# HUMAN RIGHTS LAW: FROM DISSEMINATION TO APPLICATION

## ESSAYS IN HONOUR OF GÖRAN MELANDER

BY

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# REFUGEES IN SWEDISH PRIVATE INTERNATIONAL LAW

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## 1. Introduction

Article 12(1) of the U.N. Geneva Convention of 28 July, 1951, Relating to the Status of Refugees,[1] stipulates the following:

> "The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence."

The reason behind this provision is that the majority of states participating in the conference which elaborated the Convention, including states whose private international law was normally based on the application in personal (mainly family and succession) matters of the law of the country of citizenship (nationality), were of the view that even if a refugee has not lost his original citizenship, it would not be appropriate to consider his personal matters to continue to be governed by the laws of his country of nationality (*lex patriae*). A particular argument used in this context was that the legislation in the countries generating many refugees had often recently undergone radical, revolutionary changes incompatible with the principles that had prevailed in the country of origin before the revolution, and still prevail in the country where the refugee now resides.[2] Difficulties in obtaining information about the law of the country of the refugee's nationality, as well about whether he had lost his nationality, were also invoked.[3] Since the refugee was assumed to feel no solidarity or affinity towards his country of origin and did not enjoy that country's protection, his citizenship was merely formal and he could be considered to be and treated as a 'quasi-stateless' person.[4]

However article 42 of the Convention permits contracting states to make a reservation to, *inter alia*, article 12(1). Sweden has made such a reservation and is, consequently, not bound to apply the refugee's *lex domicilii* to his personal matters. The reason for the reservation is that Swedish private international law, as it was at the time of Sweden's accession to the Convention, was based mainly on the application of the law of the country of which the natural person involved was a citizen. The possibility of giving an increased importance to domicile was at the time of the Swedish ratification of the Convention investigated by the Swedish Department of Justice, and the government and the parliament (*Riksdag*) were

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[1] 189 UNTS 137.

[2] *See* Swedish Government Bill 1954:134, p. 12.

[3] *Ibid.*

[4] *See* Government Bill 1973:158, pp. 93–94.

obviously not ready to anticipate the result by ratifying a provision that would oblige Sweden to exclude quite generally refugees from the principle of nationality.

Today, domicile can be said to play a more important role than citizenship as a connecting factor in Swedish private international law, but many Swedish conflict rules, ranging from rules on guardianship to rules on succession, continue to point out and use *lex patriae* as the applicable law, albeit sometimes in combination with *lex domicilii* or *lex fori*. In those situations where *lex patriae* is decisive, or where the nationality of the person(s) involved is relevant for the jurisdiction of Swedish courts or recognition and enforcement of foreign judgments, the question of treatment of refugees remains relevant.[5] Should they, as long as they remain citizens of their country of origin and do not acquire the nationality of their country of habitual residence, be treated as any other foreigners or should they be treated as nationals of the latter country?[6]

In spite of the above-mentioned Swedish reservation to the Geneva Convention, Swedish private international law contains today a special rule about refugees. Since 1 January 1974, Chapter 7, section 3 of the Act (1904:26 p. 1) on Certain International Legal Relations Regarding Marriage and Guardianship, as amended (hereinafter referred to as 'the 1904 Act'), provides that a 'political refugee' shall, as far as the application of that Act is concerned, be treated as "a citizen of the country of his domicile (habitual residence)".[7] Although directly applicable merely within the field of application of this Act (i.e. with regard to certain issues regarding marriage and guardianship), it can be assumed that the provision expresses a more general principle that is normally to be followed in Swedish private international law as a whole,[8] although there may be exceptions.[9] In fact, even before the entry into force of Chapter 7, section 3 of the 1904 Act, the formal citizenship of a refugee was sometimes disregarded by Swedish courts when dealing with the refugee's personal matters.[10]

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[5] An alien's citizenship is in some situation relevant even for other aspects of Swedish judicial proceedings, such as the right to legal aid or the duty to deposit security for the other party's costs, but such fiscal and administrative problems will not be dealt with here. On the Swedish treatment of refugees in these respects see the Act (1969:644) on Certain Rights of Stateless Persons and Political Refugees.

