

# An Overview of Development of Gender Based Persecution in Refugee Law under Membership of a Particular Social Group: A Study of Comparative Jurisprudence of Canada, UK & USA

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## Abstract:

Refugees are the most vulnerable people in the world who flee from homeland for saving life because of well fear of being persecution according to the 1951 Refugee Convention. Reports say that women and child refugee are almost 80% of the total number of refugees. Critics also pointed out that international refugee law is conceptually narrow. It is only limited to particular classes of people that included race, religion, nationality, membership of a particular group of people or political opinion, where women's view, women's persecution was neglected and thus it is difficult for a woman to claim and establish as a refugee. Later, UNHCR introduced several guidelines to overcome the limitation of international refugee law, in particular for women refugees, who face gender based persecution because of her gender. Further, case laws and guidelines for the women refugees of different jurisprudences also contributed for the protection of women refugees. Now, application for claim of women refugee before the adjudicator is not neglected. Rights for women refugee are well settled at the present world. The aim of this paper is to critically discuss the landmark case laws of Canada, U.K. and U.S. who extremely contributed for the development of gender based refugee claim. And finally, there is a conclusion of the discussion.

**Keywords:** Case, Convention, Discrimination, Female Genital Mutilation, Gender Based Persecution, Guidelines, Jurisprudence, Membership, Particular Social Group, Women.

## 1. Introduction:

The 1951 Convention relating to the Status of Refugees (the 1951 Convention),<sup>1080</sup> and the 1967 Protocol Relating to the Status of Refugees (Protocol)<sup>1081</sup> are the main international instruments for the protection of refugees. These treaties define 'refugee' as a person with well-founded fear of persecution due to his or her race, religion, nationality, political opinion or membership of a particular social group.<sup>1082</sup>

Article 1A(2) of the 1951 Convention as amended by the 1967 Protocol provides the definition of a refugee:

A person 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.

At the time, when the 1951 Refugee Convention was ratified, international concern was on educated Europeans who became homeless after the Second World War as well as those fleeing because of communism. However, the 1967 Protocol made the Convention applicable regardless of place and time. The refugee convention ensures that signatory states are under obligation not to return "refugees" to the state where they face well-founded fear of persecution (Article 33 of the Convention). Thus, it has been pointed that refugee protection is a surrogate level of protection, when a citizen is not protected by their home state.<sup>1083</sup>

The United Nations High Commissioner for Refugees (UNHCR) has the duty of supervising the application of the 1951 Refugee Convention pursuant to the preamble and Articles 35 and 36 of the 1951 Convention, Articles II and III of the 1967

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<sup>1080</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force on 22 April, 1954). [The Convention]. <http://www.refworld.org/docid/3be01b964.html>. (accessed July 5, 2015).

<sup>1081</sup> Protocol Relating to the Status of Refugees, Jan. 21, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force on 4 October, 1967). [The 1967 Protocol]. <http://www.refworld.org/docid/3ae6b3ae4.html>. (accessed July 5, 2015]

<sup>1082</sup> Article 1 of the Convention Relating to the Status of Refugees. G.A., Res. 429(V), U.N. GAOR, 5<sup>th</sup> Sessions, Annex, U.N. Doc (1950).

<sup>1083</sup> Constance MacIntosh, "Domestic Violence and Gender-Based Persecution: How Refugee Adjudicators Judge Women Seeking Refuge from Spousal Violence—and Why Reform Is Needed," *Refuge*, 26 (2) (2009): 148.

Protocol, and the 1950 Statute of the Office of the United Nations High Commissioner for Refugees.<sup>1084</sup> These instruments call for cooperation between Governments and UNHCR in dealing with refugee problems, including enacting law and regulations, if needed. Moreover, in addition, to the conventional definition forms, either explicitly or implicitly, part of most national asylum laws that either incorporated the conventions system into the national legal order based their relevant legislation on it.<sup>1085</sup>

More than two-thirds of the world's states are parties to this treaty, and it is to be said that the remaining states are also legally bound to respect the refugee definition as constituting customary international law.<sup>1086</sup> However, these instruments remain silence about the procedures for determining refugee status, and leave to the member states the choice of means as to implementation at the national level.<sup>1087</sup> In 1979, to overcome the procedural difficulties, a Handbook on Procedures and Criteria for Determining Refugees Status was issued by UNHCR,<sup>1088</sup> which states the procedure and criteria for determining refugee status. UNHCR also issues legal guidelines on specific questions of international refugee law, e.g. Child refugees, Women refugees. The Handbook and the Guidelines are intended to guide government officials, judges, practitioners, as well as UNHCR staff. However, it has been pointed that in the history of international refugee law, there is conflict of interest between law and politics. Signatory states of the refugee convention, particularly the western states, decline their international obligation by national security or other conceptual issues. For example, narrow definition, strict procedure.<sup>1089</sup> On the other hand, it has been seen that states are changing their view by introducing guidelines to protect the refugees, especially to women asylum claim. Further, case laws of different states, particularly, Canada, U.K. and U.S. significantly contributed for the protection of women refugees whose claim was based on 'gender based persecution' under the conventional ground of 'membership of a particular group.' Therefore, the aims of this paper is to overview the development of protection of women refugees who claim refugee status because of 'gender' and the role of the courts on this issue.

## 2. Essential Elements to be a Refugee

According to the 1951 Convention, a number of criteria must be met for a person to qualify as a refugee:

- Well-founded fear of persecution
- For reasons of race, religion, nationality, membership of a particular social group, or political opinion
- is outside the country of his nationality
- is unable or, owing to such fear, is unwilling to avail himself of the protection of that country
- 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.<sup>1090</sup>

## 3. Principle of *Non-Refoulement* and Its Exceptions

The core obligation of the Convention is '*non-refoulement*', i.e. not sending someone into a situation of persecution. The principle of *non-refoulement* is treated as the cornerstone of international refugee law.<sup>1091</sup> Article 33(1) of the 1951 Convention provides:

No contraction State shall expel or ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Right to seek and to enjoy asylum in other countries from 'persecution' also mentioned in the Universal Declaration of Human Rights (1948).<sup>1092</sup> This principle reflects the concern and commitment of the international community to ensure to those who need protection of the enjoyment of fundamental human rights, including the rights to life, to freedom from torture

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<sup>1084</sup> Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V). <http://www.refworld.org/docid/3ae6b3628.html>. [The UNHCR Statute]. (accessed July 5, 2015).

<sup>1085</sup> Rainer Hofmann, "Refugee Definition," in *Immigration Control: The Search for Workable Policies in Germany and the United States*, ed. Kay Hailbronner, David A. Martin and Hiroshi Motomura (vol-3, Berghahn Books, 1998), 229.

<sup>1086</sup> James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 24-27.

<sup>1087</sup> Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), 34.

<sup>1088</sup> Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva, 1979, re-edited 1992). [UNHCR Handbook]. [www.unhcr.org/publ/PUBL/3d58e13b4.pdf](http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf). (accessed June 20, 2015).

<sup>1089</sup> Rafiqul Islam, "The Origin and Evolution of International Refugee Law," in *An Introduction to International Refugee Law*, ed. Rafiqul Islam and Jahid Hossain Bhuyian, (Martinus Nijhoff Publishers, 2013), 19-34.

<sup>1090</sup> UNHCR Protection Training Manual. for European Border and Entry Officials, Session 3 Manual, at 6. <http://unhcr.org/ua/attachments/article/404/3.%20Who%20is%20a%20Refugee.pdf>. (accessed January 16, 2015)

<sup>1091</sup> G.S. Goodwin Gill and J. McAdam, *The Refugee in International Law* (Oxford University Press: UK, 3<sup>rd</sup> eds. 2007) 211-217.

