷

In fact, carrying out an important issue that directly affects human rights with an undetailed arrangement was also against the Turkish Constitution. Because according to Article 16 of the Turkish Constitution, fundamental rights and freedoms for foreigners can only be limited by law in accordance with international law. In this context, there were legal driving forces for the renovation of the current Turkish asylum legislation. These were; the necessity of a legal regulation on asylum, the conformity of international agreements on all other fundamental rights and freedoms ratified by Turkey, the pressure of the ECtHR decisions against Turkey, efforts to harmonize

³⁸⁵ Turkey accepted the 1951 Geneva Convention by ratifying it in the Grand National Assembly of Turkey with the Law No. 359 on 29 August 1961. Turkey has also preserved its rights with the 1967 Protocol, which it accepted with the Council of Ministers Decision dated 1 July 1968.

³⁸⁶ The Regulation on the Procedures and Principles to be Applied to Foreigners Who Came to Our Border for Asylum and Potential Population Movements with Individual Foreigners Who Have Taken Asylum in Turkey or Requested a Residence Permit from Turkey to Take Asylum in another Country, No. 94/6169 dated 14.9.1994.

³⁸⁷ Lami Bertan Tokuzlu, "Yabancılar ve Uluslararası Koruma Kanun'unun Yasal Belirlilik İlkesi Konusunda Türk Uygulamasına Katkısı Üzerine Bir Değerlendirme," *Uyusmazlık Mahkemesi Dergisi* no. 7 (2016): 1067-68.

Turkish law with the EU *acquis*, as well as the contributions of national and international human rights organizations.³⁸⁸

From a political perspective, the reasons why Turkey did not develop a comprehensive international protection policy for a long time stemmed from the country's geopolitical position and the fear of influx of refugees due to political and economic instability in the surrounding regions. The changing global conjuncture and the effort to integrate the legislation in the EU membership process required Turkey, which was trying to increase its soft power with the aim of becoming a leading state in humanitarian aid both in the region and in the world, supported to make a current and comprehensive regulation on international protection.

In addition to these, although it is not clearly stated in the general rationale of the new immigration law, the pressure to raise international protection standards as a result of the decisions made by the ECtHR against Turkey within the framework of refugee law has also encouraged Turkey to adopt liberal regulations regarding asylum.³⁸⁹ The steps taken by Turkey in the international protection system coincide chronologically with the violation decisions given by the ECtHR against Turkey.³⁹⁰ It is noteworthy that the general justification of the law does not include the large number of judicial decisions rendered against Turkey under the ECHR, which had a significant impact on the drafting process of the Turkish Asylum Law. However, the ECHR and the ECtHR are a part of the EU *acquis* as required by the EU Charter of Fundamental Rights.³⁹¹

Consequently, the Law on Foreigners and International Protection³⁹² (here in after “LFIP”) was accepted as a result of the migration trends concentrated in the geography where Turkey is located, the decisions of the ECtHR against Turkey within

³⁸⁸ Ekşi, *Yabancılar*, 2-3.

³⁸⁹ Tokuzlu, “Yabancılar,” 1065-66. ; For an analysis on the impact of ECHR decisions on LFIP See: Nuray Ekşi, *Yabancılar ve Uluslararası Koruma Kanunu (Tasarısı)* (İstanbul: Beta Yayınları, 2012): 70-73.

³⁹⁰ *Jabari/Turkey*, ECtHR, (App no. 40035/98), 11.07.2000.; *D. ve diğerleri/ Turkey*, ECtHR, (App no. 24245/03), 22.06.2006.; *Mamatkulov ve Askarov/ Turkey*, ECtHR, (App no. 46827/99 ve 46951/99), 06.02.2003.; *Abdolkhani ve Karimnia/ Turkey*, ECtHR, (App no. 30471/08), 22.09.2009. See: Tokuzlu, “Yabancılar,” 1066-67.

³⁹¹ Tokuzlu, “Yabancılar,” 1063.

³⁹² The Law on Foreigners and International Protection numbered 6458 was adopted by the Turkish Grand National Assembly on 04.04.2013 and entered into force on 11.04.2013 after being published in the Official Gazette on 11 April 2013.

the framework of refugee law, and the studies within the scope of the EU harmonization process. Despite the fact that the legal developments on asylum started in 2005³⁹³, the first of the main reasons why the law was adopted only in 2013 was the fact the EU acquis, which is the main inspiration of the law, was also changed in the same period. The second reason was that while the new legal regulations would increase Turkey's obligations regarding refugees and immigrants, Turkey was hesitant to take legal steps due to the tendency of EU policies to shift international protection responsibility to neighboring states.

4.2. THE NEW ERA OF TURKISH REFUGEE LAW – THE LAW OF FOREIGNERS AND INTERNATIONAL PROTECTION

For a long time, the international protection filed was governed by administrative regulatory actions, most of which were inaccessible and had a superficial nature. As explained in its general rationale, the main objectives of drafting the Law are to fill the gaps in the legislation left to the discretion of the administration in the field of foreigners and international protection, and to establish a comprehensive legal basis in line with the human rights standards and the needs of the period, and to provide a transparent legal framework with a normative structure where the balance between freedom and security is preserved.³⁹⁴

The LFIP is the main law regulating foreigners' law, international protection and the organization of immigration administration. Article 1 of the LFIP mentions the purpose of the law as to *“regulate the principles and procedures with regard to foreigners' entry into, stay in and exit from Turkey, and the scope and implementation of the protection to be provided for foreigners who seek protection from Turkey.”*³⁹⁵

³⁹³ In terms of Turkish Asylum Law, the National Action Plan (The National Action Plan of Turkey on the Adoption of the EU Acquis in the Field of Asylum and Migration was accepted by the Council of Ministers and entered into force on 25.03.2005.) was an important milestone in order to harmonize asylum and migration procedures with the EU acquis within the framework of the EU membership process. **See:** Sarp Ergüven and Beyza Özturanlı, “Uluslararası Mülteci Hukuku ve Türkiye,” Ankara Üniversitesi Hukuk Fakültesi Dergisi 62, no.4 (2013): 1029-1031.

³⁹⁴ Tokuzlu, “Yabancılar,” 1067-68. ; General Justification of the LFIP See: <https://www.goc.gov.tr/genel-gerekce18>

³⁹⁵ The LFIP Article No. 1.

The LFIP consists of five parts and 126 articles. In the first part, the purpose and scope of the law and the definitions of some concepts in the text are given. The second part includes the rules regarding the entry of foreigners, types of residence, statelessness and deportation. The third part is devoted to the subject of international protection. Here, the types of international protection, the procedures of application, registration, interview, status determination, decision, legal mechanisms, rights (education, health, labor market) and obligations, temporary protection, and other procedures related to the subject are explained. In the fifth and last part, there are rules regarding the duties and organization of the immigration administration.

In the following years, different regulations related to the LFIP were adopted in line with the implementation of the law and the evolving needs.³⁹⁶ In this study, the provisions of the LFIP and related regulations regarding the acquisition of international protection status will be examined in terms of gender.

4.2.1. The International Protection Regime according to the LFIP

The LFIP did not change the general character of the 1951 Refugee Convention system on international protection. Yet the law regulated the terms and procedures of the asylum application, the examination criteria of the application, the procedures to be considered in the examination, interview, decision and objection, the accommodation opportunity to be provided to the asylum seekers, administrative detention stages are regulated in detail. The education, health, work and social assistance services obtained and provisions for groups with special needs and victims of human trafficking was introduced.³⁹⁷

In addition, in Article 2/2 of the LFIP, it is regulated that provisions of international agreements to which Turkey is party to shall be implemented. Therefore, apart from the 1951 Geneva Convention, the ECHR, the International Convention on Economic, Social and Cultural Rights, the International Convention on Civil and Political Rights and The Optional Protocol, the Convention on the Elimination of All

³⁹⁶ Implementing Regulation On The Law On Foreigners And International Protection, No : 29656, 17.02.2016, https://www.unhcr.org/tr/wp-content/uploads/sites/14/2017/02/implementing_regulation_of_lfip_17_03_2016_eng.pdf & Temporary Protection Regulation No: 6883, 13.10.2014, <https://www.refworld.org/docid/56572fd74.html>

³⁹⁷ General Justification of the LFIP See: <https://www.goc.gov.tr/genel-gerekce18>

Forms of Discrimination and its Optional Protocol, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, The European Convention on Extradition, The UN Convention against Transnational Organized Crime, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence³⁹⁸, are international resources that should be taken into account besides the provisions of the LFIP.³⁹⁹

4.2.2. The Geographical Limitation Reserved by Turkey

Turkey is one of the four countries that are party to the 1951 Geneva Convention with a reservation of geographical restriction.⁴⁰⁰ The types of international protection status specified in the LFIP are also regulated within the framework of geographical restrictions. Therefore, the concepts in Turkey's national asylum legislation differ from the concepts in international asylum legislation. In addition, the EU legislation was also taken into account in regulating the types of international protection specified in the law. According to the LFIP, types of international protection status are classified under three headings. These are: refugee, conditional refugee and subsidiary protection.⁴⁰¹

According to article 61 of the LFIP, “*a person coming from a European country and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion shall be granted **refugee** status.*” The European countries specified in the law are the countries that are members of the Council of Europe.⁴⁰²

Since Turkey has placed a geographical restriction on the 1951 Geneva Convention, persons who have to leave their residence for the same reasons but due to events occurring outside of European countries can only obtain **conditional refugee** status. These persons are allowed to stay in Turkey until they are resettled in a third

³⁹⁸ Turkey has terminated this agreement. This subject will be discussed in detail later on.

