Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, The United Kingdom, and the United States

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PARTICULARIZED SOCIAL GROUPS AND CATEGORICAL IMPERATIVES IN REFUGEE LAW: STATE FAILURES TO RECOGNIZE GENDER AND THE LEGAL RECEPTION OF GENDER PERSECUTION CLAIMS IN CANADA, THE UNITED KINGDOM, AND THE UNITED STATES

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Introduction: Identifying Women as a “Particular Social Group” in the Refugee Jurisprudence of Canada, the United States and the United Kingdom ................................................................. 530
Defining “Refugee” and “Persecution” in Law ............................................. 534
Trends in the Reception of Gender Persecution Refugee Claims in
Canada ........................................................................................................... 536
The Canadian Guidelines and the Recognition of Gender Persecution ................................................................. 537
Ward v. Canada and the Nascent Recognition of Gender as the
“Particular Social Group” ........................................................................ 539
Some Key Cases and Their Significance .................................................. 541
Particularizing Social Groups: Modifying Gender ..................................... 543
Trends in Gender Persecution Claims in the United Kingdom ................. 546
Some Key United Kingdom Cases and Their Significance ..................... 547
Particularizing Social Groups: Modifying Gender in the United

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INTRODUCTION: IDENTIFYING WOMEN AS A “PARTICULAR SOCIAL GROUP” IN THE REFUGEE JURISPRUDENCE OF CANADA, THE UNITED STATES AND THE UNITED KINGDOM

For women in refugee law, the issue has always been fitting into the correct category and thus, bending the category to fit women.¹

The difficulties establishing effective legal remedies for gendered harms and gender inequalities are perhaps nowhere more starkly evident than in refugee law, where women’s appeals for safe refuge from gender persecution continue to face formidable legal obstacles. In spite of significant jurisprudential advances in recent years, these obstacles to women’s claims for asylum persist at a time when the world’s refugee crisis is exploding.² Indeed, the United Nations’ Refugee Agency has recently reported that “the number of refugees, asylum-seekers and internally displaced people worldwide has, for the first time in the post-World War II era, exceeded 50 million people.”³ Roughly half of the world’s refugees are women and girls who face particular vulnerabilities and violations as a result of their gender.⁴

³ Id.
⁴ Valerie Oosterveld, Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention, UNHCR (Sep. 2012), available at http://www.unhcr.org/504dd7649.pdf (explaining women and girls who are refugees from conflict situations “may be subjected to different violations because they
Women become refugees and request asylum for a variety of reasons, sometimes having little to do with their gender. In this analysis, however, I focus on women’s claims for refuge made on the basis that they have suffered gender-specific forms of persecution and gender-motivated rights violations. Gender persecution is expressed in multiple ways – these include forms of gendered violence, such as physical or sexual violence in intimate relationships, rape and sexual assault in other relational contexts, forced marriage, sexual slavery, trafficking for sexual exploitation, female genital mutilation (FGM), forced veiling, honour killings and other gender specific cultural or religious practices. All of these forms of gender persecution simultaneously express and reinforce women’s inferior status and men’s dominance in the particular societies in which they occur, and all can be understood in light of the pervasive and global problem of gender inequality.5

The foundational statutory definition of a refugee is articulated in the 1951 UN Refugee Convention which recognizes persecution “for reasons of race, religion, nationality, or membership in a particular social group, or political opinion . . . .”6 But persecution based on the “reason” of gender is missing from the list.7 It is the very definition of the category of refugee in the UN Convention, therefore, which does not identify gender as one of the five protected grounds.

This absence continues in the relevant domestic legislation of Canada, are women and girls, or they may be subjected to the same type of violations as men and boys, but experience or perceive these harms in a different manner. One obvious example is sexual violence committed during war: “[s]exual violence, and the long shadow of terror and trauma it casts, disproportionately affects women and girls.” This different female experience stems from pervasive global gender inequality: around the world, women and girls tend to be poorer and receive less education, and are often less mobile as a result of traditional family and caregiving responsibilities, all of which negatively compound their experiences during conflict. While women and girls may have common experiences based on their gender, sometimes girls suffer additional targeted harm as a result of their young age. For example, girls forcibly recruited to serve as fighters may serve in combat and as scouts (like boys), but may also be subjected to sexual slavery and conjugal slavery (unlike boys”); see Women, UNHCR, http://www.unhcr.org/pages/49c3646e1d9.html (last visited May 23, 2015).


7. But see id.
the United States, and the United Kingdom, among other refugee-receiving countries.\(^8\) Despite years of well-documented problems in the case law of these major refugee-accepting countries, along with an abundance of academic commentary analyzing the gender gap defining refugees,\(^9\) this significant statutory silence on gender has still not been adequately remedied in any of these states.

There have indeed been important and positive advancements in the reception of women’s asylum claims in many of the main refugee-receiving countries, including interpretive guidelines allowing adjudicators to be more gender sensitive in deciding refugee cases.\(^10\) Furthermore, the recognition of rape and domestic violence as forms of gender persecution and as human rights violations, and an increasing, if uneven, sensitization to the gender specificities of women’s experiences as refugees are welcome positive change.\(^11\) But a fundamental and persistent problem with the adjudication of women’s gender persecution based refugee claims still lies in the byzantine set of definitional hurdles imposed by asylum decision makers trying to fit claimants who have suffered gender persecution into “particular social groups.”\(^12\) This problem always circles back, in part if not exclusively, to the failure to name gender as a ground on which the

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8. Some countries have explicitly added gender to the statutory definition of refugee, including South Africa and Ireland.


10. Foster, supra note 10, at 29.

11. See Deborah E. Anker, Legal Change from the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States, in GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE 46 (Efrat Arbel et al. eds. 2014); Musalo, Gender Asylum, supra note 10, at 46; see also Karen Musalo, A Tale of Two Women: The Claims for Asylum of Fauziya Kassindja, Who Fled FGC, and Rody Alvarado, a Survivor of Partner (Domestic) Violence, in GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE 73, 76 (2014).

12. Foster, supra note 10, at 32.
persecution can be named and recognized.\textsuperscript{13}

Gender’s absence as a ground of persecution is obviously not the only procedural or definitional obstacle to women’s asylum claims.\textsuperscript{14} Among other problematic elements of the refugee process for women who have suffered gender persecution, one glaring area of difficulty (among others) is the set of issues surrounding the analysis of state protection.\textsuperscript{15} Adding gender to the statutory definition of a refugee and recognizing it statutorily as a ground of persecution is not a panacea, merely a foundational step forward. As Deborah Anker has persuasively observed, “gender, properly understood, should pervade the interpretation of every element of the refugee definition.”\textsuperscript{16}

But statutory silence on gender as an enumerated ground of persecution remains a formidable and persistent initial hurdle. Given that it is an easily remedied problem it is one that should urgently be addressed and foregrounded on refugee advocacy and law reform agenda. The various Guidelines and briefs on gender claims published by immigration authorities in the major refugee-receiving countries of Canada, the United Kingdom, and the United States, and all of their attendant policies and interpretive suggestions, have not come close to fully attenuating this problem. Instead these guidelines represent only a stopgap, as they are partial and ineffective solutions that rely on interpretive strategies to get around the absence of gender as an identified ground. Why must refugee women’s claims for asylum continue to be forced into the conceptual confusions caused by forcing gender persecution into the straightjacket of the “particular social group” category?

The conceptual challenges and interpretive resistance that continue to characterize much of the decision making about women’s asylum claims in the United States, Canada, and the United Kingdom exist in the context of the larger failure in these nations to make persecution based on gender an explicit statutory ground upon which women can claim refugee status.\textsuperscript{17} This refusal to identify the “particular social group” which suffers gender persecution as simply “women,” continues despite the fact that there, is in each country analyzed here, some jurisprudential authority suggesting that gender itself, or gender unmodified, can be recognized as the innate characteristic identifying the persecuted group.\textsuperscript{18} What is evident in the

\begin{flushleft}
\textsuperscript{13} Id.
\textsuperscript{14} Anker, supra note 12, at 51.
\textsuperscript{15} Id. at 60-61.
\textsuperscript{16} Id. at 51.
\textsuperscript{17} Foster, supra note 9, at 28.
\textsuperscript{18} See generally id.
\end{flushleft}
case law of all of these countries is that the absence of gender as an enumerated ground of persecution forces decision makers to embark upon a process of ever more fractured and increasingly narrowed and specific categories and sub-categories of women who are deemed to be members of a “particular social group.” While decision makers seem more able to recognize persecution based on religion, or race, or political opinion, in too many cases they still struggle to grasp the nature of persecution based on gender.

I argue that this legal absence, in and of itself, represents a state failure to protect refugee women seeking asylum in these countries. This is also a failure of each state’s purported commitment to gender equality. This failure persists in Canada, which prides itself as a nation whose identity is founded upon migration and refugee flows, as well as in other commonwealth countries such as the United Kingdom, Australia, and New Zealand. It is perhaps most sharply evident in the United States, where gender is not only absent as a ground upon which to claim persecution, but where the requirements of fitting gender asylum claims into the membership in a “particular social group” category, are arguably the most detached from the guidance offered by the United Nations High Commissioner for Refugees (UNHCR), and most at odds with more progressive developments in other jurisdictions.

In this article I critically review some key interpretive developments in refugee law of Canada, the United States, and the United Kingdom relating to the adjudication of women’s claims for asylum based on gender persecution and point to the difficulties decisions makers still have in seeing the gender specificity of the persecution. In order to avoid these well documented and persistent taxonomies of gender, to comply with international human rights norms, and to achieve consistency and justice, gender must become an independently recognized and identified ground of persecution in the statutory refugee law of receiving states such as Canada, the United States, and the United Kingdom. While this is certainly not a sufficient solution to the multiple barriers too often facing women’s gender persecution asylum claims, it is certainly a necessary and overdue one.

