THE CODE OF GENDER IN JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS: THE CASE OF TRADITIONAL HARMFUL PRACTICES

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ABSTRACT

The European Court of Human Rights (the ECtHR) is not a court of asylum, however the Court does accept the application of the principle of non-refoulement. Accordingly, expulsion of asylum seekers can engage the responsibility of State parties if there are substantial grounds for believing that the asylum seeker may face treatment contrary to the standards of Article 3 upon return. In some cases the ECtHR has found an opportunity to make an assessment of the risk of being exposed to the harmful traditional practices upon expulsion or deportation. This paper seeks to examine the use of gender stereotypes in these judgements. The paper focuses, through feminist analysis, on the evaluation of the Court of the real risk of finding out whether or not the reasoning of the Court is based on a gender biased evaluation of the claim. Therefore, it explores the way the Court gives weight to different factors in the final determination of the case and concludes that the ECtHR's reasoning is based on gender-stereotyping and relies on the traditional notions of gender norms which then reproduce patriarchal and suppressive gender norms and reinforce gender inequalities.

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CONTENTS

1. INTRODUCTION

The issue of asylum seekers has been a major source of discussion in many European countries; however, very little attention has been paid to the role of gender in the determination of refugee status. Assessing the credibility of the applicant's statement inevitably requires relying on some normative standards, yet Spijkerboer observes, "these normative standards are hard to make explicit and more often they are not."[1] Nevertheless, they play an important role in determining applicant's status. Importantly, the perception of gender shapes the way a court views an asylum claim, particularly when the claimant is fleeing gender-related violence. At the national level, because of the increasing number of cases and time pressure, interviewers are more willing to have recourse to stereotypes since it allows for quick decisions.[2] This paper seeks to examine the role of gender stereotypes in the decisions of the ECtHR concerning harmful traditional practices. This category of decisions particularly portrays the Court's perceptions of gender norms by bridging the issues of gender-related violence and asylum.

Claims concerning facing harmful traditional practices have been brought before the Court under Article 3 of the Convention, which prohibits torture and inhuman or degrading treatment or punishment. Harmful traditional practices fit in the category of gender-based violations. Due to the variety of these practices it is impossible to provide an exhaustive list. Nevertheless, based on the Expert Paper of the Committee on the Elimination of Discrimination against Women[3], some common factors are identifiable. First, harmful practices are being practiced in patriarchal societies where women have a subordinate position. Moreover, they are mainly related to the reproductive role of a woman in society. According to a study by the United Nations, harmful practices manifest in variable forms, such as son preference, early and forced marriage, abduction, female genital mutilation (FGM) or the slavery-like practices of Southern-Indian Devadasi system, the Nepalese Deuki or Devaki system, and the Trokosi system of Ghana, Togo and Benin[4]. What they have in common is the effect of "perpetuating women's low position in society."[5] Harmful traditions are mainly practiced by husbands, parents or other family members, however, according to the CEDAW Committee Expert Paper "they are also surfacing in public spaces."[6] It is worth mentioning that harmful traditional practices are not exclusively targeted towards women but also men can be subjected to types of gender-based violence. For instance, honour-related crimes can harm both men and women. These traditions are deeply rooted in the societies which practice them and their full abolition requires a fundamental change in customs in the society. In many countries, these practices are not considered as forms of violence; to

1 Spijkerboer 2005, p. 67.
2 Ibid.
3 Coker-Appiah 2009.
4 Ras-Work 2006, p. 2.
5 Coker-Appiah, 2009, p. 2.
6 bid. p.2.

the contrary, they are viewed as parts of the norms, customs and traditions of the society and as a part of the prevailing cultural, social and religious beliefs. More importantly, even when the practices are considered violence, public authorities are reluctant to intervene because they are regarded as private matters. For instance, in some societies, female genital mutilation has a particularly strong cultural meaning because it is closely linked to women's sexuality and their reproductive role in the society. [7] FGM is practiced in some parts of Africa as an element in a rite of passage preparing young girls for womanhood and marriage.[8] The awareness of harmful traditional practices is rising at the global[9] as well as local level, which has helped to reduce these traditions. Despite this, many women and men continue to suffer because of them.

