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## **Immigrant women facing male partner violence – gender, race and power in Swedish alien and criminal law**

**Monica Burman\***

### **Introduction**

The main concern of this article is the legal situation for women who have immigrated into Sweden to enter an intimate relationship with a man with rights of residence, but are subjected to violence by that man. This issue has until very recently been poorly recognized in Swedish law and policy. For more than 10 years, the Immigration Authorities had nothing but a couple of cases from the former Aliens Board to guide them in their adjudication of immigration law as regards residence permits for women who end their relationships with abusive men. This case law reflects the preparatory works of immigration law, which are dominated by a lack of knowledge about men's violence against women in intimate relationships and an ignorance of the significance of gender, race and power. As late as in October 2011, The Supreme Migration Court, established in 2006, tried its first case regarding abused women with insecure rights of residence. This case gives evidence of a better informed understanding of men's violence against female partners and the particular difficulties facing immigrant women. Even so, the basic problems with Swedish immigration law remain intact.

Several legislative and policy measures, especially in the area of criminal law, have been introduced in the pursuit of more effective and gender-sensitive law and policy in order to ensure that the Swedish state meets its responsibilities regarding violence against women, gender equality and women's human rights. However, the CEDAW committee and the UN Special Rapporteur on violence against women have, in their latest reports, expressed their concerns over the human rights situation for immigrant, refugee and minority women in Sweden (CEDAW/C/SWE/CO/7:7; A/HRC/4/34/Add.3). Furthermore, the existing immigration law has, for several years, been criticized by the Swedish national organization

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for women's and young women's shelters. In response to these critiques, an official committee has recently been appointed to deal with the issue of immigrant women exposed to male partner violence, but the committee has not been given the powers to propose changes in the law. The assignment is instead to map and analyze the violence women with insecure rights of residence are exposed to, to illuminate the complexity of their situation, and to propose social measures that will improve their lot and that of their children. These aspects are of course important, but the proposals from the Committee cannot present a serious challenge to the power structures and discourses in immigration law that are problematic for immigrant women exposed to male partner violence.

Migrant women across Europe with insecure rights of residence experience greater exclusion and vastly reduced access to legal solutions to combat violence against them (Humphreys and Carter 2006). It is also well known that the legal rights of residence for migrant women living with violent male partners are crucial in respect to their possibilities of leaving these men (Madsen et.al. 2005; Humphreys and Carter 2006; Bexelius 2008; Lenardt 2008; Sharma & Gill 2010; Ingram et.al. 2010). There is also a common tendency to culturalize violence against immigrant or minority women and relate it to 'others', whether the 'other' is women, men or states. Such othering processes, whereby certain 'cultures' or marginalized groups are stigmatized as 'violent', serve to normalize this violence and hence make it less visible. This can be observed today, for example, in policies within the European Union (Kantola 2010; Agustín Rolandsen & Montoya 2011).

The reality of immigrant women with insecure rights of residence exposed to male partner violence can be described as being trapped between the law and life in a no-win situation (Madsen et.al. 2005). They get caught between the rules of their native countries and those of the Swedish state which denies them the right to divorce or separation and to be protected from violence. They can either choose to stay in violent relationships until they become eligible for permanent residence themselves or leave and risk expulsion, more violence and social exclusion. Furthermore, if they do return to their country of origin, they may face the prospect of ending up in prostitution, being married off to old men, or generally having to endure wretched circumstances, unable to support themselves (Madsen et.al. 2005; ROKS 2009).

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Through a process of comparison this article analyses the ways in which gender and race are recognized and addressed in Swedish criminal and alien law with reference to men's violence against immigrant women with insecure residency. I will argue that although the Swedish criminal law system has engaged with gender equality and recognized men's violence against women as being a question of gender and power, the significance of race and racism has not been properly acknowledged. Although these aspects regarding gender and race need to be dealt with urgently, at least in the criminal law immigrant women are constructed as owning rights to be protected. In contrast, Swedish alien law is blatantly lacking in an understanding of men's violence against women both in terms of gender power relations *and* of the ways in which this violence can be racialized or culturalized. My main conclusion is that there are significant processes of 'othering' abused women in both legal areas, but especially in alien law where abused migrant women are constructed as unwanted in Swedish society when no longer fulfilling their function as men's partners. Consequently, the Swedish state appears to be relieved of any responsibility for abused migrant women.