DEFINING “REFUGEE” AND “PERSECUTION” IN LAW

The definition of who qualifies as a refugee in the United Nations’ Convention Relating to the Status of Refugees, as amended by the 1967

19. Id. at 29.

Protocol Relating to the Status of Refugees,21 has been codified in the Immigration Acts of Canada22 and the United States.23 The UN Convention stipulates that a Convention refugee is anyone who:

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, is
(i) outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail [her]self of the protection of that country, or
(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country24

Refugee claimants must prove a number of essential things to successfully gain asylum in a refugee-receiving country such as Canada, the United States, or the United Kingdom.25 The first, and perhaps most fundamental, element of the claim is proof of persecution or a well-founded fear of persecution from which they are unable to receive, or unwilling to seek state protection in their nation state of origin.26 Persecution contains two interconnected elements, for the purposes of refugee law: (1) the fear, threat or experience of the harm (persecution); and (2) the state's inability or unwillingness to protect the individual from that harm.27

The term "persecution" lacks precise legal content and is not defined in the UN Convention Relating to the Status of Refugees.28 Indeed, it is a concept that has resisted clear definition. Persecution is identified in the

22. Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.).
25. See U.N. Refugee Convention, art. 1.
27. See id. (alluding to the elements of persecution).
28. See generally id.
statutory definitions of "refugee," as a violation of human rights based on a person’s characteristics such as nationality, religion, race, political opinion, or by virtue of a person’s “membership in a particular social group." But there remains a loud statutory silence on “gender” as an expressly enumerated ground as the basis for the persecution.

The Supreme Court of Canada defined persecution in the important Ward v. Canada (Minister of Employment and Immigration) decision, as "sustained or systemic violation of basic human rights demonstrative of a failure of state protection." Paradigmatic forms of persecution based on gender, including domestic violence and rape, are widely and uncontroversially recognized in international human rights law as human rights violations. If persecution, then, is actually the same thing or else largely equivalent to what constitutes a human rights violation – which according to Canadian jurisprudence it is – then there is no legitimate reason for refusing to recognize gender as a ground of persecution.

TRENDS IN THE RECEPTION OF GENDER PERSECUTION REFUGEE CLAIMS IN CANADA

In Canada, the problem of gender’s absence from the listed grounds of persecution in the definition of a refugee has been addressed by the introduction of interpretive guidelines on gender. Because the Canadian Guidelines on “Women Refugee Claimants Fearing Gender-Related Persecution” have represented such an important development in dealing with gender persecution in refugee law, and because Canada took a lead in adopting a more gender-sensitive approach to adjudicating these claims, some may have labored under the misapprehension that Canadian refugee law has largely resolved the barriers facing women seeking asylum for gender-related abuses. In fact, Canada has frequently been held as an

29. See id., art. 1.
31. Id. at para. 71.
34. See Balser Moussette et al., Female Genital Mutilation and Refugee Status in the United States—a Step in the Right Direction, 19 B. C. INT’L & COMP. L. REV. 353, 353 (1996), for an example of academic commentary lauding the Canadian model; see also Kristine Fox, Gender Persecution: Canadian Guidelines Offer a Model for
example for other countries to follow.

However, upon closer examination, it is clear that the definitional and interpretive problems which have plagued how legal decision makers respond to women’s gender persecution claims and the ways in which legal interpretations have resisted accommodating gender as a recognized ground of persecution have yet to be resolved in the Canadian context. As some refugee scholars have recently noted, “with the Guidelines in place and now possessing long-standing familiarity, women’s claims are getting lost . . . [and] too often fail in their effort to guide gender-sensitive decision making.”35

The Canadian Guidelines and the Recognition of Gender Persecution

The Canadian Guidelines were originally developed to address the gap in dealing with gender-based refugee claims.36 The Guidelines emerged in the aftermath of significant media attention surrounding a few high profile refugee cases in which women’s claims for asylum were rejected, even though they clearly experienced persecution on the basis of their gender.37 After public attention was drawn to these egregiously decided cases, consultations were held with refugee and women’s advocacy groups, and the Chair of the Canadian Immigration and Refugee Board (IRB) issued the Guidelines in 1993, revising them again three years later in 1996.38


35. Labman & Dauvergne, supra note 2, at 282.

36. Guidelines, supra note 34, at 279.

37. See Jonathan Ferguson, Abuse of Woman ‘Really Bad’ Valcourt Says of Refugee Case, TORONTO STAR, Sept. 16, 1992, at A2 (giving the example of a woman subject to a deportation order forcing her to return to Trinidad where her violent and abusive husband had also returned so that he could avoid serving a prison sentence in Canada for repeatedly assaulting her. Her husband had previously been convicted eleven times in Canada for physical violence perpetrated against her and for his repeated threats to kill her); see also No. M91-04822, [1991] D.S.S.R. 1096, cited in “Refugee Women” at 214 (noting that given how low conviction rates are for domestic violence this is an even more striking situation and illustration of the state’s failure to protect. Another woman’s refugee application was denied (although eventually granted by Ministerial discretion) despite the persecution and harassment to which she had been subjected in Saudi Arabia for her refusal to wear a veil, as was required in that country by religious custom and state policy.).

The documented inability or refusal of adjudicators to fit gender-based claims within the statutory framework regulating the admission of refugees was the central issue the Guidelines sought to address. The Guidelines allow IRB decision makers to define the category of refugee in a way that more fully and sensitively accounts for the particularities of women's gender-specific experiences of persecution. The Guidelines also specifically instruct IRB adjudicators about ways to accommodate the claims of women who have been persecuted because they have transgressed the gendered social or religious mores of their nation states. Furthermore, the Guidelines are significant for the claims of women who seek asylum based on persecution in the form of domestic violence. In both of these examples, the Guidelines incorporate a much-needed recognition of the specific forms of persecution to which women are often subjected due to their gender.

The Guidelines also outline principles of statutory interpretation to assist with the recognition of gender-specific persecution and, when they were first introduced, they were accompanied by the provision of additional training to IRB adjudicators in how to apply the Guidelines' interpretive principles. The Canadian Guidelines, therefore, enable adjudicators to take gender into account, by allowing for the possibility of granting asylum to women who can prove that their claims are based on experiences of gender persecution, can demonstrate a well-founded fear of persecution from which they can not receive state protection in their home countries, and whose experiences of persecution can be linked to one or more of the


39. Fox, supra note 35, at 118.
40. See generally Guidelines, supra note 34.
41. See id. at 283-84. This is one of the more potentially radical aspects of the Guidelines, insofar as it allows for a legal framing of an individual woman's resistance to patriarchal norms and practices, and the punishment she receives for this resistance, as the basis for a persecution claim. In this way, and in specific contexts meeting all of the definitional requirements, the Guidelines potentially legitimate a woman's resistance to gender oppression, by conferring refugee status as an escape from that very oppression.
43. See Guidelines, supra note 34, at 283.
already enumerated grounds of persecution (religion, nationality, race, political opinion, or membership in a particular social group). In the absence of recognizing gender as its own ground of persecution this approach is supposed to be more sensitive to women’s claims of gender persecution, by accommodating them within the theoretically and empirically vexing category of “membership in a particular social group.”

However, the Canadian Guidelines do not go far enough, as they do not advocate for adding gender as an independent ground upon which a claim of persecution can be made within the statutory definition of a refugee. Instead, they direct IRB decision makers to determine “the linkage between gender, the feared persecution and one or more of the already existing definition grounds.” In this way, it is important to recognize that the Guidelines, while representing significant progress in Canada’s accommodation of women’s asylum claims based on gender persecution, are also an inherently limited remedy insofar as they are administrative directives that only reflect a policy statement of interpretive possibility and not a definitive definitional legal shift. They are not, in other words, “hard law.” The Guidelines merely serve as an interpretive device, providing what Audrey Macklin describes as, “advice on gender sensitive approaches to statutory interpretation,” and the focus of the interpretation begins with what constitutes a “particular social group.” They merely represent a partial solution when a more complete one is both possible and necessary.

Ward v. Canada and the Nascent Recognition of Gender as the “Particular Social Group”

Released only a few months after the Canadian Guidelines, the Canadian Supreme Court rendered its judgment in Ward v. Canada (Minister of Employment and Immigration) which remains foundational in terms of providing interpretive direction and clarification on identifying a fear of persecution, the absence of state protection, and on theorizing the contours of what constitutes a “particular social group” in Canadian refugee law. In obiter comments on how membership in a particular social group should be defined, Justice La Forest lends credence to the view that gender in and of itself can be an independent ground on which a claim of persecution can be founded. While the facts in Ward dealt with a claim for refugee status

44. See id. at 286.
45. See generally id.
46. Id. at 279.
49. Id. at para. 78.
made by a man threatened with death by the Irish National Liberation Army (INLA), a paramilitary organization in which he had been involved but from which he defected, Justice La Forest’s judgment engages in a wide-ranging consideration of issues highly pertinent to refugee claims, including the state’s relationship to persecution, which is analyzed more fully below, and the range of the category of “social group.”

In delineating the proper approach to defining a particular social group, Justice La Forest draws on anti-discrimination principles and *Canadian Charter of Rights and Freedoms* jurisprudence, clearly a progressive move for refugee law. Drawing on these frameworks and on previous case law, he identifies three possible categories to assign meaning to “particular social group.” These are:

- groups defined by an innate or unchangeable characteristic;
- groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to foresake the association; and
- groups associated by a former voluntary status, unalterable due to its historical permanence.

According to Justice La Forest, the first of these explicitly embraces “individuals fearing persecution on such bases as gender . . .” Of particular significance is that Justice La Forest mentions gender as its own category, not defined in relation to anything else or modified in terms of any other characteristic. This dictum from the Supreme Court of Canada suggests that the IRB can dispense with the need to identify a gender subgroup within the gendered group of women. As Macklin points out, “[t]o the extent that *Ward* contemplates gender as a category, it may be that this aspect of the *Guidelines* has been effectively superseded by the dictum of the Supreme Court of Canada.” Certainly IRB decision makers should have been inspired to move beyond the categorical constraints of the approach of the *Guidelines*. Encouraged by this Supreme Court of Canada dictum, adjudicators clearly could and should have stretched the borders of the category of membership in a particular social group further to allow for recognition of women as a social group. Yet they have not taken up this

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50. See generally *id.*
53. *Id.* at para. 78.
54. *Id.*
initiative.