The ECtHR has repeatedly stated that there is no right to asylum as such in the Convention or its protocols.[10] Nevertheless, the ECtHR regularly considers the question of whether extradition, expulsion, or deportation of the individual to the country of origin leads to him/her being subjected to treatment that is contrary to Article 3. A huge number of cases submitted to the Court have helped to develop a large body of case law concerning the protection of asylum seekers against refoulement. This article will explore the cases submitted to the Court concerning claims of facing traditional harmful practices upon extradition or expulsion, and aims to analyze the way the Court understands the complexities of the gendered nature of these claims and gives weight to the various factors involved.

2. REAL RISK OF HARMFUL TRADITIONAL PRACTICES

2.1 Real Risk Test

The principle of non-refoulement is derived from the prohibition of torture and inhuman or degrading treatment or punishment enshrined in Article 3 of the ECHR. The European Court of Human Rights held in its judgment Soering v. the United Kingdom that:

> *[...] it would not be compatible with the "common heritage of political traditions, ideals, freedom and rule of law" to which the Preamble refers, were a Contracting State to the ECHR knowingly to surrender a person to another state where there were substantial grounds for believing that he or she would be in danger of being subjected to torture or inhuman or degrading treatment or punishment.*[11]

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7 Toubia 1994, p. 712.
8 Althaus 1997, p. 130.
9 The UN Special Rapporteur on torture or other punishments or cruel, inhuman or degrading treatment specified that FGM is "comparable to torture if the states do not act with the required diligence" in his report of 2008. The European Commission has also expressed a strong commitment to the elimination of FGM.
10 See Vilvarajah and Others v. the United Kingdom 30 October 1991, para 102. Also Salah Sheek v. the Netherlands, 13 January 2007.
11 Soering v. the United Kingdom, 7 July 1989, para. 88.

In Cruz Varas and Others v. Sweden[12] and Vilvarajah and Others v. the United Kingdom[13], the Court held that the same applies to expulsion cases.

The ECtHR has regularly stated that "the alleged ill-treatment upon return must attain a minimum level of severity if it is to fall within the scope of Article 3."[14] The Court has always allowed itself a degree of flexibility when considering the prohibited acts, and has concluded that the Convention should be regarded as "a living instrument, which must be interpreted in the light of present day conditions".[15] Therefore, the assessment of the level of severity is relative and depends on the circumstances of a particular case.[16]

In order to evaluate the applicant's claim of risk upon return to the country of origin, the Court has established a 'real risk test'. The Court has established a set of ground rules for determining the existence of a risk. In the case Chahal v. The United Kingdom, the Court held that "the assessment of the existence of a real risk must necessarily be a rigorous one"[17]. Moreover, the Court only gives weight to foreseeable consequences that the applicant may face upon return[18]. Therefore, in order to determine whether an applicant's claim falls under Article 3, the Court "assesses the conditions in the receiving country against the standards of Article 3 of the Convention."[19] This assessment includes the consideration of the general situation of the receiving country as well as the individual circumstances of the case. This assessment inevitably relies on certain normative standards to verify the credibility of the applicant's claim and the possibility of being exposed to ill-treatment.

Gender stereotypes play an important role both in the credibility assessment and risk assessment, particularly when the applicant is fleeing gender-based violence. Therefore, it is necessary to explore specific characterizations of harmful traditional practices and the definition of gender stereotyping.

2.2 Assessment of General Situation in Country of Origin

In order to evaluate whether a person would be subjected to treatment prohibited by Article 3, the Court assesses the general situation of the applicant's country of origin. In its assessment, the Court takes into consideration the reports of non-governmental organizations, such as Amnesty International, and UNCHR and governmental reports, which are generally given more weight in the assessment. However, as the Court notes "the general situation of violence will not

12 Cruz Varas and Others v. Sweden, 20 March 1991.
13 Vilvarajah and Others v. The United Kingdom, 30 October 1991.
14 Hilal v. the United Kingdom, 6 June 2001 para. 60.
15 Association for the Prevention of Torture, 2008, p. 59.
16 Hilal v. the United Kingdom, 6 June 2001, para 60.
17 Chahal v. the United Kingdom, 15 November 1996, para 96.
18 See Vilvarajah and Others v. the United Kingdom, 30 October 1991, para 108.
19 Ibid. para. 42.