This article offers an analysis of Swedish preparatory works and case law and calls attention to how certain values and ideas are constructed in legal texts. It seeks to unmask and problematize power structures and discourses in law by utilizing an intersectional analytical approach developed in feminist research on men's violence against immigrant women. There is a need for such an analysis because the specific exposure of violence for minority women related to the social, cultural and legal problems they face is very seldom acknowledged in Swedish research into men's violence against women. In my view, the core of such an analysis is (1) the recognition of culturally specific forms and experiences of male violence, (2) an emphasis on the need to acknowledge how different social power structures shape and differentiates both experiences of and responses to violence, and (3) the recognition of how the imbalance of power and control runs through abused women's experiences (Sokoloff & Dupont 2005; de los Reyes & Mulinari 2005; Thiara & Gill 2010; Wendt 2010; Nixon & Humphreys 2010). I particularly want to bring to the fore the significance of power structures and discourses of gender and race in the ways immigrant women's exposure to male partner violence is reflected and responded to in law and how the women are constructed in this context. My focus is thus on the relationship between power structures, constructions in law and the lived experiences of immigrant women exposed to male partner violence. In this way I hope to highlight how intersecting power structures and discourses in law are oppressive for

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immigrant women in the way they ‘other’ the women and exclude them from the overall Swedish gender equality agenda.

With this approach I also hope to avoid the risk of reproducing, within a victim discourse, essentialized constructions of abused immigrant women as powerless and passive victims who need to be taken care of.<sup>1</sup> The overall dichotomy related to victimization, in which agency/active/non-subordination are placed in opposition to helpless/passive/subordination, is always crucial to challenge in order to offer new subject positions for abused women. The victim position is even more problematic for immigrant women who, in a context of discrimination, racism and colonial practices, are not fully included in a Swedish “us” (Carbin 2010) They risk being marked by a discourse of ‘collective victimhood’ which sees the violence as something culturally specific to them as women from certain cultures or communities (Thiara & Gill 2010).

## **Criminal Law**

### *Gross violation of a woman’s integrity – a turning point for gender*

Swedish feminist demands for criminal law that is more responsive to men’s violence against women often emphasize general prevention, positive legal rights, positive criteria for using the law and the necessity of paying attention to gender and a crime victim perspective. Such demands are confronted by a Swedish criminal legal discourse which is typically academic and neoclassical, in which the general and special preventive effects of criminalization are strongly questioned and where negative rights are emphasized. A moral principle of fairness and traditional principles of justice, such as legality, proportionality and predictability characterizing a retributive criminal legal system, are also stressed. Hence feminist demands risk being associated with arguments that are considered irrelevant, of subordinate

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<sup>1</sup> In spite of its tendency to categorize abused women as passive and helpless objects I occasionally use the term ‘victim’ instead of ‘survivor’ or similar terms to represent women exposed to male partner violence. ‘Victim’ is often a disempowering notion that renders it difficult to regard women as agents capable of taking responsibility over their own lives and the lives of their children (Kelly 1988; Mahoney 1994; Crocker 2005). My reason for using the term ‘victim’ is that it in a *legal* context it is better suited than for example ‘survivor’ to represent the legal subject with the interest law aims to protect from harm by others (Kolffjord 2004).

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importance, or even a threat to the basic principles of criminal law - its purpose, legitimacy and boundaries. Using criminal law in order to promote the goal of combating men's violence against women is thus considered problematic in mainstream criminal legal scholarship. Criminal law is not, according to a neoclassical criminal policy, first and foremost an instrument for solving social problems. Instead – it is argued – it has to be seen only as an instrument for determining blame in a fair and legally certain way (Burman 2007).

Against this backdrop the Swedish Women's Peace reform and the introduction of a new crime named 'gross violation of a woman's integrity' represent an important turning point. At the beginning of the 1990s men's violence against women was politically recognized as one of the most serious obstacles to the achievement of gender equality and acknowledged as an expression of a view of women that was incompatible with this goal (Prop. 1993/94:147). This new perspective was incorporated in a Government Bill on gender equality in 1994 wherein this violence was politically defined as a specifically gender-equality issue related to power and women's human rights. In 1998 a Government Bill entitled 'Women's Peace' offered a comprehensive and gender-sensitive reform, which incorporated several legislative and policy measures (Prop. 1997/98:55). Feminist knowledge about men's violence against women formed the basis for the Women's Peace reform. This reform recognized the importance of male violence against women as part of the gendered power structure of society and its role in undermining gender equality and women's human rights. The reality of women exposed to male violence was described as 'invisible' or 'suppressed' in the criminal law, and in response, amongst other legislative measures, a new crime - "gross violation of a woman's integrity" – was enacted.

Even though the criminal legal community presented a comprehensive critique attacking the idea of enacting a crime specifically aimed at domestic violence, and despite the critique of the proposed construction of the crime strongly influencing its final form, the law was nevertheless enacted.<sup>2</sup> This enactment represented a significant discursive change. There had been a long tradition in Swedish criminal legislative processes of constructing men's violence against women in heterosexual relations as 'different' and 'strange', and therefore not suitable for inclusion in the criminal legal system. But in the preparatory works for the

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<sup>2</sup> The critique and the processes and outcome of the legislative process are described and analyzed in Nordborg and Niemi-Kiesiläinen 2001.

