Gender-Based Persecution: A Challenge to the Canadian Refugee Determination System

Heather Potter

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GENDER-BASED PERSECUTION: A CHALLENGE TO THE CANADIAN REFUGEE DETERMINATION SYSTEM

HEATHER POTTER

The definition of a refugee contained in the Canadian Immigration Act requires that refugee claimants establish a well-founded fear of persecution based on one of the enumerated grounds, namely race, religion, nationality, membership in a particular social group or political opinion. As “sex” is not enumerated, many women must establish their claim on the basis of “membership in a particular social group.” The standard of internal cohesion that the courts employed in defining a “particular social group” severely restricted the grounds available to women claiming refugee status. New guidelines, encourage the acceptance of claims of gender-based persecution under the enumerated categories. Recent cases indicate a willingness to view claimants of gender-based discrimination as members of a “particular social group,” but these claims must still satisfy a stringent test to establish “persecution” and “state complicity.” The guidelines, while a positive development, remain an inadequate substitute for the inclusion of sex as an enumerated ground.

La définition de réfugié de la Loi sur l’Immigration du Canada requiere qu’un requérant établit une crainte de persécution bien fondée basée sur un des critères énumérés, à savoir, la race, la religion, la nationalité, le fait d’être membre d’un groupe social particulier, et les opinions politiques. Puisque le “sexe” n’est pas un fondement énuméré, plusieurs femmes doivent établir leur demande sur la base de “membre d’un groupe social particulier.” La norme de cohérence interne que les courts indique que la définition de “groupe social particulier” restreint sévèrement les fondements disponibles pour les femmes demandant le statut de réfugié. Des nouvelles directives encouragent l’acceptation de demandes fondées sur la persécution basée sur le sexe sous l’égide des catégories énumérées. Des affaires récentes indiquent une volonté de considérer les requérants invoquant la discrimination basée sur le sexe comme membre d’un groupe social particulier; cependant ces demandes doivent toujours satisfaire le test sévère de “persécution” ainsi que de la “complicité de l’état.” Les directives, tout en constituant un développement encourageant, demeure une alternative inadéquate à l’inclusion du sexe comme une catégorie énumérée.

† B.A. (Wilfred Laurier), M.A. (York), LL.B. anticipated 1994 (Dalhousie).
The international community is confronted with the challenge of dealing with the world's increasing refugee population in a humane and compassionate way. Some of these refugees are women fleeing gender-based persecution. Women who confront or are oppressed by patriarchal institutions often have no choice but to move elsewhere. However, there is uncertainty as to whether the protection extended to Convention refugees in Canada should also be extended to women fleeing gender-based persecution. In the past year, the refugee determination system has been heavily criticized by human rights and feminist groups for its treatment of female refugee claimants.

Much of the controversy has centred on two high profile cases. Nada, a Saudi Arabian woman, claimed refugee status on the basis of a fear that she would be arrested and possibly tortured by the Saudi religious police. Nada refused to wear a veil and submit to other restrictions placed on women in Saudi Arabia. She had been attacked and beaten by Islamic fundamentalists for this behaviour.\(^1\) Dularie Boodlal, a Trinidadian woman, claimed refugee status on the basis that she was a victim of domestic violence. She had sought the aid of the Trinidadian police on several occasions, but they refused to protect her from her violent spouse.\(^2\)

Both women's claims were rejected although they were eventually allowed to remain in Canada. Responding to public pressure, then Immigration Minister Bernard Valcourt exercised his discretion under section 114(2) of the *Immigration Act*\(^3\) and granted asylum on the basis of "compassionate and humanitarian considerations." This involved no change to Canadian law, but allowed for an exception to regular practice. It did not address the future claims of women refugees, nor did it confront the gendered nature of the refugee determination process. In March of 1993, largely in response to political pressure mounted by feminist and refugee rights groups, new guidelines were introduced to provide assistance to the Refugee Determination Board in dealing with claims of gender persecution.

The guidelines, although a positive step towards addressing the plight of women refugees, are not sufficient in and of themselves. This paper focusses on the need for a definition of refugee which

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1 *Canadian Press* (29 January 1993).
2 *Canadian Press* (16 September 1992.)
incorporates the needs and experiences of women fleeing gender-based persecution. It is divided into three sections. The first section provides an overview of the criteria used to determine refugee status in Canada by focussing on the definition of “particular social group” and by providing some international comparisons. The second section focusses on how women's claims for refugee status may be brought in Canada by looking at various cases. Since women can only claim refugee status on the basis of one of the enumerated grounds in the Immigration Act, it is necessary to analyze how the courts interpret the various grounds, how these interpretations potentially affect women, and finally how the courts have responded to the new guidelines issued in March of 1993. The final section of the paper focusses on alternative approaches to dealing with gender-based persecution. Women fleeing gender-based persecution require more than what the Canadian system offers. Neither solely incorporating women fleeing gender-based persecution into one of the enumerated grounds, nor relying on guidelines that are not binding, will satisfy the needs of these women refugees.