³⁹⁹ Neva Öztürk, *Mültecinin Hukuki Statüsünün Belirlenmesi* (İstanbul:Seçkin, 2015): 371. Ekşi, *Yabancılar*, 49-50.

⁴⁰⁰ Other countries applying geographic restrictions to the 1951 Convention are Monaco, Madagascar and Congo. Apart from these four states, the states that ratified the 1951 Geneva Convention with geographical limitation later removed the geographical limitation with the 1967 Protocol.

⁴⁰¹ Before the LFIP, there were only two types of international protection in Turkey's asylum system: the “refugee” status for those who meet the conditions of 1951 Convention and coming from a European country; the “Asylum seeker” status for those who meet the conditions of 1951 Convention but coming from outside of Europe. See: 1994 Regulation Art.3

⁴⁰² The LFIP Art. No. 3/b.

country. However, there is no assurance regarding the resettlement of conditional refugees to safe third countries.⁴⁰³ In this context, conditional refugee is a term created due to the geographical restriction imposed by Turkey.⁴⁰⁴ The ECtHR has not found that Turkey's legal regulation of granting refugee status to those coming from Europe and conditional refugee status to those coming outside of Europe is contrary to human rights.⁴⁰⁵ The Court underlined this distinction is a result of Turkey's asylum policy which was given as an authority to discriminate geographically is based on the 1967 Protocol of the 1951 Geneva Convention.⁴⁰⁶

Subsidiary protection status is a type of protection produced by the development of international law, which is provided to foreigners who are outside the scope of the 1951 Geneva Convention but need to be protected both as an extension of the Convention's principle of non-refoulement and as per the prohibition of torture in international human rights conventions.⁴⁰⁷ This complementary protection is regulated on the basis of the subsidiary protection provision in the EU Qualification Directive.⁴⁰⁸

According to Article 63 of the LFIP regulating subsidiary protection, if a person who cannot be qualified as a refugee or conditional refugee but be granted subsidiary protection because “*if returned to the country of origin would:*

- a) *be sentenced to death or face the execution of the death penalty;*
- b) *face torture or inhuman or degrading treatment or punishment;*
- c) *face serious threat to himself or herself by reason of indiscriminate violence in situations of international or nationwide armed conflict;”* so that cannot be removed.

As a result, the geographical restriction reserved in the LFIP led to the emergence of two separate international protection statuses: refugee and conditional refugee status. In addition, subsidiary protection has been added to the law as a new

⁴⁰³ Balay Sütüoğlu, “Uluslararası Mülteci Hukukundaki Gelişmeler Işığında Türkiye Örneğinin Değerlendirilmesi,” (Master diss., İstanbul Üniversitesi, 2019),138.

⁴⁰⁴ Neşe Baran Çelik, “Türk Hukukunda Uluslararası Koruma Başvurusunda Bulunan veya Uluslararası Korumadan Yararlanan Yabancıların Hak ve Yükümlülükleri,” İnönü Üniversitesi Hukuk Fakültesi Dergisi 6, no.3 (2015): 67-148.

⁴⁰⁵ Ekşi, *Yabancılar*, 154.

⁴⁰⁶ In terms of international law, there is no obstacle for Turkey to categorize asylum seekers as refugees/conditional refugees according to the geographical area they come from. This is the case with the ECtHR *AG and Others v Turkey* (App.No: 40229/98, Strasbourg 15 June 1999).

⁴⁰⁷ Ekşi, *Yabancılar*, 48-49.

⁴⁰⁸ The EU Qualification Directive Article No. 15.

type of protection in order to comply with current international legal standards and the EU legislation. There are some differences in terms of the rights and obligations of the three protection statuses mentioned. First of all, the conditional refugee will stay in Turkey until they are resettled in a third country, while there is no such temporary situation for refugees and subsidiary protection status holders. In addition, conditional refugees and subsidiary protection status holders are under the obligation to reside in a certain province and renew their identity documents every year, while refugees renew their identity documents every three years and are not obliged to reside in a certain province. There are also differences in travel procedures between refugees and conditional refugees. Another important difference arises in the context of family residence permit. According to this; refugees and subsidiary protection status holders are able to request a family residence permit, while conditional refugees were not counted among these persons. Therefore, conditional refugees cannot benefit from family reunification through a family residence permit. In this case, the conditional refugee would wait for an indefinite time to be resettled in a third country while staying away from her/his family. Another difference arises in the scope of access to the labor market. While subsidiary protection status holders and refugees are not subject to a time constraint to obtain a work permit, there are time constraints and procedural differences regarding the right to work for conditional refugees.⁴⁰⁹

According to article 91 of the LFIP, *temporary protection* can be provided to foreigners who have been forced to leave their country, and who come to or cross borders in a *mass influx situation seeking immediate and temporary protection*. Temporary protection is not regulated in the international protection section of the law.⁴¹⁰ The detailed regulation on temporary protection status is regulated in the Temporary Protection Regulation, which was issued in order to control the population movement from Syria to Turkey.

⁴⁰⁹ Aksoy, “Toplumsal Cinsiyet,” 155.

⁴¹⁰ The law states that the types of international protection are limited to refugee, conditional refugee and subsidiary protection statuses. The three protection statuses are defined in Articles 61, 62 and 63 of Chapter 3 of the Law, titled “International Protection”. On the other hand, the temporary protection status, which is very similar to the abovementioned statuses in terms of protection interest, is regulated in Article 91 of the Chapter 4.

Menekşe accepts temporary protection as a means of accessing international protection, availing from the protection of another state, thus, there is no general distinction in terms of rights and services.⁴¹¹ However, according to Turkish asylum law, those who are protected by the temporary protection mechanism are not considered to have acquired any of their international protection status directly, and individual international protection applications of foreigners within this scope are not processed.⁴¹² As a matter of fact, in the Temporary Protection Regulation, it is clearly regulated that individual international protection applications of persons under temporary protection status will not be evaluated in order to implement temporary protection measures effectively.⁴¹³

In the regulation, it is stated that temporary protection can be terminated collectively with the decision of the President and only after this decision, it can be decided that the applications of those who apply for international protection be evaluated individually.⁴¹⁴ Besides, there is no provision for the duration of temporary protection. In this context, Turkey's temporary protection system has been regulated by a secondary regulation instead of a law, and has been left to the discretion of the administration, contrary to its own constitutional law, without taking any legal assurance measures.⁴¹⁵

4.2.3. The Application of Non-Refoulment Principle

Although the law of asylum is an area generally left to the sovereignty of the states, the prohibition of refoulement has become a customary rule of international law and is the principle in many international treaties, especially the main subject of examination in the ECtHR judgment based on the ECHR. As a result of the geographical reservation, the number of foreigners who have gained refugee status in Turkey is quite low. For this reason, asylum law in Turkey mainly operates on the basis of the principle of non-refoulement.

⁴¹¹ Talip Menekşe, "Türk Uluslararası Koruma Sisteminde Karar Merkezleri," *Göç Araştırmaları Dergisi* 4, no.2 (2018): 209.

⁴¹² Çelik, "Türk Hukukunda Uluslararası Koruma," 73.

⁴¹³ Temporary Protection Regulation Article No.1.

⁴¹⁴ Temporary Protection Regulation Article No. 11.

⁴¹⁵ Tokuzlu, "Yabancılar," 1097.

The prohibition of refoulement, which is included in the ECHR and the 1951 Geneva Convention, as well as in many international treaties, has been accepted as a basic principle also in the LFIP. According to the Article 4 of the LFIP: “*No one within the scope of this of this Law shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.*” As can be seen, the LFIP accepted both the cases of non-refoulement in article 33 of the 1951 Geneva Convention and the prohibition of refoulement included in many international agreements⁴¹⁶, as well as article 3 of the ECHR. It has clearly stated that it will find an area of application for all foreigners who are threatened with persecution.⁴¹⁷

4.2.4. The Current International Protection Procedure of Turkey

The refugee status determination process had been carried out by the UNHCR for many years due to the dual nature of Turkish asylum law (refugee/conditional refugee), the country's incomplete regulations in the field of asylum, and the lack of a civilian administrative institution specialized in the field of migration. With the LFIP adopted in 2013, the General Directorate of Migration Management was established. For a while, the Turkish state and UNHCR continued to carry out the procedures for receiving international protection applications and determining status separately within their own institutional structures. The UNHCR has ended the procedures for receiving international protection applications and determining status in Turkey as of 10.09.2018. Today, the General Directorate of Migration Management and affiliated Provincial Directorates of the Ministry of Migration are the only authorized administrative institutions for international protection assessment and status determination⁴¹⁸ and the Turkish Courts in the judicial field.