normally in itself entail a violation of Article 3 in the event of an expulsion"[20]. Nevertheless, in extreme cases the general situation in country of origin may lead to the possibility of a real risk. In NA v. the United Kingdom, the Court stated:

The Court has never excluded the possibility that the general situation of violence in a country of destination may be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.[21]

Similar reasoning can be found in in N v. Sweden. The applicant was an Afghan woman arguing that, if returned to Afghanistan, she would face a real risk of being persecuted or even sentenced to death because she had separated from her husband and later had a relationship with another man.[22] The Court pointed out that there were no specific circumstances substantiating that the applicant would be subjected to such treatment by her husband, but the Court could not ignore the general risk indicated by statistical and international reports.[23] Therefore, the Court held that the expulsion to Afghanistan was against Article 3.

When the overall situation in the country of origin is improving or there are positive developments in certain issues relating to the particular case, the Court is more willing to assume that the situation of gender-based violence and, consequently, harmful traditional practices also improves. In Collins and Akaziebie v. Sweden the applicant, a woman from Delta State in Nigeria, sought asylum in Sweden on the ground that she wanted to avoid being subjected to FGM. The woman, who was 25 years old and pregnant, claimed that women in Nigeria had to undergo a severe type of FGM at childbirth. Later on she added that she also wanted to protect her daughter from having to undergo the practice. Thus, the applicant claimed that if expelled to her country of origin, she would be subjected to FGM. The following facts, which do not support the applicant's claim, were presented by the Court as factors proving that the practice of FGM is decreasing in Nigeria. First, the Nigerian government has prohibited FGM in many states States by law. In addition, although at that time there was no federal law in Nigeria against practicing FGM, the federal government publicly opposed FGM. Furthermore, several NGOs were fighting against the practice.[24] This, combined with some other facts of the case, led to a finding of no violation with regard to the applicants.

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20 H.L.R. v. France, 29 April 1997, para 41.
21 S.A. v. Sweden, 27 June 2013, para 45.
22 N. v. Sweden, 20 July 2010, para 47.
23 Ibid, para 58.
24 Collins and Akaziebie v. Sweden, 8 March 2007, p. 10.

It appears that the Court's assessment of the general situation of country of origin underestimates the fact that harmful tradition practices are deeply rooted in societies. The general improvement of the situation of country of origin does not necessarily lead to the abolition of harmful traditional practices. For instance, in Collins and Akaziebie v. Sweden, although there is a decrease in FGM rates in Nigeria, the rate is still considerably high. Also, the Committee on the Rights of the Child expresses its concerns about the lack of support services available to protect girls who refuse to undergo FGM and of services to rehabilitate the victims of FGM in its consideration of state State reports.[25] The same may apply to other forms of harmful traditional practices.

In the case of S.A v. Sweden, which concerned a Sunni Muslim man from Iraq who had been in a relationship with a Shiah Muslim woman, the applicant stated that after proposing to the woman, he faced threats from the woman's family. Furthermore, the family had carried out a so-called honour killing and murdered the woman. The applicant further alleged that his mother had been shot and killed by the woman's family and their house had been burnt down. In the assessment of the general situation of the state State of origin, the Court referred to the material provided in the case F.H. v. Sweden which did not concern honour-related crimes and was submitted four years earlier, and concluded that "the Court sees no reason to alter the position taken in this respect four years ago."[26] Meanwhile, the reports of international organizations express a serious concern over honour-related crimes in Iraq, and there is information that the Iraqi Penal Code provides for a lenient punishment for crimes committed in the name of honour.

In the assessment of the general situation of the receiving country, the Court often looks at whether the receiving state can provide protection in order to prevent the risk. Therefore, it is necessary to examine the notion of 'agent of protection' in the view of the ECtHR.

2.3 Agent of Protection: Male Relatives

To prove the existence of the risk it must be shown that the authorities of the receiving state State are not able to obviate the risk by providing appropriate protection.[27] One of the distinctive features in the assessment of the risk in cases of harmful traditional practices is that the Court often has very wide understanding of protection, meaning that the provider of protection does not necessarily need to be the stateState. The Court often takes the view that women supported by a male relative enjoy a sufficient degree of protection.