DETERMINING REFUGEE STATUS

In 1985, the United Nations estimated that there were ten million refugees world wide, two-thirds of whom were women and children. Canada, in accordance with its international and humanitarian commitments, admitted 26,575 refugees in 1988. 59% of those accepted in the refugee class were male and 41% were female; a widening of the gender gap from the 1980 figures of 56% male and 44% female. Many of these women came to Canada as the dependents of male refugees and did not attempt to claim refugee status in independent claims. When they did make independent

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5 Employment and Immigration Canada, Immigration to Canada: A Statistical Overview, IM 062/11/89.

6 I am not aware of any statistics available on this issue but see for example Sittampalam (Re) (1991), 13 Imm. L.R. (2d) 287 (Imm. & Ref. BD., Ref. Div).
claims, women generally claimed refugee status according to the traditionally defined grounds of what constitutes a refugee.

Section 2 of the Immigration Act states:

"Convention refugee" means any person 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,
(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself 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 country, and
(b) has not ceased to be a Convention refugee by virtue of subsection (2),
but does not include any person to whom the Convention does not apply pursuant to Section E or F of Article 1 thereof, which sections are set out in the schedule to this Act.7

Similar to many other countries, Canada incorporated into domestic legislation the international definition of a refugee that is found in the 1951 Convention Relating to the Status of Refugees8 and in the 1967 United Nations Protocol Relating to the Status of Refugees.9 The definition requires that refugee claimants establish a well-founded fear of persecution, and that the persecution is based on one

8 28 July 1951, 189 U.N.T.S. 137 [hereinafter Convention]. Article 1(A)(2) of the Convention defines a refugee as someone who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

of the enumerated grounds, namely race, religion, nationality, membership in a particular social group, or political opinion. Persecution on the basis of sex is not listed in the definition. Thus, women fleeing gender-based persecution cannot bring their claim specifically on the basis of sex. Instead, they must establish their eligibility for refugee status under one of the other headings. While there is the potential to base a claim for refugee status on any of the enumerated grounds, membership in a "particular social group" is often seen as the most viable route for women fleeing gender-based persecution.

International Definition of a Social Group

"Particular social group" was not defined in the 1951 Convention. David Neal emphasizes that "social group" was intended as a residual category for asylum seekers who did not fall into one of the other enumerated areas. He suggests that the drafters of the Convention recognized that groups worthy of protection would inevitably appear who could not be anticipated in 1951. The drafters of the Convention therefore, left the boundaries of the social group category undefined in order to retain flexibility for the future.10

James Hathaway cautions against using the concept of "particular social group" as an all-encompassing residual category. He notes that the drafters of the Convention clearly distinguished between those whose fear was attributable to their civil and political status, and those whose fear was caused by other factors.11 Nevertheless, while Hathaway clearly sees gender as falling within the ambit of a particular social group, his focus on civil and political status may be unnecessarily limiting as it would require a recognition on the part of decision makers that many of the gendered institutions that are oppressive to women are socially and politically constructed, rather than being natural and immutable.

Various approaches to the term "particular social group" have been adopted within the international community. Some of these are highly influential in Canadian courts, others less so. In 1988, the Office of the High Commissioner for Refugees published the Handbook of Procedures and Criteria for Determining Refugee Status.

It provides a generalized starting point for determining membership in a social group and focusses on the internal cohesion of a social group. Paragraph 77 states:

A particular social group normally comprises persons of similar background, habits, or social status. . . . A claim to fear of persecution may frequently overlap with a fear of persecution on other grounds, i.e., race, religion or nationality.\(^{12}\)

The requirement of internal cohesion may be problematic, especially since there is often the additional expectation that a particular social group should pose a threat to the state. M. Jane Kronenberger notes,

Thus, it is often the government itself which determines the contours of the group which it deems to be a threat to its continued rule. The inquiry of the court in ascertaining the identifiability of a particular social group must, therefore, focus on the role of the agents of persecution in attributing certain characteristics to a group and singling it out for persecution. There may be historic and political reasons for middle class women to defy strict Islamic decrees, but this does not mean that a group must have formed internally to oppose the regime before a claim arising from persecution based on social group membership can be established. Refugee determination should be based on the government’s attribution of characteristics to a “particular social group” that it has chosen to persecute.\(^{13}\)

U.S. jurisprudence has adopted a narrower definition of social group which demands a high level of group cohesion. The U.S. Court of Appeal defined “particular social group” in *Sanchez-Trujillo v. I.N.S.***:

The statutory words “particular” and “social” which modify “group,” . . . indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some

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statistical relevance. Instead, the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.\(^\text{14}\)