[6] Although they concern many refugees as well, the problems of statelessness and of multiple nationalities will not be dealt with in this paper, mainly because they are not specific for refugees and do not seem to require any special regulation with regard to refugees.

[7] The Swedish wording uses the term *hemvist*, which should be translated into English as habitual residence, or as domicile in the sense of habitual residence. It is thus not synonymous with the concept of domicile in, for example, English law.

[8] *See* M. Bogdan, *Svensk internationell privat- och processrätt* (ed. 5, Norstedts Juridik, Stockholm, 1999) p. 148 with further references.

[9] It seems, for example, that refugees are to be treated as any other aliens with regard to the application of rules on personal names; *see* Government Bill 1982/83:38, p. 9.

[10] In Swedish legal writing, *see e.g.* N. Beckman, *Svensk domstolspraxis i internationell rätt* (Norstedts, 1959) pp. 16–18 and 61–62; H. Karlgren, *Kortfattad lärobok i internationell*

Chapter 7, section 3 of the 1904 Act gives rise to several problems, the principal question being who is entitled to the status of political refugee in the context of private international law (see part 2 below). Another question to be discussed is whether there are legitimate reasons to treat refugees in a different manner from other foreigners when it comes to personal issues such as marriage, guardianship or inheritance (see part 3 below).

## 2. Who is a refugee in Swedish private international law?

Swedish private international law contains no definition of its own of who is a refugee or political refugee. However a definition of 'refugee' can be found in the Swedish Aliens Act (2005:716). This statute, belonging to the field of administrative law, regulates mainly the right of aliens to sojourn or reside in Sweden, including the right of asylum granted to refugees.

Chapter 4, section 1 of the Aliens Act defines 'refugee' as an alien who is situated outside the state of his citizenship[11] because of well-founded fear of being persecuted for reasons of race, nationality, membership in a particular social group, religious or political opinion, and is unable or, owing to such fear, is unwilling to avail himself of that state's protection. This definition follows relatively closely the definition of refugee in article 1 of the Geneva Convention, although the Swedish statute adds an important clarification: it stipulates that is is irrelevant whether the persecution emanates from the authorities as such or from others, provided that the authorities do not offer safety and protection from the persecutors.

The Aliens Act contains in Chapter 4, section 5, rules about circumstances that result in a refugee losing his refugee status, such as the acquisition of a new nationality or a voluntary return to the country of origin.

In addition to 'refugees' as defined above, the Aliens Act recognizes in Chapter 4, section 2, an additional, similar category of persons, namely 'others who are in need of protection' (*skyddsbehövande i övrigt*). This category comprises aliens who, without being refugees as defined above, have left their country due to well-founded fear of being punished by death or subjected to corporeal punishment, torture or other inhuman or degrading treatment or punishment, or are in need of protection because of an international armed conflict, civil war or environmental disaster, or feel well-founded fear of persecution because of their gender or homosexuality.

There is also a third, partly similar category comprising persons who are neither recognized as refugees nor deemed to be in need of protection, but are granted a residence permit on humanitarian grounds pursuant to Chapter 5, section 6 of the Aliens Act. Although most such cases, for example where a residence permit was granted due to medical reasons, are not similar to refugee status, some humanitarian grounds may, in fact, be very close to those mentioned in connection with asylum.

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*privat- och processrätt* (ed. 5, Liber, Lund, 1974) pp. 80–82; L. Pålsson, *Svensk rättspraxis i internationell familje- och arvsrätt* (Norstedts, Stockholm, 1986) pp. 27–29.

[11] A corresponding rule on stateless refugees is found in Chapter 4, section 1, para. 3 of the Aliens Act. Stateless refugees are, however, not dealt with here.

It is not the purpose of this article to analyze the definition of refugee in the Aliens Act, but rather to examine to what extent that definition, which in the course of years has several times been modified through legislation or re-interpretation, applies in private international law as well.