Some Key Cases and Their Significance

In the Canadian refugee case law there have some positive legal developments in recent years with regard to claims based on gender persecution. One significant legal development is the judicial recognition of rape and sexual assault as largely gendered crimes. This has long been recognized in sexual assault case law at the Supreme Court of Canada but has been a more vexed issue at the decision-making level of the tribunals of the Immigration and Refugee Board, where rape has sometimes been mischaracterized as a “common crime,” similarly affecting men and women. However, an appellate court in Dezameau v. Canada (Minister of Citizenship and Immigration), has clearly linked gender and rape, and has identified the significantly higher vulnerability women have to this particular crime (which is overwhelmingly committed by men) and how this can factor into a refugee claim based on gender persecution.

In 2007, Elmancia Dezameau, a woman from Haiti made a claim for refugee status, had her claim initially denied by the IRB but succeeded after an appeal on judicial review to the Federal Court of Canada. The decision is especially important because one of the legal errors made by the original board that heard her case was the failure to recognize rape as a gendered crime. As the Federal Court explained in rejecting the initial decision, the Board erred “in law and with respect to the facts, in finding that rape is not a gender-related risk in Haiti or that rape is a general risk faced by all Haitians.” Put differently, the Federal Court of Canada clearly identified rape as a gendered crime “grounded in the status of women in society.”

Another positive and important relatively recent development in the Canadian refugee case law is the recognition of domestic violence as a human rights violation and a form of gender persecution. The

57. See generally Dezameau v. Canada (Citizenship and Immigration) [2010] 1 F.C. 559 (Can.).
58. Id. at para. 1.
59. Id. at para. 10.
60. Id. at para. 41.
61. Id. at paras. 34-35.
62. See MacIntosh, supra note 43, at 152. See Narvaez v. Canada (Minister of Citizenship and Immigration), [1995] 2 FCR 55 for judicial recognition that women facing domestic violence were recognized as a particular social group for purposes of
significance for the definition of a refugee is that women who are victims of domestic violence and seek asylum on this basis can have their claims recognized as representing gender persecution, forming a nexus to a convention ground. This recognition of domestic violence as gender persecution minimizes the vexing definitional issues surrounding tying the gender-based persecution to a "particular social group," because unprotected women suffering domestic abuse can be recognized as the "particular social group," a welcome and important form of progress. According to Constance MacIntosh, this development in the case law "is an extremely positive one to document. It suggests that domestic violence—like forced prostitution, or state-sanctioned rape—has passed the conceptual threshold where its repugnance to fundamental human rights could still be debated."  

It also suggests, in theory at least, that the recognition of gender persecution in the form of rape or domestic violence also recognizes an obvious violation of the claimant’s human rights.

But a recent academic review and analysis of reported decisions that reached judicial review in Canada has shown that this apparently important shift in the refugee jurisprudence, however, has been uneven at best. Based on an analysis of 528 gender persecution refugee claims made by women who experienced domestic violence, Efrat Arbel finds that the recognition of domestic violence as a human rights violation was absent in most of the judgments issued by decision makers. As she notes, "adjudicators rarely identified domestic violence as a rights violation in itself." This demonstrates the disconnect between theory and practice in this aspect of refugee law and gender persecution claims.

Assuming that the obstacle of the ground and identification of a "particular social group" is overcome in an asylum claim, the legal analysis shifts to the question of the "adequacy" of the state protection available to the asylum seeker, an area posing its own set of complications and challenges, and warranting its own analysis (not undertaken here). In other words, even in those cases in which the positive development recognizing domestic violence as a form of gender persecution is met, it is not necessarily the case that a claim made on this basis is more likely to be accepted. Indeed, and to the contrary, one study suggested extremely high

an asylum claim based on gender persecution.

63. Id. at 153.
64. See Arbel, supra note 43, at 729.
65. See id. at 748.
rejection rates of these types of claims in Canada, rejections that are overwhelmingly upheld on review. A more recent and larger study of refugee domestic violence cases decided on appeal in Canada reports that the majority of the appeals, about 80%, were denied, while only about 20% had positive outcomes ("refugee admissions or successful appeals"). The positive development of recognizing domestic violence as a human rights violation and as gender persecution has not always been carried through in the Canadian case law.

Particularizing Social Groups: Modifying Gender

Of greatest significance for the purposes of this analysis of definitional issues in gender persecution claims is the fact that domestic violence is consistently recognized as a form of persecution for a claim for asylum, even if the recognition is incomplete in terms of foregrounding the human rights violation it entails. In fact, "the survey of RPD decisions revealed no cases where the claim was denied on the basis that the alleged domestic violence did not constitute persecution." So while the question of "particular social group" is closer to being resolved given the identification of domestic violence as gender persecution, other kinds of gender-based harms from which women flee and seek asylum in Canada, continue to pose the same taxonomic absurdities posed by the "particular social group" analysis.

Examples of constructed sub-divisions of gender in Canadian case law include "single women suffering from abuse at hands of former spouses who have been forced into prostitution," women "married according to traditional Yoruba custom," "women in Pakistan in forced marriages,"

67. MacIntosh, supra note 43, at 152 (noting that research, based on a review of 135 reported decisions pertaining to domestic violence gender persecution claims, revealed an astonishing rejection rate of between 98% and 100% of claims in the five years studied, 2004-2009. The largest reason for rejected claims was difficulties in proof that home state could not protect, followed by a finding that the story of domestic violence was not found to be credible by the adjudicator. In describing the sample of available reported decisions available for review MacIntosh observes that the study: "is limited to those decisions that were reported in the LexisNexis Quicklaw database. LexisNexis Quicklaw does not report all decisions of the RPD, but it does include a pool of decisions that is considerably larger than those which CIC posts in RefLex, their public and searchable online database.").


“Trinidadian women subject to wife abuse,”73 “women in El Salvador abused by a perceived partner, a rebuffed ex-boyfriend,”74 “young, female, rural Fujianese,”75 and “a family including two minor children led by a single parent female with serious mental health problems, in a country with serious social and economic problems with a documented negative effect on women and children.”76

In Cornejo v. Canada (Minister of Citizenship & Immigration)77 decided in 2010, the refugee claimant identified that she belonged to a “particular social group” consisting of “women who [become] pregnant out of marriage and whose family belongs to the Way.”78 Other examples of “particular social groups” include, “women living without male support in Sri Lanka,”79 “single women who were trafficked in Ethiopia,”80 “Tamil woman subjected to domestic violence and the wife of an alleged child molester,”81 a “battered woman, [who] is unable or, by reason of that fear, unwilling to avail herself of the protection of her homeland, Pakistan,”82 “women in a vulnerable position in Guyana subjected to fear for lives because of adult child’s threats against them to obtain money,”83 “women alone without a male head,”84 “educated, wealthy Roma women who challenge power structure,”85 and finally, “vulnerable Tamil woman from Jaffna, preyed upon by the Tamil militants and the Sri Lankan security forces.”86

73. Canada v. Meyers (1992), [1993] 1 F.C. 154 [hereinafter Meyers]. This case, it should be pointed out, was decided shortly before the release of the Guidelines, but the Guidelines do not remedy the problem of sub-classification which appeared in Meyers. Instead, they underscore it. In other words, because the Guidelines do not recognize that gender can itself constitute the social group facing persecution, the same taxonomic problem persists in which increasingly narrow sub-groups of women sharing specific characteristics are identified as the relevant and persecuted social groupings.
75. Zheng v. Canada, 2002 FCT 448 (Can.).
77. Cornejo v. Canada, 2010 FC 261 (Can.).
78. See id. (explaining “The Way” describes a fundamentalist Catholic Christian Sect.).
79. Kamalendran v. Canada, 2006 FC 393 (Can.).
81. Swaminathan v. Canada, 2007 FC 86 (Can.).
82. Khan v. Canada, 2005 FC 139 (Can.).
83. Dannett v. Canada, 2006 FC 1363, para. 8 (Can.).
84. Roberts v. Canada, 2007 FC 796, para. 27 (Can.).
85. Florea v. Canada, 2005 F.C. 1472, para. 1 (Can.).
86. Kathirgamu v. Canada, 2005 F.C. 300, para. 4 (Can.).
In the early 1990s in Canada, numerous committees were created by the government to study the issue of gender and refugee claims and to offer advice on reform to eliminate the problems in receiving and interpreting women’s asylum cases. In 2001, the National Association of Women and the Law (NAWL) in Canada recommended “the refugee definition be amended to formally include gender in its own right.” Despite much lobbying, advocacy and scholarly discussion over the years pertaining to the continuing problems processing women’s refugee claims based on gender persecution, the Canadian government’s record on dealing effectively with gender persecution claims in the asylum process can at best be described as poor and neglectful. Constance MacIntosh has observed that the decision not to enumerate gender as a protected ground was an explicit one, based on the conviction that the Guidelines would provide a sufficient corrective to the documented problems. But as MacIntosh correctly observes, this decision not to recognize gender is inconsistent with the positions that Canada has taken in other contexts, where we have voluntarily and proudly explicitly bound ourselves by law to protecting women against wrongful treatment on the basis of their gender. For example, this commitment is reflected within the terms of our constitution and in both federal and provincial laws.

The Canadian government has had ample opportunity over many, many years to bring refugee law in line with the Canadian constitutional guarantee of equality (which significantly applies to non citizens) by adding gender as an enumerated ground of persecution. It has so far neglected to do so. This represents a significant state failure in Canada to deliver on an explicit commitment to gender equality, and a failure to live up to its international law obligations for women’s equal rights.