The case A.A and Others v. Sweden is one of the examples in which the Court used this argument to cast doubt over the existence of a real risk. The case concerned a mother (A.A.), three daughters and two sons of Yemeni nationality. The applicants stated that if deported to Yemen they would face a real risk of being the victims of an honour crime as they had disobeyed their

25 Ibid. p. 8.
26 S.A v. Sweden, 27 June 2013, para 47.
27 A.A. and Others v. Sweden, 28 June 2012, para 72.

husband/father and had left the country without his permission.[28] A.A. also claimed that she had suffered from years of abuse by her husband, but that her main reason for leaving Yemen had been to protect her daughters who were either being threatened with an arranged marriage or had already been forced into one.[29] The Court concluded that the substantial grounds for believing that the applicants would be exposed to a real risk of being killed or subjected to treatment contrary to Article 3 of the Convention if deported to Yemen had not been established in the present case, and therefore the Court found no violation of Article 3.

In this case, the Court did not find the situation in Yemen severe enough to substantiate the possibility of a risk. Nevertheless, the information provided to the Court on the situation of women and children in Yemen demonstrated that there was no law prohibiting domestic abuse and that the law concerning violence against women is rarely applied.[30] Yemeni legislation does not prohibit spousal rape and does not address any forms of honour crimes nor forced marriage.[31] The report also indicated that child marriage was a significant problem in the country.[32] This information indicates that the state is unable or unwilling to provide protection to women suffering from domestic violence or forced into marriage. However, the Court surprisingly did not find this information as an indicator of the possibility of a risk, which is the first step in the risk assessment. This implies that forced marriage is not sufficiently serious breach of human rights to fulfil the criteria of Article 3.

In evaluating if protection is available for the applicant against the risk, the Court concluded that there is sufficient protection for all the applicants. The Court notes that "the first applicant's brother has continued to support her by sending her various documents, and even if it is true that he is now moving around in Yemen, the Court is of the opinion that the first applicant has not shown that she cannot count on his protection in Yemen"[33]. Also, the two sons of the first applicant were mentioned as sources of protection for the applicants if returned.[34] Therefore, according to the Court, the support of a male relative provides alternative protection that may be sufficient to bridge any shortcomings in the protection provided by the state.

Spijkerboer observes that this understanding of protection reproduces the "patriarchal notion of women belonging to men"[35]. He contends that it appears that Article 3 does not protect women against patriarchy even in its most violent form and requires women to play by its rules: "try to pay

28 Ibid. para 13.
29 Ibid. para 11.
30 Ibid. para 38. The information was provided by the United States Department of State in the 2010 Human Rights Report: Yemen of 8 April 2011.
31 Ibid. para 39.
32 Ibid. para 39.
33 Ibid. para 83.
34 Ibid.
35 Spijkerboer 2015, p. 4.

back the dowry, try to identify nicer men to protect you and hope that alternative dependency will not turn violent as well"[36]. This wide notion of the agent of protection is very problematic since it sets another standard for the availability of protection in the receiving country for the cases of gender-based violence and leaves the safety and protection of women in the hands of male relatives. Moreover, it is not obvious how this protection is offered or whether people mentioned as the sources of protection are really willing to aid the persons under threat.

3. FINAL DETERMINATION OF THE CASE

3.1 Internal Flight Alternative

The final determination of asylum seeker status might also be connected with the question of whether he/she can relocate to safer areas within the country of origin, whether or not the "Internal Flight Alternative" (IFA) is available for the asylum seeker. The Refugee Convention says nothing about the IFA. "The notion of IFA was developed in a somewhat ad hoc manner through international and national jurisprudence, academic analysis and governmental and intergovernmental policy statements."[37] According to the UNHCR, the concept of IFA refers to a "specific area of the country where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him/herself and live a normal life."[38] In many jurisdictions around the world, IFA is invoked to deny refugee status from persons at risk of being persecuted for a convention reason.[39] UNCHR has never favored the practice of IFA, mentioning that "the 1951 Convention does not require or even suggests that the fear of being persecuted needs to be always extended to the whole territory of the refugee's country of origin. [40]

