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## The politics of protection

Are women who flee domestic violence political refugees? The INS says they could be, but controversial new rules could come too late for the woman whose case inspired them.

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By **Fiona Morgan**

Jan. 9, 2001 | SAN FRANCISCO -- For 10 years, Rodi Alvarado's husband beat her. According to her undisputed testimony, her husband, a former soldier, beat her unconscious; he beat her so badly that she bled internally; he raped her often and even threatened to kill her. Alvarado knew that if she didn't leave Guatemala, she'd soon be dead.

Guatemala offers little or no protection for women who are abused. When she asked the Guatemalan police for help, they told her they couldn't get involved in domestic disputes. The judge she appealed to said the same thing. She made several unsuccessful attempts to leave her husband and live elsewhere in Guatemala, but he always tracked her down.

Then, in 1995, Alvarado made the dangerous, illegal crossing into the United States via Brownsville, Texas, and soon landed in San Francisco, where she found pro bono legal representation and filed for asylum protection with the Immigration and Naturalization Service.

Alvarado has made a new life here, supporting herself through hourly wage jobs in the Bay Area. According to her co-counsel, Karen Musalo, the hardest struggle has been living without the children Alvarado had to leave behind, a then-8-year-old daughter and 3-year-old son, who she did not want to expose to the risk of her illegal flight.

But Alvarado's status in America is still uncertain -- her case is a major controversy within the INS, and her plea for asylum protection has prompted the agency to propose a binding definition of what it means to be a refugee, to be persecuted, to merit protection by the U.S. government.

Last month the Justice Department, of which the INS is a branch, disseminated new asylum proposals. Prompted in large part by the troubling contradictions within the system that Alvarado's case brought to light, the rules explicitly state that persecution on account of gender can, in certain circumstances, be grounds for granting asylum. The rules would also set a clear (or at least clearer) framework of legal requirements for seeking asylum. The INS is accepting comments on the rules until Jan. 22. The policy and public comments will then be forwarded to the incoming Bush administration, which must decide whether or not to implement the policy.

Human rights advocates and feminists are celebrating the proposed policy changes, which would help

many women seeking asylum as a result of domestic abuse in other countries. Amnesty International and other human rights groups have organized letter-writing campaigns to drum up support for the issue.

"They're a step in the right direction, [but] they don't go as far we would have liked," says Musalo, who serves as a co-counsel to Alvarado. Musalo also runs the Center for Gender and Refugee Studies at the University of California's Hastings College of Law in San Francisco.

But critics say this is just one more step in a process of broadening the definition of asylum far beyond its original intent -- and beyond what the system can handle.

"We can't solve all of the world's problems through our asylum laws," counters Dan Stein, executive director of the Federation for American Immigration Reform. "It's far beyond the capacity of our asylum system to be providing permanent residences to everybody who wants to flee a country where there are prevailing social norms that we might find unacceptable," he says.

INS officials say they do not expect the rules, if approved, to open the floodgates to a wave of asylum seekers. In the past, when asylum grounds were broadened to encompass potentially millions of victims of persecution, the agency did not receive a deluge of petitions. "There's no significant increase in the number of claims coming forward," says INS spokesman Bill Strassberger when asked about previous changes in the asylum rules.

That's because people have to make it to the U.S. first before they can apply (and very few have the means to get here), they don't want to get here or they lack awareness that the option exists. In 1999, 42,000 asylum claims were filed with the INS and 13,500 were granted. And it's not as easy as simply being a woman from a country with backward attitudes toward women. Each person applying for asylum has to prove his or her individual case, that she has a "well-founded fear" of torture or death if she were to go back home.

In addition to granting asylum to women entering the U.S., if enacted the regulations would also protect women living here as temporary residents whose husbands get into trouble for abusing them on U.S. soil. Currently, the wife's immigration status is often tied to her husband's, so she is forced to leave the country if he is deported for a domestic violence conviction. INS statistics show that about 300 men are deported as abusers each year.

But the incoming Bush administration might not put the rules into effect. "It is not unusual at all for the incoming new administration to yank all of the regulations or other pending matters that have not been finalized," Musalo cautions. Though she is ambivalent about the proposed rules, she finds the timing of their release even more distressing. A Bush aide said the administration would wait until Bush takes office before reviewing the INS's proposed policy.

Strassberger says he feels the INS has done the proper work in preparing the rules to ensure that they will meet bipartisan approval. But the rules would not necessarily help Alvarado. In 1999, the Board of Immigration Appeals ruled against her appeal, and Alvarado's case is currently awaiting last-minute review by outgoing Attorney General Janet Reno. If Reno does not reverse or vacate that decision, Alvarado could be deported. "The person whose plight brought attention to the gaps in protection and caused this whole very controversial process to take place and to actually bear fruit, wouldn't it be ironic if [she] didn't benefit?" Musalo asks.

At the Geneva Convention of 1951, world leaders defined a "refugee" as a person outside his or her country of origin, unable or unwilling to return there, "because of persecution or a well-founded fear of persecution

on account of race, religion, nationality, membership in a particular social group or political opinion." While four of those grounds seem fairly clear cut, the definition of "a particular social group" is -- the INS admits -- problematically vague. That definition and the controversy surrounding it are at the heart of Alvarado's case and are the impetus for the newly proposed rules.