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87. See LaViolette, supra note 10, at 174.
88. NAT’L ASS’N OF WOMEN & THE LAW, Brief on the Proposed Immigration and Refugee Protection Act (Bill C-11), 27 (2001). The NAWL also recommended that if the government declined to recognize gender in its own right it should then be included as part of a larger open ended list of social groups. NAWL also recommended that ‘social group’ should be defined in Bill C-31 as explicitly including gays and lesbians. Other reports were subsequently submitted to the Canadian government about gender issues in the Canadian asylum process including, CATHERINE DAUVERGNE, ET AL., GENDERING CANADA’S REFUGEE PROCESS (2006).
89. MacIntosh, supra note 43, at 149.
90. Id.
91. Constitution Act, being Schedule B, Part 1 to the Canada At, 1982, c. 11 (U.K.) (guaranteeing gender equality (as well as equality on other enumerated and analogous grounds) before and under the law, and equal protection and benefit of the law without discrimination).
TRENDS IN GENDER PERSECUTION CLAIMS IN THE UNITED KINGDOM

In the 1980s the European Parliament passed a resolution urging member states to recognize women refugee claimants who rejected the cultural, religious or social norms of their originating societies, as belonging to a "particular social group."92 Despite this positive beginning, a 2012 review of law, policies, and practices in Europe pertaining to gender related asylum claims93 suggests that "there are vast and worrying disparities in the way different EU States handle gender-related asylum claims." As a result of these inconsistencies across EU states, the authors of this analysis concluded that "women are not guaranteed anything close to consistent, gender-sensitive treatment when they seek protection in Europe. Women seeking asylum are too often confronted with legislation and policy that fail to meet acceptable standards, while even gender-sensitive policies are not implemented in practice."94 The United Kingdom's record exemplifies this broader European trend.

The United Kingdom is one of the few member states of the European Union to have issued gender-specific refugee guidelines to assist decision makers in adjudicating gender-based refugee claims.95 The Guidelines, entitled, "Gender Issues in the Asylum Process," describe what kinds of gender persecution fit the grounds for asylum and recognize that some forms of persecution are gender specific, including "rape and other forms of sexual violence, domestic violence, crimes in the name of honor, female genital mutilation (FGM), forced abortion and sterilization."96 The Guidelines further stress the importance of considering the gender-related aspects of a refugee claim to help "ensure that all aspects of a claim are

94. Id. at 7-8.
96. Id. at 5. The Guidelines further stipulate that: There are many forms of harm that are more frequently or only used against women. These can occur in the family, the community, or at the hands of the State. They include, but are not limited to: marriage-related harm (e.g. forced marriage); violence within the family or community (e.g. honor killings); domestic slavery; forced abortion; forced sterilization forced prostitution; trafficking; female genital mutilation; sexual violence and abuse; or rape.
fully and fairly considered."\textsuperscript{97} However, the case law from the U.K. suggests an ongoing failure by the U.K. Board to assiduously follow and properly implement their guidelines on gender issues in asylum claims.

The U.K. Border Agency defines "particular social group" in terms of innate or immutable characteristics, which may include: "gender, age, marital status, religion, family and kinship, past economic status/class, occupational history, disability, sexual history, sexual orientation and ethnic, tribal or clan affiliation."\textsuperscript{98} This is consistent with the framing of membership in a "particular social group" as necessarily related to an "immutable characteristic," as was set out in the two important companion British refugee decisions, \textit{Shah} and \textit{Islam}.

\textit{Some Key United Kingdom Cases and Their Significance}

These two decisions, \textit{Islam v. Secretary of State for the Home Department} and \textit{R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah}, centered on the claims of Pakistani women who had been subjected to violence by their husbands. In each case, the women had been accused by their husbands of having committed adultery, thereby transgressing "Islamic mores."\textsuperscript{99} The women were both physically abused and compelled by their husbands to leave their homes.\textsuperscript{100} In criminal proceedings under Sharia law, these women would, had they been found guilty, have been subject to "flogging or stoning to death."\textsuperscript{101}

The women's claims for political asylum in Britain were initially denied. The rejection was based on a finding that, as a matter of law, the claimants did not belong to a "particular social group."\textsuperscript{102} That the women had suffered gender persecution was not disputed. Nor was the state's failure to protect these women contested.\textsuperscript{103} The major issue in the appeals instead

\textsuperscript{97} \textit{Id.} at 3.

\textsuperscript{98} \textit{Id.} at 11.


\textsuperscript{101} \textit{Id.} at 1.

\textsuperscript{102} \textit{Id.} at 3.

\textsuperscript{103} \textit{Women in Pakistan: Disadvantaged and Denied Their Rights, AMNESTY INT'L, available at \textit{http://www.refworld.org/docid/3ae6a9fb18.html} (last visited May 11,
revolved around the pivotal question of how their claims fit into the "membership in a social group" category, legally recognized and protected by the Convention.

On appeal the House of Lords rejected the lower court's finding that because there was no common uniting attribute to satisfy the requirement of cohesiveness, the women could not be recognized as members of a "particular social group" within the meaning of the Convention.\(^{104}\) To the contrary, and in an important and welcome development, the Law Lords found that the women did in fact belong to a "particular social group," though they had distinct approaches to how precisely that group was defined (and they divided four to one on the question).\(^{105}\) Three Law Lords accepted the validity of "women in Pakistan" as constituting the "particular social group," while one Law Lord found the group to be narrower, constituted by "women in Pakistan accused of adultery."\(^{106}\) Gender was the basis of the "particular social group," though it was gender described in combination with other attributes.

The House of Lords decision is significant for its explicit and sustained analysis of gender as the fundamental basis of the oppression and persecution the claimants in these cases suffered. The legal reasoning in Islam and Shah was also characterized by a broad and purposive approach to interpreting the Convention. As Lord Hoffmann opined, "the concept of social group is in my view perfectly adequate to accommodate women as a group in a society that discriminates on grounds of sex, that is to say, that perceives women as not being entitled to the same fundamental rights as men."\(^{107}\) This kind of legal analysis promised potentially expansive results, namely, the recognition that gender discrimination could be explicitly foregrounded in refugee law, and even that gender might itself be recognized as the ground of persecution.

The recognition of gender as the basis for membership in a "particular social group" was also confirmed in a subsequent pair of important cases.

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2015).


105. In fact, one commentator notes that one of the fascinating aspects of this judgment is that, their differences aside, the majority based their decision "on a reasoning which was wider than that which the appellants (understandably, given the stance of the Court of Appeal) dared to advance." Sue Kirvan, Note, *Women and Asylum: A Particular Social Group* 7 FEMINIST LEGAL STUDIES, 333, 336 (1999).

106. *Id.* at 335. The dissenting Law Lord agreed with the majority on some of the fundamental issues regarding the interpretation of the Convention but not in their application to facts of these cases. Instead, Lord Millet argued that in these cases "particular social group" did not exist independently of the persecution suffered.

decisions issued by the House of Lords in 2006. In these cases, often referred to simply as Fornah, the UK’s highest court made clear that it adopted the UNHCR’s approach to gender according to which “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.”108 The House of Lords further indicated that a “particular social group” is defined either by the social perception approach, in which the “particular social group” is distinguished from the rest of society, or by the protected characteristic approach, which is when the group is characterized by an immutable characteristic, or a characteristic fundamental to their human dignity.109

It is in the decision involving Ms. Fornah’s asylum claim that the House of Lords provided extensive reasons on the analysis of whether or not the persecution could be based on her membership in a “particular social group.”110 Ms. Fornah fled Sierra Leone, after having been raped and made pregnant, because she feared persecution in the form of FGM, a practice performed “on the overwhelming majority of girls in Sierra Leone.”111 Ms. Fornah’s claim was accepted by the House of Lords and, though their various reasons differed about how precisely to define the group, the Lords all agreed that her claim for gender persecution in the form of FGM fit into the category of membership in a “particular social group.” In fact, Baroness Hale of Richmond went so far as to observe in apparent exasperation that, “the answer in each case is so blindingly obvious that it must be a mystery to some why either of them had to reach this House.”112

All of the Lords found that FGM is a form of gender persecution and found that Ms. Fornah’s risk of being subject to it put her in a “particular social group” requiring protection, though some Lords framed the group

109. Id.
110. Id. at paras. 4, 6. In the prior proceedings, the Secretary of State for the Home Department accepted that Ms. Fornah was credible and that she would be subjected to inhuman and degrading treatment if she was returned to Sierra Leone, and granting her protection under Art 3 of the European Convention on Human Rights. The applicant appealed on the basis that she should be recognized as a refugee. By a majority the Court of Appeal found that the applicant had not established that she was a member of a particular social group. The practice of FGM in Sierra Leone was not discriminatory in a way that set those who are subjected to it apart from others in society and that FGM could not be used as the defining characteristic of the particular social group because it was inseparable from the persecution feared.
111. Id.
112. Id. at para. 83.
more narrowly than others. Lord Rodger of Earlsferry, for example, found that "the appellant belongs to the group of uninitiated intact women who face persecution by enforced mutilation,"113 while Lord Hope of Craighead opined "one can say, with greater precision, that the particular social group is composed of uninitiated indigenous females in Sierra Leone."114

Significantly, in the decision a number of the Lords expressly found that gender itself was the basis for the social group and the persecution. Lord Bingham opined that he found "no difficulty in recognizing women in Sierra Leone as a particular social group for purposes of article 1A(2)" of the UNHCR Convention.115 Baroness Hale states that it "was never in dispute that the harm which these two women feared was sufficiently serious to amount to persecution," and "in each case it was either wholly or partly gender-specific."116 According to Baroness Hale, if a woman is persecuted because she is a woman in a country where women are assigned an inferior status, this is sufficient to engage the Refugee Convention without further sub-classification. Finally, Lord Brown of Easton-Under-Heywood writes that "I do not disagree with Lord Bingham and Baroness Hale that the group could if necessary be more widely defined to include even the initiated on the basis that all Sierra Leonean women suffer discrimination and subjugation of which the practice of FGM constitutes merely an extreme and ghastly manifestation."117

**Particularizing Social Groups: Modifying Gender in the United Kingdom Case Law**

In the important House of Lords judgment in *Fornah*, Lord Rodger of Earlsferry also made a clear statement that gender can form the "particular social group" in refugee law.

There is no doubt, of course, that all the women in a given society can comprise a particular social group for purposes of the Convention. That was settled by the decision of the House in *R v Secretary of State for the Home Department, Ex p Shah*.118

But after the apparent conceptual advance of recognizing the persecution of the group of women qua women, came the immediate qualification and

113. *Id.* at para. 80.
114. *Id.* at para. 56.
115. *Id.* at 31.
116. *Id.* at 47.
117. *Id.* at 119.
118. *Id.* at 76, per Lord Rodger of Earlsferry [Emphasis Added].
...[T]here is no particular virtue in defining the group so widely. Of course, persecution for reasons of membership of that group equates to persecution for reasons of gender - which slots easily into the sequence of race, religion, nationality and political opinion. But, even if there is widespread discrimination against women in various aspects of life in Sierra Leone, that is not in itself a sufficient reason to overlook the true, more specific, reason for the persecution of these intact women.\textsuperscript{119}

The decision in \textit{Fornah} seemed to suggest, Lord Rodgers’ equivocations aside, that UK asylum law would recognize persecution based on gender without resorting to the repeated fracturing and unnecessary partialization of categories of “particular social groups” in various national and social contexts. That promise, however, remains unfulfilled.