The Canadian system has been resistant to the limited interpretation espoused in \textit{Sanchez-Trujillo}. Sanchez-Trujillo was denied refugee status because "young El Salvadorean males of military age" did not constitute a particular social group. Significantly, the Canadian Immigration Appeal Board made the opposite ruling in \textit{Marco Antonio Valladares Escoto v. M.E.I.}\(^\text{15}\)

The European Parliament determined in 1984 that women with a well founded fear of persecution because they have "transgressed social mores" should be considered a particular social group under the Convention refugee definition.\(^\text{16}\) The High Commissioner acknowledged the existence of gender-based persecution in the "Note on Refugee Women and International Protection."\(^\text{17}\) He suggested that it may be appropriate to adopt the reasoning of the European Parliament, especially in light of the U.N.'s commitment to gender equality as evidenced by the \textit{Convention on the Elimination of All Forms of Discrimination Against Women}.\(^\text{18}\)

The European Parliament definition expands the definition of social group to identify certain groups of women. However, it does not provide protection for women fleeing domestic violence who cannot be said to have "transgressed the social mores of the society in which they live." Canada has recognized the limitation of this definition proposed by the European Parliament, and, in certain cases, Canadian courts have further expanded the types of claims women can make under the "social group" category. Nevertheless,

\(^\text{14}\) 801 F.2d 1571 (9th Cir. 1986) at 1576.

\(^\text{15}\) (June 1988) Imm. Appeal Board Decision 111.8.


\(^\text{17}\) UNHCR 1990e. The U.N. Note is discussed in Forbes Martin, \textit{ibid.} at 24–25.

Canada has yet to enunciate a clear test which will provide protection for all women fleeing gender-based persecution.

**Canadian Jurisprudence**

For a number of years, Canada recognized social group claims only when the social group could establish a nexus to one of the other four enumerated grounds of civil or political status.\(^\text{19}\) The court stated in *Obertz Belfond*:

> Either the group must be political and proclaim and exhibit dissidence with the regime or be a religious sect which has been persecuted by the civil authorities because of its religious beliefs. In a multinational state, a racial minority might also constitute such a group.\(^\text{20}\)

In later decisions, the courts have moved away from this narrow approach in order to endow “particular social group” with a wider meaning. Courts and tribunals were quite flexible in their approach to what constitutes a social group and, at times, were receptive to the claims of women. The Immigration Appeal Board decided in *Zekiye Incirciyen*\(^\text{21}\) that single Turkish women living in a Moslem country without the protection of a male relative constituted a particular social group. The Immigration and Refugee Board reached similar decisions for Moslem women in Lebanon and for Tamil Women in Sri Lanka.\(^\text{22}\) The courts, however, have not attempted to develop a comprehensive test for the determination of a particular social group until recently. Three recent decisions provide some indication of where the refugee determination system may be heading on this issue.

1. **Canada (Attorney General) v. Ward**\(^\text{23}\)

*Ward* is the leading case on what constitutes “particular social group.” It dealt with a former Irish National Liberation Army

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\(^{19}\) Hathaway, *supra* note 11 at 157–158.


\(^{21}\) (10 August 1987) Imm. Appeal Board Decision M87-1541X, quoted in Hathaway, *supra* note 11 at 162.

\(^{22}\) Imm. Ref. B. Decision T89-00260, July 1989 and M89-0213, June 1989, quoted in Hathaway *ibid.* at 162.

\(^{23}\) (1990), 108 N.R. 60 (F.C.A.) [hereinafter *Ward*].
(INLA) supporter who attempted to disassociate himself from the organization after releasing two of the hostages he had been assigned to guard. He was court-martialed by the INLA and sentenced to death. Mr Ward sought refugee status in Canada.

The majority of the Federal Court of Appeal rejected Ward's claim that the INLA constituted a “particular social group.” However, both the majority and the minority decisions endorsed a purposive interpretation of “particular social group” in light of section 3(g) of the Immigration Act which states the objective of the Act:

To fulfill Canada’s international legal obligations with respect to refugees, and to uphold its humanitarian tradition with respect to the displaced and persecuted.

In defining social group, Urie, J.A., for the majority, reasoned that persecution for membership in a social group can only occur when the group’s activities are perceived to be a possible danger to the state:

It is implicit from the foregoing that the persecution arising from membership in a social group must arise from its activities perceived to be a possible danger of some kind to the government.²⁴

While internal cohesion in membership is one criteria, establishing a refugee claim on the basis of membership in a “particular social group” requires that the group pose a threat to the state and that the fear of persecution be connected to this threat. Urie, J.A. found that Ward’s fear was not directed at the state but at INLA which viewed him as a traitor, and had sentenced him to death. Thus, the claimant’s fear arose from within the group itself; it was not linked to the state. It could be argued that this restricted definition was intended, for policy reasons, to exclude terrorists from the social group category and should not be applied too broadly.