⁴¹⁶ Conventions to which Turkey is a party to that explicitly prohibit the repatriation: the ECHR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, The European Convention on Extradition, The UN Convention against Transnational Organized Crime. **See:** Ekşi, *Yabancılar*, 132-33.

⁴¹⁷ Ekşi, *Yabancılar*, 63.

⁴¹⁸ UNHCR Turkey, Registration and RSD with UNHCR, [https://help.unhcr.org/turkey/tr/information-for-non-syrians\)/registration-rsd-with-unhcr/](https://help.unhcr.org/turkey/tr/information-for-non-syrians)/registration-rsd-with-unhcr/)

4.3. CRITICAL ANALYSIS OF THE LAW OF FOREIGNERS AND INTERNATIONAL PROTECTION FROM GENDER PERSPECTIVE

4.3.1. The Absence of Gender in the LFIP

Women in refugee law are often portrayed as a victim or a fragile person in need of care and protection.⁴¹⁹ The female imagination of Turkish law is not different from the representation of women in refugee law. Although the language of the LFIP can be considered neutral in general, with traditional interpretation there are provisions that can be read as masculine. By referring the Article 3 on the definitions, Baklacioğlu and KIVILCIM asserts, women are generally portrayed as victims as dependents on family members, as mothers or spouses, as pregnant women or as victims with special needs who have been subjected to torture, sexual assault or other serious psychological, physical or sexual violence.⁴²⁰

There is no regulation on gender in the provisions of the LFIP on international protection status. Starting with the descriptions, refugee/conditional refugee status is not defined gender sensitively. The classic refugee definition of the 1951 Geneva Convention has been preserved exactly the same in the law. In terms of providing international protection, the acceptance of gender-based violence as persecution and interpretation of all other grounds (race, religion, nationality, membership of a certain social group and political opinion) in a gender-sensitive manner is not included in the law. Secondly, there is no other provision or additional gender guideline mentioning any regulations taking gender into account.

The legal tools to evaluate Turkish asylum legislation in terms of gender are the international conventions, the EU acquis and the UNHCR Guidelines. In this regard, the gender insensitive law firstly constitutes a violation of its own Article 2⁴²¹ regarding the basic principles to be followed and the regulations to be taken as basis in the implementation of the Law. Because the Article 2 clearly states that the international human rights conventions to which Turkey is party to be prioritized in the implementation of the law. Secondly, the lack of regulation on gender in the LFIP does

⁴¹⁹ Baklacioğlu, *Uluslararası Sınırlar*.

⁴²⁰ Ibid.

⁴²¹ The LFIP Article No. 2 (2): “*This Law shall be implemented without prejudice to provisions of international agreements to which Turkey is party to and specific laws.*”

not comply with the EU law which was taken as reference. Thirdly, the recommendations set forth in the UNHCR guidelines on asylum law were disregarded. This suggests that, the Turkish law falls far behind current international law standards regarding gender issues.

Istanbul Convention on Asylum:

The gender-neutral regulation of the LFIP is inconsistent with the Turkish Constitution. Pursuant to Article 90/5 of the Constitution, agreements on human rights have the force of law and are binding.⁴²² In this context, the Istanbul Convention⁴²³ is also included in Turkey's international legal obligations. We can make the first analysis of the LFIP in the context of the Istanbul Convention. Because the Istanbul Convention is the first legally binding international convention that defines gender inequality and violence against women as a violation of human rights. The Convention explicitly refers to gender-based persecution and has particular provisions for asylum-seeking women and gender-based asylum claims. The gender-neutral attitude of the LFIP is inconsistent with the provisions Istanbul Convention.

As detailed in the previous section, the Istanbul Convention imposes a responsibility on states to take legal measures to recognize gender-based violence as a form of persecution within the meaning of Article 1 A (2) of the 1951 Geneva Convention and as a form of serious harm requiring subsidiary protection. In addition, states will assure that the grounds laid down in the 1951 Convention is interpreted in a gender-sensitive manner and if there is a risk of persecution, applicants are granted refugee status in accordance with the relevant legal instruments. Finally, they will “take the necessary legislative and other measures to establish gender-sensitive admission procedures and support services for asylum seekers, as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.” Although these obligations are binding for

⁴²² Turkish Constitution Article No: 95/5: “*International agreements... have the force of law. ... In the case of a conflict between international agreements... concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.*”

⁴²³ Istanbul Convention is explained in detailed in the previous section.

Turkey, neither the LFIP nor the other regulations on asylum does not contain such a regulation.

*Turkey's Ambivalence of Istanbul Convention*⁴²⁴

Here, by opening a separate section, it is necessary to specifically mention current legal and political conditions and discussions going on regarding the Istanbul Convention in Turkey. Turkey was the first country to sign and ratify the Istanbul Convention, which was opened for signature on 11.05.2011 in Istanbul without any reservation. The Convention entered into force on 01.08.2014. In the first years after the signing of the convention, Turkey made legal arrangements in its domestic law to prevent violence against women⁴²⁵, established women's rights centers and domestic violence prevention units⁴²⁶. Further, the Convention was used as a reference by advocates in the combat against sexist justice system and gender-based violence.

Turkey withdrew from the Istanbul Convention with the Presidential decision dated 20.02.2021.⁴²⁷ And it is the first and only country in the Council of Europe to have withdrawn from an international human rights convention.⁴²⁸ The Convention was withdrawn with the statements that the arrangements in the contract constitute a contradiction to the Turkish family and society structure, cause the family institution to break up, and encourage different sexual orientations.⁴²⁹ It was stated by government officials that even if the Istanbul Convention was withdrawn, the protection of women against violence has already been continuing by the domestic law⁴³⁰. However, the aforementioned law no. 6284 law is only about protective/preventive measures for the protection of women who have been subjected to violence. It does mention neither

⁴²⁴ In this section, the views of Şükran Eroğlu, Oya Meriç Eyüboğlu, Tuğçe Duygu Köksal, and the former Representative of the Council of Europe to Turkey, Daryal Batıbay were also used. See: Türkiye'nin İstanbul Sözleşmesi Serüveni <https://www.dw.com/tr/t%C3%BCrkiyenin-i%C3%87stanbul-s%C3%B6zle%C5%9Fmesi-ser%C3%BCveni/video-57048226> Accessed 4.05.2022.

⁴²⁵ Law and Regulation No. 6284 on Protection of Family and Prevention of Violence against Women

⁴²⁶ Women's rights centers in bar associations; police domestic violence prevention offices; Regulations such as the prosecutor, who was assigned to prevent domestic violence, were introduced.

⁴²⁷ The Presidential decision numbered 3718 published in the Official Gazette on March 20, 2021.

⁴²⁸ Agnes Callamard, "Turkey's withdrawal from the Istanbul Convention," Amnesty International, July 1, 2021, <https://www.amnesty.org/en/latest/news/2021/07/turkeys-withdrawal-from-the-istanbul-convention-rallies-the-fight-for-womens-rights-across-the-world-2/> Accessed 4.05.2022.

⁴²⁹ Murat Paksoy, "Tartışmaların Odağındaki İstanbul Sözleşmesi," *Anadolu Ajansı*, July 28, 2020, <https://www.aa.com.tr/tr/turkiye/tartismalarin-odagindaki-istanbul-sozlesmesi/1924988> Accessed 4.05.2022.

⁴³⁰ The Law no. 6482 on Protection of Family and Violence Against Women.

gender inequality nor gender-based violence. It does not carry the spirit and essence of the Istanbul Convention, so we cannot say that it is sufficient for protection.

In the first place, the abolition of the international convention on fundamental rights and freedoms, which had been duly put into effect, by the decision of the President, is unconstitutional. Because, a contract that entered into force with the approval of the Grand National Assembly of Turkey can only be exited by following the same procedure, that is, with the approval of the Assembly of Turkey.⁴³¹ Many lawsuits have been filed against the decision before the State Council of Turkey to annul the Istanbul Convention and no definite decision has been made.⁴³²

In fact, the truth of the matter is that the target stipulated by the Istanbul Convention is not accepted by the Turkish government's ideology⁴³³. The main backbone of the Convention is that violence against women can be resolved in the long term by ensuring gender equality between men and women. However, the Turkish government does not share this opinion, but has announced its decision to withdraw based on other reasons. The Turkish government's assertion of concepts such as gender and sexual orientation as the reason for leaving the Convention revealed the Turkish government's discriminatory perspective towards LGBTI individuals in terms of sexual orientation, and its perspective on gender and women's rights in general. Therefore, we can claim that feminist ideology is incompatible with the ideology of the current Turkish government.