In stark contrast to the direction signaled by the majority of the House of Lords in \textit{Fornah}, a range of highly specialized sub-categories of women have been constructed in the subsequent UK case law, including, for example, “particular social groups” such as “women in the Ivory Coast,”\textsuperscript{120} “women charged with committing adultery in Pakistan,”\textsuperscript{121} “women in Liberia belonging to those ethnic groups where FGM is practiced,”\textsuperscript{122} “women (at risk of FGM) in Sudan,”\textsuperscript{123} “lesbian women in Albania,”\textsuperscript{124} “former victims of trafficking in Moldova,”\textsuperscript{125} “former victims of trafficking in Thailand,”\textsuperscript{126} “former victims of trafficking in China,”\textsuperscript{127} “former victims of trafficking in Albania,”\textsuperscript{128} “young Iranian women who refuse to enter into arranged marriages,”\textsuperscript{129} and finally, “women who do not conform to the heterosexual narrative and are perceived as lesbians in

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{MD (Women) Ivory Coast CG}, [2010] UKUT 215, 282 (IAC) (U.K.).


\textsuperscript{122} \textit{SK (FGM – ethnic groups) Liberia CG}, [2007] UKAIT 1, 69 (U.K.).

\textsuperscript{123} \textit{FM (FGM) Sudan CG}, [2007] UKAIT 60, 145 (U.K.).


\textsuperscript{126} \textit{AZ (Trafficked women) Thailand CG}, [2010] UKUT 118, 139 (IAC) (U.K.).


\textsuperscript{128} \textit{AM and BM (Trafficked women) Albania CG}, [2010] UKUT 80, 166 (IAC) (U.K.).

Jamaica.”  

Furthermore, research over almost the last decade has shown the failure by the UK Board to properly implement and follow their guidelines on Gender. For example, recent research conducted on the UK asylum process has found that, whereas the average overturn rate of all refugee cases is 27%, for cases for asylum brought by women 42% of initial refusals were overturned at the appeal tribunal (Asylum Aid, 2011). This differential suggests that something problematic is at play in the adjudication of women’s asylum claims. A report produced by the Women’s Project, at the NGO in the UK called Asylum Aid, finds that “the UKBA and the Tribunal’s interpretation of the Convention ground of a particular social group which is not in accordance with the House of Lords’ decision in Fornah results in a discriminatory approach to asylum claims based on the Convention ground of particular social group where the group is defined by gender and fails to ensure that protection is granted to those who have a well-founded fear of persecution because of their gender.”

In the absence of gender being recognized as a ground of persecution, the interpretive barriers surrounding the articulation of membership in a “particular social group” and the sub-classifications this seems to have necessitated will continue to impede access to justice for women who flee from gendered harms and seek asylum in the UK. Clearly gender needs to be recognized as its own ground of persecution to move past this recurring barrier.

TRENDS IN GENDER PERSECUTION REFUGEE CLAIMS IN THE UNITED STATES

In 1995, the U.S. Department of Justice issued Considerations for Asylum Officers Adjudicating Asylum Claims from Women, a document intended to provide an interpretive aid for asylum officers who are the initial decision makers for refugee claims made within the United States. The Considerations state that gender claims should be assessed within “the

131. See UNITED KINGDOM VISAS AND IMMIGRATION, supra note 69.
framework provided by existing international human rights instruments”\textsuperscript{134} and that political opinion or membership in a “particular social group” are the possible grounds for asylum claims based on gender persecution. But as is evident in the Canadian and the British refugee jurisprudence, the same troubling classification phenomenon pertains in the U.S. case law with regard to “particular social groups,” which have been continuously defined in narrow and individualized terms.

An early and important U.S. decision should have mapped out for immigration decision makers the route of finding gender itself as the basis of a “particular social group.” In \textit{In re Acosta},\textsuperscript{135} the U.S. Board of Immigration Appeals\textsuperscript{136} (BIA) found that membership in a “particular social group” was based on a “common immutable characteristic,” which might be innate, as “sex, color, or kinship ties,” or might be a “shared past experience such as military leadership or land ownership.” This significant decision in U.S. refugee law showed a promise of doctrinal progression and expansion with regard to legal definitions of “particular social group,” especially in recognizing gender as the basis of this category. This promise, however, is still unrealized in the asylum jurisprudence in the U.S. in the decades since that encouraging judgment.

Recognizing that the content of the “particular social group” category would necessarily be filled in on a “case-by-case basis,” the BIA in \textit{Acosta} acknowledged that the constitution of a “particular social group,” therefore, could be circumstantially specific, as in a shared experience or voluntary status that unites group members. More significantly, however, the legal reasoning in \textit{Acosta} expressly allowed for recognition that a “particular social group” can be organized around fundamental characteristics essential to a person’s identity, which obviously includes such fundamental attributes as gender. However, a review of key cases reveals that the radical potential of this recognition that gender can form the basis of a “particular social group” has not been realized in subsequent U.S. case law relating to women’s refugee claims arising out of experiences of gender persecution. In fact, after the step forward \textit{Acosta} represented, there have been multiple steps backwards.

Decided after \textit{Acosta}, the U.S. decision in \textit{In Re Kasinga}\textsuperscript{137} has also been hailed as an interpretive breakthrough because it explicitly recognized that

\textsuperscript{134} \textit{Id.} at 2.

\textsuperscript{135} \textit{In re Acosta}, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) [hereinafter \textit{Acosta}].

\textsuperscript{136} The Board of Immigration Appeals (BIA) is an administrative tribunal mandated to review the decisions of immigration Justices in hearings to determine whether or not a case for asylum in the U.S. has been successfully made out.

\textsuperscript{137} \textit{In re Kasinga}, 21 I. & N. Dec. 357, 377 (B.I.A. 1996) [hereinafter \textit{Kasinga}].
gender can be a component of the "particular social group" category. But the judicial reasoning underpinning this finding suffers from the same restricted and compartmentalized approach to gender that has characterized the Canadian and British case law. In Kasinga, the applicant for asylum, Fauziya Kassindja, was a young woman from Togo who sought asylum in the U.S. to protect herself from being forced to submit to her tribe's practice of female genital mutilation (FGM), a practice of injuring and often permanently maiming the genitals, imposed upon all female members either in childhood or adolescence for the purposes of carrying out cultural beliefs about women's sexuality. Ms. Kassindja had successfully escaped the practice through the protection of her influential father. Upon his death she fell under the care of her aunt who forced Ms. Kassindja into a polygamous marriage and, in preparation for it, was also making plans to force her to undergo FGM before the marriage was to be consummated.

The BIA found that the practice of FGM constituted persecution, thereby satisfying the first component of the legal analysis of the basis for a grant of asylum. In order to satisfy the second phase of the legal inquiry, the persecution had to be tied to one of the five categories specified in section 101(a)(42)(A) of the Immigration and Nationality Act. The BIA found, therefore, that the persecution was "on account of" her membership in the "particular social group" of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."

In this case, the BIA arrived at a fair legal result, but only by way of the most circuitous analytic route. Despite the fact that FGM is a gender-specific practice imposed upon all girls in the society precisely because they are female, the BIA did not find that the group subject to persecution was comprised of the tribe's female members. Had it done so, it would have foregrounded gender as the obviously salient characteristic of identity that is the basis upon which FGM was inflicted. This kind of more expansive analysis would have recognized FGM as a gender-specific form of persecution and led to a precedent in which gender alone was recognized

138. This case was also analyzed in Randall, HWLJ, and this discussion is adapted from that article.
139. Ms. Kassindja's name was misspelled in the decision which is, incorrectly, identified as Kasinga. For a discussion of this, see Musalo, Protecting Victims, supra note 10, at 135.
140. In re Acosta, 19 I. & N. Dec. at 358 (stating that she was only 19 years old at the time of her application, and 17 years old at the time that the events occurred).
142. In re Kasinga, 21 I. & N. Dec. at 368.
as the basis of the persecuted social group. Instead, the BIA focused on the fact that the applicant had escaped the practice, situating her within the far narrower group of women “having intact genitalia” who also oppose the imposition of FGM. This is more than a matter of semantics. Instead, it is an issue of finding legal categories that can most appropriately accommodate the facts, one of which is that the persecution (in the form of FGM) from which Kassindja sought escape, is a gender-specific practice. Indeed, FGM is a practice of gender inequality.

The definition of “particular social group” in Kasinga, while representing a positive legal development in the U.S. context, is nevertheless one that shies away from grappling with gender as a category in its own right. By linking the persecution Kassindja experienced to her opposition to and escape from the practice and artificially constructing this status to comprise membership in a “particular social group” defined by her tribal membership, her gender and her “genitally intact” status, the BIA’s analysis of the applicant’s situation has it backwards. The BIA failed to acknowledge that the persecution existed precisely “on account of” her gender.

Some Key Cases and their Significance

This problematic trend has continued to unfold in the adjudication of key cases since this important but flawed decision. An example par excellence of the protracted tortured and convoluted route an asylum claim made by a woman fleeing gender persecution can take in the U.S. is found in In re R-A-. Even more problematic than the ever narrowing construction of “particular social groups” are cases, such as R-A-, in which courts have simply refused to recognize gender as forming even part of the group identity, leading to denial of asylum. While the case was ultimately favorably decided on December 10th, 2009 when she was finally granted asylum in the U.S., the applicant, Ms. Alvarado, a Guatemalan woman who had been subjected to a decade of extreme physical and sexual abuse from her husband and received no police protection, underwent a 14-year odyssey through the U.S. refugee process to get relief in the form of a grant of asylum.