MacGuigan, J.A., in dissent, adopted a more liberal interpretation of social group. He drew a clear distinction between natural and non-natural groups. He noted that characteristics of a non-natural social group included members united in a stable association for

²⁴ Ibid. at 65.
common purposes. 25 Using this definition, he was prepared to find that INLA constituted a social group.

The majority and minority decisions differed greatly on the understanding of persecution. Urie, J.A., for the majority, accepted that state complicity is a prerequisite for establishing persecution. MacGuigan, J.A., in dissent, argued that it is sufficient that the state is unable to protect the individual.

The majority decision of the Federal Court of Appeal in Ward makes it difficult for women to advance refugee claims. Women who are persecuted for their failure to conform to traditional social customs would need to establish that their actions were perceived as a threat to the state, rather than as an issue of morality. Jacqueline Greatbatch argues convincingly that women’s resistance to the wearing of the chador in Iran challenges Islamic fundamentalism which is the basis of state power, and is, therefore, a threat to the state. However, because of the distinction drawn between public and private life, and the delegation of women’s activities to the private sphere, it is difficult to convince refugee boards of the political nature of these women’s actions. 26

The Federal Court of Appeal decision in Ward was overturned by the Supreme Court of Canada in Ward v M.E.I. 27 La Forest, J. defined a “particular social group” to include:

1. groups defined by innate or unchangeable characteristics
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake that association
3. groups associated by former voluntary status unalterable due to its historic importance. 28

La Forest, J. found that INLA did not meet this definition of a “particular social group,” but went on to decide that Ward was being persecuted on the basis of political opinion.

The application of the definition of the Supreme Court of Canada as it relates to women seeking refugee status is somewhat

25 Ibid. at 72.
28 Ibid. at 121–122.
uncertain. La Forest, J. quoted with approval *M.M. v. M.E.I.* \(^{29}\) and *Cheung v. M.E.I.*, \(^{30}\) both of which contemplate gender as the basis of membership in a particular social group. In these cases gender was viewed as an innate and immutable characteristic. However, case law has developed whereby women are required to establish their claim as a sub-group, such as “women who are victims of domestic violence,” in order to advance refugee claims of a gender-based nature. It is not clear whether such a sub-group would meet the requirements of the test La Forest, J. establishes. Women within these sub-groups are often isolated from other women in the same position and they do not necessarily constitute a voluntary organization. Finally, neither the failure to comply with traditional social mores, nor the fact that they are battered, is an unchangeable or innate characteristic.

In his decision, La Forest, J. also considered the issue of persecution in relation to a claim for refugee status. He concluded that an applicant could meet the social group category either by establishing state complicity or the state’s inability to provide protection for the applicant. In situations where state officials have admitted that they are unable to provide protection, or where the applicant can demonstrate this inability through clear and convincing evidence, persecution may be established. It is only in situations in which state protection might reasonably have been forthcoming that the claimant’s failure to approach the state for protection will defeat the claim. \(^{31}\) This finding is important because it allows for a positive ruling in situations where the person is being persecuted by someone other than the state.

For women fleeing domestic violence, however, gathering evidence and establishing state complicity is difficult since their claim of persecution derives from a shared cultural understanding of the state agent and the batterer which defines women as unworthy of protection.


\(^{30}\) (1993), 19 Imm. L.R. (2d) 81 (F.C.A.).

\(^{31}\) This is in line with the Federal Court of Appeal position subsequent to its decision in *Ward*. See for example, *Salibian v. M.E.I.* (1990), 73 D.L.R. (4th) 551 (F.C.A.).
In Inaudi, the Immigration and Refugee Board addressed the definition of social group in reaching its decision that homosexuals in Argentina constitute a “social group” within the meaning of Section 2(1) of the Immigration Act. Teitelbaum, one of the adjudicators in this hearing, held that since social group was not defined by the Immigration Act, the words should be given their ordinary or usual meaning. She adopted the Oxford dictionary definition of “social” as “capable of being associated or united” and the definition of “group” as “a number of persons classed together on account of a certain degree of similarity.” Colle, the other adjudicator in this hearing, adopted a more restrictive definition of social group. The definition reads:

People in social groups are conscious of belonging together in common memberships, and a group possesses some mechanism to determine who belongs and who does not.

Considering the wide diversity among women, it is uncertain whether women are encompassed by either of these definitions. However, both board members were willing to find that homosexuals were encompassed by the definition. Homosexuals, like women, also come from a variety and backgrounds and lead widely diverse lives. However, in this case the Board focussed on the “gay lifestyle” of the refugee claimant and on societal stereotypes. In this way they found common membership in a “social group.” It may be difficult to establish an equivalent commonality of a shared female culture. The definitions of “social” put forward by both adjudicators may effectively exclude women since their persecution results more from the status ascribed to them in a patriarchal society than from any sense of self-definition from within the group.