<sup>1092</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

or cruel, in human or degrading treatment or punishment, and to liberty and security of the person. These and other rights are threatened when a refugee is forcibly returned to persecution or danger.<sup>1093</sup>

However, it is to be mentioned that, principle of *non-refoulement* is not applicable where the applicant is dangerous to the security of the country or convicted by a final judgement for a particular serious crime.<sup>1094</sup> Further, Article 33 should be read with Article 1F. Article 1F provides application of the exclusion clauses. According to the Article 1F some people are also excluded in 1951 Refugee Convention, who committed crime against peace, crime against humanity or who committed non-political crime before claiming refugee status, or who has been guilty of acts contrary to the purposes and principle of the United Nations.<sup>1095</sup>

#### 4. Meaning of Persecution

As per the conventional definition of refugee, persecution is one of the essential elements to establish as refugee. However, the Handbook states that there is no universally accepted definition of persecution and also pointed that attempts to formulate such a definition had not been successful.<sup>1096</sup> However, the Handbook focus some indication as to what persecution includes. A ‘threat to life or freedom’ or ‘other serious violation of human rights’ always constitutes persecution.<sup>1097</sup> Discriminatory treatment<sup>1098</sup> constitutes persecution in certain circumstances such as when one faces “serious restrictions in his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.”<sup>1099</sup>

Persecution includes a combination of factors that cumulatively portray an ‘atmosphere of insecurity in the country of origin.’<sup>1100</sup> Further, under international refugee law, ‘persecution’ needs not to be carried out by the states. ‘Persecution’ can also come from non-state entities as well, in the general context of lack of effective states protection. The UNHCR recognises that the agents of persecution need not be the state, but it may be other groups within the society which do not respect the standards established by the laws of the country.<sup>1101</sup>

Professor James Hathaway defines the word ‘persecution’ as the sustained or systematic violation of basic human rights demonstrative of a failure of state protection.<sup>1102</sup> Hathaway suggests that in order to understand whether persecution exists- it is useful to examine two key issues. First, the issue of whether harm apprehended by the claimant amounts to persecution, i.e. whether it constitutes ‘serious harm’ within the meaning of persecution, and secondly, whether there has been a failure of state protection.<sup>1103</sup> Professor Goodwin-Gill also expresses the view that ‘persecution’ includes breaches where the degree of protection normally to be expected of the government is either lacking or denied.<sup>1104</sup>

#### 5. Gender-Based Persecution

The question arises: what is meant by the term ‘gender based persecution’ in refugee law? In a simple way ‘gender-related persecution’ refers to the experience of women who are persecuted *because* they are women, i.e. because of their identity and status as women. The concept of women being persecuted *as* women addresses forms of persecution that gender-specific including, for example, sexual violence, female genital mutilation, forced abortion and sterilisation and the denial of access of contraception. However, ‘gender-specific violations’ do not necessary constitute persecution because of gender. For

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<sup>1093</sup> For example -Universal Declaration of Human Rights (1948): Article- 2 provides right to freedom, and no distinction should be made on the basis of the political, jurisdictional or international status. Article 3 provides for right to life and security. Article 5 prohibits torture or cruel or inhuman treatment. Article 14 provides right for asylum.

<sup>1094</sup> Article 33(2) of the 1951 Refugee Convention.

<sup>1095</sup> Article 1F (a), (b) and (c) of the 1951 Refugee Convention. Further see: Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, UNHCR. HCR/GIP/03/05, 4 September 2003. <http://www.unhcr.org/3f7d48514.html>. (accessed June 10, 2015). See for more discussion: Jahid Hossain Bhuyian, “Protection of Refugees Through The Principle of Non-Refoulement,” in *An Introduction to International Refugee Law*, ed. Rafiqul Islam and Jahid Hossain Bhuyian, (Martinus Nijhoff Publishers, 2013), 99-131.

<sup>1096</sup> UNHCR Handbook, para. 51, provides: “there is no universally accepted definition of persecution, and various attempts to formulate such a definition have met with little success.”

<sup>1097</sup> Ibid.

<sup>1098</sup> The Handbook defines discrimination as differences in the treatment of various ‘groups’. Ibid, at para. 54. It does not, however, define groups. It acknowledges that such differences do exist to a greater or lesser extent in many societies. Therefore, recipients of such treatment are not necessarily the victims of persecution unless certain circumstances, as such serious restrictions on the right to earn a livelihood, to practice religion, or to access normally available educational facilities, result. (para. 54).

<sup>1099</sup> Ibid.

<sup>1100</sup> Handbook, para. 53.

<sup>1101</sup> Handbook, para. 65.

<sup>1102</sup> Hathaway, *The Law of Refugee Status*, 104 -5.

<sup>1103</sup> Ibid, 99 -134.

<sup>1104</sup> Goodwin-Gill, *The Refugee in International Law*, 77-79.

example, if a man's genitals are subjected to electric shocks, he is certainly being tortured in a gender-specific way, but it does not follow that he is being persecuted because of his gender.<sup>1105</sup>

Macklin pointed that certainly gender may explain why a woman was persecuted. Gender may also determine the form that persecution takes. In some cases, women's fear of persecution more well-founded than that of a man in similar circumstances, and thus they are not synonymous.<sup>1106</sup>

## 5.1. Examples of Case Laws on Gender-Based Persecution

### 5.1. 1. Sexual Violence as Means of Persecution

Sexual violence includes forms of sexual threat, assault, interference and exploitation, including rape, statutory rape, and molestation without physical harm or penetration.<sup>1107</sup> A number of cases have interpreted sexual violence including rape, as a form of persecution. In a U.S. decision, Olimpia Lazo-Majano was repeatedly tortured through rape in El Salvador by Zuniga, a member of El Salvador army. He first raped Lazo-Majano at gunpoint; other times he held hand grenades to her forehead threatening to explode if she resisted his advances. He also threatened to cut-off tongue, pulled of nails and even to kill her children. In *Olimpia Lazo-Majano* case the Ninth Circuit judge acknowledged that rape is a form of persecution.<sup>1108</sup>

As with cases recognizing sexual violence is a persecution in the context of the refugee definition, domestic violence has also on occasion been held to amount to persecution leading to refugee status. In the US case *Matter of M-K*,<sup>1109</sup> a woman requested asylum on grounds of persecution based on an ongoing cycle of physical and verbal spousal abuse. She sought legal protection on three occasions after being severely beaten, but was told the police would not interfere as it was a domestic matter. The Court held that there was a lack of national protection and made a finding of persecution. In defining persecution, the judge referred to international recognised human rights and instruments, such as the Declaration on the Elimination of Violation against Woman, which specifically condemns battering as a serious violation of human rights.<sup>1110</sup>

### 5.1. 2. Punishment for Transgression as Persecution

The requirement to conform to certain restrictive dress codes and the penalties for digression from such laws have also been analysed in the context of persecution in a number of cases. In *Farideh Fathi-Rad* case, the applicant was arrested, detained and interrogated on eight or nine occasions because of her failure to conform properly to the Islamic dress code. The Federal Court of Canada ruled that the treatment 'was completely disproportionate to the objective of the law and constituted persecution.'<sup>1111</sup>

### 5.1. 3. Law, Policy or Practice itself may be interpreted as Persecution

The practice of Female Genital Mutilation (FGM), which takes various forms ranging from clitoridectomy and excision to infibulation,<sup>1112</sup> had been pronounced in certain courts as a persecutory practice *per se*. Moreover, a number of international

<sup>1105</sup> Heaven Crawley, *Refugees and Gender: Law and Process* (Bristol, UK, Jordan Publishing Ltd, 2001) 7- 8.

<sup>1106</sup> Audrey Macklin, "Refugee Women and the Imperative of Categories," *Human Rights Quarterly* 17(2) (1995): 258-259.

<sup>1107</sup> UN High Commissioner for Refugees (UNHCR), 'Guidelines on the Protection of Refugee Women,' July 1991. <http://www.refworld.org/docid/3ae6b3310.html>. (accessed June 30, 2015), para. 59. Furthermore, Article 2 of the Declaration on the Elimination of the Violence against Women provides that: "physical , sexual abuses of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; physical, sexual and psychological violence occurring within the general community, including rape sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; physical, sexual and psychological violence perpetrated or condoned by the State."

<sup>1108</sup> *Olimpia Lazo-Majano v. Immigration and Naturalization Service (INS)*, 813 F.2d 1432, 1433 (9th Cir. 1987). See also: Maureen Mulligan, "Obtaining Political Asylum: Classifying Rape as a Well-Founded Fear of Persecution on Account of Political Opinion," *Boston College Third World Law Journal*, 10 (2) (1990): 355-380.

<sup>1109</sup> *Matter of M.K.*, Office of the Immigration Judge, Executive Office for Immigration Review, (U.S. Immigration Ct., Arlington, Va., Aug. 9, 1995). A 72-374-558.

<sup>1110</sup> The decision also refers to International Convention on Civil and Political Rights (ICCPR) 1966, the Universal Declaration on Human Rights (UDHR) 1948, and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979. All references also include comments on the state obligation to provide protection without discrimination.

<sup>1111</sup> The Federal Court in Canada, *Farideh Fathi-Rad v. Secretary of State for Canada*, (F.C.T.D., no. IMM-2438-93), McGillis, 13 April 1994, at 5.

<sup>1112</sup> Clitoridectomy is the partial or total removal of the clitoris. Excision is the removal of the clitoris. Infibulation is the

instruments and declarations already proclaimed FGM as a form of sexual violence against women.<sup>1113</sup> Authorities in the country where it is practised may be unable or unwilling to provide protection for women and girls who seek to evade the practice. Even though FGM is practised by private actors, notwithstanding, various international human rights instrument clearly established State responsibility for safeguarding against such violations.<sup>1114</sup>

In 1996, the U.S. Board of Immigration Appeals (BIA) concluded that the level of harm inflicted in the practice of FGM constituted persecution. The Board noted that FGM as practised in some countries ‘is of an extreme nature causing permanent damage, and not just minor form of genital ritual.’<sup>1115</sup>

Moreover in 1994, the Immigration and Refugee Board of Canada (IRB) similarly interpreted FGM as persecution based on the evidence and facts presented.<sup>1116</sup> The case involved a minor child who would face FGM if returned to her country of origin, as her mother would then be powerless to prevent the practice.