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Women's Peace reform the difficulties in dealing with such violence were also connected to the criminal legal system itself. As a result, the criminal law, from being constructed as a rather stable entity, quite impossible to challenge, became more open to scrutiny in respect to, for example, the types of values embedded in its theory and practice. Similarly, the criminal legal system's inability to deal with difference related to gender was also exposed. Knowledge from other fields, such as feminist research into violence, was also taken more seriously and more easily used to examine criminal law (Burman 2009). This meant that the law became an instrument for promoting gender equality, and gender equality was simultaneously formulated as a relevant aspect of criminal policy.

The purpose behind the new legislation was to 'construct' a crime that better accorded with the reality of violence against women in intimate relationships and with the evidence from feminist research, e.g. patterns of repeated violence and the severity of its consequences (SOU 1995:60; Prop. 1997/98:55). Another purpose was to ensure that blameworthiness for such violence is more adequately valued. The definition of the crime is sex-neutral and includes all intimate relations, for example between parent and child or same-sex relations, but in the second paragraph there is a sex-specific formulation concerning heterosexual relations and explicitly gendering the perpetrator as a man and the victim as a woman.<sup>3</sup>

The new crime covers less serious acts that are already criminalized, for example non-aggravated assault, unlawful threats, harassment and unlawful coercion. Such acts now can be judged together and judged as more blameworthy than before if two specific prerequisites are met; if the acts form an element in a repeated violation of the victim's integrity, and if they are likely to severely damage the victim's self-confidence.<sup>4</sup> Moreover, although every act is singularly criminalized, the details of the place and date of each one are not necessary. So those acts committed over a period of time can comprise the basis for punishment, even

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<sup>3</sup> See Ds 1999:36 for an official English translation of the crime.

<sup>4</sup> More serious criminal acts such as rape and attempted murder cannot be included. If a man, beside rape(s), has committed, for example, repeated assaults against his female partner, he can be convicted of both rape and gross violation of a woman's integrity, and the rape(s) can be taken into account in judging the two specific prerequisites of the latter crime.

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though the precise time and place of each act of violence and how they were carried out may be to some extent unspecified.<sup>5</sup>

The reform and the newly defined crime have had significant effects. There has been an increased visibility and awareness of men's violence against women in the criminal justice system, whilst it also seems that police and prosecutors use the possibilities offered by the new law to give much more attention to repeated patterns of violence (Niemi-Kiesiläinen, 2006). After some years of low prosecution rates and uncertainties regarding the adjudication of the new law, significant increases in the number of reported cases, prosecution rates and the number of men sentenced to imprisonment, have been observed (Nilsson 2004; Lindström 2005; Hradilova Selin & Westlund 2008).

Despite the current criminal law appearing to be rather successful at protecting women's rights in the context of domestic violence, there are nevertheless lingering problems. Several forms of male use of psychological violence to gain power and control over women remain excluded, even though the possibilities of considering psychological violence have increased (Burman 2010). Discourses hindering a gender equal treatment of the violence still tend to dominate and influence legal practice and case law, for example by those apologizing for violent men and/or blaming abused women for the violence they suffer (Burman 2010). Finally, as already mentioned, the exile-specific context of immigrant women and racialized power structures are poorly recognized in this legislation.

### *Othering processes in criminal law*

According to two official government inquiries the same institutional racial discrimination exists in the Swedish criminal justice system as in countries where there is more extensive debate and research on the matter (SOU 2005:56; SOU 2006:79). Attention so far has mainly been directed at discrimination against or unfair treatment of offenders or persons suspected of crime (Diesen et.al. 2005; SOU 2006:30; BRÅ 2008a; BRÅ 2009), with victims of crime receiving much less attention. However, studies indicate that the overall chance of a case

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<sup>5</sup> The Supreme Court has elaborated this aspect in NJA 2004 s.437. It seems to be the opinion of the Supreme Court that a prerequisite for accepting a series of unspecified acts is that some more detailed and specified acts can also be established.

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reaching prosecution is less if the victim is of foreign origin than if s/he has a Swedish background (Diesen et.al. 2005; BRÅ 2008a).

In regards to immigrant women exposed to male partner violence, studies produce a rather complex picture. Immigrant women seem to comply more easily with the 'ideal', defenceless and subordinated female victim of male partner abuse and are often considered to be less independent than women of Swedish origin (Andersson & Lundberg 2000). Their exposure to violence may be seen as more serious, their stories of continuing abuse to be more reliable or their trustworthiness as higher. However, this only seems to be the case if the violent man is also of foreign background (BRÅ 2008a). Yet cases of male partner violence against minority women are less often successfully prosecuted by the police than cases of violence against women with a Swedish background and minority women report that they experience worse treatment from the police than Swedish women do (BRÅ 2008b).