Whereas, a state has to observe the consequences of it in detail while making a transaction. It has to determine the effects on society and determine the status of individuals whose rights will be violated. The absence of the Istanbul Convention which comprehensively addresses gender in all its dimensions, including asylum, is an

⁴³¹ The decision to terminate the Istanbul Convention is unconstitutional. The Istanbul Convention entered into force with the approval of the parliament. While there is a social will in the acceptance of the contract, there is no social will in the withdrawal.

⁴³² The case on the subject is still ongoing. According to the opinion given by the Prosecutor of the Council of State of Turkey: The abolition of the international convention, subject to the approval of the Turkish National Assembly, is possible with the discretion of the Turkish National Assembly. According to the Constitution, the ratification of the Istanbul Convention and the suspension or termination of its implementation are possible with the decision of the Grand National Assembly of Turkey. He stated that in accordance with the principle of parallelism, a transaction should be withdrawn, abolished or terminated by following the same procedure as it was established. He stated that the Istanbul Convention cannot be terminated only by the decision of the President, unless a law is enacted to terminate it.

extremely negative development for women and LGBTI refugees. In this case, the disappearance of an obligation regarding gender-sensitive asylum procedures and international protection status assessment raises the question whether a country that does not fulfill this obligation even when it is a party to the Convention⁴³⁴ will fulfill it after exiting the Convention. The exit from the Istanbul Convention is generally negative for Turkey, both in terms of its national law and international reputation. This development, which is worrying for Turkish citizens and all foreigners in the country, is an extremely negative situation, a regression in the context of the fact that the driving force of the gender sensitive regulation of the asylum law remains unsupported.

The EU acquis

Secondly, when making the gender analysis of the LFIP, it is necessary to look at the EU asylum law, which is cited as a reference in the preamble of the law. As explained in the previous section, the Qualifications Directive 2011/95/EU regulates the elements of access to international protection in detail and includes gender-sensitive provisions on many issues. For example; the Directive stipulates that acts of gender-based violence can be considered as “persecution”⁴³⁵; it also requires that the personal situation of the applicant, including age and gender, be taken into account when determining whether the applicant has been subjected to treatment that could be described as “persecution” or “serious harm”⁴³⁶. The Directive states that the fear of persecution or serious risk requiring international protection may arise both from state or non-state actors.⁴³⁷ In addition, it expresses “particular social group” ground depends on the special situation of the country of origin, and includes gender-specific common features, and with this definition, it can include a group formed on the basis of sexual orientation.⁴³⁸

In the context of the mentioned EU regulations, it is observed that Turkish law deviates from the EU law on gender. Because, none of the detailed regulations on

⁴³⁴ The Istanbul Convention had been already signed by Turkey when the LFIP was prepared and entered into force.

⁴³⁵ The EU Qualification Directive Article No. 9 (2) (f).

⁴³⁶ The EU Qualification Directive Article No. 4 (3) (c).

⁴³⁷ The EU Qualification Directive Article No. 6 (c).

⁴³⁸ The EU Qualification Directive Article No. 10 (1) (d).

gender sensitive international protection procedures mentioned in the EU Qualifications Directive are found neither in the LFIP nor in the LFIP Implementing Regulation.

The UNHCR Guidelines

Thirdly, although not explicitly included in the preamble of the LFIP, based on the general reference to the 1951 Geneva Convention and international obligations, the UNHCR's 2002 and 2012 Guiding Principles regarding the gender-sensitive implementation of the Convention are important. The UNHCR Guiding Principles address the need for states to establish gender guidelines for migration professionals in order to establish gender-sensitive asylum laws and ensure uniformity in practice. However, although the Turkish asylum law was adopted on the premise of catching up to current international standards, it seems to have neglected gender issue that the UN attaches great importance to. As stated above, there are neither gender sensitive provisions in the law nor the gender guideline stipulated by the UNHCR recommendation papers.

4.3.2. Would Subsidiary Protection Be the Solution for Asylum Seeking Women?

The complementary/subsidiary protection has expanded the scope of the international protection regime as an extension of the principle of non-refoulement for those who cannot obtain refugee status due to the limited reasons specified in the 1951 Geneva Convention but need to benefit from international protection in the context of human rights.

Subsidiary protection entered Turkish asylum law regime with the LFIP⁴³⁹ and was taken exactly from the EU Qualification Directive⁴⁴⁰. Gender is not specifically included in the definition of subsidiary protection in the EU Qualifications Directive. However, the same EU Directive already clearly states in its previous articles that international protection status determination procedures will be gender sensitive.

In the light of this information, while the LFIP adopted the regulation of subsidiary protection exactly from the EU Qualification Directive, it did not adopt the gender-sensitive provisions of the same Directive on international protection. Hence,

⁴³⁹ The LFIP Article No. 63.

⁴⁴⁰ The EU Qualification Directive Article No. 15.

there is no explanatory provision on gender sensitivity for subsidiary protection, like the definition of refugee/conditional refugee, in the LFIP. In fact, since gender was not included as a cause of persecution in the LFIP's definition of refugee/conditional refugee, it could have been specifically mentioned in the definition of subsidiary protection. By this way, it could be ensured that applications based on gender based persecution are evaluated in a gender-sensitive manner. Despite the benefits of such an arrangement, some scholars argue that recognizing gender-based violence as a ground for subsidiary/supplementary protection statute rather than refugee status may lead to a devaluation of gender-based persecution comparing to other forms of persecutions. Further, it may lead to a perception that all persecution types women facing may categorically require complementary protection, which will create a kind of discrimination in refugee law.⁴⁴¹

Anyhow, international protection can be provided to these people by interpreting the subsidiary protection reasons listed in the law⁴⁴² within a gender sensitive manner. Ekşi suggests that, those who can benefit from subsidiary protection may include women escaping female genital mutilation and those who were sentenced to stoning for adultery.⁴⁴³ On the contrary, some authors state that practical implementation the subsidiary protection is ambiguous and complicated due to Turkey's distinction between refugee and conditional refugee.⁴⁴⁴

In addition, although the principle of non-refoulment is envisaged for those who may be subject to the death penalty, torture, and inhuman treatment if they are sent back, it is observed that the law preserves the classic gender-neutral definition of non-refoulment⁴⁴⁵ as well. The gender-based persecution that women may suffer if they are sent back was not counted as inhuman treatment.

⁴⁴¹ Freedman, *Gendering*, 82.

⁴⁴² The LFIP Article No. 63 listing reasons to obtain subsidiary protection statute as follows: “*be sentenced to death or face the execution of the death penalty; face torture or inhuman or degrading treatment or punishment; face serious threat to himself or herself by reason of indiscriminate violence in situations of international or nationwide armed conflict.*”

⁴⁴³ Ekşi, *Yabancılar*, 150.

⁴⁴⁴ Öztürk, *Mültecinin Hukuki Statüsü*, 404. ; Tokuzlu, “Yabancılar,” 1083.

⁴⁴⁵ The LFIP Article No. 4.

4.3.3. The Negative Effects of Status Difference

As stated in the previous section, there are various differences between rights and obligations regarding residence, travel, notification and employment between the status of refugee, conditional refugee and secondary protection listed in the LFIP.

Turkish authorities do not publish any official information on protection types and gender distribution of international protection status holders.⁴⁴⁶ However, as of March 17, 2021, officials stated that only 28 people were in refugee status in the country, but the exact number of conditional refugees and subsidiary protection status holders was not shared by the authorities.⁴⁴⁷ Even though Turkey is one of the 4 countries that have accepted to grant refugee status only to those coming from European countries, it is the country hosting the highest number of refugees today. Considering the low number of the European applications, it can be said that most of the international protection status holders in Turkey are conditional refugees.⁴⁴⁸

Conditional refugee status holders will stay in Turkey temporarily. During their stay, they have administrative obligations such as being obliged to reside in a certain province, registering and notifying in the desired form and time. There may be a possibility of loss of rights if women conditional refugees are unable to fulfill certain administrative obligations due to language barriers or gender roles creating obstacles. Furthermore, conditional refugees' access to work is possible only 6 months after their application. In this case, the conditional refugee, who will have to wait at least six months to work, will have to earn her living only by working illegally. Especially women and LGBTI asylum seekers may become more open to exploitation during this period. In addition, conditional refugees cannot benefit from their right to family reunification during their stay in Turkey. It is clear that a female asylum seeker who has left her home country due to gender-based persecution will suffer more due to the lack of family reunification right, the uncertainty of the duration of her stay in Turkey and her resettlement in a third country.