Political asylum was created as a distinct form of refugee aid through the Refugee Act of 1980. Asylum was mainly designed for people visiting the U.S. in some sort of diplomatic role, who might defect and request protection. "When Congress passed the Refugee Act," Stein says, "they did not expect more than 5,000 asylum grants to be given in any given year." Once the Cold War ended, many people expected the number of people asking for asylum to level off, but that didn't happen. Instead, the grounds for asylum have steadily broadened, especially in the last 10 years.

In recent years, the INS has broadened its definition of a "social group" to include such disparate people as gays fleeing persecution or women fleeing female genital mutilation in Africa or elsewhere. Other nations bound by the Geneva Convention, such as Canada, Britain and Australia, already offer social group protection to women in cases of domestic violence.

"Asylum law was meant to protect people who stand up for political opinions," Musalo says. "Why isn't feminism just as worthy of a political opinion to protect?" She says that since the refugee definition was created, the idea of a social group has always encompassed "situations where a person is persecuted for something either they cannot change or they shouldn't be expected to change. Gender fits; it is clearly the kind of thing that was contemplated."

In 1996, human rights and feminist groups cheered as the BIA ruled in favor of Fauziya Kasinga, a young woman from Togo who fled her homeland because she would have been forced by her relatives to undergo female genital mutilation, a rite traditionally required by her tribe. In a landmark, precedent-setting decision, the INS ruled that Kasinga had a well-founded fear of persecution because of her social group -- defined as female members of that tribe who don't want to undergo forced female circumcision. Her gender, the decision said, was essential to that social group and constituted part of the grounds for asylum.

Even more significant, the board said the persecution didn't have to come directly from the government -- the government's failure to protect Kasinga amounted to persecution.

Thus the precedent was set for gender protection. But when the BIA took up Alvarado's case and ruled against her, its decision upset that precedent. "It shook the pillars," Musalo says of the Alvarado decision. "The decision ... doesn't just affect domestic violence cases. It affects gender cases across the board," she says.

The immigration judge who initially ruled in favor of Alvarado's case agreed that she was persecuted on account of her social group and because of her political opinion. Her social group was described by the judge as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." The fact that Alvarado resisted her husband's violent acts of control, the judge ruled, constituted a political opinion of disagreement that she should be under his thumb; the fact that he beat her in retaliation constituted persecuting her for that opinion.

But the BIA said Alvarado's actions didn't spring from an opinion, merely from the fundamental desire not to be beaten. In the minds of many human rights advocates, drawing that distinction flies in the face of international human rights law.

The board established that since her husband beat her constantly, with or without provocation, "for no

reason at all" in fact, that her opinion could not be fairly claimed as his motive. "The arbitrary nature of the attacks further suggests it was not the respondent's claimed social group characteristics that he sought to overcome," the ruling read. The board was unconvinced that Alvarado's husband was even aware whether she had any opinions, much less that he cared what they might be. The board effectively ruled that the abuse Alvarado suffered was a private matter, not a political one, despite the state's refusal to protect her. "It's a view of domestic violence and of gender relations that's totally taken out of any sociological, political or historical context," Musalo says.

If Janet Reno does not reverse the BIA's decision, then Alvarado will likely be forced to leave the U.S. But her case -- and especially the INS policy proposal that followed it -- may still help others.

U.S. domestic laws consider domestic violence an institutional evil as well as a private one. But the question the INS must finally consider is whether we can afford to expand the same protection to people who are not American citizens. While domestic abuse is abhorrent, critics of the new rules caution that there are only so many people the U.S. can take under its wing, and therefore definitions of asylum must remain conservative.

Musalo, who was Kasinga's attorney, says she and other advocates are concerned that the proposed rules don't go far enough to restore the precedent set by the Kasinga ruling. She described them as "a compromise," one that sets stricter guidelines around gender protection than did the Kasinga ruling. The rules do not state that women can always claim gender as grounds for persecution. Rather, it explains ways in which gender can compose part of those grounds.

"It's been said [by critics] that anyone who has a failed marriage would qualify for asylum -- that's not the case," says Strassberger of the INS. "It's a situation where someone is in an abusive relationship where the government of their country is unable or unwilling to protect them."

But despite the INS's efforts to clarify what a "social group" means, some say the definition is still too qualified, too circumstantial. "The whole definition of gender asylum -- I mean the term, when you think about it, is ambiguous to the point of absurdity," Stein says. Gender affects everything from family rights to property ownership to the treatment of wives in Islamic countries. In other words, it's an issue that affects hundreds of millions of people around the world.

Musalo and other advocates say gender has always been part of the intended definition. "Most of us who work in this area believe that under a fair interpretation of the Refugee Act, these cases are already covered," she says. Thus the new rules on social group protection aren't an expansion of the concept, just a clarification.

Whatever happens to Rodi Alvarado, the controversy over political asylum didn't start and won't end with her case.

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