Both board members in Inaudi placed considerable emphasis on the fact that a social group should be based on an immutable characteristic. Teitelbaum refused to state categorically that homosexuality was an immutable characteristic and qualified “particular social group” to include voluntary conditions which are so fundamen-

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33 Ibid.
34 Ibid.
tal to a person’s identity that a complainant ought not to be compelled to change it.


*M.M.* involved the judicial review of the decision of a Credible Basis Panel. It is one of the few cases dealing directly with gender-based persecution. The case indicates that individual women applicants must base their claims for refugee status within particular “sub-groups” of women. M.M. was a Trinidadian woman who was subject to domestic violence. She was unable to gain the protection of the Trinidadian state because of the indifference of its authorities.

In *M.M.* the Federal Court of Appeal rejected the argument that its decision in *Ward* applied as precedent. The Court found that *Ward* did not propose any workable test for the recognition of other social group claims. In addition, it held that the facts in *Ward* were so different from the present case as to make *Ward* inapplicable. When *M.M.* was decided *Ward* had not yet been argued before the Supreme Court of Canada. It is a matter of speculation whether the Federal Court would have felt constrained by the test of a social group established by La Forest, J. It is not clear whether the sub-group of “Trinidadian women subject to domestic violence” could meet the requirements of his test.

The Federal Court of Appeal in *M.M.* stated that while women may constitute a social group, they cannot correctly be characterized as a particular social group within the meaning of the statute. Thus, the group must be limited to “Trinidadian women subject to wife abuse.” Felicite Stairs and Lori Pope, two scholars in this area, recognize that this constitutes a potential problem because once a woman is removed from a battering situation she is no longer a member of that social group, even though she will revert back to that status if her refugee claim is denied.36 The Federal Court of Appeal concluded its decision by stating:

A question may be posed for the future; since, in this context, persecution must be feared by reason of membership in a particular social group, can fear of that perse-

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35 Supra note 29 [hereinafter *M.M.*].
cution be the sole distinguishing factor that results in what is at most merely a social group becoming a particular social group. 37

Clearly this is the argument women need to make in order to seek recognition as a particular social group. They must establish their membership in a sub-group of women, such as those who are victims of domestic violence, or those who transgress social mores, and establish that this sub-group possesses sufficient common characteristics to constitute a particular social group.

Canadian courts and immigration tribunals have, in some instances, been willing to extend protection to vulnerable groups, including certain sub-groups of women. This seems to provide sporadic protection. Because there exists no well established test for determining what constitutes a social group, much is left to the discretion of individual adjudicators. While women fleeing persecution may continue to base their claims on membership in a social group, or on their political beliefs, immigration lawyers say that their success with such cases is poor and often depends upon the constitution of the Refugee Board that hears the case. 38 On March 9, 1993, a set of guidelines was issued by the Immigration and Refugee Board. 39 The new guidelines represent a significant liberalization of the Board’s approach to gender-based persecution. The new guidelines encourage those claiming gender-based persecution to incorporate their claims under one of the other enumerated grounds. The guidelines emphasize that gender often intercepts with other forms of persecution. They purport to deal with most gender-based claims involving women who have transgressed religious or social norms under the enumerated categories of religion and political opinion. The guidelines explicitly recognize that women who are exposed to violence, and are unprotected, are encompassed under the heading of membership in a social group. A discussion of several cases decided under the new gender guidelines follows.

37 M.M. v. M.E.I., supra note 29 at 10.
39 Immigration and Refugee Board, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution, 9 March 1990.
4. C.(X.N.) (Re) 40

The C.(X.N.) (Re) case involved an Ecuadorian woman who claimed that she was subject to domestic abuse and that the Ecuadorian government was unwilling to protect her. The Canadian Refugee Determination Division [hereafter C.R.D.D.] determined that women who were subject to domestic violence shared a similar background and therefore constituted a particular social group. This reasoning is somewhat surprising considering the vast differences that exist among battered women.

After accepting that women subject to domestic violence constitute a social group, the tribunal considered whether the state was unwilling to protect the refugee claimant. Extensive evidence was presented to show that battered women were afforded little protection by the Ecuadorian state, including reports by various agencies and organizations, and evidence that domestic violence is not a crime in Ecuador and therefore does not carry any type of punishment. The C.R.D.D. accepted this evidence as proof of state complicity and accepted the refugee application of C(X.N.).

The decision of the C.R.D.D. in C(X.N.) has not always been duplicated in other decisions involving victims of domestic violence. In both A.(I.E.)(Re) 41 and N.(L.Y.) (Re) 42 the C.R.D.D. accepted that women who were victims of domestic violence qualified as members of a social group. However, both these women were unable to establish the complicity of the Jamaican or Grenadian states, and thus their refugee claims failed. It should be noted that neither women had access to the type of expert evidence offered by C(X.N.) in the Ecuadorian case, and both Jamaica and Grenada had formal laws prohibiting domestic violence.