⁴⁴⁶ Turkish authorities only publish statistics on the number of applications for international protection. See: <https://www.goc.gov.tr/uluslararasi-koruma-istatistikler>

⁴⁴⁷ E.K., "Göç ve uyum konulu toplantıda Türkiye'deki göç olgusu anlatıldı," Kırım Haber Ajansı, March 17, 2021, <https://qha.com.tr/haberler/politika/goc-ve-uyum-konulu-toplantida-turkiye-deki-goc-olgusu-anlatildi/310229/> Accessed 15.05.2022.

⁴⁴⁸ Sütüoğlu, "Uluslararası Mülteci Hukukundaki," 138.

4.3.4. A Positive Development - The Category of “Person with Special Need”

In other respects, it is seen that gender sensitive regulations are made in Turkey's new asylum law in accordance with the EU Directives on ‘persons with special needs’. The LFIP regulates the "person with special needs" category for unaccompanied minors, a disabled person, an elderly person, a pregnant woman, a single mother or father with a child, or a person who has been subjected to torture, sexual assault or other serious psychological, physical or sexual violence by enabling them some priorities and rights.⁴⁴⁹ Those with special needs will be given priority in terms of reception and accommodation in the centers, priority will be given in their international protection applications, and treatment will be provided to people who have been subjected to torture, sexual assault or other serious psychological, physical or sexual violence.^{450 451}

At the same time, the LFIP establishes a special residence permit for the victims of human trafficking in order to avoid the effects of what they have been through and to decide whether to cooperate with the authorities.⁴⁵² Many women and LGBTI are exploited in various ways by falling into the hands and being dependent to human smugglers during the asylum process. For this reason, this provision, which has been specially brought to those who are found to be victims of human trafficking, is very positive for victims of gender-based violence.

The law also lists foreigners who will not be subject to a deportation decision as follows: “Those who have serious indications that they will be subject to the death penalty, torture, inhuman or degrading punishment or treatment in the country to which they will be deported; Those who are considered risky to travel due to serious health problems, age and pregnancy; Victims of human trafficking who benefit from the victim support process; Victims of psychological, physical or sexual violence until their treatment is completed.”⁴⁵³

⁴⁴⁹ The LFIP Article No. 3 (1); Article No. 67.

⁴⁵⁰ The LFIP Article No. 95(3), Article No. 67(1)(2); Temporary Protection Regulation Article No. 23(2)(3), Article No. (38(3), Article No. 48

⁴⁵¹ Nurcan Özgür Baklacioğlu and Zeynep Kıvılcım, *Sürgünde Toplumsal Cinsiyet* (İstanbul: Derin Yayınları, 2015), 33.

⁴⁵² The LFIP Article No. 48.

⁴⁵³ The LFIP Article No. 55.

On the other hand, the term “victims of violence” brings to mind the criticisms made by post-moderns in the context of legal language. This structure reinforces the perception that the female body is terrorized. Calling women “victims” can easily lead to stigmatization as victims of rape and ostracism from family and society.

Kıvılcım thinks, taking into account the victim position of women or their vulnerable status as single mothers or pregnant women, these priorities in accessing envisaged rights are insufficient as they only cover some women, but they are still important.⁴⁵⁴ Gender disadvantage has been tried to be resolved by compressing it into extraordinary/temporary situations. A comprehensive gender perspective as demanded by the radicals has not been applied.

4.3.5. The Uncertainty of Interview and Evaluation Procedures

Interview is the most important stage for all asylum seekers in accessing international protection. At this stage, it is investigated whether the person is in need of international protection by asking questions about why the applicant left his/her country, why he/she sought international protection and the risk in case of his/her return.⁴⁵⁵ Gender-sensitive interview and assessment procedures are important for asylum seekers fleeing gender-based persecution to be able to articulate the reasons for persecution as well as for the immigration personnel to examine these reasons with gender sensitivity. However, just like the definitions of international protection status, the asylum application and evaluation procedures of the LFIP are gender-neutral.

In Turkish asylum law, the subject of interview is regulated in the LFIP⁴⁵⁶ and the 2016 LFIP Implementation Regulation⁴⁵⁷. The law states that the international protection interview will be held individually as a rule- but only with family members with the consent of the adult -, by providing confidentiality with the opportunity to make expression in the best possible way. That the applicant is obliged to present all the information and documents that will support the reasons for asylum, and furthermore,

⁴⁵⁴ Baklacıoğlu and Kıvılcım, *Sürgünde*, 33.

⁴⁵⁵ Menekşe, “Türk Uluslararası Koruma,” 201-202.

⁴⁵⁶ The LFIP Article No. 75.

⁴⁵⁷ The Implementing Reg of LFIP Articles No. 81 and 89.

the interviews with people with special needs will be held in accordance with their special circumstances.

The Implementing Regulation of the Law dated 2016 gives more detail for the interview procedures. According to this regulation; the interview will be conducted by personnel who is trained on the interview techniques, refugee law, human rights law and country of origin.⁴⁵⁸ Interpreters and within the possibilities experts such as psychologists, social workers and the person's lawyer can attend the interview as observers.⁴⁵⁹ The interviewer explains the procedure and the information shared by the applicant will be kept confidential.⁴⁶⁰ The interviewer communicates with the applicant by taking into account his/her special circumstances, country of origin, and culture of the country while avoiding behavior and attitudes that may prevent the applicant from giving information.⁴⁶¹ The special circumstances of people with special needs are taken into account during the interview.⁴⁶² The interviewer may ask additional questions or conduct more than one interview, if necessary, in order to clarify the claims of the applicant.⁴⁶³ While evaluating the applicant's statements and other evidence, the interviewer also confirms the information from accessible, transparent, and up-to-date sources called country of origin information.^{464 465}

One of the most important issues in carrying out the asylum process in a gender sensitive manner is the way the interview is conducted with the applicant. However, neither the LFIP nor its regulations prescribes the necessary procedural rules for the gender sensitive conduct of the interviews. In interviews conducted without considering such situations, women and LGBTI individuals will have difficulty expressing the gender-based violence or discrimination they are victims of.⁴⁶⁶ As a result, they may be deprived of many rights and their asylum applications may be rejected.

⁴⁵⁸ The Implementing Reg of LFIP Article No.81/2).

⁴⁵⁹ The Implementing Reg of LFIP Article No. 82/1).

⁴⁶⁰ The Implementing Reg of LFIP Article No. 85/1)

⁴⁶¹ The Implementing Reg of LFIP Article No. 85/2).

⁴⁶² The Implementing Reg of LFIP Article No. 85/3).

⁴⁶³ The Implementing Reg of LFIP Article No. 83/2, art.88/1)

⁴⁶⁴ The Implementing Reg of LFIP Article No. 84 & 86).

⁴⁶⁵ Menekşe, "Türk Uluslararası Koruma," 201-202.

⁴⁶⁶ Baklacioğlu and Kıvılcım, *Sürgünde*, 35.

The Istanbul Convention imposes an obligation on the state party to develop gender-sensitive asylum procedures, consider the different experiences and protection needs of women and men.⁴⁶⁷ It also imposes an obligation to develop gender-sensitive asylum procedures in order to properly assess the asylum claims of women and girls who have been subjected to gender-based violence.⁴⁶⁸ It also requires the State party to regulate on the following subjects: informing women about asylum procedures, informing applicants that they can have interview individually, without family members; provide the opportunity to demonstrate gender-based protection needs and to make an independent international protection application; adopting the guiding principles and training the personnel for gender sensitive assessment of asylum claims; granting the applicant a choice regarding the gender of the interviewer and the interpreter; respecting the privacy of information received during interviews.⁴⁶⁹

When the LFIP and the Implementing Regulation are examined, it is clearly arranged that the interview is conducted individually and in accordance with confidentiality, and that the interview can only be conducted with family members with the consent of the person. In this way, if the woman or LGBTI applicant has been subjected to violence due to gender and refrains from telling about the violence she has experienced for various reasons in front of her family members, she will have the opportunity to express herself more easily and she will be able to apply for international protection without being dependent on her family members. The fact that the LFIP is based on individual application in accordance with both the reference EU law and international regulations is a very positive arrangement for women and LGBTI asylum seekers.

The law states that special circumstances of people with special needs are taken into account during the interview⁴⁷⁰ and they will be contacted by taking into account the culture of the country they come from while avoiding attitudes that will prevent them from giving information.⁴⁷¹ According to KIVILCIM, this arrangement is positive in terms of conducting interviews with victims of gender-based persecution, but still has

⁴⁶⁷ Istanbul Convention Explanatory Report, par. 314.

⁴⁶⁸ Istanbul Convention Explanatory Report, par. 317.

⁴⁶⁹ Istanbul Convention Explanatory Report, par. 317.

⁴⁷⁰ The LFIP Article No.75/3; The Implementing Reg of LFIP Article No. 85/3.