Nevertheless, the UNCHR Guidelines on International Protection provide that in the evaluation of possibility of IFA states States should employ a set of tests. The first set of questions deals with a relevance analysis and is concerned with the accessibility of safe areas to the asylum seekers, the agent of persecution, and the possibility of further persecution or harm upon relocation. Relevant to this paper, if the agent of persecution is a non-state party it is important that the Court takes into account "whether the persecutor is likely to pursue the claimant in the area and whether State protection from the harm feared is available there."[41] The second analysis concerns reasonableness and deals with the question of whether the claimant "in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there."[42]

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36 Spijkerboer 2015, p. 4.
37 Reinhard 2002, p. 179.
38 UNCHR 2003, para 6.
39 Hathaway & Foster 2013, p. 1.
40 UNCHR 2003, para 6.
41 UNCHR 2003, para. 7.
42 Ibid.

The question of internal flight relocation may arise for the ECtHR after the assessment of the real risk in order to establish whether the applicant can avoid the risk by relocating to other parts of the receiving country. The Court has established some prerequisites for the applicability of IFA. In the case of D.N.M. v. Sweden,[43] the Court provides that

> *Therefore, as a precondition for relying on an internal flight alternative certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment.* [44]

The case law shows that the ECtHR has repeatedly considered the internal flight alternative as one of the stages in assessing the real risk. A quick glance over the cases related to harmful traditional practices – where the agent of ill-treatment is a non-state agent – reveals the possibility of finding that the real risk is ultimately dependent on whether or not a relocation option is available to the applicant. However, it appears that the assessment of availability of IFA follows a very subjective test which is not supported by evidence concerning the situation of gender-related persecution. More importantly, the normative standards the court Court employs for the assessment of the possibility of IFA stands on a very stereotypical notion of gender norms which define men as independent and strong and women as dependent and vulnerable.

In most of the cases of harmful traditional practices the Court is more than likely to endorse the government's claim about the possibility of IFA. Often the Court finds it sufficient to review the general situation of the receiving country without taking into consideration whether the sufficient guarantees are fulfilled. Frequent reference by the Court to the IFA implies that the applicant should exhaust all the domestic remedies before applying for asylum. Indeed, exhaustion of all domestic remedies is neither a requirement of the UN Refugee Convention nor a requirement for the applicant of non-refoulement. The Court's assessment appears to rely on gender-stereotyping because often the sex, age, health and independence of the applicant provide sufficient reasons to invoke IFA and deny the right to asylum.

3.2 Women and Claims of Harmful Traditional Practices

When the general situation in the country of origin is improving, the Court puts more weight on the assessment of the personal situation of the applicant. This assessment inevitably follows a perception of gender roles. The normative standards used in assessing the credibility of women's claims are often based on a very traditional and gendered understanding of women's roles in the receiving country. These normative standards often give attention to women's vulnerability, such as financial dependence, physical weakness and need for protection, and

43 See also Sufi and Elmi v. the United Kingdom, 28 June 2011, para 266.
44 D.N.M. v. Sweden, 27 June 2013, para 54.

expect women to behave in a way that fulfills this expectation of appropriate gender behavior. If a woman shows a different behavior than what is expected, she might be deemed incredible.

This perception of gender roles is very well portrayed in the case of Omerdeo v. Austria[45]. The applicant was a single Nigerian woman from Delta State who claimed that if expelled to Nigeria she would run the risk of undergoing FGM. The Court, after giving regard to the personal circumstances of the applicant, found that there is a possibility that the applicant would be exposed to the risk of undergoing FGM upon return. Nevertheless, it concluded that "owing to her education and working experience as a seamstress, there is a reason to believe that the applicant will be able to build her life in Nigeria without having to rely on the support of family members."[46] Almost the same observation was made in the case of Collins and Akaziebie v. Sweden. The ECtHR referred to the applicant's personal situation, noting that she had 12 years of schooling, is now 30 years old, and that she successfully managed to flee to Sweden and apply for asylum. The Court reasoned further:

> *it is difficult to see why the first applicant, having shown such a considerable amount of strength and independence, cannot protect the second applicant form from being subjected to FGM, if not in Delta State, then at least in one of the other states in Nigeria where FGM is prohibited by law and/or less widespread than in Delta State.*[47]