Until now, there has been only one Supreme Court case regarding the crime of gross violation of a woman's integrity that involves an immigrant woman as the victim of male partner violence. This case is interesting, not only because of what is said in the text, but also because of what is not said and the ways in which the case differs from cases when both the victim and the perpetrator are of Swedish white origin. The woman in the actual case had married an immigrant man from Africa with residence in Sweden, having herself immigrated to Sweden from Africa five years before the trial. The man was found guilty of molestation and unlawful threats on four occasions and of a large number of assaults, with the acts having been committed during a period of two and a half years. The exile-specific factors facing immigrant women victims of domestic violence are to some degree acknowledged in the case. However, the legal argumentation in judging the repeated criminal acts as likely to severely damage the woman's self-confidence is dominated by a strong discourse on the defencelessness and subordination of the immigrant woman.

[The woman] had recently moved to Sweden without any knowledge of the Swedish language and was mostly alone at home with young children. She lacked a social network. The circumstances in the case show that [the man] did not make any efforts to make it easier for her to integrate into Swedish society and that in various ways he tried

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to control and limit her contact with others. It is evident that she was more or less at his mercy (NJA 2003 s. 144, p. 157).

In this way, the woman's submissiveness, isolation and language problems are emphasized, even though there is extensive information in the case about the woman's agency, for example how she opposed the man, transgressed his 'rules' and, in spite of her language problems, made several contacts outside the home. In similar cases of repeated violence, when victim and perpetrator are of Swedish white origin, such evidence of female agency would make courts hesitant about the woman being an 'ideal' victim of domestic abuse. This might influence the judgment of the prerequisite 'likely to severely damage the woman's self-confidence' in the opposite direction (Burman 2010). It is true that the woman in this case was constructed as a 'real' victim of male abuse, but at the cost of disempowering and discriminatory intersecting discourses on gender and race.

Perhaps it is even more important that the man in this case also was an immigrant from Africa. Men of Swedish white origin who are violent against female partners have never before or since in the Supreme Court case law on domestic violence been judged in a similar way as controlling and dominant. As regards such men, the Swedish case law is instead dominated by discourses on the perpetrator's unstable psychological conditions, especially strong emotions, disturbances, anger or psychological stress, that are seen as 'caused' by the relationships with their female partners and as 'causing' their violence (Burman 2010). In my view, these differences seem to reflect the overall societal tendency to problematize and culturalize a violent man's behaviour, masculinity and attitudes related to women to a much greater extent if he has a foreign background (de los Reyes 2003). It also serves as an example of the pitfalls of recognizing exile-specific factors in criminal law while simultaneously failing to acknowledge racialized power structures and the tendency to 'other' the problem as not being related to Swedish men or women. Racializing gendered violence in this way serves to make both the violence perpetrated by 'normal' white Swedish men and their female victims invisible. Swedish 'normal' men are, as in the case of rape, constructed as being immune to committing gender related crimes and their violence as not primarily having to do with gender inequality and gendered power relations (Bredström 2002; Jarl & Stolt 2010).

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## **Alien Law**

### *Power structures*

The system for partner immigration comprises a principal right for an immigrating partner to settle in Sweden if the relationship with the person in Sweden is judged to be serious and a two-year probationary period during which the immigrant partner is granted a residence permit with limited duration.<sup>6</sup> This legal construction brings with it a special tactic for control often used by the abuser, namely the threat of a forced return to the country of origin. Abused immigrant women with insecure residency live constantly under the threat that the men might leave them and some men even inform the Swedish Migration Board that the relationship is unstable (Misiowiec 1999; Lenardt 2008; ROKS 2009).

Immigration law does, however, recognize the problem that immigrant women exposed to male partner violence do not dare disclose their exposure within the two-year probationary period due to fear of deportation and therefore continue a relationship in which they are abused. For this reason, even if the relationship has ended before the two-year time limit has expired, a residence permit may be granted, if the main reason for ending the relationship is that the woman or her children have been exposed to violence or other serious violations of freedom or personal integrity (the domestic violence rule).<sup>7</sup>

A common discourse present in preparatory works is that of the protection of global relations, in which it is seen as important that national borders should not hinder the establishment of intimate relations.<sup>8</sup> However, a discourse on the misuse of immigration law, where bogus marriages are said to be a common background to illegal immigration, dominates the preparatory works by the way it is used repeatedly as an argument in how to shape the regulations.<sup>9</sup> One example is the common line of argument that the risk of bogus marriages and misuse of the legislation must restrict the possibility of receiving a permanent residence

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<sup>6</sup> Chapter 5 section 3a and section 8 The Aliens Act (2005:716).

<sup>7</sup> Chapter 5 section 16 paragraph 3 The Aliens Act (2005:716).