⁴⁷¹ The Implementing Reg of LFIP Article No. 85/2.

shortcomings.⁴⁷² The first shortcoming is that LGBTI individuals are not counted among the people with special needs in the law, so they may have difficulties in expressing themselves at the interview stage. Various problems such as use of inappropriate terminology, offensive questions, verbal abuse in asylum interviews based on sexual orientation and gender identity has been reported in international reports.⁴⁷³ It has also been reported that in applications based on sexual orientation or gender identity, there is no sensitivity to the expression of the applicant and censorship is applied.⁴⁷⁴

The second shortcoming is the ambiguity of the identification procedure of the people with special needs. The special needs will probably be determined at the interview stage. For this reason, the interview should be conducted in a way that enables the applicant to express his/her special situation.⁴⁷⁵ In order for the applicant to easily express the situation that is the basis of the special need, it would be healthy to conduct the interview with an interviewer and an interpreter of the same sex, if requested. The fact that there is no clear provision in the law regarding same-sex interviewers shows that a gender-neutral interview method is envisaged in the LFIP. However, the necessity of having officers of the same sex in the interviews regarding asylum applications has been explicitly stipulated in both the UNHCR policy guide⁴⁷⁶ and the reference EU law legislation⁴⁷⁷. It is reported that the number of female translators in Turkey is quite low.⁴⁷⁸

On the other hand, the LFIP obliges the applicant to submit information and documents to support the application for international protection.⁴⁷⁹ However, in cases where gender-based persecution is the basis of the asylum application – especially domestic violence, sexual orientation, sexual violence – the difficulty for the applicant to provide information and documents to support this situation has not been taken into

⁴⁷² Baklacioğlu and Kıvılcım, *Sürgünde*, 47.

⁴⁷³ Hayriye Kara and Damla Çalık, “Waiting to be Safe and Sound: Turkey as LGBTI Refugees’ Way Station,” KAOS GL, 2016, <https://kaosgldernege.org/images/library/2016multeci-raporu2016.pdf> Accessed 17.05.2021.

⁴⁷⁴ European Council on Refugees and Exile, “Ülke Raporu:Türkiye,” 2018, 34.

⁴⁷⁵ Baklacioğlu and Kıvılcım, *Sürgünde*, 47.

⁴⁷⁶ UNHCR Guideline 2002, par. 36.

⁴⁷⁷ The EU Asylum Procedures Directive Article No. 15/3(b)&(c).

⁴⁷⁸ European Council on Refugees and Exile, “Ülke Raporu:Türkiye,” 2018, 34.

⁴⁷⁹ The LFIP Article No. 75/2.

account.⁴⁸⁰ Although this regulation is in line with the reference EU legislation⁴⁸¹, it is in contrast to the UNHCR guidelines⁴⁸².

As a result, LFIP is based on individual application. Individual interviews and evaluations are made for the international protection claims. In this case, obtaining an independent application and protection separately from family members is an important right for the victims of gender-based violence. However, there is an obligation to provide information and documents to justify the claims. The fact that gender claims cannot be easily obtained like the usual types of evidence used in other refugee claims has been forgotten or deliberately ignored by the law. The fact that the law states that interviews will be conducted taking into account the situation of people with special needs and the culture of the country they come from is a positive arrangement especially for women asylum seekers. On the other hand, the fact that the applicants do not have the opportunity to choose same-sex interviewers and interpreters is a shortcoming that may cause them to have difficulties in expressing themselves during the interview phase and even to lose their right to access international protection. However, the relevant EU legislation referenced by the LFIP clearly states that asylum seekers can choose interviewers from their own sex upon request, and that the applicant's cultural background as well as gender, sexual orientation, and sexual identity will be taken into account at the interview stage.

4.3.6. The Risk of Accelerated Procedure

The fact that the asylum seeker does not mention the issues that require international protection in her application causes her to be subject to the accelerated evaluation procedure.⁴⁸³ In practice, the accelerated assessment prevents asylum seekers from “accessing a fair status determination procedure with all necessary procedural safeguards, in particular access to legal support and appeal procedures.

Many female asylum seekers may not even be aware that gender-based violence may be a justification ground for accessing international protection. It may not be easy for an asylum seeker who has been subjected to gender-based violence to explain her

⁴⁸⁰ Baklacioğlu and Kıvılcım, *Sürgünde*, 46-47.

⁴⁸¹ The EU Asylum Procedures Directive Article No. 13/2(b).

⁴⁸² UNHCR Guideline, 2002, par. 36.

⁴⁸³ The LFIP Article No.79/1 (a).

situation at the interview stage, moreover, she may be afraid to reveal it if she has a family member with her. Likewise, if an application is made on behalf of one of the family members – usually the male asylum seeker – and the international protection claim is rejected, then the international protection will be denied for the other family members as well. For this reason, it is very important to conduct the interview in a gender sensitive manner. The fact that gender-based violence issues are not addressed at all during the interview would make it difficult for the applicant to enjoy many rights, including access to legal services, and create the risk of the rejection of her application.

While the law excludes unaccompanied minors from the accelerated evaluation procedure, it does not exclude applicants with special needs from this procedure which is a very negative provision for victims of gender-based violence who are at risk of being subjected to accelerated evaluation because they cannot express their concerns due to language barriers, lack of information, and the imposition of gender roles.

4.3.7. Temporary Protection - An Obstacle for Applying International Protection

Temporary protection is provided to people who have been forced to leave their country and reach the borders in a mass influx situation seeking for urgent protection.⁴⁸⁴ According to Turkish asylum law, the opportunity of individuals under temporary protection to apply for international protection is prohibited.⁴⁸⁵ These people cannot access international protection for an indefinite period, and after the end of temporary protection, the evaluation of international protection applications depends on the decision to be taken by the President.⁴⁸⁶ However, there are clear provisions regarding the duration of temporary protection in the reference EU legislation⁴⁸⁷ and it is stated that these persons can apply for international protection⁴⁸⁸.

Regardless of their status, there are a total of 4,082,693⁴⁸⁹ refugees and asylum seekers in Turkey, and 3,762,889⁴⁹⁰ of them are Syrians under temporary protection. In the early days of their arrival in Turkey, Syrians were seen as temporal ‘guests’ in terms

⁴⁸⁴ The LFIP Article No. 91/1.

⁴⁸⁵ Temporary Protection Regulation Article No.16.

⁴⁸⁶ The LFIP Article No. 91/2; Temporary Protection Regulation Article No.11.

⁴⁸⁷ The EU Temporary Protection Directive Article No. 4.

⁴⁸⁸ The EU Temporary Protection Directive Article No. 17.

⁴⁸⁹ Kızılkoyun, “İçişleri Bakan Yardımcısı tek tek açıkladı!”

⁴⁹⁰ Directorate of Migration Management of Turkey, Temporary Protection Statistics, <https://en.goc.gov.tr/temporary-protection27>. Last Accessed at: 10.05.2022.

of humanitarian and political conditions. However, the increase in the number of these people and the prolongation of their stay in the country cause uncertainty in the scope of protection of these people and create problems in the context of human rights.

In the Temporary Protection Regulation adopted for the purpose of controlling the population coming from Syria, the persons to be covered by temporary protection and the services to be provided to these persons were determined, and the access to international protection for Syrians under temporary protection was blocked.⁴⁹¹ While mentioning the rights of holders of international protection status in the LFIP; in TPR, taken exactly from the relevant EU legislation⁴⁹², it is not the "rights" of the temporary protection status holders, but the "services" that are at the disposal of the state.⁴⁹³ As a result, although Syrian asylum seekers are protected by the provisions of the relevant Law and Regulation, they have to stay in Turkey for an indefinite period without being able to access international protection and its guaranteed rights, but only benefiting from certain services provided by the state.⁴⁹⁴

This uncertainty is valid for all Syrian refugees, but it also creates a disadvantage for Syrian women and LGBTI refugees in terms of gender. International protection status determination procedures are not carried out for asylum seekers under temporary protection regime. However, Kıvılcım remarks that some Syrian women have been subjected to sexual persecution both in the context of armed conflict in Syria and in the countries they fled after, especially in rape, forced and early marriage, trafficking, and forced sex work. LGBTI individuals, on the other hand, are executed, tortured and ill-treated by both official armed forces and other opposition armed groups.⁴⁹⁵

Turkey has legislation on the prevention of violence against women no. 6284 in its domestic law.⁴⁹⁶ By referring to this law, TPR states that Syrians under temporary protection will also be protected by taking preventive and protective measures within the framework of the same law (footnote: GKY art.48/3). Although this provision of TPR is an important arrangement since it clearly references violence against women, it falls

⁴⁹¹ Sütüoğlu, "Uluslararası Mülteci Hukukundaki," 151.

⁴⁹² The EU Temporary Protection Directive Chapter 3.

⁴⁹³ Temporary Protection Regulation Article No. 26-31.

⁴⁹⁴ Sütüoğlu, "Uluslararası Mülteci Hukukundaki," 151.