"What can be understood from the Court's reasoning is that if the applicant shows signs of strength and courage, she probably does not need to be protected. The Court's reasoning relies on the stereotypical characteristics attributed to women of traditional societies as weak, uneducated and poor. As Eva Brems puts it, according to the Court "if a woman is strong enough to stand up against cultural oppression, she is too strong for outsider protection."[48] Freedman also highlights that the victimization of refugee women essentializes a particular set of gendered roles and fails to take into account the underlying gendered relations of power.[49] The stereotypical image of women in Third World countries in international law as "sexually constrained tradition-bound, incarcerated at home, illiterate, and poor"[50] has been criticized widely. Kapur argues that often women are portrayed as "defenceless victims of a cruel anti-female culture more than that of 'dissidents' who actively resist against the political and religious oppression of women as victims of male dominated society."[51] This stereotypical notion introduces a set of requirements for protection which are not necessarily relevant to the risk of being subjected to harmful traditional practices, and suggests that if women are strong enough to flee the country and independent enough to manage their lives alone they are not in real danger nor in real need of protection. "

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45 Decision on the admissibility of Omerdeo v. Austria, 20 September 2011.
46 Decision on the admissibility of Omerdeo v. Austria, 20 September 2011, para 1.
47 Collins and Akaziebie v. Sweden, 8 March 2007, p. 14.
48 Brems 2010.
49 Freedman 2010, p. 193.
50 Kapur 2002. p. 18.
51 Kapur 2002. p. 18.

3.3 Men and Claims of Harmful Traditional Practices

Stereotyping is not only limited to cases concerning women, it also affects the claims of male applicants. The recent examples are the two cases of S.A v. Sweden and D.N.M v. Sweden, which are concerned with two young Iraqi men alleging that if they returned to Iraq they would be exposed to the risk of being the subject of honour-related crimes as they were in unconventional relationships with women of whom their families did not approve. The Court found that there was a possibility that if the applicants returned to the country of origin, they ran the risk of being subjected to honour-related crime. However, the possibility of IFA resulted in finding no violation in regards to both applicants.

In S.A v. Sweden, the applicant claimed that the IFA is not available to him since certain documents are needed in order to relocate him from one part of Iraq to another and to do so he should contact the authorities, which might lead to him being found by the woman's family. He also added that the family of the woman belongs to a powerful clan with connections and means to trace him wherever in Iraq he might go. The Court rejected the applicant's claim and held that "there is no indication that it would be impossible or even particularly difficult for Sunni Muslims – comprising a sizeable group, reportedly making up one third of the country's population – to find a place to settle where they would constitute a majority or, in any event, be able to live in relative safety."[52] Among other reasons, the Court noted that "he is a relatively young man without any apparent health problems."[53] It appears that the Court takes a more rigorous test regarding the male applicants. The reasoning of the Court is based on the perception of masculinity which entails capability, health and independence. Therefore, even the physical health of the applicant provides enough reason for rejecting the need for protection. Notwithstanding, the dissenting opinion attached to the case of S.A v. Sweden – which is similar to that of D.N.M v. Sweden – refers to the report of the Joint Finnish-Swiss Fact-Finding Mission which claims that "single male Sunni Arabs without a sponsor in the KRG area are refused". The dissenting judges concluded that the applicant, being a single male Sunni without a sponsor, clearly falls within this category. The dissenting judges also indicated that the Court does not evaluate in depth the guarantees needed for IFA and suggested that the guarantees required under the Court's case law on IFA options necessitate that the place of safety be identified by the deporting state State in order that the risks related to the transit thereto, admittance and settlement therein may be assessed.[54]

This judgment is not exceptional, as also at the national level male applicants have to pass a stricter test to substantiate their claims due to the characteristics which are attributed to

52 S.A v. Sweden, 27 June 2013, para 57.
53 Ibid, para. 58.
54 S.A v. Sweden, 27 June 2013, Dissenting opinion of Judge Power-Forde joined by Judge Zupančič.