5. X.(G.C.) (Re) 43

In this case, a woman from China was in contravention of the state's one-child-only policy when she became pregnant with her second child. As a result, she experienced a forced abortion, had her business license withdrawn, and was sought by the state for compulsory sterilization. It was accepted that the claimant was entitled to seek

refugee status on the grounds of political opinion with little discussion. Furthermore, since the state was the agent of persecution, there was no issue of state complicity. The Board determined that the claimant had good grounds to fear persecution if she was forced to return to China.

The gender guidelines encourage the acceptance of gender-based persecution under various grounds, including membership in a social group and political opinion, with very little discussion. Thus, it is easier for women to get past this preliminary hurdle. However, in making such determinations, the board seems to be focussing on what constitutes state complicity. Thus, in cases like X.(G.C.) (Re), where the state is clearly the agent of persecution, it is much easier for a woman to make a claim of gender-based persecution. In cases involving domestic violence, it is more difficult to establish state complicity.

6. Y.(R.W.) (Re)\(^4\)

Y.(R.W.) (Re) involved a Muslim woman from Algeria who escaped to Canada in order to avoid being forced into an arranged marriage. She claimed persecution on the grounds of religion, and argued that she feared her father would kill her for refusing to conform to the Islamic way of life by failing to accept the arranged marriage. The C.R.D.D. readily accepted that women who transgress the traditional mores of society in Muslim countries are persecuted on the basis of religious belief.

The Tribunal focussed predominately on state complicity to persecution. They found that Y.(R.W.) could not obtain state protection because her father was a well-known religious authority, both in his community and throughout Algeria.

Y.(R.W.) (Re) forms an interesting contrast to N.(L.Y.) (Re).\(^5\) In N.(L.Y.) (Re) the C.R.D.D. failed to accept that N.(L.Y.) was unable to seek police protection from domestic violence. She testified that Grenadian police do not take domestic violence very seriously and that it was futile to seek police protection because her father was a member of the police department. She testified that although her father no longer held a prominent position because he had been demoted as a result of alcohol problems, he still wielded

\(^5\)Supra note 42.
considerable influence within the police department. In *N. (L. Y.) (Re)* the C.R.D.D. was unwilling to accept state complicity to persecution because of the institutional position held by the perpetrator of the violence. Yet they accepted that argument in *Y. (R. W.) (Re).*

The new guidelines appear to effectively address the concerns of women who have transgressed the traditional mores of society. These women are able to establish their claim under the established grounds of religion or political opinion, and there is a willingness in the C.R.D.D. to accept state complicity to their persecution. However, state complicity is more difficult to establish in cases of domestic violence. It may be that in considering persecution, a tribunal is more willing to accept state complicity in "exotic" situations such as sterilization in China or forced marriages in Algeria. Situations involving domestic violence are often disturbingly familiar.

**APPROACHES TO DEALING WITH GENDER-BASED PERSECUTION**

There are two approaches to dealing with gender-based persecution. One approach advocates the incorporation of gender-based persecution under one of the enumerated grounds, whether it be religion, political opinion, or membership in a particular social group. This approach emphasizes that gender often intersects with other forms of persecution. This is the position advocated by the guidelines. The other approach favours identifying sex specifically as a ground for establishing a refugee claim.

The new guidelines outline how claims of gender-based persecution can fit within the current definitions of persecution under the other enumerated categories. Thus, for example, a woman may claim that reprisals for failure to observe traditional Islamic custom constitutes religious-based persecution.

The current definition of religious persecution appears to be broad enough to encompass persecution within a religious group. Hathaway suggests that the definition of religious persecution at international law includes the right to hold or not to hold any particular religious belief, and the right to practice any religion, including participation in, or abstinence from, formal worship and religious
practices. The Immigration Appeal Board has accepted that religious behaviour includes more than formal acts of worship and may encompass other acts of political significance. In *Luis Alberto Mena Ramirez v. M.E.I.*, the Immigration Appeal Board found that conscientious objection to military service constituted a religious belief. They stated:

> the Board [found] a systematic persecution by reason of religion. It is the failure of the recruiting system to make allowances for the convictions of the conscientious objector that forms the basis of the fear. Such a failure amounts to fear of persecution within the meaning of the Act.\(^{47}\)

This is similar to the situation in some Islamic countries where state laws fail to accommodate those individuals who do not follow the predominant religion or some tenets of it.

Establishing religious persecution also requires that state involvement in the persecution, or in the state’s failure to protect the individual, be proved. Thus, women fleeing gender-based persecution in some Islamic states should be able to claim persecution on the basis of religion under the current definition.