<sup>8</sup> See for example SOU 1997:152, p.173; SOU 1999:16, p. 377; Prop. 1999/2000:43, p. 33.

<sup>9</sup> See for example SOU 1999:16 pp. 360-376; Prop. 1999/2000:43, p. 36.

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permit based on the domestic violence rule. Violence which is termed “petty encroachments” shall not as such lead to the granting of a new residence permit. In assessing whether the violence or violation might lead to a new residence permit special consideration shall be given to (1) the circumstances under which the abuse took place, (2) how serious the abuse has been, (3) if violence or violations have occurred as single isolated incidents or as repeated violations, and (4) the duration of the relationship (Prop. 1999/2000:43). The evidentiary standard is that the woman has to show probability that the abuse has taken place. A prosecution or conviction in court is not necessary. Police reports or written evidence from the social services, healthcare services or women’s shelters documenting the woman’s statements about the violence can be sufficient. Another evidentiary requirement is that the causal connection between the violence and the woman ending the relationship must appear plausible.

It is hard to understand the view that special criteria are needed in order to prevent misuse of the domestic violence rule. What is implied here? Is it a fear that men will admit to having perpetrated violence in order to help women to get a residence permit? Or is it that women, assumed to have had no serious intention from the beginning, would be given an opportunity to easily manipulate men into using violence and then reporting them to the police so they can obtain a residence permit? It is also possible that this is an expression of the common ‘fear’ or even ‘presumption’ that women make false allegations of violence in order to gain advantages they are supposed not to be entitled to. Even if the relevance of this last consideration could not be questioned, the ‘problem’ it presupposes could be seen as solved by the rather heavy burden of proof that is placed on abused women. So why is it regarded as necessary, in addition to this burden, to give so much emphasis to the type of violence or length of the relationship? The relevance of the criteria can also be questioned. Why is, for example, the duration of the relationship relevant for deciding the question of a residence permit? Moreover, these criteria reveal a view that is in opposition to the general Swedish violence-against-women discourse, which expresses zero tolerance against violence. In this discourse no explicit exemption is made from legal and social rights for abused women in relation to how serious the violence has been or the duration of the relationship.

There are several examples in the preparatory works which unmask a serious lack of knowledge about men’s violence against women in intimate relations, e.g. a statement about

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evidence of the required causal connection between violence and the woman ending the relationship. One factor considered to count against such a connection is if a long time has elapsed between the violent events and the end of the relationship (SOU 1997:152; SOU 1999:16; Prop. 1999/2000:43). However, here the need to acknowledge the way violence functions as a tool for exerting power and control, the different ways in which an abusive man can maintain power and control without resorting to criminalized acts, the complex process it is for women to leave violent men, and the exile-specific factors facing immigrant women, are all totally ignored.

Alien law offers two more alternatives for obtaining a permanent residence permit when a relationship has ended within two years: first, if the immigrant, apart from the relationship that was the reason for immigrating, has a special attachment to Sweden, for example to children or a new partner; second, if other particularly strong reasons for granting a residence permit exist - one example of this being cases when the proven abuse does not fully meet the requirements of the domestic violence rule, but the woman, due to a divorce or separation, risks social exclusion if she returns to her country of origin (Prop. 1999/2000:43).

Case law and the few studies that have been undertaken in this area suggest that abused women face evidentiary problems and that few women are granted residence permits on the basis of the domestic violence rule. According to statistics from the Swedish Migration Board, the most common ground in 2009 for obtaining a residence permit after experiencing violence was 'special attachment' (ROKS 2010). It also seems as if the second alternative 'other particularly strong reasons' plays a more important role for abused women than the domestic violence rule. Until very recently, when The Supreme Migration Court (SMC) tried its first case involving the domestic violence rule, relevant case law consisted of three cases in 2000 from the former Aliens Board.

In the three cases from the Aliens Board, the domestic violence rule was considered inapplicable to the granting of a residence permit. In one case<sup>10</sup> the man had been charged with repeated rapes, assaults and unlawful threats, but was convicted of just a single non-aggravated assault. The Aliens Board found the violence in this conviction not serious enough to meet the criteria of the domestic violence rule. Nevertheless, the Board concluded

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<sup>10</sup> UN 390-00.