them. Spijkerboer notes that "the concepts of masculinity may be used to dismiss the claims of men, because like female applicants, they are perceived as deviating from the male norm of the classical refugee stereotypes."[55] Mascini et al. also call attention to the persecution of male asylum seekers who deviate from patriarchal social norms about gender roles, particularly the victims of crimes of honour who can face discrimination in the asylum process. [56] Gender-stereotyping in the Court's judgments is alarming because it sets the norm for national asylum procedures. Timmer points out the problem with stereotypes in the following way: "they tie both men and women down to a particular identity. They place a certain mould on individuals, independent of what they are capable of, experience or desire."[57] This stereotyping ignores the experiences of individuals by placing them into pre-existing categories of male and female behavior and leaves very little room for people who transcend from the gender norms of their society. This ultimately reinforces the stereotypical conceptions of femininity and masculinity in national asylum procedures.

The main harm of basing legal reasoning on stereotypical notions is that it essentializes the differences between women and men and limits their ability to develop their personal capacities and participate in the transformation of gender roles. Eventually this understanding ignores the experiences of people who stand up against the harmful traditions of their societies.

4. CONCLUSION

The European Court of Human Rights does not have jurisdiction to decide on asylum matters, yet it has a great influence in setting the standard for the protection of asylum seekers at the national level through the notion of non-refoulement. The judgments of the ECtHR regarding harmful traditional practices are a very good indication of how gender stereotypes shape the way the Court gives weight to the applicant's claim, since they bring up very basic assumptions of expected gender roles that should be carried out by the male or female applicants. In this paper the aim was to analyze the way the ECtHR assesses the applicant's claim of facing harmful traditional practices upon return to the receiving country. This paper, through a feminist approach, attempts to reveal the gendered nature of the Court's reasoning.

Generally, for the assessment of the real risk, the Court considers two sets of requirements. First of all, it should be shown that there are substantial reasons for believing that the applicant will face treatment contrary to the standard set out in Article 3 of the ECHR upon return to the receiving country. Secondly, it should be proven that the receiving state is unable or unwilling to take measures to prevent the risk. Case law demonstrates that the Court uses a wider notion of protection in cases of harmful traditional practices since it also considers the protection

55 Spijkerboer 1999, p. 195.
56 Mascini and Van Bochove 2009, p.113 and 129.
57 Spijkerboer 2000, p. 185.

provided by the relatives – and particularly male family members – of the applicant sufficient for preventing the risk. This wide notion of the agent of protection is very shaky since it sets a different threshold for the availability of protection in the cases of harmful traditional practices. Moreover, it is very problematic because it reproduces the patriarchal social norms about women belonging to men and leaves the fate of female applicants in the hands of nicer males in the receiving country.

One of the key issues that has been studied in this paper is the normative standard that the court employs in defining the real risk. This normative standard rests on the very traditional notion of gender norms which attributes sets of characteristics to males and females. This normative framework is very rarely questioned because it has never been explicitly expressed in the Court's reasoning. This paper sought to demonstrate that the Court employs a gendered normative framework to apply its 'real risk test'.

The notion of internal flight relocation is often used as a stage in the assessment of the possibility of the real risk. However, similar to the assessment of asylum claims at the national level, the assessment of the possibility of internal relocation at the ECtHR follows a stereotypical notion of gender roles. The case law shows that gender stereotyping affects the claims of male and female applicants. The notions of dependence, weakness and poverty are used to define the vulnerability of the applicant. Therefore, if the applicant shows signs of independence, strength and health it is often assumed that he or she is able to build a relatively normal life in another part of the receiving country, and therefore does not need international protection. This perception of gender norms raises certain challenges since it leaves very little room for considering the claims of people who transcend accepted gender norms in their receiving country and sets certain requirements which are not necessarily relevant to the possibility of facing the risk of harmful traditional practices.

This short investigation has demonstrated that the Court employs a gendered test both in the assessment of the real risk the applicants face and in the assessment of the availably of internal relocation. The perception of gender norms plays an important part in the final assessment of the court. This stereotypical notion of gender norms leaves very little room for the assessment of the individual experiences of the applicants, and it ignores the distinctive characteristics of harmful traditional practices. Relying on gender stereotypes untimely excludes people who stand up against the suppressing gender norms of their society from international protection.

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