#### 5.1. 4. Where the Means of Carrying Out a Law are Persecutory

Certain practices or laws are considered persecutory *per se*. In many occasions the courts have found that it is necessary to draw a distinction between the law and the methods used to enforce it. Such distinction has been made for example, in cases involving family planning policies. While courts have found the laws in question not to be inherently persecutory, they have nevertheless, in certain cases, declared the methods used to enforce them as persecutory.<sup>1117</sup> In *Chan v. Canada*<sup>1118</sup> the court decided that the implementation of China’s one child policy, through sterilisation by local officials, could constitute a well-founded fear of persecution.

#### 6. Criticism of the 1951 Refugee Definition

The 1951 Refugee Convention is the universally excepted instrument for the protection of refugees. Despite it has been criticised on many aspects. It has been pointed out that international law is ambiguous in defining the term *refugees*, and there is widespread disagreement within and between countries on the criteria for conferring refugee status. The determination of refugee status is left exclusively in the hands of states and the definition of refugee is limited to persons fearing a narrow spectrum of human rights violations—persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion.<sup>1119</sup>

Many critics criticised the conventional definition as unduly narrow, conceptually incoherent, and morally illegitimate.<sup>1120</sup> Martin acknowledges that civilians caught in civil war need relocation and yet are not covered by the convention definition because there are not targeted for persecution.<sup>1121</sup>

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complete removal of the clitoris, labia minora and the inner surface of the labia majora; the vulva is then stitched together.

<sup>1113</sup> Art. 2(a), Declaration on Elimination of Violence against Women (1993) defines violence against women to encompass ‘female genital mutilation and other traditional practice harmful to women.’ The Committee on the Elimination of Discrimination against Women in General Recommendation No. 14 of 1990 and the World Health Organisation in World Health Assembly Resolution WHA46. 18 of 1993 and the 1994 WHO Executive Board resolution on traditional practices harmful to the health of women and children have called for the eradication of FGM.

<sup>1114</sup> For example, Article 5 of Convention on the Elimination of All Forms of Discrimination against Women (1979), which requires States to ‘modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’; Art 16 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment 1984, which requires, *inter alia*, that the State ‘prevent... acts of cruel, inhuman or degrading treatment..., when such acts are committed by or with the consent or acquiescence of a public official or other persons acting in a official capacity’.

<sup>1115</sup> In *re Fauziya Kasinga* (1996), Interim Dec. 3278, US BIA, at 5.

<sup>1116</sup> *Farah v Canada* (Minister of Employment and Immigration) (1994) 3 July. See: Hildegard Dumper, “Navigation Guide Women Refugees and Asylum Seekers in the UK,” November 2003, updated May and Nov. 2004, at 15; available at <http://www.icar.org.uk/navgdwomen.pdf>. (accessed June 20, 2015).

<sup>1117</sup> “Gender- Related Persecution: An Analysis of Recent Trends” ( Prepared by UNHCR in connection with the Symposium on Gender- Based Persecution, Geneva, 1996), (Special Issue on UNHCR Symposium on Gender- Based Persecution, *International Journal of Refugee Law* (1997): 99.

<sup>1118</sup> *Chan v. Canada* ( *MEI*) [1995] 3 SCR; (1995) 128 DLR ( 4<sup>th</sup>) 213.

<sup>1119</sup> Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis*, (Oxford University Press, 1994), 141.

<sup>1120</sup> Carens notes refugee scholars included: Shacknove 1985; Zolberg, Suhrke, and Aguayo 1989; Hathaway 1991; Singer and Singer 1988. See: Carens, J., “The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the problem to the Problem of Restricting Asylum,” in ed. Haibronner, *Immigration Admissions*, (Berghahn Books, 1997), 9-10.



Moreover, also it has been criticised that the refugee definition does not include ‘economic migrant’<sup>1122</sup> or ‘natural disaster’.<sup>1123</sup> It has been revealed that, ‘natural disaster’ is generated by human actions. The devastation of a flood or supposedly natural famine can be minimised by social politics and institutions.<sup>1124</sup>

In the eye of the feminist, Johnson noted that although international instruments relevant to the protection of refugee make no distinction between male and female, it is nevertheless clear that “the male refugee was in the mine of the drafters”.<sup>1125</sup> Castel proposed that the Conventional definition of refugee should be reviewed, and that change has been to include as refugees women who face persecution because of their gender.<sup>1126</sup>

Indra observed that female experiences of persecution are ignored because the key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men, e.g. – political opinion, religious practice. With regard to private sphere activities where women’s presence is more strongly felt, is primarily silence, e.g. - rape, domestic violence. Thus, state’s oppression of a religious minority is political that is well accepted in the 1951 refugee definition while gender oppression at home is not.<sup>1127</sup>

### 7. UNHCR Guidelines and other Developments

Because of enormous criticisms, finally, UNHCR gave attention on women refugees and the first Symposium on Gender – Based Persecution was held by UNHCR in February 1996.<sup>1128</sup> The symposium was remarked as a welcome initiative as it allowed UNHCR and a number of states to share information on the issue of gender-based persecution and to compare state practice on the protection of refugee women.<sup>1129</sup>

It had been emphasised that the systemic rape of women in Somalia and in former Yugoslavia were tragic examples of how violence against women had become widespread. According to statistics, refugee women and their dependants constitute approximately 80 per cent of the world refugee population. Since the 1951 Convention relating to the Status of Refugees does not expressly identify gender as a ground for persecution, these women may go unrecognized as refugees, and thus be unable to gain access to adequate protection.<sup>1130</sup>

The Executive Committee of UNHCR (EXCOM), in Conclusion No. 39, acknowledged that states are free to adopt in interpretation that ‘women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a “particular social group” within the meaning of the article 1(A) (2) of the 1951 Refugee Convention.’ The Executive Committee issued a number of notes and conclusions relating specifically to the refugee women.<sup>1131</sup> The UNHCR also issued several publications of interest to those representing refugee women and asylum seekers. These includes *Guidelines on the protection of the Refugee Women* (1991) and *Sexual Violence Against Refugees; Guidelines on Prevention and Response* (1995a). Both sets of guidelines address gender-based persecution and recommend procedures to make the asylum determination process more accessible to women. Further, the Executive Committee Conclusion No.73 recommends that states should develop appropriate guidelines on women asylum-seekers since women refugees often experience persecution differently from refugee men.<sup>1132</sup> Although UNHCR guidance is not binding

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<sup>1121</sup> Martin, “The Refugee Concept: on Definition Politics and Careful use of a Scarce Resource,” in *Refugee Policy; Canada and the United States*, ed. Howard, (Toronto:York Lanes , 1991), 30 – 51 (in Joseph Carens., “The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum,” in *Immigration Control : The Search for Workable Policies in Germany and the United States* ed. Hailbronner, Martin and Hiroshi Motomura, (vol.-3, Berghahn Books, 1998) , 13.

<sup>1122</sup> Goodwin-Gill, *The Refugee in International Law*, 3.

<sup>1123</sup> Andrew E. Shacknové, “Who is Refugee?,” *Ethics* 95 (2) (1985): 274, 279.

<sup>1124</sup> *Ibid.*

<sup>1125</sup> A.B. Johnson , “The International Protection of Women Refugees : A Summary of Principal Problems and Issues,” *International Journal of Refugee Law* 1(2) (1989):221, 222.

<sup>1126</sup> Jacqueline R. Castel, “Rape, Sexual Assault and Meaning of Persecution,” *International Journal of Refugee Law* 4(1) (1992): 39.

<sup>1127</sup> Doreen Indra., “Gender: A Key Dimension of the Refugee Experience,” *Refugees*, 6(3) (1987): 3-4.

<sup>1128</sup> The Symposium was held in response to UNHCR Executive Committee Conclusion No.77, which calls upon the High Commissioner to ‘support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to protection specifically aimed at women, by sharing information on States’ initiatives to develop such criteria and guidelines, and monitoring to ensure their fair and consistent application.

<sup>1129</sup> Participating States included Australia, Austria, Belgium, Canada, Finland, France, Germany, Ireland, Italy, the Netherlands, New Zealand, Sweden, the United Kingdom, and the United States. See: Isabelle Daoust and Kristina Folkelius, “Developments: UNHCR Symposium on Gender-Based Persecution,” *International Journal of Refugee Law* 8(1/2) (1996):180.