According to the preparatory legislative materials (*travaux préparatoires*), which are given great weight in the Swedish legal system, the definition of refugee in 'section 2 of the Aliens Act' should be used by analogy in the interpretation of Chapter 7, section 3 of the 1904 Act (see above).[12] This was a reference to section 2 of the Aliens Act (1954:193), which was in force at the time of enactment of Chapter 7, section 3 of the 1904 Act. The definition of refugee in section 2 of the Aliens Act of 1954 differed in some respects from the present Aliens Act from 2005, although even the 1954 definition followed the Geneva Refugee Convention relatively closely. This gives rise to the question whether the subsequent changes in aliens legislation should be followed also at the interpretation of Chapter 7, section 3 of the 1904 Act.

It is possible to argue that the authors of Chapter 7, section 3 of the 1904 Act had in mind the refugee definition as it was stipulated in section 2 of the Aliens Act at that time and that Swedish private international law should not automatically follow the subsequent changes in the aliens legislation regarding who is and who is not a refugee for the purposes of the right to asylum. The Aliens Act of 1954 was in its entirety replaced by the Alien Act (1980:376), which was replaced bu the Aliens Act (1989:529), which was in turn replaced in its entirety by the present Aliens Act (2005:716). There have also been partial amendments affecting provisions on refugees and asylum. All these changes in the aliens legislation were preceded by investigations and discussions focusing on the alien's right to asylum (residence permit), while the possible consequences for conflicts of law were not even mentioned.

The most conspicuous difference between the relevant provisions of the Aliens Act of 1954 (in force at the time of enactment of Chapter 3, section 4 of the 1904 Act) and the present Aliens Act is that the Aliens Act of 1954 spoke of 'political refugee' (*politisk flykting*), while the current Aliens Act does not use that term any more but speaks merely of 'refugee' (*flykting*). The adjective 'political' disappeared from the Aliens Act in connection with the entry into force of the Aliens Act of 1980, in order to adapt the Swedish terminology to that of the Geneva Refugee Convention (which speaks of refugees and not of political refugees). The term 'political refugee' is, nevertheless, retained in the wording of Chapter 3, section 4 of the 1904 Act, which has thus not been amended in order to keep up with the changes in the Aliens Act. This might be considered as an indication that the term 'political refugee' in the 1904 Act should even today be interpreted in accordance with the definition contained in the 1954 Aliens Act, in spite of the fact that the 1954 Aliens Act was repealed and replaced with new legislation as early as in 1980.

[12] *See* Government Bill 1973:158, pp. 70 and 122.

It is, however, difficult to find good substantive reasons speaking in favour of such an approach, which would, furthermore, be very impractical, as it would mean that Swedish courts could not, in the context of private international law, rely on the decisions taken today by other Swedish authorities about the refugee status of the person(s) concerned.

The refugee status of a person is usually examined and decided by the Swedish central aliens authority (the Migration Board) in connection with that person's application for Swedish asylum, meaning a residence permit on the grounds of that person being a refugee. However, the examination and decision can take place even later, for example when the person in question, who may have already been granted a residence permit on other grounds, applies to the Migration Board for an official declaration of his refugee status (*flyktingförklaring*) in accordance with Chapter 4, section 3 of the Aliens Act or for a special refugee travel document (*resedokument*) issued in accordance with the Geneva Refugee Convention and Chapter 4, section 4 of the Act. However, the criteria regarding refugee status are not necessarily the same in all these situations. While the granting of asylum and the official declaration of refugee status are expected to abide by the definition of refugee in the Swedish Aliens Act, the travel document can be issued only to refugees covered by the Geneva Convention.[13] To the extent that the Swedish refugee definition in its wording or as it is interpreted in practice is more liberal than the Convention, the travel document must be refused. The opposite situation, where a person who is a refugee under the Convention is not considered as such under the Swedish Aliens Act, should not arise, since the Swedish definition aspires to be at least as generous as the definition in the Convention.[14]