⁴⁹⁵ Baklacioğlu and Kıvılcım, *Sürgünde*, 28.

⁴⁹⁶ Law and Regulation No. 6284 on Protection of Family and Prevention of Violence against Women.

behind the international law standards because it is not sufficient to protect Syrian refugee women who are exposed to gender-based violence.⁴⁹⁷ Because it is clearly stated that the implementation of the aforementioned national law no. 6284 will be based on international human rights Conventions.⁴⁹⁸

Categorically blocking the way for refugees, regardless of whether they are victims of gender-based violence or not, to apply for a full asylum is also contrary to the Istanbul Convention, the state party has an obligation to recognize gender-based violence as a form of persecution that requires international protection and to make the necessary arrangements.⁴⁹⁹ In this case, Turkey's obligation was not only to take preventive and protective measures for the protection of victims of gender-based violence, regardless of their protection status, but also to evaluate whether the violence in question is the basis for the recognition of refugee status or subsidiary protection. Or, it was necessary to make legal arrangements that enable these victims to apply for international protection individually. According to the Explanatory Report of the Istanbul Convention, even if women cannot obtain refugee status, but there is a risk of being subjected to gender-based violence or life-threatening or inhuman treatment when they are returned to their country of origin, these women should be given international protection.⁵⁰⁰ The decision to withdraw from the Istanbul Convention has created a very negative situation for Syrian women living under temporary protection but in need of international protection due to gender-based persecution, because their access to international protection by the help of the Istanbul Convention was also taken away from them.

On the other hand, TPR has made it easier for Syrian people with certain characteristics to apply for international protection, unlike other Syrian citizens who are subject to the temporary protection regime. According to the regulation, it is foreseen that “persons who participated in an armed conflict in their country but have permanently terminated their activities” may be allowed to apply for international protection directly.⁵⁰¹ Öztürk states that due to this regulation, an unlawful distinction is

⁴⁹⁷ Baklacioğlu and Kıvılcım, *Sürgünde*, 36.

⁴⁹⁸ Law no. 6284: Article No.2(a).

⁴⁹⁹ Istanbul Convention Article No. 60.

⁵⁰⁰ Istanbul Convention Explanatory par. 311.

⁵⁰¹ Temporary Protection Regulation Article No.14/3.

made between foreigners.⁵⁰² Ekşi states that this exemption was brought by anticipating the risks that those who fled from the Syrian army or fought against the Syrian army would face life-threatening risks if they returned to their country after the end of the civil war.⁵⁰³ Kıvılcım criticizes that while such an exception is foreseen for persons belonging to the armed forces, the law did not envisage the women and girls who have been raped by these armed forces, forced into sexual slavery or who have been victims of sexual abuse and sex work after coming to Turkey, as well as LGBTI individuals who have faced violence by armed groups.⁵⁰⁴

4.3.8. The Disadvantage of a Narrow Family Definition

As Kıvılcım mentions, “family” has a central importance in the construction and reproduction of gender roles, and is an important concept in terms of legal regulations regarding immigration and asylum. The family, defined as a set of dependencies that forms the basis of the legal right to apply for a residence permit and to request family reunification. Family institution consists an area where women refugees receive support to hold on to life in the new country, and where various serious violations, including physical and sexual violence, take place.⁵⁰⁵

The regulation of the LFIP regarding the family is another regulation that needs to be examined in terms of gender. The definition of family in the law⁵⁰⁶ consists of the nuclear family, which includes only the spouse and children. This narrow definition creates problems for women who flee societies where patriarchy and polygamy are common. Pursuant to Turkish law on family residence permit⁵⁰⁷, even if there is a valid marriage according to the law of the origin country, in the case of more than one spouse, only one spouse is granted a family residence permit. However, children from other spouses are also given a family residence permit. Since there is no explanation as to which spouse will receive a residence permit, it seems that the law leaves the choice to the husband in marriages. As a result, in polygamous marriages, other spouses will not

⁵⁰² Öztürk, *Mültecinin Hukuki Statüsü*, 244.

⁵⁰³ Ekşi, *Yabancılar*.

⁵⁰⁴ Kıvılcım remarks the influence of the Turkish foreign policy on its asylum legislation. Indeed, the relevant article appears to be included with political motivations rather than human rights aspirations both creating a discriminatory and gender-insensitive provision in the asylum law. **See:** Baklacioğlu and Kıvılcım, *Sürgünde*, 16.

⁵⁰⁵ Baklacioğlu and Kıvılcım, *Sürgünde*, 41.

⁵⁰⁶ The LFIP Article No. 3(a).

⁵⁰⁷ The LFIP Article No.34/2.

be able to obtain a residence permit and not be able to benefit from family reunification, will be left behind, and moreover, may face separation from their children. It is a very sexist regulation prepared with the pre-acceptance that the refugee is male. Moreover, the acceptance of just the official marriage in the context of family reunification can have negative consequences, especially for LGBTI individuals.⁵⁰⁸ However, according to the family definition of the referenced EU regulation, if the legislation or practice of the Member State treats unmarried couples similarly to married couples, in addition to the children and spouse, the partners in extra-marital relationships are also considered as family members.⁵⁰⁹

Likewise, TPR has narrowed down the regulation of the EU Temporary Protection Directive based on the same narrow family definition. According to the regulation in the EU Temporary Protection Directive, the family consists of children, partners in marital or extra-marital relationships, and close relatives living together as a family when the events leading to the massive influx of refugees begin.⁵¹⁰ However, Syrian families living under the temporary protection regime in Turkey live as extended families beyond this narrow definition. This is also how family ties and obligations are perceived and functioned in the Syrian society. In addition, women who lost their nuclear family members due to the conflict in the mass population movements that cause temporary protection, came to Turkey with their mother, father, mother-in-law, siblings or their spouses and children and live with them. Women are often economically or socially/culturally dependent on members of this extended family. This regulation in TPR is a negative regulation for Syrian LGBTI individuals and women who are not officially married but be the second or third spouses of a man.⁵¹¹

⁵⁰⁸ Baklacioğlu and Kıvılcım, *Sürgünde*.

⁵⁰⁹ The EU Qualifications Directive Article No. 2(j).

⁵¹⁰ The EU Temporary Protection Directive Article No. 15.

⁵¹¹ Baklacioğlu and Kıvılcım, *Sürgünde*, 42.

CONCLUSION

The legal institution claims to be impartial and abstract, but it was created from a masculine point of view. The distinction created between the public and private spheres has left the problems experienced by women in areas considered private out of the field of intervention. Gender hierarchy and legal norms built within the framework of the public sphere - private sphere ignore the abuse of rights and experiences of violence that women are exposed to due to their gender.

However, gender-based abuse and violence is quite common in every part of the world. In fact, this type of violence is a violation of human rights. However, in the name of cultural practices or the so-called neutral and sometimes openly discriminatory legal systems of states leave women unprotected in a secondary position, and in a way, encourages the practice of this gender-based violence. Women who are exposed to gender-based violence but cannot find protection in their country of origin have no choice but to migrate and seek protection in other countries.

Refugees are one of the most important issues waiting for a solution in the field of international human rights today, but the international protection regime based on the 1951 Geneva Convention is an area created mostly by the political concerns of the states. From a legal point of view, the definition of refugee is not clear enough and highly selective criteria must be met in order to be accepted as a refugee. Apart from this, the period when the 1951 Geneva Convention was written, women's rights were not on the agenda and gender inequality was not even an issue of awareness. For this reason, this protection system, created by men from a male perspective, ignored the violence that could constitute persecution against women and left such demands of women out of the international protection regime.

Feminist movements have made significant contributions in order to construct a fair legal discipline. Liberal feminists have made historical breakthroughs in achieving gender equality in national and international contexts. Radical feminists, by putting the concept of gender-based violence at the center of their criticism, legitimized defending

women, expanding beyond the public sphere by legal interventions in every aspect of sociality for a real solution. The contribution of post-modern feminists is that they draw attention to the plural forms of femininity formed by many different effects such as culture, region, age, and call for the intervention of the law in the victimization of women.

Feminist law has criticisms on refugee law as well as the modern legal discipline. Refugee law has also been created with a masculine perspective. In parallel with the progress in women's rights and gender sensitivity in the world and many developments in the international and regional sense, the situation of women in refugee law has begun to be questioned. In this context, there are important steps taken in terms of women's access to protection due to the persecution they experience due to their gender.

The first step towards gender-based persecution and access to international protection was achieved with the contributions of feminist critiques of the 1951 Geneva Convention. The first of these criticisms is that there are no persecution grounds due to sex or gender in the refugee definition, and moreover, the definition is written in a masculine voice as wordings with “his/himself”. The second criticism of the Convention is the explicit distinction between public and private spheres. According to this, international protection is provided based on the types of persecution experienced in the public sphere. However, the public sphere is heavily male-dominated, so international protection will only be possible in cases based on male activities. The private area with women is excluded from the scope of protection. These criticisms reveal that at the time the Convention was written, the refugee person was conceived as male.