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that the woman had likely been subjected to sufficient serious violence. The Board referred to the fact that the man had been deterred before the trial by the charges brought against him and that the woman maintained the same story of violence and abuse throughout the criminal procedure. The duration of the couple's cohabitation in Sweden, four months, was, however, regarded as too short for the domestic violence rule to be applicable. In the two other cases the Aliens Board found that the women did not meet the requirement of showing probability of "enough serious violence", mainly because she failed to prove physical violence. In one of these cases the Board was rather unclear regarding how they judged the evidence requirement, even though they regarded the woman's contact both with the police and the women's shelter as a factor that supported her claim that she had suffered repeated physical violence.<sup>11</sup> In the other, the day after the woman had reported the violence to the police she withdrew her report and the case was later closed.<sup>12</sup> The main arguments in the evidentiary assessment were her report being withdrawn without being heard by the police and the absence of documentation of physical violence.<sup>13</sup> In addition, in one of these cases the duration of the couple's cohabitation in Sweden, nine months, was regarded as relatively short but nevertheless long enough for the domestic violence rule to be applicable.<sup>14</sup> Yet in both cases the psychological harassment and humiliating ill-treatment the Board found had taken place was not deemed serious enough. Ultimately, in two of the three cases, the women were granted a residence permit on the grounds of having 'other particularly strong reasons',<sup>15</sup> with the violence or ill-treatment they had faced, plus the risk of social exclusion if they returned to their native country (Iran in both instances), being regarded as strong reasons for residence permits to be granted.

Studies clearly indicate that the Aliens Board case law has had a strong impact on the application of the domestic violence rule. The main reasons for not granting a residence permit seem to have been that the woman has not shown sufficient probability that the abuse took place or that the violence experienced is not considered serious enough. Another

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<sup>11</sup> UN 418-00.

<sup>12</sup> Since 1982 a complaint from the victim or any other special consideration are no longer required for a prosecution of domestic violence. But it is still rather common for abused women to choose not to cooperate during the preliminary investigations and if there is no other evidence in favor of the police report, the prosecutors normally decide to close the case.

<sup>13</sup> UN 391-00.

<sup>14</sup> UN 418-00.

<sup>15</sup> UN 390-00 and UN 391-00.

common argument for not applying the domestic violence rule has been that the duration of cohabitation is too short (MIGV 2003; Blomqvist and Berndtsson 2004; ROKS 2010). The overall picture is that the domestic violence rule has been applied restrictively, which is not surprising considering the restrictive tone in the preparatory works. The Aliens Board case law has effectively reinforced ignorance about gender and violence and the patriarchal view in the preparatory works.

In the SMC case from 2011 the woman was granted a residence permit on the basis of the domestic violence rule.<sup>16</sup> The case does to some extent counteract the previous commonly expressed suspiciousness towards immigrant women who report that they have been victims of male partner violence. The main issue in the case was whether the woman had shown probability that the abuse had taken place. The Migration Board and the Migration Court found that she had not met the evidentiary requirement. The main arguments in this assessment were that the woman had failed to disclose the violence in spite of several contacts with the Migration Board during the relationship and that she reported the violence to the police six months after she informed the Migration Board about the violence and that the relationship had ended. In this respect, the argumentation of the SMC gives evidence of a better understanding of men's violence against female partners in general and the difficulties for immigrant women to disclose and report violence in particular. For example, the SMC acknowledged that immigrant women often need time in order to find out what they can expect from the Swedish society and to consider what actions to take.

In my view, the SMC case is an example of when there can be no doubt about the applicability of the domestic violence rule. In contrast to the previous cases from the Aliens Board, the woman in the SMC case managed to present extensive evidence supporting her story of physical violence and coercive control. She had reported the violence to the police, but the prosecutor decided to close the case. However, the police investigation contained interviews with several witnesses who had observed clear evidence of violence on her face and had heard her express fear of her husband. She had contacted the social services in connection with the separation from the man, and they judged her situation so serious that they provided her with a safe shelter. Further, a restraining order had been issued which for a year prohibited the man to visit or otherwise contact her. Finally, the fact that she took the

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<sup>16</sup> UM 8405-10, 2011-10-21.

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initiative to inform the Migration Board about the separation and disclosed the violence before the Migration Board initiated the investigation that led to the decision to deport her, was regarded to speak in favour of her trustworthiness. The length of the relationship was two and a half year after her arrival to Sweden. It was established in the case that the woman during that time had been subjected to physical violence on average on ten occasions per month.

At least this case shows that there exists a possibility to receive a residence permit based on the domestic violence rule. However, immigration law is still based on a misdirected ambition to reveal bogus marriages by using irrelevant criteria about violence that are oppressive towards immigrant women. The domestic violence rule implies that these women have to put up with violence for a rather long time in order to fulfil the ‘relationship duration’ and ‘serious enough and repeated violence’ criteria. Yet if she waits too long before leaving, the causal connection between the violence and her ending the relationship might be questioned. I believe that it will continue to be rather difficult for abused women to obtain residence permits based on the right to live a life free from male partner violence and that it will still be easier for abused women to obtain a permit on the basis of relationships to others, as partners to another man or as mothers to children born in Sweden. Violence can generally be viewed as a hindrance to a woman’s right to end a relationship (Ekbrand 2006). Alien law strengthens this hindrance because of the legal criteria that have to be met. Yet a violent man can easily get rid of an immigrant woman by separating from or divorcing her and there is nothing to stop him from starting a new relationship with another woman with insecure residency. The law helps to maintain immigrant women in a submissive position and makes the process of strengthening or empowering them more difficult (Madsen et.al. 2005:63; ROKS 2009). In sum, restrictive immigration legislation affects minority women’s gender equality and signals that immigrant women are unwanted in Swedish society.