<sup>1130</sup> *Ibid.*

<sup>1131</sup> *Ibid.*

<sup>1132</sup> *Ibid.*

on the signatories states of either to the 1951 Convention or 1967 Protocol, but these are recognized as persuasive authority during making the decision by the courts.<sup>1133</sup>

In 2002, further development for protection of the women refugees were initiated as ‘*Guidelines on International Protection: Gender-Related Persecution*’ was adopted by UNHCR.<sup>1134</sup> The guidelines pointed out that these Guidelines specifically focus on the interpretation of the refugee definition contained in Article 1A(2) of the 1951 Convention from a gender perspective, as well as propose some procedural practices in order to ensure that proper consideration is given to women claimants in refugee status determination procedures and that the range of gender-related claims are recognised as such.<sup>1135</sup> The guidelines also noted that adoption of a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.<sup>1136</sup> The Guidelines provide determining factors – whether or not a claimant’s home state can protect her. In particular, the social, cultural, traditional and religious norms and the laws of the country of origin affect the affecting women.<sup>1137</sup>

In 2002, UNHCR has also issued ‘*Guidelines on International Protection: Membership of a Particular Social Group*’.<sup>1138</sup> It states that ‘it is the ground with the least clarity and it is not defined by the 1951 Convention itself.’<sup>1139</sup> And ‘there is no closed list of what groups may constitute a ‘particular social group’ within the meaning of Article 1A(2).’<sup>1140</sup> The guidelines provide UNHCR definition of a particular social group<sup>1141</sup> and also provide – ‘these guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field.’<sup>1142</sup>

In 2008, the UNHCR produced a ‘*Handbook for the Protection of Women and Girls*’.<sup>1143</sup> It supplements the Guidelines on the Protection of Refugee Women (1991), and addresses both the legal framework as well as broader protection-related issues.<sup>1144</sup> Handbook describes some of the protection challenges faced by women and girls of concern to UNHCR. It sets out the legal standards and principles that guide UNHCR’s work to protect women and girls and outlines the different roles and responsibilities of States and other actors.

A number of countries including Canada, the United States, Australia, Germany, Ireland, the Netherlands, South Africa, Sweden and the U.K. already included explicit reference to gender or sex as grounds for refugee status in their domestic refugee legislations.<sup>1145</sup>

## 8. Comparative Jurisprudence

Canada, U.K. and U.S.A. are the signatory states of the 1951 Refugee Convention and the 1967 Refugee Protocol. These states also introduced Gender Guidelines that illustrated how to embrace the claim of women refugees. However, the adjudicators not only rely on direct evidence as testimony from the claimant as their experience but also considered the ‘country reports’ to assist the assessment of state protection. These documents are compiled by a variety of governmental and

<sup>1133</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987) (referring to UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status to interpret the 1967 Protocol’s definition of refugee).

<sup>1134</sup> Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UNHCR, HCR/GIP/02/01, 7 May 2002. <http://www.refworld.org/docid/3d36f1c64.html> (accessed July 9, 2015).

<sup>1135</sup> *Ibid.*, para 1.

<sup>1136</sup> *Ibid.*, para 4.

<sup>1137</sup> MacIntosh, “Domestic Violence and Gender-Based Persecution,” 154. See also: para. C (2) of the Guidelines of Canadian Women Refugee Claimants Fearing Gender-Related Persecution.

<sup>1138</sup> Guidelines on International Protection No. 2: ‘Membership of a Particular Social Group’ Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UNHCR, HCR/GIP/02/02, 7 May 2002. <http://www.refworld.org/docid/3d36f23f4.html> (accessed July 9, 2015).

<sup>1139</sup> *Ibid.*, para. 1.

<sup>1140</sup> *Ibid.*, para. 3.

<sup>1141</sup> *Ibid.*, para. 11.

<sup>1142</sup> *Ibid.* Preamble.

<sup>1143</sup> UNHCR Handbook for the Protection of Women and Girls ( January 2008).

<http://www.refworld.org/docid/47cfc2962.html> (accessed July 9, 2015).

<sup>1144</sup> See also: “Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for U.S. Attorneys,” (May 2014), *Center for Gender & Refugee Studies*, University of California Hastings College of the Law. [http://cgrs.uchastings.edu/sites/default/files/Review\\_Foreign\\_Gender\\_Guidelines\\_Caselaw\\_0.pdf](http://cgrs.uchastings.edu/sites/default/files/Review_Foreign_Gender_Guidelines_Caselaw_0.pdf) (accessed June 20, 2015).

<sup>1145</sup> Heaven Crawley, “Gender-Related Persecution And Women’s Claims to Asylum.” <http://www.refugeelegalaidinformation.org/gender-related-persecution-and-women%E2%80%99s-claims-asylum>. (accessed June 20, 2015).

non-governmental sources. For example, country reports are produced by the United States Department of State, Amnesty International and Human Rights Watch.<sup>1146</sup>

This part of the paper will critically analyse leading case laws of Canada, United Kingdom and United States on gender-related asylum claim based on ‘membership of a particular social group’. By this analysis reader will get a comparative picture how these states are responding to gender-based asylum claim.

## 8.1. Canada

### 8.1.1 Refugee Act and Gender Guidelines

Canada ratified the 1951 Refugee Convention and 1967 Protocol on 4 June 1969.<sup>1147</sup> The primary law in Canada for protection of refugee is the Immigration and Refugee Protection Act, 2001, which replaced the former Immigration Act of 1976.<sup>1148</sup> The Act is accompanied by the Immigration and Refugee Protection Regulations.<sup>1149</sup> In 2010, the Balanced Refugee Reform Act<sup>1150</sup> was adopted with a stated intent to ‘improve Canada’s asylum system, resettle more refugees from abroad and make it easier for refugees to start their lives’ in Canada.<sup>1151</sup> The Immigration and Refugee Board (IRB) makes decision about claim of refugee status in Canada. Jurisprudence of Canada highly contributed in the development of international refugee law, particularly in gender based refugee claim while Canada is the first state to introduce Gender Guidelines in 1993.<sup>1152</sup> The Guidelines remarked: “Although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of Convention refugee may properly be interpreted as providing protection for women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds.”<sup>1153</sup> The guidelines were carefully drafted to sensitize adjudicators to how women may experience persecution in ways that differ from men, and to illustrate how such persecution may fall under the refugee definition while the Immigration and Refugee Protection Act does not refer explicitly to gender-based persecution or gender-related refugee claims, and thus the decision-makers are expected to apply the guidelines cautiously.<sup>1154</sup> Further, *Ward* case is the leading case that focuses on the meaning of ‘Membership of a Particular Social Group’ as mention in the 1951 Convention.

### 8.1.2. Landmark Cases

In 1993, the Supreme Court of Canada in *Canada (Attorney General) v. Ward*<sup>1155</sup> set out guidelines for interpretation ‘particular social group.’ The fact was, the claimant, Patrick Ward, was a former member of the Irish National Liberation Army (INLA), who feared that the INLA would persecute him for assisting the escape of an INLA hostage. His claim to refugee status was based on his political opinion and on his membership in a particular social group, the INLA. Ward, a citizen of Ireland and the U.K., further claimed that he could not receive adequate protection from either State if returned there.

In determining what is meant by ‘particular social group’, the court started from the basic premise that underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination. La Forest J. held that the appropriate interpretative approach to the meaning of particular social group should therefore “take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.”<sup>1156</sup> The court went on to elucidate some tests which could be used to achieve this result:

- i) Groups defined by an innate or unchangeable characteristic; (e.g. –by gender, linguistic background, sexual orientation)

<sup>1146</sup> MacIntosh, “Domestic Violence and Gender-Based Persecution,” 154.

<sup>1147</sup> States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, UNHCR. [www.unhcr.org/3b73b0d63.html](http://www.unhcr.org/3b73b0d63.html). (accessed July 9, 2015).

<sup>1148</sup> The Immigration and Refugee Protection Act, 2001 (S.C. 2001,c.27). Assented to 1 Nov. 2001; came into force on 28 June 2002; last amended on 28 May 2015. <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/fulltext.html>. (accessed June 30, 2015).

<sup>1149</sup> Immigration and Refugee Protection Regulations, SOR/2002-227.

<http://laws-lois.justice.gc.ca/eng/regulations/sor-2002-227/>. (accessed June 30, 2015).

<sup>1150</sup> Balanced Refugee Reform Act 2010, S.C. 2010, c. 8. [http://laws-lois.justice.gc.ca/eng/annualstatutes/2010\\_8/](http://laws-lois.justice.gc.ca/eng/annualstatutes/2010_8/). (accessed June 30, 2015).

<sup>1151</sup> “Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for U.S. Attorneys,” 15.

<sup>1152</sup> Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution.: Guidelines issued by the Chairperson pursuant to Section 65(3) of the Immigration Act, Canada. Effective date: November 13, 1996.

<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx>. (accessed June 30, 2015).

<sup>1153</sup> Ibid.

<sup>1154</sup> Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for U.S. Attorneys,” 15.

<sup>1155</sup> *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689.

<sup>1156</sup> Ibid., *Ward*, at 739.