Initially the BIA denied asylum to Ms. Alvarado even though the severe physical and sexual abuse she suffered was violence that the Board had no trouble identifying as constituting persecution. The application failed at

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143. Id. at 366.
145. Id. at 927. The decision was based on a split, 10-5 en banc decision which included a vigorous dissent critiquing the shortcomings of the majority’s analysis and
this stage, however, because, among other reasons, the BIA found that her persecution was not “on account of” a cognizable ground, rejecting her claim that the relevant social group was “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.” This decision generated a storm of protest and academic criticism, and was vacated by order of the Attorney General, on January 19, 2001, and was remanded to the BIA for rehearing after the expected final publication of new regulations pertaining to gender asylum claims.

Following the BIA decision and the critical reactions to it, Ms. Alvarado’s case required further years of intervention and waffling by three Attorney Generals – Janet Reno, John Ashcroft and Michael Mukasey – before reaching a final disposition. It was finally settled late in 2009 when the immigration judge issued a summary judgment granting asylum. Critical to the positive outcome in the R-A- case was the brief ultimate finding.

146. The Board also engaged in an analysis of the perpetrator’s motivation for the abuse, arguing that he was inclined to assault and inflict harm only on the applicant, and not on a larger social group of which she claimed to be a member, as if this were somehow relevant to the legitimacy of her asylum application. The Board also seemed to suggest that the government of Guatemala was capable of protecting the applicant from domestic violence, thereby the negating the absence of state protection for this applicant, and, as some commentators have argued, ignoring the evidence. See Deborah E. Anker, et al., Defining “Particular Social Group” In Terms of Gender: The Shah Decision and U.S. Law 76 INTERPRETER RELEASES 1005, 1006 (1999).

147. The Board also rejected the enumerated ground of “political opinion” for this applicant. In re R-A- 22 I & N Dec. at 926.


150. These rules expressly state that gender can form the basis of a particular social group, and are also intended to aid assessments of domestic violence refugee claims, removing the barriers enacted by the In re R- A- decision.

151. See generally Barbara Barreno, In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims, 64 VAND. L. REV. 225, 225-69 (2011) (summarizing and analyzing the sorry trajectory of this woman’s asylum application; see also Musalo, Gender Asylum, supra note 10, at 58-60; Matter of R-A-, supra note 150.

152. See Musalo, Two Women, supra note 12, at 74; see also Matter of R-A-, supra note 150.
filed by the Department of Homeland Security (DHS) in another case involving a refugee claim to escape domestic violence, known as Matter of L.R.

In the brief relating to L.R., the DHS provided a roadmap for the legal requirements of eligibility for asylum claims based on membership in a “particular social group” and also importantly recognized that domestic violence can be a basis for a successful refugee claim. 153 Ms. L.R. suffered many years of brutal physical and sexual violence and had 3 children, each of whom was conceived because of marital rape perpetrated by her common law husband. He also tried to kill her and prevented her from seeing her children. Ms. L.R. fled to the U.S. with her 3 children in 2004.

While there were various procedural issues related to her claim for asylum, for the purposes of this analysis of great significance was the immigration judges’ simultaneous acknowledgment that the severe physical and sexual abuse perpetrated by her common law husband amounted to persecution combined with the simultaneous refusal to recognize that this very persecution was on account of a protected ground – her gender. Ms. L.R.’s lawyers’ claim was that the “particular social group” of which she was a member was defined by gender and her inability to leave a violent abuser. 154

The immigration judge, however, astonishingly found that Ms. L.R.’s abuser was simply a “violent man,” as if he randomly inflicted violence on anyone around him, and as if this kind of violence was an entirely anomalous or exceptional event in women’s lives. On this judicial view, it wasn’t Ms. L.R.’s gender or relationship status which was the basis of the violent persecution she suffered at her spouse’s hands. In this decision the judge both rendered the patterned nature of gendered violence invisible, and implied that sexual and physical violence in an intimate heterosexual relationship is not part of the gendered problem of domestic violence but instead a kind of untargeted, random and haphazard event. This judgment is clearly, to say the least, out of sync with not only the decades of research demonstrating the gendered nature of domestic violence but also out of line with now uncontroversial international recognition that domestic violence is a human rights violation which affects women the world over.


154. This characterization of women who are terrorized in intimate relationships in a social context of state failures and the absence of police protection as “unable to leave,” is in and of itself highly problematic as it casts the lens on the victim instead of on her social context. But it is no doubt necessitated by the requirements of fitting into a cognizable social group for the purposes of a refugee claim when gender persecution is not recognized as its own distinct form of human rights violation.
This problematic decision, however, was overturned and Ms. L.R., after initially being rejected, was ultimately granted asylum in 2010 after her case traversed another long legal journey from the initial IJ to the Board of Immigration Appeals (BIA) and then back again to Immigration Court.\textsuperscript{155} The critical intervention in the final hearing seemed to be the DHS brief filed in 2009 in which the Department’s current position was outlined on whether victims of domestic violence, in circumstances like those faced by L.R. “are members of a particular social group within the meaning of the Act.”\textsuperscript{156}

While recognizing that domestic violence may be the basis for an asylum claim, the DHS brief cautions that not “every victim of domestic violence is eligible for asylum”\textsuperscript{157} and stresses that a range of requirements must be met including a relatively rigorous evidentiary record (particularly pertaining to the country conditions and lack of state protection). However, the Brief is significant for stating that domestic violence victims can, for the purposes of asylum claims, form a particular social group and relaxes the requirements for meeting the requirements of “social visibility” and “particularity” with regard to women subjected to domestic violence. The Brief indicates that a woman who can show she was in domestic relationship with a spouse who believes he has a right to inflict violence in a segment of society “that will not be accorded protection from harm inflicted by a domestic partner”\textsuperscript{158} can meet the “social visibility” requirement of the membership in a “particular social group” ground for persecution. Commentators have noted that the analysis in the DHS brief, while significant for cases involving domestic violence, has positive implications for gender-based claims more generally. “The brief takes the position that gender and status in a relationship, status in the family, and/or status in society can define a social group that fulfills all the current social group requirements, and that these characteristics may be one central reason for gender-based persecution.”\textsuperscript{159}

\textsuperscript{155} See Musalo, Gender Asylum, supra note 10, at 60–62; see also Matter of L-R-, supra note 154; see also Jessica Marsden, Note, Domestic Violence Asylum After Matter of L-R-, 123 YALE L.J. 2512, 2528–30 (2014).


\textsuperscript{157} DHS 2009 Brief, supra note 157, at 12.

\textsuperscript{158} Id. at 18.

\textsuperscript{159} Matter of L-R-, supra note 154.
The Bbrief recommends two possible ways of accommodating Ms. L.R.'s claim within membership within a particular social group. The first recommended characterization is "Mexican women in domestic relationships who are unable to leave," and the second is "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."\textsuperscript{160} Clearly these characterizations are superior to the view of the IJ who failed to recognize any gender-defined group to which Ms. L.R. belonged and who failed to appreciate the nexus between her claim and any enumerated ground of persecution. Yet the DHS brief nevertheless fails to grasp the bigger issue which is that domestic violence is itself a form of gender persecution and that her gender is the basis on which she was violated sexually and physically by her violent common law husband. Her gender was not a coincidence or irrelevant detail, but fundamental to the experience of domestic violence.

**Particularizing Social Groups: Modifying Gender**

Despite the positive elements of the DHS brief, it is not hard law but is, like the Canadian Guidelines, an interpretive guide only. Many of the formidable barriers to women's gender persecution claims for asylum in the United States continue to flow from the absence of gender as an enumerated ground of persecution, and result in the increasingly convoluted attempts to fit these claims into various permutations of "particular social groups." Furthermore, to fit a gender persecution claim into the membership in a "particular social group" analysis, there is now troubling precedent imposing onerous further requirements that must be met.\textsuperscript{161} It was in *Matter of C-A.*\textsuperscript{162} that the court found that, in order to establish a recognized social group, two additional necessary criteria are that the group must have "social visibility" and be characterized by "particularity." These two further requirements were upheld in the 2008 decision, *Matter of S-E-G.*\textsuperscript{163}

"Social visibility" refers to the visibility of the group within the broader society and "particularity" specifies that the group cannot be too populous or too diverse. But as Karen Musalo points out, decision makers have been [particularly] "confounded by what is meant by 'social visibility.'"\textsuperscript{164}

\textsuperscript{160} DHS 2009 Brief, *supra* note 157, at 14.


\textsuperscript{164} Musalo, *Gender Asylum, supra* note 11, at 60.
These additional requirements, then, erect even more definitional obstacles to women’s gender-based refugee claims and also represent a problematic retreat from the recognition in the important 1985 decision in Matter of Acosta, that sex can be recognized as an immutable and common characteristic to a group of individuals for the purposes of membership in a “particular social group.” Furthermore, they do not resolve the problem of increasingly specific sub-classifications of women in “particular social groups.” Indeed, they compound it.

To illustrate this point, U.S. decision makers have defined various “particular social groups” as “women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable,”[165] females “born into the Tukulor-Fulani tribe in Senegal,”[166] “women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice”[167] as the relevant social group in a successful asylum claim and “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”[168] In Aguirre-Cervantes v. INS, a young woman from Mexico, was granted relief on the basis that the persecution she suffered (extreme physical abuse perpetrated by her father) was “on account of” her membership of the “particular social group” identified as her own family of origin.[169] In Hernandez-Montiel v. INS, another petitioner from Mexico was granted asylum on the basis of persecution on account of the very specific sexual identity described as homosexual men with female identities.[170] In Matter of A-N-, a woman who fled abuse from her husband in Jordan was granted asylum on the basis that she was part of the “particular social group” comprising “married, educated, career-oriented” Jordanian women, indicating a recognition of the gender-based persecution but with a series of major qualifications attached to narrow the ground significantly.[171] In Sarhan v. Holder, the “particular social group” was described as “women in Jordan who have (allegedly) flouted

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166. Niang v. Gonzales, 422 F.3d 1187, 1191 (10th Cir. 2005).
168. See In re R-A-., 22 I. & N. Dec. 906, 920 (B.I.A. 1999), vacated, 22 I. & N. Dec. 906 (A.G. 2001) (noting the relevant social group identified in a claim which was initially denied though later allowed).
169. Aguirre-Cervantes v. INS, 242 F. 3d 1169, 1178 (9th Cir. 2001).
repressive moral norms, and thus who face a high risk of honor killing.”