An official declaration of a person's refugee status, made by the Migration Board pursuant to Chapter 4, section 3 of the Aliens Act, is intended to be binding on Swedish courts and all other Swedish authorities.[15] There are no reasons to make an exception for Swedish courts in disputes dealing with personal matters of family and inheritance law. As the declaration is made on the basis of refugee status criteria in the present Aliens Act, it appears logical to accept the application of these criteria even in the context of conflicts of law, i.e. to interpret the reference to 'political refugees' in the 1904 Act to be a reference to the refugee concept in the present Aliens Act rather than in the old legislation in force some thirty years ago. The terminological difference between the 1904 Act and the present Aliens Act (which today speaks about refugees instead of political refugees, see *supra*) does not, it is submitted, constitute and obstacle in this respect, since the change of terminology in

[13] This is explicitly stipulated in Chapter 1, section 10 of the Aliens Decree (1989:547), issued by the Swedish government in order to implement and complement the Aliens Act.
[14] However, whether the Aliens Act really fulfills this ambition is not quite certain. *See e.g.* K. Folkelius and G. Noll, 'Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act', 10 *International Journal of Refugee Law* (1998) pp. 607–636.
[15] *See* Government Bill 1979/80:96, p. 44.

the aliens legislation was intended mainly to adapt the Swedish terminology to that of the Geneva Refugee Convention.[16]

The decision of the Migration Board granting a refugee travel document should in practice also be accepted by Swedish courts as a full proof of refugee status. This was confirmed in 1991 by the Swedish Supreme Court in the case of *Tayebe* S. v. *Faramarz N.*,[17] concerning an application for divorce between two Iranian nationals. The respondent spouse opposed the application and argued that there were no grounds for divorce under Iranian law. Such objection is not valid if at least one of the spouses is of Swedish nationality. The divorce was granted because the petitioner had been issued a refugee travel document and was, therefore, to be treated as a Swedish national pursuant to Chapter 7, section 3 of the 1904 Act. The respondent argued that the petitioner was not really entitled to refugee status and that the travel document had been issued on the basis of false statements about invented persecution risks in Iran, but the Supreme Court referred simply to the decision made by the Swedish authority issuing the travel document (a predecessor of the Migration Board) and found no reason to disregard that decision.

Similarly, a decision of the Migration Board denying asylum or refusing a declaration of refugee status should normally be respected by the courts. A person can, however, fulfill the criteria for refugee status even if he has never asked for asylum (often because he has obtained a residence permit on some other ground) and has never applied for an official declaration or travel document. Many *bona fide* refugees are reluctant to make such applications, for example in order not to cause difficulties for relatives still living in the country of origin. If such a person invokes, in the context of conflict of laws, that he is a refugee, it seems that the court has to examine the facts and circumstances and decide whether the person *in casu* is a refugee or not pursuant to the criteria of the present Aliens Act. The court may turn to the Migration Board for information and advice, without, however, being bound by the Board's opinion.[18] On the other hand, if a Swedish court deciding a personal matter bases its decision on the refugee status of the person(s) concerned, this shall not, of course, bind the Migration Board if it is subsequently asked to grant asylum, make an official declaration of refugee status, or issue a refugee travel document to the same person(s).

The persons who are not refugees under the Swedish Aliens Act but have obtained a residence permit on humanitarian grounds or because they were considered to be in need of protection (see above) do not seem to be entitled to any special treatment in private international law.[19] Similarly, the fact that a person has applied for asylum, official declaration or travel document does not, as such, make

[16] *See* Government Bill 1979/80:96, pp. 39–42 and 88.

[17] *See* [1991] *Nytt Juridiskt Arkiv* no. A 2.

[18] *See* Government Bill 1973:158, p. 94.

[19] *See*, however, section 6 of the Act (1997:191) on Sweden's Accesssion to the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, providing for special treatment of children that are refugees or are "in a situation similar to that of a refugee". See Government Bill 1996/97:91, p. 78.

him a refugee in the Swedish conflicts of law, but under certain circumstances it may be appropriate for the court to postpone its decision until the question of refugee status has been determined by the Migration Board.