- ii) Groups whose members' voluntary associate for reason so fundamental to their human dignity that they should not be forced to forsake the association; (e.g. – human rights activists)
- iii) Group associated by a former voluntary status, unalterable due to historical permanence.<sup>1157</sup>

In *Ward's* case, by applying the test, the court found that the INLA was not a particular social group within the meaning of the Convention refugee definition. The court held that members of the INLA were not characterised by an innate characteristic, as per category (i), and were not associated by a former voluntary status, unalterable due to its historical permanence, as per category (iii). The court further found that given the INLA's objective of obtaining political change by any means, including violence, it could not be found so fundamental to the human dignity of its members that they should not be forced to forsake it, as per category (ii). The Court concluded that Ward's fear was not based on his membership in the group, but rather on his action as a member, as an expression of his political opinion.<sup>1158</sup> The Supreme Court of Canada, moreover, confirmed that the enumerated ground of 'membership in a particular social group' included groups defined by 'gender.'<sup>1159</sup>

*Cheung v. Canada*<sup>1160</sup> case also provided guided material in gender based refugee status. The Federal Court of Appeal held that Chinese women who had more than one child and faced forced sterilization were from a particular social group fearing persecution as they are 'united or identified by a purpose which is so fundamental to their dignity that they should not be required to alter it.'<sup>1161</sup>

Canada is first country who incorporated the Gender Guidelines. In this issue, the Parliamentary Standing Committee remarked that if the I.R.B. members ignore the Gender Guidelines subsequently the decision could be reviewed by the courts.<sup>1162</sup> This is supported by statements made by the Federal Court in *Vidhani v. Canada (Minister of Citizenship and Immigration)*:

[T]he Board should have dealt with [the claimant's] testimony on possible sexual attack by the police and determined whether this constituted persecution in her case... it is a reversible error for the Board to have failed to ask the proper question and conduct the proper analysis of the persecution to which she would be subject for refusal to marry.<sup>1163</sup>

The decision in *Mohamed v. Canada (Secretary of State)*<sup>1164</sup> also views the proposition that a decision may be set aside where the I.R.B. fails to deliver reasons which squarely the issue of gender-related persecution.<sup>1165</sup> Moreover, the Guidelines also provide useful instrument when a higher court reviews a decision of I.R.B. members.<sup>1166</sup> In *Narvaez v. Minister of Citizenship and Immigration* the Federal Court noted that certain I.R.B. Members had wrongly concluded that women fearing domestic violence do not constitute a particular social group. The failure to recognize her as a member of a particular social group results in faulty analysis of whether the state was unable or unwilling to protect her.<sup>1167</sup>

## 8.2. United Kingdom

### 8.2.1. Refugee Act and Gender Guidelines

U.K. is the signatory state both of the 1951 Refugee Convention and the 1967 Protocol.<sup>1168</sup> The Asylum and Immigration Appeals Act 1993 incorporated the Refugee Convention into U.K. law and amended by the Asylum and Immigration Act 1996, the Immigration and Asylum Act 1999, the Nationality Immigration and Asylum Act 2002, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, and the Immigration, Asylum and Nationality Act 2006.<sup>1169</sup> In U.K.

<sup>1157</sup> Ibid. *Ward*, at 739.

<sup>1158</sup> Krista Daley and Ninette Kelley, "Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence," *International Journal of Refugee Law* 12 (2) (2000): 150.

<sup>1159</sup> *Ward*, at 739.

<sup>1160</sup> *Cheung v. Canada (Minister of Employment and Immigration)* [1993] 2 F.C. 314 (C.A.).

<sup>1161</sup> Ibid. See also Valerie L. Oosterveld, "The Canadian Guidelines on Gender Related Persecution: An Evaluation," *International Journal of Refugee Law* 8(4) (1996):593.

<sup>1162</sup> Oosterveld, "The Canadian Guidelines on Gender Related Persecution: An Evaluation," 581.

<sup>1163</sup> *Vidhani v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 902 (Fed. Ct. Trial Div.), paras. 15-16.

<sup>1164</sup> *Mohamed v. Canada (Secretary of State)* (1994), 73 F.T.R. 159.

<sup>1165</sup> Oosterveld, V., "The Canadian Guidelines on Gender Related Persecution: An Evaluation." 581.

<sup>1166</sup> Ibid., 593.

<sup>1167</sup> *Narvaez v. Canada (Minister of Citizenship and Immigration)* ( T.D. ), [1995] 2 F.C. 55, February 9, 1995, IMM-3660-94. Available at: <http://reports.fja-cmf.gc.ca/eng/1995/1995fca0185.html>. (accessed June 30, 2015).

<sup>1168</sup> UK ratified the 1951 Convention and 1967 Protocol on 11 March 1954 and 4 September 1968 respectively. See: States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, UNHCR. [www.unhcr.org/3b73b0d63.html](http://www.unhcr.org/3b73b0d63.html). (accessed June 30, 2015).

<sup>1169</sup> Asylum and Immigration Appeals Act 1993, 1993 c. 23. <http://www.legislation.gov.uk/ukpga/1993/23/contents>; Asylum and Immigration Act 1996, 1996, c. 49. <http://www.legislation.gov.uk/ukpga/1996/49/contents>; Immigration and Asylum Act 1999, 1999, c.33. <http://www.legislation.gov.uk/ukpga/1999/33/contents>; Nationality, Immigration and Asylum Act 2002,

application to be a refugee status should be made to the Home Office. U.K. Home Office set out 'the Immigration Rules Part 11' that applies to refugee claims, referring to the international obligations undertaken by the United Kingdom. The procedures of the Rules shall apply to the consideration of asylum and humanitarian protection.<sup>1170</sup>

In 1998, an NGO, named the Refugee Women's Legal Group, proposed *Gender Guidelines for Determination of Asylum Claims in the U.K.*<sup>1171</sup> The Immigration Appellate Authority adopted further guidelines by issuing the Asylum Gender Guidelines in 2000 to assist asylum adjudicators to consider the application.<sup>1172</sup> Moreover, in 2004, (later amended in 2006 & 2010) the U.K. Border Agency (UKBA) Home Office introduced guidance notes regarding asylum interviews,<sup>1173</sup> as well as more specific guidance comments addressing the gender issues.<sup>1174</sup> It has been commented that these guidelines address the special considerations to the caseworkers, i.e.- they should give more weight when they assess claims for asylum that might include gender-related issues and advise on how to take gender into account when they look at the persecution experienced and whether there has been a failure of state protection.<sup>1175</sup>

### 8.2.2. Landmark Cases

In *Savchenkov v. Secretary of the State for the Home Department*,<sup>1176</sup> the Court of Appeal of U.K. considered, for the first time, the principles by reference to which the term 'particular social group' should be construed. The case concerned the Russian citizen who, whilst working as a security guard at the hotel, had been approached by the mafia with a request to work for them. He declined the request. Earlier, The Immigration Appeal Tribunal held that this individual came within a particular social group namely, hotel security guards who have been approached by the mafia and refused to co-operate. Later, this decision was overturned by the court of Appeal on the basis that those who were approached by the mafia to co-operate with it, and refuse to do so, did not constitute a social group. The Court of Appeal held:

1. The phrase "social group" should be interpreted according to the following principles:

1. 1. The Convention does not entitle a person to asylum whenever he fears persecution if returned to his own country. Had the Convention so intended, it could and would have said so. Instead, asylum was confined to those who could show a well-founded fear of persecution on one of a number of specific grounds, set out in article 1A(2);

1. 2. To give the phrase "membership of a particular social group" too broad an interpretation would conflict with the object identified in 1.1 above;

1. 3. The other "Convention reasons" (race, religion, nationality and political opinion) reflect a civil or political status. "Membership of a particular social group" should be interpreted *ejusdem generis*.

1. 4. The concept of a "particular social group" must have been intended to apply to social groups which existed independently of persecution. Otherwise the limited scope of the Convention would be defeated: there would be a social group, and so a right to asylum, whenever a number of persons fear persecution for a reason common to them.

2. It followed that those who were approached by the mafia to co-operate with it, and refused to do so, did not constitute a social group for the purposes of the Convention. They had disparate characteristics and interests: the only common characteristic was a fear of persecution because of their refusal to co-operate with the mafia.

3. Neither security guards *per se* nor the security guards in a particular St. Petersburg hotel were a social group within the meaning of the Convention.<sup>1177</sup>

Later, the decision of the House of Lords in the case of *Shah and Islam*<sup>1178</sup> case significantly contributed to the development of international refugee law.<sup>1179</sup> Observed that in past, the specific experiences of women asylum seekers was neglected in

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2002, c.41. <http://www.legislation.gov.uk/ukpga/2002/41/contents>; Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, 2004, c. 19. <http://www.legislation.gov.uk/ukpga/2004/19/contents>; Immigration, Asylum and Nationality Act 2006, 2006, c. 13. <http://www.legislationline.org/download/action/download/id/968/file/67c8f38d38d6a578de8154746810.pdf>. (accessed June 30, 2015).