However, today, many women seek protection in other countries because they fear persecution because of their gender. The fact that the violence experienced by women in the private sphere is outside the scope of legal protection actually means that they cannot benefit from the protection of the state. The discriminatory rules applied to women, the activities and expressions of women are not accepted as public and they are confined to the private sphere. The fact that discrimination against women is perpetrated by non-state actors or the normalization of violence against women in the name of culture should not cause exclusion from the scope of international protection.

Today, although some types of gender-based violence are accepted as a justification for accessing to international protection in international law, this situation is not certain for everywhere and everytime. The decision rests with the states and relevant immigration personnel and courts. In addition, the articulation of gender-based violence in refugee law through the ground of membership of a 'particular social group', that is, socially rather than politically, is discussed in the literature. Because associating violence against women with being a member of a certain social group may have negative consequences. From this perspective, the oppression of women will be perceived as a type of violation that cannot be a political issue in the public sphere. As a result, this will cause women's problems to be categorized as always different and less important than other problems.

Thanks to the feminist criticisms made to the 1951 Geneva Convention, it was realized that the international protection regime ignored women's issues. Problems have been raised, important steps have been taken to combat gender-based violence and improve access to rights for refugee women, both within the UN and at the regional level. There have been breakthroughs affecting refugee women such as UN Executive Committee resolutions, Recommendations, Protocols on human trafficking on violence and women. The Convention on the prevention of all forms of discrimination against women with the UN CEDAW has been accepted as the declaration of women's basic human rights, and CEDAW Recommendation No 32 has been created directly to improve the situation of refugee women.

The UNHCR has significant breakthroughs in women's issues and gender-based violence. Although the inclusion of sex/gender as a ground of persecution in the refugee definition is currently out of the question, the UNHCR has published many guidelines for the gender-sensitive interpretation and application of the 1951 Geneva Convention. These guidelines include principles regarding gender sensitivity, principles for interpretation of belonging to a certain social group, pluralist principles that gender has a multidimensional structure that includes factors such as age and ethnicity, principles regarding sexual orientation, as well as principles specific to countries of origin. The UNHCR also recommends that all states should establish gender guidelines in their national legislation. Although these texts published by the UNHCR are not binding, it is

clear that they have led to very important advancements that raise the international standards on refugee women and gender. There is no doubt that the advocacy of all feminist movements has an impact on this positive progress.

The most developed region in terms of gender sensitive refugee law is Europe with its two important institutions. Firstly, the contribution of the Council of Europe in this regard is significant. Although there is no provision of right of asylum in the ECHR, it still provides a wider area of protection than the 1951 Geneva Convention with the other rights it protects. In addition - unlike the Geneva Convention- the ECtHR strengthens the obligation to implement these rights by the states parties, thereby increasing their binding character.

The Istanbul Convention is the first international convention to prevent gender-based violence and has important regulations regarding refugee women. It expects states to regulate their asylum laws in a gender-sensitive manner, placing significant obligations on states regarding gender sensitive interpretation. These regulations include gender-sensitive interpretation of the refugee definition and the mentioned persecution grounds of the 1951 Geneva Convention, establishment of gender-conscious asylum procedures, development of gender aware interview techniques, creation of gender-related asylum guidelines, training of personnel in this regard, and the principle of non-refoulement.

The other important institution in Europe is the EU. The refugee law of the EU has also adopted its international protection regime from the 1951 Geneva Convention, but there are important regulations regarding gender. The EU refugee law regulates the following provisions in line with gender sensitivity: the recognition of gender-based persecution as a type persecution providing international protection, sexual orientation, the principle of non-refoulement, the definition of extended family, benefiting from temporary protection. Although the EU member states do not have a regulation and application that is fully equivalent to EU law in this regard, the fact that the EU has made comprehensive regulations on gender in the field of asylum can be considered as a great development.

Turkey is a party to the 1951 Geneva Convention with geographical restriction. With the developments in the last twelve years, Turkey is the country hosting the largest number of refugees in the world today. Turkey has faced an intense migration wave in a short time and provides international protection to millions of people in different statuses due to its asylum system. Most of the refugees in Turkey come from Eastern societies and stay in Turkey until they are resettled in another country with conditional refugee status. In addition, a very dense Syrian population, who fled the war in Syria and crossed the borders collectively, lives in Turkey with temporary protection status.

Turkish refugee law is based on a newly created law in terms of both the practical requirements of the situation in Turkey and the harmonization with the EU *acquis*. In the rationale of the new law, it is stated that the main aim is to achieve international standards.

The justification and purpose of the law are taken into account in the interpretation of the law. The first of the purposes of the Turkish refugee law was the necessity of regulating an issue related to fundamental human rights by law rather than regulative provisions. As clearly indicated in its Preamble, the second aim of the law was to reach international legal standards and harmonize with the EU *acquis*. The new law would accord with both the constitution and international conventions to which Turkey is a party. In addition, the prohibition of *refoulement*, which is accepted as customary international law, was clearly articulated in the law. In this case, the legal instruments to be taken as a basis in the gender analysis of the Turkish asylum legislation are: the Istanbul Convention, which envisages very advanced breakthroughs in the issue of gender in international conventions; the gender-related articles of the EU asylum legislation and the UNHCR Guidelines that make the greatest contribution to the development of international refugee law in the context of gender.

The first tool in the analysis of Turkish refugee legislation in the context of gender is the Istanbul Convention. Although the Istanbul Convention had been signed before the new Turkish asylum law was entered into force, there is no reference to sex or gender in the definitions of international protection status of the law, contrary to the requirements set forth in the Convention. Neither gender-sensitive interpretation nor

gender-sensitive asylum procedures, which were deemed necessary by the Istanbul Convention, are envisaged in the Turkish refugee law.

Moreover, Turkey has announced that it has withdrawn from the Istanbul Convention, which is a very important legal resource that protects the rights of refugee women as well. The way the contract was terminated caused many political and legal debates in the country. However, even when the Convention was in force, Turkey did not fulfill its obligations by not making any gender-sensitive arrangements in its refugee law. There is no regulation on the gender-sensitive interpretation of the grounds of persecution specified in the refugee definition, any arrangements for gender-sensitive non-refoulement principle or subsidiary protection, no regulation on gender awareness and interview techniques, staff training, or gender guideline.

The second analysis tool in the context of gender in Turkish refugee legislation is the EU law which was taken as reference. While the EU asylum law explicitly referred to gender and sexual orientation in international protection regulations, regulated the transition from temporary protection to international protection, and defined the concept of family broadly, Turkish law has no parallel arrangements on these issues. However, while the Turkish refugee legislation adopts the EU refugee legislation in almost the same way in many respects, it is seen that it does not adopt the gender-related parts of the EU asylum legislation. In this context, the study concludes that this stance of Turkey may be a conscious ignorance rather than a simple negligence.

In Turkish refugee law and its regulations, sex or gender is not counted as a ground of persecution requiring international protection, and this sensitivity is also not shown for complementary protection; the definition of family in the law is nuclear family, contrary to the reality of life of refugees living in Turkey; for persons living under temporary protection and are victims of gender-based violence, the application for international protection has been closed. The only positive regulation is the definition of 'persons with special needs'. Here, too, women have been victimized and an arrangement has been made on the basis of motherhood. Although the law has introduced temporary regulations for victims of sexual violence or single mothers, these regulations are insufficient and do not provide permanent and inclusive protection.

The third analysis tool in the context of gender in Turkish refugee legislation is the UNHCR's guidelines, which lead the setting of international standards. However, as mentioned above, the Turkish law has no reference to the recommendations aiming gender awareness emphasized in the UNHCR Guidelines, nor does it have a provision regulated in this direction.

The 1951 Geneva Convention was written at a time when women's rights were out of the international agenda and women's experiences were excluded. This deficiency has been tried to be overcome by the developments in the international and regional arena. However, the Turkish refugee law preferred not to benefit from these developments and adopt the same sharp abstraction and impartiality as the Convention from the year 1951. In the light of the above analysis, it would not be wrong to say that the Turkish refugee law was created with a masculine point of view, in a manner of conscious negligence. The analysis made in the study states that Turkey aimed more of superficial legal regulations rather than human rights while creating the new asylum law.

As a result, although Turkey's refugee law has been newly regulated and aimed to harmonize with international and regional law, it appears as a rather backward legislation on gender issues. There is no regulation in the law regarding how gender-based claims of asylum will be evaluated and decided. In this case, it seems that such applications are left to the evaluation and initiative of the personnel whose training in the context of gender is not prescribed by law. Although the law appears to be supposedly gender neutral, its neutrality and abstraction are stark. Therefore, gender-based experiences of women have been excluded and made invisible by the Turkish asylum law. Provisions that appear to be gender-neutral are highly likely to create inequalities between the sexes in practice.

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