#### *Othering processes in alien law*

The main interest in the preparatory works is directed towards the women who immigrate to Sweden, not the men. Categorizing discourses are common and share a construct of women as “the other”. In one category of immigrant women entering into a relationship with a man in Sweden they are described as “adventurous”; as very ‘eager’ to come to Sweden and as

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having only themselves to blame for the situation, because they have taken the risk of immigrating to live with a man in Sweden without knowing anything about him.<sup>17</sup> Another category is women who are “social migrants”, hoping for a better life. The partner relationship is described as not “normal” because it is considered to be connected more to economic, social or political situations in the woman’s country of origin than to a “normal” established mutual love relationship.<sup>18</sup> Yet another category is “culturalized women”; women described as coming from countries in which their freedom of movement is strongly restricted and they are totally dependent on their men. These women are constructed as especially problematic because it is presumed they encounter special difficulties in Sweden due to cultural conflicts and antagonisms regarding sexuality, relationships and gender roles.<sup>19</sup>

In this way, immigrant women are constructed in relation to a tacit norm - the “Swedish” woman who is presumed to have honest intentions regarding her relationships, who is living under gender equal conditions and is able to handle her situation. By granting residence permits on the basis of “other particularly strong reasons” the problem can also be defined as existing outside the “gender equal” Swedish borders, in the abused woman’s “underdeveloped and gender unequal country of origin”. This is a way of “othering” the problem of male partner violence and avoiding having to deal with the responsibilities of the Swedish state to protect women inside its borders against the violence.

The starting point for Swedish alien law is that the law shall not hinder the establishment of relations crossing national borders. But this starting point as well as the male demand for women which lies underneath it, becomes totally invisible when violence becomes an issue. What happens instead is that alien law only focuses on the immigrant women. The power structures embodied in alien law and the ways in which abused immigrant women are constructed excludes from the picture not only the gendered processes and consequences of violence, but also the parts taken by demanding men in Sweden and the Swedish state, both of whom originally welcomed the women to Sweden. In my view, alien law leaves immigrant women’s integrity, rights and welfare poorly protected. Having the possibility to stay in Sweden seems to be something immigrant women must ‘earn’. The crucial question is rather,

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<sup>17</sup> See for example SOU 1997:152, p. 170 and Prop. 1999/2000:43, p. 34.

<sup>18</sup> See for example Prop. 1999/2000:43, p. 35.

<sup>19</sup> See for example SOU 1997:152, p. 171 and Prop. 1999/2000:43, p. 34-35.

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if it is reasonable for the State's obligation towards them to be so weak, then why has the state supported women's mobility in order for them to become the partners of men in Sweden?

### **Concluding Discussion**

The most obvious difference between criminal and alien law is in regards to gender. Feminist demands on criminal law have often been (and still are to some extent) met with scepticism or resistance in mainstream criminal legal research and policy because the demands are interpreted as a use of criminal law which conflicts with the very idea of criminal law. Criminal law is conventionally comprehended as being based on legal and ethical principles - some of them laid down in human rights instruments, constitutions or laws - which have the purpose of exerting a strong influence on the penalization of violence, the application of the law and the criminal legal process. The legal principles, concepts and subjects in this area of law are constructed with the aim of ensuring that the person who is being accused of a crime is treated in accordance with the rule of law. In contrast, the victim of crime has no self-evident position within the criminal justice system. Further, arguments based on the relevance of gender are often rejected because criminal legal principles and norms are considered to be gender neutral. In spite of this continued rejection of feminist demands Swedish criminal law has undergone some rather radical changes in regards to gender, power and male violence against women in intimate relationships and women who have been victims of male partner violence are constructed as legal subjects with rights.

Alien law is in many respects described in the opposite way, as 'special' and implying other demands such as flexibility and extensive scope for assessing the particular circumstances in individual cases (see Nilsson in this edition). The legal criteria and evidentiary standard in the domestic violence rule are certainly flexible and might therefore be expected to lead to a more flexible outcome. Instead, alien law shows a continued pattern of reproducing patriarchal notions of abused women and a problematic representation of violence itself. This is not so surprising given that the significance of and relations between gender, violence and power have not been acknowledged and implemented in alien law. Neither have existing

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human rights for immigrant women exposed to male partner violence been taken seriously. Instead of being represented as legal subjects and women with rights, intersecting patriarchal and racist discourses construct immigrant women exposed to male partner violence as ‘other women’ who are unwanted in Swedish society when no longer fulfilling their purpose as partners of men in Sweden. This ‘othering’ process is similar to that in which female victims of trafficking for sexual purposes are precluded from being considered as belonging to the moral community of the destination country and in which their status as irregular immigrants, rather than women living in the country, is the categorizing condition (Marmo & La Forgia 2008; Yttergren in this issue).