The preparatory legislative materials concerning Chapter 7, section 3 of the 1904 Act state that whether a person is treated as refugee depends "to some extent" on whether he himself invokes his refugee status, as it is as a rule inconceivable for Swedish authorities to consider an alien to be refugee if he himself denies that he is one.[20] It is submitted, however, that it should not be accepted that a person asserts or denies his refugee status depending on whether this is advantageous or disadvantageous for him in the particular case. If he has asked for and obtained Swedish asylum, an official declaration of refugee status, and/or a refugee travel document, then he should be treated as a refugee even if he prefers to deny such status in the context of conflicts of law. There are no reasons to allow refugees to pick cherries out of two legal systems, since this would give them a preferential advantage not enjoyed by other persons, in particular by their counterparts in judicial proceedings.

Most cases where Swedish courts have to deal with personal matters involving refugees concern refugees residing in Sweden. It must, nevertheless, be stressed that Chapter 7, section 3 of the 1904 Act is not limited to such cases. Swedish courts can in certain situations have jurisdiction to adjudicate personal matters concerning aliens who have obtained asylum or reside in a third country, for example an Iranian refugee enjoying French asylum and living in France. To decide whether such a person is really a refugee and should therefore in Swedish private international law be treated as a French national is not quite so simple. If he holds a travel document issued by French authorities pursuant to the Geneva Convention, it is natural to recognize him as a refugee and treat him, consequently, as a French national, since if the French authorities decided that he fulfills the Convention's criteria then he can be assumed to be a refugee according to Swedish law as well. The mere fact that a person has been granted asylum in a third country is, on the other hand, not necessarily sufficient, as the criteria used pursuant to that country's alien legislation may be too liberal from the Swedish point of view. The fact that a person has been refused refugee status in his country of residence cannot, similarly, bind Swedish courts, as the criteria applied in that country may be more restrictive than those stipulated in Swedish law. Due to practical reasons, it is normally a good idea to presume, in the absence of proof to the contrary, that the foreign decision is correct and in conformity with the Swedish refugee definition. If the authorities of the country of residence have not yet taken a decision on the person's refugee status, Swedish courts can either stay the proceedings until such decision is made or decide independently whether the person is a refugee according to the Swedish definition and criteria.

[20] *See* Government Bill 1973:158, pp. 122–123.

### 3. Should refugees be treated differently in private international law than other foreigners?

As mentioned at the outset, Sweden has made a reservation with regard to the Geneva Refugee Convention's article 12(1). This means that Swedish private international law can treat refugees in the same way as other aliens without violating any international undertaking. The provision in Chapter 7, section 3 of the 1904 Act is the result of an autonomous Swedish decision and reflects autonomous Swedish considerations and points of view. It differs from article 12(1) of the Convention, not merely because the definition of refugee may be slightly different but also and mainly by dealing only with refugees having a domicile (habitual residence) in a country outside their country of origin. Article 12(1) of the Convention covers also the case where the refugee has not yet established such domicile, in which case the refugee's personal status is governed by the law of the country where he sojourns or resides, even if only temporarily. The Swedish legislator seems to be of the view that refugees without a domicile are to be treated as other foreigners, so that the law of their country of origin is to be applied whenever Swedish conflict rules lead to the application of *lex patriae*. The main reason for this difference given in Swedish preparatory legislative materials is that the connection with the country of the refugee's residence should be relatively permanent before its law can be allowed to replace the *lex patriae*.[21] It is submitted that this is a reasonable approach: to subject the refugee's most important personal matters to the laws of a country where he sojourns merely temporarily, before he moves to a country of more permanent settlement, can lead to unfortunate decisions. The temporary sojourn, perhaps in a refugee camp with no or very little contact with the surrounding society should not suffice to replace the refugee's *lex patriae* with local law.

However the main question remains: is it reasonable and appropriate to treat refugees in private international law as citizens of the country of their domicile (habitual residence) while applying *lex patriae* to other persons? This question loses obviously much of its relevance if and when the domicile replaces quite generally citizenship as connecting factor, but to the extent this does not happen and citizenship retains its importance one may ask why refugees should be treated differently.