Women who are victims of violence could possibly bring their claim under the enumerated ground of political opinion. In *Lazo-Majano v. I.N.S.*,\(^{48}\) the U.S. Court of Appeal granted refugee status to an El Salvadorean woman who had been physically and sexually abused by a low ranking member of the military. She sought asylum on the basis of political opinion. Noonan, J. stated:

> So in this case, if the situation is seen in its social context, Zuniga is asserting the political opinion that a man has a right to dominate and he has persecuted Olimpia to force her to accept this opinion without rebellion.\(^ {49}\)

Thus, the U.S. Court has expressed some willingness to examine the ideological underpinnings of violence against women under the category of political opinion. The case was not, however, decided


\(^{47}\) (May 1988) Imm. Appeal Board Decision 110.15.

\(^{48}\) 813 F.2d 1432 (9th Cir. 1987).

\(^{49}\) *Ibid.* at 1435.
on this basis. The Court, in making its decision, reverted to a more traditional analysis of political opinion as holding views subversive to the government.

It may be possible to construct a successful argument for recognizing gender-based persecution as an element of political opinion. If so, this would be a positive development because it would then be recognized that women’s relationships, often confined to the private sphere, are indeed political. However, the opinion of Noonan, J. in *Lazo-Majano* was particularly enlightened and is unlikely to gain widespread acceptance by Canadian courts. The new guidelines seem to reject this possibility, preferring to deal with women fleeing domestic violence under membership in a particular social group.

James Hathaway has raised concerns about enumerating sex as a ground for refugee status. He states:

> The problem is that if one, at this stage pursues the inclusion of gender and leaves aside all of these other important categories that have seen to be without the social group category, I think that you end up privileging one form of disenfranchisement over all of the others.\(^{50}\)

This argument would tend to favour pursuing gender-based claims under the category of particular social group. Undoubtedly, the inclusion of sex as a grounds for a refugee claim would provide express protection to women. However, any gains made by women in the “particular social group” category would benefit other disadvantaged groups that are less mobilized.

Jacqueline Greatbatch adopts this position. She argues that adequate protection for women lies not merely in creating a separate female paradigm for gender-based claims but in the development of a broader human rights paradigm.\(^{51}\) There is a concern that establishing sex as a separate category will lead to the marginalization of women’s concerns rather than establishing them as significant and compelling human rights. However, women can forge alliances with other disenfranchised groups and agitate for the development of a broader human rights paradigm while still seeking explicit statutory rights for women. By entrenching their

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51 Supra note 26 at 526.
position, women may actually make the position of other groups stronger.

A major concern with the guidelines is that they are more susceptible to change than legislation and may be altered once the political pressure mobilized around the issue of gender-based persecution subsides. The guidelines are not binding on members of the refugee board and do not constitute official government policy or law.

Tribunals are not bound by precedent established at other tribunal hearings, so the guidelines do not establish an authoritative body of case law. Lee Cohen, an immigration lawyer in Halifax, Nova Scotia suggests that refugee boards are often very conservative and that the guidelines may be more influential at the appeal level. The guidelines may act to persuade the court to broaden the definition of a particular social group established by the Supreme Court of Canada in *Ward v. M.E.I.* Until this happens, however, the decisions made under the guidelines have no precedent-setting authority.

The guidelines simply encourage an interpretation of the Convention refugee definition which recognizes gender-related claims. They seek to promote consistency in refugee board decisions. They do not carry statutory authority which is the major advantage of including gender explicitly as a grounds for claiming refugee status.

It has been suggested that the definition of a Convention refugee, drafted in 1951 before the modern feminist movement, should be updated to include persecution on the basis of sex. There is, however, some concern that any amendment to the definition of a Convention refugee in the *Immigration Act* to include gender may disturb its integrity at international law. James Hathaway, has stated:

> If we were to reopen it for this in the age of restrictionism in which we now live, there is an overwhelming probability that a lot of the protections that refugees currently enjoy would be taken out of the Convention. There is a big, big risk factor if you are

53 *Supra* note 27.
This is unconvincing. Canada has incorporated the international definition of a Convention refugee into domestic law, the definition can be altered in the Canadian context through an amendment to the *Immigration Act*. That amendment would not alter the definition at international law; Canada would simply go beyond what is demanded of us under international treaty obligations.

Furthermore, Canadian decision makers must also interpret the Convention in a manner consistent with the *Canadian Charter of Rights and Freedoms*. The *Immigration Act*, like all federal legislation, must conform to Charter standards. This is further enforced by section 3(f) of the *Immigration Act* which states:

3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need . . .

(f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*.

Immigration policy must be implemented in conformity with the *Charter* which lists sex as a prohibited ground of discrimination under section 15. There is no direct discrimination on the basis of sex since women can establish their refugee claims under the same enumerated categories as men. However, it could be argued that the statute is under inclusive because it fails to accommodate the differences between men and women refugees. The Convention refugee definition which is incorporated into Canadian law does not accord protection for women fleeing domestic violence, an exclusively female experience. Stairs and Pope argue that decision makers can provide international protection without violating the *Charter* through a liberal interpretation of particular social group, well founded fear of persecution, and state protection. This is also

54 Quoted in Oziewicz, *supra* note 50.
56 *Supra* note 36 at 165.
the position of the new guidelines. Considering the restrictions being placed on the definition of a particular social group, and the uncertainty in the application of the concept by the courts, it may be preferable to use the Charter to argue for explicit recognition of gender in the definition of a Convention refugee.