<sup>1170</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/428684/Immigration\\_Rules\\_-\\_Part\\_11.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428684/Immigration_Rules_-_Part_11.pdf). (accessed June 30, 2015).

<sup>1171</sup> Refugee Women's Legal Group: Gender Guidelines for the Determination of Asylum Claims in the UK (July 1998) . <http://www.ilpa.org.uk/data/resources/4112/genderguidelines.pdf>. (accessed June 30, 2015).

<sup>1172</sup> Immigration Appellate Authority, Immigration Appellate Authority: Asylum Gender Guidelines (Nov. 1, 2000). <http://www.unhcr.org/refworld/docid/3ae6b3414.html>. (accessed June 30, 2015).

<sup>1173</sup> Guidance from UK Visas and Immigration on how it decides asylum support applications, and other information about the asylum support system. <https://www.gov.uk/government/collections/asylum-support-asylum-instructions#documents> . (accessed June 30, 2015).

<sup>1174</sup> UK Border Agency, Gender Issues In The Asylum Claim. First published: 29 September 2010. <https://www.gov.uk/government/publications/gender-issue-in-the-asylum-claim-process>. (accessed June 30, 2015).

<sup>1175</sup> "Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for U.S. Attorneys," 58-59.

<sup>1176</sup> *Secretary of State for the Home Department v. Savchenkov* [1996] Imm. AR 28 (CA).

<sup>1177</sup> *Savchenkov*, Court of Appeal. <http://www.refworld.org/docid/3ae6b6c410.html>. (accessed June 20, 2015)

<sup>1178</sup> *R v. Immigration Appeal Tribunal, and another ex parte Shah*, [1999] 2 A.C. 629 (H.L.).

<sup>1179</sup> Goodwin-Gill, G., "Cases and Comment: Judicial Reasoning and Social Group and the Effect of Islam and Shah," *International Journal of Refugee Law* 11(3) (1999):537.

Britain and the landmark ruling in the conjoined appeals *Shah and Islam* marked the change of direction. It has been remarked that the case revolved the correct interpretation of ‘particular social group.’<sup>1180</sup>

Shahanna Sadiq Islam and Syeda Khatoon Shah were married Pakistani women who fled their homes and their country to escape domestic violence. The case involves the appeals of two Pakistani women who had been the victims of violence at the hands of their husbands and were seeking political asylum in the U.K. They were married and had been exposed to false allegations by their husbands that they had been guilty of adultery. It was accepted that they had well-founded fear of persecution by their husbands which local Islamic law could condone and also aggravate by subjecting the women to the criminal process of Sharia law under which the punishment for sexual immorality is severe and may lead to death by stoning. The Court of Appeal held that these two women were *not* members of a ‘particular social group’ within the meaning of the Convention. Later, the appellants appealed to the House of Lords, and the highest court allowed the appeals.

In a single, combined decision the House of Lords reviewed the cases of appellants *Islam and Shah*, and decided that “women in Pakistan” are a particular social group for the purposes of the Convention. The status of women in Pakistan was low, and that domestic violence and abuse of women is prevalent in that society. Women are unprotected by the State, which tolerates and sanctions discrimination against women.

*Shah & Islam* held that ‘persecution’ requires serious harm plus inadequate state protection. The applicant must demonstrate a well-founded fear of domestic violence against which the government is unwilling to protect.<sup>1181</sup> After the decision of *Shah*, domestic violence asylum claims are denied where the applicant cannot demonstrate (i) a failure of state protection; (ii) that women in her state are treated sufficiently poorly to comprise a particular social group; or (iii) that she lacks an internal flight alternative.<sup>1182</sup>

Alternatively, in some cases, the courts reject domestic violence claims where the applicant’s state furnishes “sufficient protection.”<sup>1183</sup> Sufficient protections putatively exist even where there is inefficiency, corruption, or incomplete protection against isolated ill-treatment.<sup>1184</sup> It is presumed that democratic states that theoretically provide protection to the citizens are often presumed to provide sufficient protection, absent cogent evidence to the contrary.<sup>1185</sup>

In *Shah* case, Lord Hope’s remarks are mentionable: Lord Hope cautioned, however:

As the particular social group must be identified in each case in the light of the evidence, the fact that women in Pakistan belong to a particular social group because of the way people of their gender are treated in their society does not mean that the same result will be reached in every other country where women are discriminated against.<sup>1186</sup>

For instance, an Iranian victim of domestic violence was denied asylum because the court held that ‘Iranian women’ were not a particular social group as they were treated better than Pakistani women were in *Shah* case. The Iranian women had some access to education, alimony, and political participation; and they could sometimes obtain post-divorce child custody if fathers were violent or drug-addicted.<sup>1187</sup>

In 2006, the House of Lords also gave a landmark decision in *Fornah*<sup>1188</sup> case. In this case, the apex court of U.K. held that the women who are fleeing from Sierra Leone because she would face gender specific persecution in the form of FGM are eligible as refugees. The House of Lords unanimously decided that the characteristics of the group is female and ‘perceived by society as inferior’ (para. 31) and they belong to certain tribes that practice FGM. *Fornah* decision is also important since the UNHCR Guidelines on membership of a particular social group was approved by the highest court of UK (para. 15).<sup>1189</sup>

<sup>1180</sup> Colin J. Harvey, “Mainstreaming Gender in the Refugee Protection Process,” *New Law Journal* 129 (1998): 534.

<sup>1181</sup> *Shah & Islam*, at 648

<sup>1182</sup> Bethany Lobo, ‘Women As A Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom,’ *Georgetown Immigration Law Journal*, vol. 26 (2012):370. <http://ssrn.com/abstract=2263350>. (accessed June 20, 2015)

<sup>1183</sup> *Mishto v. Secretary of State for the Home Department*, [2003] EWCA Civ 1978, [5].

<sup>1184</sup> *Mishto*, [2003] EWCA Civ 1978, [6].

<sup>1185</sup> *Ivanauskienė’s*, [2001] EWCA (Civ) 1721, [65].

<sup>1186</sup> *Shah & Islam*, at 658.

<sup>1187</sup> *ZH*, [2003] UKIAT 00207, [87].

<sup>1188</sup> *K and Fornah v. Secretary of State for the Home Department*, [2006] UKHL 46.

<sup>1189</sup> *Ibid. Fornah*, <http://www.asylumlawdatabase.eu/en/case-law/uk-house-lords-18-october-2006-fornah-v-secretary-state-home-department-linked-secretary>. (accessed June 10, 2015).

In 2008, *Moldova v. Secretary of State for the Home Department*,<sup>1190</sup> for the purposes of sexual exploitation, a Moldovan woman was trafficked to the UK. She testified against her trafficker. Subsequently, the trafficker was arrested and convicted. Moldova woman feared that he would harm her if she returned to the country. The Tribunal held that ‘former victims of trafficking’ could constitute a social group that forms a basis for granting refugee protection.

### 8.3. U.S.

#### 8.3.1. Refugee Act and Gender Guidelines

United States is the signatory party to the international refugee instruments. The 1951 Refugee Convention and the 1967 Protocol were endorsed by the U.S. government on 22 September 1970.<sup>1191</sup> The United States Refugee Act of 1980<sup>1192</sup> was an amendment to the earlier Immigration and Nationality Act, 1952 and the Migration and Refugee Assistance Act, 1962. Its aim was to provide a permanent and systematic procedure for the admission to the United States of refugees. According to the Refugee Act of 1980, in order to obtain asylum the applicant first must establish that he or she fits within the definition of a ‘refugee’:

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>1193</sup>

In U.S., The Supreme Court determined that the element of a ‘well-founded fear of persecution’ means a reasonable possibility that an individual will be persecuted.<sup>1194</sup> Once a female asylum seeker establishes the existence of persecution, she next must establish membership in a ‘social group.’<sup>1195</sup>

In 1995, the United States Immigration & Naturalization Services (INS) issued a new guideline for gender based refugee claim that formally recognized ‘gender-based persecution as a valid ground to claim as refugee status in U.S.’<sup>1196</sup> It has been pointed that this guidelines expended the definition of ‘refugee’ to include those who flee because of ‘gender based persecution.’ The Guidelines also suggested more accurate and consistent decisions in asylum cases when it is brought by women. The guidelines also recommend several procedural considerations for asylum officers.<sup>1197</sup>

#### 8.3.2. Leading Cases

The concept of membership of a particular social group was first considered in *Matter of Acosta*<sup>1198</sup> case in U.S., where the Board of Immigration Appeals (IRB) defined the meaning of ‘social group’ as individuals who either share an immutable characteristic or a characteristic that, though not immutable, is so fundamental to the individual’s identity that the individual should not have to change this characteristic. In *Acosta* the BIA held that members of a taxi-driver cooperative in El Salvador did not constitute a social group because their membership was not immutable.