Treating refugees as nationals of their country of domicile is relatively easy to defend when nationality is used as ground for jurisdiction of courts. The refugee has usually no or little access to the courts in his country of origin, feels well-founded fear that he would not be treated fairly by them, or has other legitimate reasons not to subject his personal matters to them. It is, therefore, highly desirable that a refugee domiciled in Sweden be allowed to turn to Swedish courts to the same extent as if he were a Swedish citizen.

A similar approach is appropriate in the matter of recognition and enforcement of judgments. In those cases where citizenship in the country of adjudication of the

[21] *See* Government Bill 1973:158, p. 94.

person(s) involved normally suffices for recognition and enforcement of the ensuing judgment, the formal citizenship of the refugee who had left the country should not be sufficient. The refugee should in this situation be treated as a citizen of his country of domicile (usually Sweden) in order to prevent the authorities in the country of origin from carrying on the persecution by means of judicial proceedings.

The answer is not that simple regarding the question about the legal system that should govern the refugee's personal matters. The fact that a person opposes and risks persecution by the regime of his country does not, by itself, mean that it would be inappropriate to subject his personal matters to the legal rules of that country.[22] The rules in question have usually been enacted with the general population in mind and are not directed against the particular refugee. Should the law of the country of origin comprise rules maltreating people who have fled the country, such rules would be refused application in Sweden due to violation of Swedish public policy (*ordre public*).[23] Furthermore, the persecution directed against the refugee does not necessarily emanate from the state as such; it may, in fact, result from the activities of private groups acting in violation of the law.

Most *bona fide* refugees are compelled to leave their country of origin against their will and hope to be able to return there within foreseeable future. Although experience shows that the majority of refugees stay on in Sweden even after political changes in their country of origin have made it possible for them to return, it can be argued that it is illogical to apply Swedish law to personal matters of those immigrants who have been compelled to come to Sweden by circumstances beyond their control, while *lex patriae* is applied to aliens who have moved to Sweden of their free will in order to settle here permanently and build their future here.

It should, furthermore, be noted that the nature of the refugee flow has undergone important changes during the latest decades. Most refugees coming to Sweden some thirty years ago came from various communist or right-wing dictatorships in Europe. Today, they come mostly from countries in other continents with cultural, religious, ethical and legal traditions that are often very different from those prevailing in Sweden and reflected in Swedish law. For a refugee coming from, for example, communist-ruled Czechoslovakia or Poland, Swedish law represented values that were familiar to him and that he often even remembered from pre-communist days. In fact, the very reason for leaving these countries was often that the refugee preferred these values to those prevailing currently in his country of origin. Such a refugee could be expected to adapt relatively quickly to Swedish law in such areas as family or inheritance.

The situation is somewhat different with regard to many of the refugees coming from, for example, Islamic countries or the Far East. To subject the personal matters of such persons, more or less against their will, to Swedish law, which probably seems strange and incomprehensible to them, is highly problematic. As it was put by one participant in a discussion on the subject, we cannot expect immigrants from

[22] *See* Government Bill 1973:158, p. 72.
[23] *See e.g.* Chapter 7, section 4 of the 1904 Act.

other cultures to start thinking as Lutherans upon arrival in Sweden. This is especially true regarding the so-called quota refugees, who are given refugee status and acquire Swedish domicile practically immediately upon arrival, long before they learn to understand Swedish and obtain some fundamental knowledge about Swedish society and Swedish values. The problem is less acute with regard to people who had been in Sweden for a longer time, sometimes several years, before they acquired Swedish domicile as a result of their asylum application finally being granted by the Swedish authorities.

These types of questions arise not merely in connection with refugees, but quite generally whenever the advantages and disadvantages of the application of *lex patriae* and *lex domicilii* are discussed and compared. However, the problem becomes more pronounced in the refugee context, because refugees are supposed to be subjected to *lex domicilii* even regarding those matters that in respect of other aliens have consciously been left to be governed by the law of the country of their citizenship. Regarding such matters, which are today relatively few and are expected to decrease rather than increase in volume, the application of *lex patriae* would, it is submitted, be acceptable, and maybe even preferable, also in relation to refugees.