It is advised that gender-based persecution be dealt with separately. Doreen Indra argues that Canadian refugee policy has systematically neglected gender as a critical consideration. Refugee categories have been shaped predominately by the male refugee experience. It is important that women's experiences be recognized as distinct. Women should not be invisible within the immigration system, and dealing with gender-based persecution separately forces a recognition of the particular position of women which otherwise could be too easily overlooked.

Then Minister of Immigration, Bernard Valcourt, expressed some concern that in dealing with gender-based persecution, Canada needs to be sensitive to cultural differences and should not impose its values on other countries. Ed Broadbent, Director of the International Centre for Human Rights, addressed this concern, stating:

We're not talking about forcing Saudi Arabia to change its behaviour, we're talking about our own government changing its domestic practices when it comes to refugee law to be consistent with what we believe.

While Canada needs to respect other cultures, we also have an ethical obligation to promote human rights.

The particular position of the refugee claimant should not be overlooked when that refugee is a woman who clearly defines her treatment as gender-based persecution. Thus, it is not primarily the Canadian state defining what constitutes persecution in the foreign context. The Canadian state should respect the view of the refugee claimant especially where it corresponds to our own value system.

Bernard Valcourt also expressed some concern that allowing persecuted women to claim refugee status on the basis of sex would

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lead to a strain on the immigration system. Rebecca Cook, a University of Toronto law professor, expressed similar sentiments:

Generosity, while a good idea in principle could also create a refugee flood because of widespread oppression of women around the world.

This position may be somewhat overstated and is explicitly rejected in the guidelines. Section 2(1)(a)(i) of the Immigration Act states that the claimant must be “outside the country of that person’s nationality” to apply for refugee status. The majority of women suffering gender-based persecution simply do not have the resources to leave their oppressive situation in order to claim refugee status in Canada.

Furthermore, under section 2(1)(a), the refugee claimant must establish a well founded fear of persecution and their state’s unwillingness or inability to protect them. The cases decided under the new guidelines indicate that this is a significant burden to discharge. This is, thus, a further check on any potential flood of women wishing to claim refugee status.

Some critics feel that the floodgates argument is flawed philosophically. David Neal argues that, on a conceptual level, asylum under the Convention refugee definition is designed as an individual, not a class remedy. Class size, therefore, should not be a fundamental concern. He states:

In other words, while country conditions must play an evidentiary role, they are not determinative. As they should not require, so should they not preclude the granting of asylum.

James Hathaway emphasizes that we should determine membership in a particular social group using the *ejusdem generis* principle. Thus, we should extend protection to those persons whose civil and political status puts them at comparable risk to those in other enumerated categories. He argues, therefore, that sex-based claims should not be defeated by the floodgates argument since race, nationality, religion, and political opinion are also characteristics shared by large numbers of people. The floodgates argument

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60 Canadian Press (25 January 1993).
61 Ibid.
62 Neal, supra note 10 at 240.
63 Hathaway, supra note 11 at 163.
should not stand as an impediment to the inclusion of sex as a ground for claiming refugee status.

CONCLUSION

Gender-based persecution is a pressing social problem which generates refugees. Canada needs to develop a refugee system sensitive to the needs of female refugee claimants, and one able to deal effectively with gender-based claims.

The new guidelines are a positive step toward dealing with gender-based persecution. However, they do not provide an adequate substitute for a legislative initiative. Ideally, gender-based persecution should be addressed through the explicit addition of sex to the list of enumerated categories, either by amending the Immigration Act, or by mounting a Charter challenge and forcing its amendment. This would provide the maximum protection for women and ensure that women are not rendered invisible by a system which does not explicitly acknowledge the experiences of women refugees. A legislative provision is more permanent because the procedure for amendment and revocation is more formal than that of guidelines, and legislation is binding on both tribunals and courts.

The decisions under the new guidelines in N. (L.Y.) (Re) and A. (I.E.) (Re) demonstrate that it is not sufficient to focus exclusively on including sex within religion, political opinion or membership in a particular social group as grounds for claiming refugee status. More women have been able to establish a ground for claiming refugee status since the guidelines have been implemented. However, the liberalization of refugee policy on gender-based persecution has been hindered by the stringent application of the tests of what constitutes persecution and state complicity. The rigid application of these tests has served to disqualify many of the women advancing claims of gender-based persecution. In searching for answers to gender bias in the refugee determination system, the ability of human rights advocates to place effective political pressure on the government is the key determining factor.

64 Supra note 42.
65 Supra note 41.