An important study examining 206 asylum claims made by women who experienced domestic violence and sought refuge in the United States found that approximately one third of the cases (63 of 206) were denied, and most commonly on the basis of a “lack of cognizable social group.”

In the author’s words, despite some progress in decision making about domestic violence based gender persecution asylum claims in the U.S., the absence of applicable norms and the shifting policy positions on the part of DHS have continued to produce contradictory and arbitrary outcomes in domestic violence asylum cases.” The main impediment to consistent and fair decision making in these domestic violence based asylum claims is the failure to grasp domestic violence as a gendered harm; too often it is viewed in a decontextualized way by DHS decision makers who tend to characterize it as a “personal dispute.”

This finding echoes the comparative analysis Efrat Arbel undertook of the gender persecution cases appealed to the Federal Court of Canada, where the gendered harms of FGM and forced sterilization were more consistently grasped as gender-based persecutions than were the claims based on domestic violence. Missing the gendered nature of domestic violence, while problematic on multiple levels of analysis, is particularly troubling in exacerbating the barriers which already impede the recognition of women’s claims as fitting into a “particular social group.”

The failure to recognize gender alone as forming the basis of the group’s identity compromises advances made in recognizing domestic violence as a form of gender persecution. In the recently released and precedential decision, in Matter of A-R-C-G-, the BIA confirmed that women seeking asylum to escape domestic violence can be recognized as members of a “particular social group.” This landmark decision resolves nearly two decades of legal uncertainty about whether or not women fleeing domestic violence were entitled to asylum protection in the U.S. The case has been sent back to an immigration judge to decide on the evidence whether the asylum requirements are met with regard to the state’s failure to protect Ms. C-G-. But the decision’s precedential value lies in the recognition that the persecution she suffered, described by the BIA as “repugnant abuse,” was tied to her membership in the “particular social group” formed by

172. Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011).
174. See id. at 147.
175. See Arbel, supra note 43, at 748.
“married women in Guatemala who are unable to leave their relationship” and that domestic violence can form the basis for an asylum claim.

In In re A-R-C-G-, the BIA confirms its holding from Matter of W-G-R- and Matter of M-E-V-G- that an asylum seeker must demonstrate their membership in a “particular social group” which is “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” Gender is identified as an “immutable characteristic” of the group to which Ms. C-G- belongs, but it is not gender unmodified. Her marital status and her “inability” to leave the relationship are the other elements defining the group. This decision is important for its recognition of domestic violence as a basis for an asylum claim. Yet the legal analysis in the decision does not surmount the definitional problems surrounding categorizations of “particular social group” membership and the difficulty recognizing gender alone as providing the nexus to the persecution.

It is perhaps no coincidence that the ongoing judicial construction of increasingly particular versions of what constitutes a “particular social group” in U.S. refugee law fits neatly with what is arguably a radically individualized liberal ethos, infusing much of U.S. law and American politics more generally. Recognition of large social groups situated in structured relationships of inequality — and none is larger than that constituted by gender — is antithetical to seeing the decontextualized and unsituated individual as the fundamental unit of analysis, as is so central to the liberal political tradition. Clearly a much-needed correction to this in the context of refugee law is the statutory recognition of gender as meeting the nexus requirement in the definition of refugee.

HOLDING BACK THE FLOODGATES: ALARMIST ARGUMENTS ABOUT MASS REFUGEE CLAIMS IF GENDER IS RECOGNIZED AS A GROUND OF PERSECUTION

The official documents and interpretive Guidelines of major refugee-receiving countries such as Canada, the United Kingdom, and the United States all recognize that persecution can take gender specific forms, just as the International Convention on Refugees recognizes that persecution takes religious, political and racialized (among other) forms. Why then, is there the persistent refusal to recognize gender as its own ground of persecution?

177. Id. at 392.
Why must gender-based persecution – unlike other forms of human rights violations, which are recognized as historical and contemporary patterns of oppression rising to the level of persecution warranting state protection – be arduously fit into ever more context-specific and distinctly-defined “particular social group” categories? How can this exclusion of gender be justified?

Lurking beneath the concern about enumerating gender as a ground of persecution in the definition of refugee is a concern about the size of the group and a fear that too many of the world’s downtrodden women will rush the gates of the more prosperous countries of the developed world seeking asylum there. Recognizing gender as an enumerated ground of persecution is therefore seen by some as unleashing the specter of hordes of prospective claimants seeking asylum simply by virtue of their membership in a social category that is seen as being far too large.\(^{179}\)

Some U.S. refugee decisions have been explicit in expressing the concern that gender is an over-broad category on which to define a social group.\(^{180}\) For example, Circuit Judge Hartz, writing for the Tenth Circuit Court of Appeals in a case involving a woman’s claim for asylum based on FGM, opined “[t]here may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation’s residents to obtain asylum on the ground that women are persecuted there.”\(^{181}\)

But the concern about “half a nation’s residents” seeking asylum elsewhere entirely misses the very point of asylum law and misunderstands its highly individualized nature. As Baroness Hale patiently explains:

> Not all persecution gives rise to a valid asylum claim. Very bad things happen to a great many people but the international community has not committed itself to giving them all a safe haven. People fleeing national and international wars, famine or other natural disasters are referred to as refugees, and offered humanitarian aid by the international community, but they do not generally fall within the definition in the 1951 Convention. Asylum can only be claimed by people who have a well-founded fear of persecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion”.\(^{182}\)

Indeed, the interpretive documents of the refugee-receiving countries

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179. See Musalo, Protecting Victims, supra note 10, at 120.
180. See Sanchez-Trujillo v. INS, 801 F.2d 1471, 1576-1577 (9th Cir. 1987); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994).
also address this concern about gender being too expansive a ground of persecution. For example, the UK Guidelines assert the following:

The fact that a PSG may consist of large numbers of the female (or male) population in the country concerned is irrelevant - race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.\footnote{183} It should also be pointed out that this classic fear of opening the "floodgates" has not prohibited recognition in refugee law that other enumerated grounds – such as race, religion, and nationality – necessarily encompass huge populations. This is a fact also referenced in the Canadian \textit{Guidelines}.\footnote{184} Furthermore, the UNHCR guidelines on gender-related persecution expressly emphasize that the size of a social group is not a relevant criterion in its recognition. Using the size of the group of women as a basis for refusing its recognition "has no basis in fact or reason, as the other grounds are not bound by this question of size."\footnote{185}

Most fundamentally, then, the "floodgates" concern misses the essential nature of the refugee remedy, which is a highly individualized, case-by-case one. Regardless of the fact that large numbers of people in the world suffer oppression and persecution, asylum claims are made one at a time, on an individual basis, and each individual claimant must pass procedural and evidentiary hurdles and fit her petition into a well-structured legal framework in order to make out her case.

Moreover, migration is rarely an easy process. Many refugee claimants make arduous and sometimes life-threatening journeys to reach a country where asylum can be claimed, a fact which is painfully evident in the frequent media accounts of migrant deaths caused in treacherous water crossings.\footnote{186} Women and children have been an increasing presence in


\footnote{184}{\textit{Id.} ("The fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant – race, religion, nationality and political opinion are also characteristics shared by large numbers of people.").}

\footnote{185}{UNHCR, \textit{Guidelines}, supra note 21, at 8.}

\footnote{186}{In the first seven months of 2015 over 2000 migrants died trying to reach Europe by crossing the Mediterranean, more than double the number who died in the same time period the previous year. \textit{International Organization for Migration, Deadly Milestone as Mediterranean Migrant Deaths Pass 2,000}, 08/04/15, https://www.iom.int/news/deadly-milestone-mediterranean-migrant-}
migrant flows in what the International Organization for Migration describes as a "worrying trend," particularly with regard to the rise in the number of women using dangerous routes.\textsuperscript{187}

The IOM, a Geneva-based organization, for example, reports that 16,839 female migrants have arrived in Italy in 2014, more than double the 7,658 who arrived during the same period in 2013.\textsuperscript{188} A briefing paper by Médecins Sans Frontières (MSF), highlights the frequency with which women migrants experience sexual violence both in their countries of origin and also en route as they journey towards a country where they seek asylum. Given these treacherous conditions and the formidable obstacles facing migrants, it is hardly a legitimate concern that the floodgates will be forced open by the recognition of gender as its own ground of persecution.

Claims for asylum based on gender, as is the case for other claims, only stipulate the enumerated reason for the persecution in any individual case by naming the ground on which it is based. It is certainly not the case that legal definitions of who counts as a refugee render large segments of the population eligible for asylum simply by virtue of membership in identified groups. To the contrary, refugee law provides a necessarily patchwork, individualized micro-level solution to complex macro-level social, economic, and political problems in the world.

Beyond meeting the refugee definition the claimant must also prove a failure of state protection, which in itself can in many cases be a major, if not insurmountable, evidentiary burden.


OVERCOMING GENDER NEUTRALITY: WHY GENDER MUST BE LEGALLY RECOGNIZED AS ITS OWN GROUND OF PERSECUTION

[T]he danger of confronting the universality of women's oppression lies in the rejoinder that women are always and never refugees—always, because they cannot confidently rely on state protection wherever they live; and never, because there is no place to which they can flee.\(^{189}\)

That women can now seek asylum from gender-related persecution has been described as “one of the most remarkable achievements in [our] legal history.”\(^{190}\) Yet migrant women’s claims for asylum when they flee from one nation and seek refuge in another to escape the particular harms of gender persecution, and the attempt to create legal spaces in which these claims can be accommodated in major refugee receiving states such as Canada, the United States, and the United Kingdom, throw into stark relief a complex set of legal, political and social issues. These include definitions surrounding human rights, women’s rights and legal recognition of what constitutes a rights violation, the public/private split, the state’s role in and relationship to gender inequality and the socio-legal contexts of violence against women more broadly. Furthermore, given that the majority of refugees come from nations of the Global South, sometimes described as the developing countries,\(^{191}\) refugee claims and their reception in the nations of the Global North – particularly the liberal democratic countries of the West – inevitably evoke dominant narratives and representations of cultural “others.” Put differently, refugee law, policies and flows tend to be deeply racialized.