The UNHCR Handbook indicates persons with ‘similar backgrounds, habits or social status’ to constitute a ‘particular social group.’<sup>1199</sup> The BIA, however, pointed out narrow approach of it as:

“[P]ersecution on account of membership in a particular social group” . . . [encompasses] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify

<sup>1190</sup> SB (PSG - Protection Regulations - Reg 6) *Moldova v. Secretary of State for the Home Department*, CG [2008] UKAIT 00002. <http://www.unhcr.org/refworld/docid/47837c902.html>. (accessed June 20, 2015).

<sup>1191</sup> States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, UNHCR. [www.unhcr.org/3b73b0d63.html](http://www.unhcr.org/3b73b0d63.html). (accessed June 30, 2015).

<sup>1192</sup> The Refugee Act of 1980, United States, Public Law No. 96-212, 94 Stat. 102, MAR. 17, 1980. <http://www.gpo.gov/fdsys/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf>. (accessed June 2, 2015).

<sup>1193</sup> The definition of a refugee is at INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(43) (2000).

<sup>1194</sup> *INS v. Cardoza-Fonesca*, 480 U.S. 421, 428 (1987).

<sup>1195</sup> E. Dana Neacsu, “Gender-Based Persecution as a Basis for Asylum: An Annotated Bibliography, 1993–2002,” *Law Library Journal*, vol. 95(2) (2003):194.

<sup>1196</sup> *Considerations for Asylum Officers Adjudicating Asylum Claims from Women (“INS Gender Guidelines”)*, 26 May 1995. <http://www.refworld.org/docid/3ae6b31e7.html>. (accessed June 5, 2015). [Persecution Guidelines].

<sup>1197</sup> Persecution Guidelines, at 1-4. See also: Lucy Akinyi Orinda, “Securing Gender-Based Persecution Claims: A Proposed Amendment to Asylum Law,” *William & Mary Journal of Women & the Law* 17(3) (2011): 670-72. <http://scholarship.law.wm.edu/wmjowl/vol17/iss3/7>. (accessed July 9, 2015).

<sup>1198</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985).

<sup>1199</sup> *Handbook*, para. 77.

under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.<sup>1200</sup>

In another case involving a citizen of El Salvador, the U.S. Court of Appeals for the Ninth Circuit developed its own definition of a particular social group. In *Sanchez-Trujillo v. I.N.S.*<sup>1201</sup>, it was held that a social group required close affiliation, a common impulse, and voluntary association. In *Sanchez-Trujillo case* the Ninth Circuit enunciated a four-part test to evaluate whether an applicant qualifies as a “refugee” under the particular social group category. An adjudicator must determine: (i) whether the group identified by the applicant is cognizable as a particular social group; (ii) whether the applicant is a member of that cognizable group; (iii) whether the “social group” has in fact been targeted for persecution; and (iv) whether special circumstances exist to create per se eligibility for asylum on the basis of mere membership in that social group. In summary, to make a successful claim for asylum, the applicant must prove persecution “on account” of one of the five statutory grounds.<sup>1202</sup> However, The *Sanchez-Trujillo* test has not been adopted by other Circuit Courts.<sup>1203</sup>

On the other hand, *Matter of Kasinga*<sup>1204</sup> was the first precedent decision in U.S. law granting asylum to a woman fleeing a gender-based form of persecution. The U.S. BIA held that young women who were members of the ‘Tchamba-Kunsuntu’ Tribe of northern Togo, who had not been subjected to female genital mutilation, as practiced by that tribe, and who opposed the practice constituted a particular social group.<sup>1205</sup>

Until 2006, the *Acosta* factor of immutability was the primary consideration to the U.S. courts that required an applicant to show in order to establish eligibility as a member of a ‘particular social group.’ However, In *Matter of C-A*<sup>1206</sup> the Board identified the additional factor of ‘social visibility,’ and held that not all groups sharing an immutable or fundamental characteristic are cognizable as ‘particular social groups.’ The Board noted that in its prior cases dealing with ‘particular social groups.’ It had also considered the recognizability, or social visibility, of a proposed group. The Board explained that social groups based on innate characteristics such as sex or family relationship are easily recognizable and understood by others to constitute social groups. The Board therefore rejected the claim of confidential informants as being members of a “particular social group” because the very nature of their conduct is out of the public view.<sup>1207</sup>

Under *Matter of C-A*, there are three basic questions that must be answered in order to conclude that individuals are members of a particular social group. First, is the trait asserted to define the group one that is either immutable or fundamental, within the meaning of the test set out in *Acosta*? Second, is the group socially visible or distinctive, as opposed to being a group that has significance only to the persecutor? And third, is the asylum officer satisfied that the group is not defined by terrorist, criminal or persecutory activity or association, past or present?<sup>1208</sup>

According to the provision of *Matter of C-A*, when evaluating claims based on membership in a group of police officers, soldiers, or government informants, asylum officers must pay close attention to the “nexus” or “on account of” element, i.e. – motivation of the harm, whether the harm was for personal revenge or it was for on account of group of membership. Moreover, the applicant must also satisfy all the other elements of the refugee definition in order to be granted asylum. The asylum officer must examine each element separately, even though certain types of evidence may be relevant to several elements.<sup>1209</sup>

However, the test of *Matter of C-A* was much criticised as BIA's sudden and unexplained application of a dispositive ‘social visibility’ test, the confusion surrounding the meaning of membership of a particular social group is now more acute than ever. The use of the ‘social visibility’ test as a requirement to finding membership of a particular social group is both legally misguided and promotes undesirable public policy.<sup>1210</sup> It was also commented that- there are many weaknesses of

<sup>1200</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

<sup>1201</sup> *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986).

<sup>1202</sup> Orinda, “Securing Gender-Based Persecution Claims: A Proposed Amendment to Asylum Law,” 670.

<sup>1203</sup> “Asylum & the Rights of Refugees,” *The International Justice Resource Center*: A non-profit human rights organization based in San Francisco, California; <http://www.ijrcenter.org/refugee-law/> (accessed June 20, 2015).

<sup>1204</sup> *Matter of Kasinga*, 21 I&N 357 (BIA 1996).

<sup>1205</sup> *Kasinga*. See also: “Asylum & the Rights of Refugees,” *The International Justice Resource Center*.

<sup>1206</sup> *Matter of C-A*, 23 I&N Dec. 951 (BIA 2006).

<sup>1207</sup> Lisa Mendel-Hirsa, “Domestic Violence and Political Asylum.” <http://www.empirejustice.org/issue-areas/domestic-violence/battered-immigrants/articles/domestic-violence-and.html>. (accessed June 10, 2015).

<sup>1208</sup> “Guidance on Matter of C-A-: U.S. Citizenship and Immigration Services.” [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Archive%201998-2008/2007/Jan%202007/c\\_a\\_guidance011207.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Archive%201998-2008/2007/Jan%202007/c_a_guidance011207.pdf), at 7. (accessed June 10, 2015).

<sup>1209</sup> Ibid., “Guidance on Matter of C-A-: U.S. Citizenship and Immigration Services.”

<sup>1210</sup> Kristin A. Bresnahan, “The Board of Immigration Appeals’s New Social Visibility Test for Determining Membership of a Particular Social Group in Asylum Claims and Its Legal Policy Implications,” *Berkeley Journal of International Law* 29(2) (2011): 651. <http://scholarship.law.berkeley.edu/bjil/vol29/iss2/5> (accessed June 10, 2015).



‘social visibility,’ and that dispositive the test for determining ‘membership of a particular social group.’<sup>1211</sup> Further it is mentioned that, “BIA’s unexplained imposition of the social visibility requirement has potentially jeopardized the Refugee Act’s ability to protect those who need it most. Such a requirement greatly narrows the particular social group definition, which even before the imposition of the social visibility requirement necessitated a very high burden of proof. A dispositive social visibility requirement raises that burden too high for asylum applicants whose claims are based on sexual orientation or identity, for domestic violence victims, for victims of gang violence, and many others.”<sup>1212</sup>

Moreover, in 2008 in *Matter of S-E-G*<sup>1213</sup> the BIA articulated another required factor of ‘particularity’ and ruled that in addition to the *Acosta* test of ‘immutability,’ the additional factors of particularity and “social visibility” are actual required elements of a ‘particular social group claim.’ Social visibility is a question of whether the proposed social group is recognized or perceived as a group in society or is treated distinctly. Particularity is a question of whether the proposed group is defined clearly enough for an adjudicator to determine who is and who is not a group member.<sup>1214</sup> According to the Board, the “essence of particularity is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons”.<sup>1215</sup> The key question according to the Board is whether the proposed description is sufficiently particular or is too amorphous to create a benchmark for determining membership.<sup>1216</sup> However, commented that, “the decision is important, as it appears to elevate the notion of ‘social visibility’ from a *factor* in the determination of a particular social group to a *requirement*.”<sup>1217</sup> Also remarked that S-E-G highlights the complexity of U.S. social group jurisprudence and it needs further clarity. The clarity could be achieved by amending the Refugee Act of 1980 to include a definition for social group.<sup>1218</sup>

