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Article

*169 GENDER-RELATED REFUGEE CLAIMS: EXPANDING THE SCOPE OF THE CANADIAN
GUIDELINES

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Abstract

In 1993 the Immigration and Refugee Board of Canada adopted guidelines entitled 'Women Refugee Claimants Fearing Gender-Related Persecution'. The Guidelines represent a cutting edge approach and have helped to guarantee a refugee determination process for women refugees that is more sensitive to gender-related claims of **asylum**. However, the author demonstrates that the concept of gender-based persecution, as it is presently defined, makes it difficult for members of the Board to systematically evaluate all types of gender-related persecution, to which certain men and women are subjected. The author examines **asylum** claims based on sexual orientation and identity, as well as those based on persecution specifically inflicted upon men, and argues that the gender-specific analytical framework adopted by the Immigration and Refugee Board is relevant to these cases. The author concludes that change is needed in the form of a more clearly defined social constructionist interpretation of gender. Clearly, defining 'gender' as a socially constructed concept would reveal the gender-specific factors that interfere with the rights of certain men and would make more visible the links between gender and other causes of persecution, like sexual orientation.

1. Introduction

In September 1991, a panel consisting of two members of the Canadian Immigration and Refugee Board ('Board') rejected the **asylum** claim of a young Saudi Arabian woman. [FN1] The woman, known in the media as Nada, feared persecution for having refused to obey her country's discriminatory dress code for women. She claimed, among other things, that men had subjected her to indecent acts and obscenities for not wearing a veil. [FN2] She *170 also described her fear of the Mutawwi' in -- the Saudi Committee for the Propagation of Virtue and Prevention of Vice. [FN3]

In the reasons for its decision, the Board suggested that Nada should 'obey the laws of general application that she denounces, in all circumstances ...'. [FN4] The decision created great controversy and quickly became a *cause célèbre*, symbolic of the struggle to protect not just Nada, but all refugee women. Her case drew public attention to the question of whether persecution directed specifically at women should be taken into account in the Canadian refugee determination process.

It is now more than 15 years since Nada was denied **asylum** by the Board. [FN5] Since rendering this decision, the Board has published guidelines relating to women refugee claimants fearing gender-related persecution; [FN6] the Supreme Court of Canada, in *Canada (A.G.) v. Ward*, [FN7] ruled in favour of recognizing gender-based social groups; and Board decisions, both positive and negative, on gender-based persecution have grown in number. It is now, therefore, a good time to look at changes in refugee law with re-

spect to gender issues, to identify the strengths and weaknesses of these developments, and to discuss new directions that could be taken.

The goal of this article is to begin rethinking the Board's conceptual framework for gender, a framework found in the guidelines entitled 'Women Refugee Claimants Fearing Gender-Related Persecution' [FN8] ('Guidelines'). There is no denying that the Guidelines represent a very forward-looking approach to the issue. In fact, Canada was the first country to seriously consider the problem of women refugees and **asylum** law. Nonetheless, the notion of gender-based persecution in the Guidelines should be broadened, since the current definition of gender-related persecution limits the ability of Board members to systematically evaluate all forms of persecution based on gender and the ways in which it is carried out against victims.

This failure is partly due to the fact that the prevailing Canadian analysis treats gender persecution as essentially tied to biological sex. This article argues that gender-based persecution flows not from the victim's biological sex but, rather, from the power relations that characterize relations between *171 men and women. Gender-related persecution guidelines must be based on hierarchies of social roles -- roles that exist in societies around the world - and not on the biological sex of the claimants. This study undertakes to outline the shortcomings of the current approach by examining **asylum** decisions involving sexual minorities and a number of male victims of persecution. It concludes that the Guidelines must be revised in order to reflect the full extent of gender-persecution.

The analysis is divided into two main parts: the first and more descriptive part aims to situate the issue of gender-related claims within a statutory, historical, and conceptual context. Then, in the second more analytical part, two types of **asylum** claims are examined: claims in which the issue of sexual orientation or sexual identity is raised and claims involving persecution specifically against men. The goal of the second part is to evaluate the relevance of applying the Guidelines' gender-based analysis to these cases. The article concludes by examining the challenges that must be overcome in order for the Board to determine all gender-related claims in an integrated and systematic way.

2. Gender-related refugee claims

The following paragraphs present an overview of the factors at the core of the definition of 'refugee' so that a discussion of the developments relevant to gender-related claims may be undertaken.

2.1 The refugee determination process

The refugee determination process is entrusted to the Board, an independent tribunal established in 1989. The Board's Convention Refugee Protection Division handles claims brought forward by persons seeking refugee status and determines whether claimants meet the definition of a refugee, as set out in the United Nations Convention Relating to the Status of Refugees. [FN9] Incorporated in section 96 of the Immigration and Refugee Protection Act, [FN10] this definition essentially states that a refugee is a person who fears persecution by reason of race, religion, nationality, membership of a particular social group, or political opinion, [FN11] and who *172 cannot obtain the protection of his or her country of nationality or habitual residence.