In this wider context, there have clearly been some positive policy and interpretive developments regarding gender persecution asylum claims in the case law of the countries analysed here. In an unpublished decision in the U.S., forced marriage was recognized as gender persecution,\(^{192}\) and in

\(^{189}\) Macklin, supra note 48, at 271.

\(^{190}\) Sherene Razack, Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender, 8 CAN. J. WOMEN & LAW 45, 47 (1995).

\(^{191}\) In this paper I use the North/South, First World/Third World, and East/West dichotomies interchangeably. The language used to capture these differences between nations of the so-called developed countries of the north and underdeveloped of the south, is necessarily inadequate, but for the purposes of this paper these terms make the necessary point.

Canada, domestic violence has consistently, in theory at least, been recognized as gender persecution with a nexus to a convention ground. But these successes, among others, do not ameliorate the larger and more entrenched legal obstacles facing women refugees. As Edwards observes, even the successful gender persecution cases seem to remain exceptions despite over a decade of positive case law. In a 2004 study of 41 European asylum systems, for example, it was found that less than half had recognized sexual violence as a form of persecution (41.5 per cent); over a third of countries (33 per cent) do not accept persecution at the hands of non-state actors as falling within the definition of a refugee in the 1951 Convention; and nearly two-thirds of countries do not acknowledge failure to conform to social and cultural mores as a basis for a claim to asylum (61 per cent). Moreover, just over one-third of countries had recognized women or particular women as members of PSG (36.5 per cent). Likewise, jurisprudence in the United States has been at best muddled.  

The 2002 UNHCR Guidelines concerning particular social groups expressly acknowledged that “sex can properly be within the ambit of the social group category.”  

Moreover, the country guidelines also make the connection between gender discrimination and gender persecution, a link that is well supported in some of the case law. According to the Canadian Guidelines, for example, persecution may, in some circumstances, “be the same as severe discrimination on grounds of gender.”  

Similarly, the UK guidelines recognize that “discrimination may amount to persecution in countries where serious legal, cultural, or social restrictions are placed upon women.”  

But these policy-guided interpretive spaces in refugee law are insufficient to the task of recognizing gender adequately. As Michelle Foster succinctly puts it, “one of the most pernicious difficulties is the overwhelming reluctance of both advocates and decision-makers to frame the relevant . . . [‘particular social group’] as simply ‘women.’”  

As the examples in the case law illustrate, in an international context where deep and structured gender inequalities are still pervasive the world over, the Canadian Guidelines, British Guidelines and U.S. 

194. Guidelines in International Protection No. 1, supra note 21.  
195. Laviolette, supra note 10, at 176.  
196. UNITED KINGDOM VISAS AND IMMIGRATION, supra note 96, at 3.  
197. Foster, supra note 10, at 28.
"Considerations" are all inadequate half-measures. They all fail to direct decision makers to recognize that female gender status is itself constitutive of membership in a particular social group. This would have been a creative way of interpreting and filling the statutory gender gap in the definition of a refugee. All of the guidelines, however, fall short of the interpretive strategy of indirectly finding gender itself to be a ground of persecution by recognizing women as a social group, and by recognizing a specific form of persecution based on the fact that of being women. Instead, the Canadian Guidelines state that "what is relevant is evidence that the particular social group suffers or fears to suffer severe discrimination or harsh and inhuman treatment that is distinguished from the situation of the general population, or from other women." In this way, then, the Guidelines mandate the identification of particular groups of women subject to persecution, particular groups of women whose experiences are distinguished from that of other women. The Guidelines themselves miss the essential point.

In November 2014, the United Nations CEDAW committee issued General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women. This recommendation advances a range of practical measures to improve protection of women’s rights in the asylum process. The Recommendation urges that all of the UN Refugee Convention grounds identifying the bases of persecution should be interpreted in a gender-sensitive way. It further calls upon states to domestically recognize sex, gender, and LGBT status as free-standing grounds for claiming asylum (in particular see paragraphs 13, 30 and 38 of the Recommendation). Clearly the Recommendation, which emerged from a long collaboration and work of an expert committee, aims to address the silence on gender which exists

198. In the Canadian context, this interpretive strategy would recognize gender as a ground of persecution without it actually having been enumerated as an independent ground, a statutory amendment which would have to be undertaken legislatively and which exceeds the authority of the IRB Chair.

199. Immigration and Refugee Board, Guidelines Issued by The Chairperson Pursuant to Section 65(3) of The Immigration Act 279, 284 (1993) [emphasis in original].

200. Id. Furthermore, with specific regard to domestic violence the Guidelines stipulates that "a sub-group of women can be identified by reference to the fact of their exposure or vulnerability... to violence, including domestic violence, in an environment that denies them protection."

PARTICULARIZED SOCIAL GROUPS in the Refugee Convention and aims to do so, in part, by urging the explicit identification of gender as its own independent ground. This is a legal move which is long overdue.

CONCLUSION: GENDER, JUSTICE AND REFUGEE LAW

It is clearly the case that adding gender as an explicit ground in the definition of a refugee is an insufficient solution to the multiple barriers facing women seeking asylum based on gender persecution. As Anker notes, adding gender to the enumerated grounds does not solve the problem because

the obstacles to women's eligibility for refugee status lie not in legal categories per se, but in the incomplete and gendered interpretation of refugee law — the failure of decision-makers 'to acknowledge and respond to the gendering of politics and of women's relationship to the state.'

Anker's well-taken point that recognizing gender as a ground of persecution is insufficient as a strategy does not, however, make it unnecessary. Indeed, adding gender is one important interpretive and legislative step towards a more complete and gendered interpretation and application of refugee law.

Numerous scholars and other refugee law experts have called for improvements in the interpretation of "particular social group." As one commentator argues, "[t]he addition of 'gender' as a refugee category is a moral and political imperative. It is also a realistic goal, given increased international recognition of the particular dangers women refugees face." Adding gender as a basis for recognizing persecution in the definition of "refugee" in Canada, the United Kingdom, and United States would align asylum legislation in these countries more fully with the international human rights instruments they have signed onto that identify and protect women's human rights. If the question is how to do this, then, "the answer, of course, lies . . . in a broader principle, and the exaggerated focus on sub-groups and identifying characteristics . . . [leads] to the essential

202. Anker, supra note 12, at 51.
203. See generally Doyle, supra note 10, at 520-21.
205. See id.
identifying factor being ignored, namely, women in context, that is, women in social context.\textsuperscript{206}

The fundamental problem with fitting gender persecution claims into the "particular social group" approach is that there is no rationale for how the sub-group within gender-as-a-group is to be defined. In Macklin's words, "the Guidelines accept that...gender may form the basis for [particular] social group ascription, but they evade the important question of how to circumscribe the group."\textsuperscript{207} Women's refugee claims for asylum from sexual violence then, have had to be found to rest on an ever-expanding, yet paradoxically increasingly narrow set of categories of claimants—for example, "Indian women subjected to physical violence from husbands," or "Lebanese women subjected to sexual abuse by uncles," and so on. This fruitless particularization misses the very crucial point of the analysis—that sexual violence is itself a form of gender persecution and that it is gender which is both the common denominator defining the social group and which makes women the target of this form of persecution in the first place.

In fact, the very section of the Canadian Guidelines which stipulates that a sub-group of women can be identified by being distinguished from other women, is immediately followed by the assertion that "[t]hese women face violence amounting to persecution, because of their particular vulnerability as women in their societies...."\textsuperscript{208} The Canadian Guidelines, therefore, fail to follow through on the radicalism of the very insight they espouse. So too do the guidelines of the United Kingdom, and the much lauded DHS brief in L.R. doesn't even approach a meaningful recognition that gender is the basis for many forms of persecution of women the world over.

Catharine MacKinnon has pointed out that most gendered violence was simply out of view "when the laws of war, international humanitarian law, and international human rights guarantees were framed."\textsuperscript{209} While significant legal developments have brought this violence into view, refugee law in Canada, the United Kingdom and the United States, along with other key refugee-receiving countries, requires significant further reform to sharpen the focus and make delivery of meaningful legal remedies more possible. The well-recognized and entrenched masculinist bias in the definition of refugee and persecution can only begin to be overcome by making gender a statutorily identified ground for persecution.

\begin{footnotes}
\footnotetext{206}{Guy S. Goodwin-Gill, Judicial Reasoning and 'Social Group' after Islam and Shah, 11 INT'L J. REFUGEE L. 537, 537 (1999).}
\footnotetext{207}{Macklin, supra note 48, at 245.}
\footnotetext{208}{Immigration and Refugee Board, Guidelines Issued by The Chairperson Pursuant to Section 65(3) of The Immigration Act 279, 284 (1993) [emphasis added].}
\footnotetext{209}{Catharine MacKinnon, Women's September 11th: Rethinking the International Law of Conflict, 47 HARV. INT'L L.J. 1, 1 (2006).}
\end{footnotes}
If it is their status as women in a gender unequal society which renders them vulnerable to gendered harms, for example, domestic violence at the hands of their male intimates — exactly the point that feminist advocates have been making for decades and a point already well recognized in international human rights law — then it is gender itself which is the basis for membership in a particular social group. Gender is the defining characteristic that delimits the social group, and gender is the basis of the persecution. An intra-group comparison to construct a sub-group of particularly vulnerable women within the group of women as a whole is superfluous, problematic, and impedes access to justice for women who are most in need of it. And that is why refugee-receiving states like Canada, the United States, and the United Kingdom, among others, must enumerate gender as an independent and recognized ground of persecution for the purposes of asylum law.

Recognizing gender as a basis of persecution is not in and of itself a solution to all of the difficulties and interpretive obstacles facing women fleeing gender persecution (or indeed refugees more generally). But it is an essential move in the direction of delivering a more just and gender-sensitive asylum process in the world’s affluent and safer nations, those which purport to offer persecuted people safe refuge and state protection. As Baroness Hale has effectively and acerbically observed:

The world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society.\(^2\)

The governments of Canada, the United Kingdom, and the United States still need to be “woken up” to the fact that in the refugee law of their countries, gender must be statutorily recognized as a ground of persecution for the purposes of making a refugee claim. Fairness, justice, and women’s equal access to the law require it.

\(^2\) Fomah v. Sec’y of State for the Home Dep’t, [2006] UKHL 46, [86] (U.K.)