Further, the United States recently in two landmark cases granted asylum to two women who were subjected to years of brutal domestic violence in countries where their pleas for help were ignored by both the police and the judiciary. One is a Guatemalan woman named Rody Alvarado whose well-known case (*Matter of R-A*)<sup>1219</sup> dragged on for fourteen years and was at the centre of the struggle for recognition that women fleeing domestic violence and other human rights violations are entitled to asylum. The other is a Mexican woman known as *Ms. L.R.*,<sup>1220</sup> whose case came into the spotlight after officials in the Obama Administration filed a brief taking the position that *Ms. L.R.* - and other women who have suffered domestic violence - may qualify for refugee protection. The victories in *Matter of R-A*- and *L.R.* are incredibly significant, both for the women in those cases and for their broader implications for domestic violence and gender-based claims in the United States and internationally.<sup>1221</sup>

In the fact of *Matter of R-A*, Rody Alvarado Pena is a Guatemalan woman who suffered ten years of egregious physical and sexual abuse at the hands of her husband, a former Guatemalan soldier. *Ms. Alvarado*’s husband abused her on a daily basis from the outset of their marriage (at which time she was just sixteen years old). Her husband repeatedly expressed his opinion that he had the right to treat *Ms. Alvarado* as he did because of her gender and their relationship. During his abuse he made statements such as “You’re my woman and you do what I say”, “You’re my woman and I can do whatever I want”. Despite her repeated efforts to gain government protection, the courts and the police refused to intervene. *Ms. Alvarado*’s abusive husband could both make and carry out his threats with impunity because of the institutionalized discrimination against women in Guatemala, and the absolute failure of governmental protection. In the case, *Ms. Alvarado*’s claimed as social group, “married women in Guatemala who are unable to leave the relationship”, was defined by immutable characteristics and fulfilled the new social visibility and particularity requirements.<sup>1222</sup>

In the case of *Matter of L-R*, *Ms. L.R.* is a Mexican woman who was kept in virtual captivity for twenty years by her common-law husband, during which time he inflicted brutal physical and sexual violence and abuse upon her. When she was nineteen years old and attending a teacher-training program in Mexico, he was the school’s sports coach. He raped her at gunpoint and for the next two decades kept her like a prisoner, using physical force, beatings and death threats against her and her family members to prevent her from leaving him. He raped her regularly and tormented her mentally and physically.

<sup>1211</sup> *Ibid*, 677.

<sup>1212</sup> *Ibid*, 678-79.

<sup>1213</sup> *Matter of S-E-G*, 24 I&N Dec. 579 (BIA 2008).

<sup>1214</sup> “Domestic Violence and Gender-related Claims for Asylum: Recent US Jurisprudence,” *Women’s Asylum News*, Issue 95, September 2010, at 8. [http://d356gh0apz9rk0.cloudfront.net/wpcontent/uploads/2013/02/WAN\\_September.pdf](http://d356gh0apz9rk0.cloudfront.net/wpcontent/uploads/2013/02/WAN_September.pdf). (accessed June 10, 2015)

<sup>1215</sup> *Matter of S-E-G*, at 584.

<sup>1216</sup> Lisa Mendel-Hirsa, “Domestic Violence And Political Asylum.” <http://www.empirejustice.org/issue-areas/domestic-violence/battered-immigrants/articles/domestic-violence-and.html>. (accessed June 10, 2015).

<sup>1217</sup> Lindsay M. Harris and Morgan M. Weibel, “*Matter of S-E-G*—: The Final Nail in the Coffin for Gang-Related Asylum Claims?,” *Berkeley La Raza Law Journal*, 20 (2010): 5.

<sup>1218</sup> *Ibid.*, at 28.

<sup>1219</sup> *Matter of R-A*-, 22 I&N Dec. 906 (BIA 1999), *vacated*, 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded*, 24 I&N Dec. 629 (A.G. 2008). The Respondent in *R-A*- was finally granted asylum after a fourteen year battle by an immigration judge on December 10, 2009.

<sup>1220</sup> *Matter of L-R*- (B.I.A. Apr. 13, 2009), Department of Homeland Security’s Supplemental Brief. [http://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf). (accessed June 5, 2015).

<sup>1221</sup> “Domestic Violence and Gender-related Claims for Asylum: Recent US Jurisprudence,” *Women’s Asylum News* at 7.

<sup>1222</sup> Lisa Mendel-Hirsa, “Domestic Violence And Political Asylum.”

When she tried to leave him he retaliated with even more extreme abuse. When Ms. L.R. reported the abuse, Mexican police not only failed to protect her, but they informed her common-law husband that she had complained, which resulted in even more gruesome beatings. Ms. L.R. also sought assistance from a Mexican judge who told her he would help her if she had sex with him. Eventually, Ms. L.R. realized that her abuser would not rest until he killed her and that the authorities would not protect her, so she fled to the United States with her children and sought asylum. But she was paralyzed by having been a victim of domestic violence for twenty years. She suffered from nightmares, anxiety, depression and insomnia.

Ms. L.R., like Ms. Alvarado, was the victim of severe and brutal domestic violence. One major difference between the two cases is that Ms. L.R. faced an additional burden in her asylum case relating to a provision of asylum law known as the one-year bar. Applicants for asylum are required to file their applications within one year of arriving in the U.S. or, in the absence of extraordinary circumstances- they are statutorily barred from applying. Ms. L.R. filed her asylum application seven months after the one-year period ran. As a result, the asylum office referred her to an immigration judge who denied her claim.

On appeal before the BIA, the attorney for the Department of Homeland Security (DHS) initially defended the judge's decision. However, DHS changed its position after President Obama came into office. High level officials in the DHS authored and filed a supplemental brief, arguing that Ms. L.R. could qualify for asylum as a member of either the particular social group of "Mexican women in domestic relationships who are unable to leave," or "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."

Finally, in *L.R.* judgement the DHS set forth the elements of a successful claim, stating that a woman would have to show that in her country:

- 1) the society and legal norms tolerate and accept violence against women;
- 2) the government is unable or unwilling to protect her; and
- 3) there is no place within the home country that the woman could relocate to in order to escape her persecutor.<sup>1223</sup>

## 9. Conclusion

The aim of the 1951 Refugee Convention was to protect the European people who fled during Second World War because of fear of persecution on account of race, religion, nationality, political opinion or membership of a particular social group. In practice, it is realized that, refugee issue is a universal problem that could not be limited by time and geographic limitation as a consequence the 1967 Protocol relating to the Status of Refugees was adopted by General Assembly. In 1979, a Handbook on Procedures and Criteria for Determining Refugee Status was introduced by UNHCR for providing assistance to the member states, which is not binding but treated as persuasive authority. The Convention and the Protocol was criticized from different perspectives, particularly from feminist point of view, gender issue was not considered by the instruments. Gender based persecution was ignored by the drafters. In 1991, Gender Guidelines was issued by UNHCR due to difficulties. In 2002, UNHCR introduced more specific guidelines on: 'Gender-Related Persecution,' 'Membership of a Particular Social Group,' 'Claims to Refugee Status based on Sexual Orientation and/or Gender Identity.' Signatory states, Canada, U.K. and U.S. also introduced guidelines for women refugees and contributed to the development of women refugees under the conventional ground of 'membership of a particular social group.'

In *Ward*, Canadian court defined 'membership of a particular social group' as innate and unchangeable characteristic who voluntary associated with as fundamental dignity, former voluntary status, unalterable due to its historical permanence. On the other, in *Matter of Acosta*, U.S. court gave a more specific view on the 'membership of a particular social group' as "persecution on account of membership in a particular social group refers to persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic." In *Sanchez-Trujillo* the phrase 'particular social group' implies a collection of people closely affiliated with each other, which are actuated by some common impulse or interest. Later, *Matter of C-A-*, U.S. court added 'social visibility' test in addition to *Acosta* judgment that narrowed the definition of 'particular social group.' The House of Lords of U.K. in *Shah and Islam* held that victim of domestic could be a ground of the Convention under the categories of 'particular social group.'

Finally, it be concluded that refugee protection is a complex area of law where lots of considerations are needed before granting the application, i.e. Refugee Convention and Protocol, human rights issues, various international instruments, UNHCR guidelines, domestic laws and national policy. Although the women refuges are well protected in the 21<sup>st</sup> Century, nonetheless, there is no uniformity among the signatory sates of the 1951Convention and 1967 Protocol. Therefore, cohesion and uniformity is indispensable for the better protection. It is expected that UNHCR and all the member states should take more initiatives and fair procedure and guidelines on 'gender based persecution' for all genuine applicants.

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