The most obvious similarity between criminal law and alien law is that immigrant women exposed to male partner violence tend to be constructed as the ‘other’, even though the ‘otherness’ is formulated differently. Also, the violence tends to be constructed as a non-Swedish problem in both. Male partner violence, at least when it is connected to unequal gender relations, is represented as something that mainly ‘other’, non-Swedish men are engaged in or as a problem that other ‘patriarchal’ states are particularly unwilling or unsuited to deal with.

Neither legal area begins to approach what I, at the beginning of this article, described as an intersectional approach to men’s violence against immigrant women. Some recognition of the specific situation for immigrant women exists in both legal areas, but the risks associated with highlighting ‘culturally specific’ violence without recognizing power structures are also visible within them. There is a clear tendency in both criminal and alien law to ‘other’ the violence and to separate the abuse experiences of immigrant or minority women. Such a separation might, within a context of racism and sexism, promote othering discourses, blame the victim or exclude gendered power relations from the analytical frame (Thiara & Gill 2010; Agustín Rolandsen & Montoya 2011). These problematic aspects are most clearly found in Swedish alien law. In criminal law the main problem, as already noted, seems to be the connection made between race, culture and unequal gender relations. Another risk associated with ‘diversity sensitiveness’ as regards violence against women is that it might end up in a ‘one size fits all’ definition of violence, such as ‘family violence’, which though capable of recognizing institutionalized racism, may render gendered power relations invisible (Vincent & Eveline 2010).

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In the most recent Swedish gender equality policy documents, abused women of immigrant or foreign origin are to some extent recognized as a ‘particularly vulnerable group’ due to the specific factors they face as immigrants and abused women with insecure rights of residence are described as facing a ‘particularly difficult situation’ (Government Communication 2007/08:39; Government Communication 2011/12:3). In the directives to the recently appointed committee, these women are represented as a ‘particularly exposed group’ (Directive 2011:44). However, the ways in which immigrant women who suffer male partner violence are affected by discrimination and power systems related to gender and race in Swedish law and society is still an absent issue. Indeed, naming the women as ‘particularly vulnerable’ or ‘particularly exposed’ puts them in danger of being constructed as deviating from the Swedish norm (Carbin 2010). If such a naming occurs together with ‘othering’ processes, such as the ones in criminal law, there is a risk of creating a discourse of ‘collective victimhood’ and precipitating a culturalization of male partner violence. However, with the kind of ‘othering’ processes that are present in alien law, there is a danger that violence in this context will be connected to shortcomings related to individual immigrant women, and not the role played by gender, race and power in Swedish law and society. In sum, when it comes to women of non-Swedish origin exposed to male violence, whether inside or outside Swedish national borders, it is more appropriate to speak of the absence of a model for gender equality and the lack of protection of women’s human rights (see also Nilsson and Yttergren in this edition).

Giving voice to abused women from diverse contexts is important, but can end up in relativist identity politics (Sokoloff & Dupont 2005). A focus solely on law’s inability to take abused women’s different identity formations into consideration might make law unable to grapple with the diversity of violence. Therefore I agree with those who argue that an intersectional approach to law should not mainly be bound up with issues of identity (for example, Conaghan 2009). In my view, as regards immigrant women exposed to male partner violence, there is a need to include a broader social and legal context into an analysis of law and policy. Intersectional analysis can provide an understanding of power and oppression which highlights and critiques the constitutive effects of law in producing the subjectivity of abused immigrant women, as well as the relationship between these constructions, power structures and material considerations, such as the violence immigrant women are exposed to. My analysis has focused on the latter aspects. It shows that the notions that men’s violence

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against women always harms women and is about the assertion of power and control over women should be placed at the centre of an intersectional approach to law and policy. Doing so will hopefully contribute to counteract the problematic aspects of Swedish law highlighted in this article and other risks associated with a simplified approach to gender and race in relation to men's violence against women.

Law is often an unreliable ally in efforts to combat men's violence against women and improve the rights and situation of abused women. Using law to pursue gender equality and to confront and challenge patriarchal and racist domination and oppression is fraught with problems, especially when the gendered and racialized power structures in law remain unmasked, unchallenged and unchanged. However, the comparison between Swedish criminal and alien law gives reason to be a little optimistic, for while alien law is a good example of what happens if nothing at all is done to challenge and change power structures in law, one can observe some significant positive outcomes of the gender equality reform of criminal law.

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