In order for a claimant to be granted the status of Convention refugee, she must establish each of the elements listed in the definition of a refugee: a well-founded fear of persecution based on one or more of the five enumerated grounds and the inability to obtain the protection of her country of nationality or habitual residence. The notion of persecution is at the heart of the definition of a refugee. In order for the feared abuse to be deemed persecution, it must be considered sufficiently serious. [FN12] Furthermore, a claimant

must establish that the persecution is based on her political opinions, race, religion, nationality, or membership of a particular social group. Finally, refugee protection is conferred on the claimant only if she succeeds in showing that the State of her nationality or habitual residence is either unwilling or unable to protect her. [FN13]

2.2 The problems faced by refugee women

In many cases, persecution suffered by women is no different than persecution suffered by men. Women, like men, are victims of persecution by reason of race, religion, nationality, political opinions, or membership of a particular social group. [FN14] However, women may suffer abuse because of the gender division in social roles or because of the particular relationship between women and the State:

Les femmes entretiennent un autre rapport avec la vie publique et l'État, vivent fréquemment d'autres formes de résistance (politique), s'engagent dans le domaine social, les activités d'aide et de soutien [...] Elles sont en outre particulièrement vulnérables en tant que gardiennes de l'honneur familial et que porteuses d'enfants [...]. [FN15]

*173 Refusal to conform to the gender-specific roles of a given society can lead to abuse, as was the case for the young Saudi refugee, Nada. [FN16] In such cases, women are persecuted because they transgress the roles that are imposed upon them. [FN17] Moreover, women are often victims of 'private' violations, such as spousal abuse or the threat of forced marriage. In such cases, persecution is not necessarily carried out by representatives of the State, but by private individuals. Since a number of these human rights violations reflect the society's patriarchal nature, the government chooses to ignore the abuses or, worse, sanctions the persecution.

Both the method of persecution and the reasons for it can differ with respect to men and women. Genital mutilation, infanticide, forced marriage, spousal abuse, involuntary abortion, mandatory sterilization, sexual assault, dowry-related murders, honour crimes, widow burning, mandatory dress codes, and trafficking in women are all abuses inflicted upon women because they are women.

Yet, gender-based persecution is not explicitly identified in the definition of a Convention refugee. It is the claimant, therefore, who must show the link between gender, the feared abuse, and one or more of the grounds listed in the definition of a refugee. Prior to 1993, women refugees were rarely able to convince members of the Board that the persecution they faced as women constituted persecution by reason of political opinion, religion, race, nationality, or membership of a particular social group. In fact, since the majority of refugee claimants are men, refugee case law largely reflects the male experience. [FN18]

The Executive Committee of the United Nations High Commissioner for Refugees ('UNHCR') acknowledged the problem as early as 1985 when it released a Conclusion providing that States were free to consider women persecuted for transgressing social mores as members of a 'particular social group'. [FN19] In 1990, the UNHCR followed up with its 'Guidelines on the Protection of Refugee Women', a policy document that outlines the ways in which refugee women's protection concerns should be *174 recognized by States and taken into account in the refugee determination process. [FN20]

In Canada, the issues faced by women refugees were raised shortly after the Board was established in 1989. Several members of the Board expressed concern that issues specific to women refugees were being overlooked, and, as a result, women refugee claimants' chance of success was negatively affected. Consequently, the Board formed a committee at its Toronto office to investigate the problem. [FN21] The issue was then the object of a number of studies, was addressed at professional training sessions, and was considered in Board decisions from 1989 to 1993. [FN22]

In 1993, the Supreme Court of Canada clarified, in *Ward*, [FN23] that gender can constitute the basis of a claim for membership of a particular social group. Justice LaForest defined 'social group' by identifying three categories of groups. [FN24] The first category, 'groups defined by an innate or unchangeable characteristic', embraced 'individuals fearing persecution on such bases as gender, linguistic background and sexual orientation'. [FN25] Since women refugee claimants had difficulty linking their fear of persecution on the basis of gender to one of the five grounds enumerated in the definition of a Convention refugee -- race, religion, nationality, membership of a particular social group, or political opinions -- the Supreme Court's decision to recognize gender as a valid criterion for membership in a social group was a pivotal development in the case law. [FN26]

In addition, the cases of numerous women refugee claimants, such as *Nada*, received intense media attention, often after public campaigns led *175 by non-governmental organizations in support of the claimants. [FN27] This increased pressure on the government and caused a wave of claims between 1991 and 1993. [FN28] The pressure exerted by refugee women, their lawyers, and advocacy groups compelled the then Minister of Employment and Immigration, Bernard Valcourt, to grant **asylum** in January 1993 to both *Nada* [FN29] and *Basdaye Kisson*, a Trinidadian woman who had been the victim of spousal abuse. [FN30] He also announced that the Board would establish a new policy for women claiming refugee status. Indeed, since 1993 the Board has had guidelines for handling the claims of refugee women.

2.3 The Chairperson's guidelines on gender-related persecution

On March 9, 1993, the then Chairperson of the Board, Nurjehan Mawani, published her guidelines entitled 'Women Refugee Claimants Fearing Gender-Related Persecution'. [FN31] An updated version of the 1993 Guidelines has been in effect since 13 November 1996. [FN32] The Guidelines *176 assist the members of the Board in recognizing the particular nature of persecution against refugee women by differentiating it from the persecution of male refugees. Moreover, the Guidelines promote consistency in decisions on refugee claims made by women.

The Guidelines do not change the definition of a Convention refugee, but rather define the conceptual framework within which members of the Board can read gender-related concerns into existing legislation. [FN33] The Guidelines state, 'the central issue is thus the need to determine the linkage between gender, the feared persecution and one or more of the definition grounds'. [FN34] An attempt is thus made to encourage a broader interpretation of the existing definition of a Convention refugee.

According to the Guidelines, the Board must address four critical issues. First, it must evaluate the extent to which women claimants fearing gender-based persecution can successfully invoke one of the five enumerated grounds. The Guidelines state that women refugee claimants may be placed into four broad categories [FN35] while emphasizing that 'these categories are not mutually exclusive or exhaustive'. [FN36] In each case, the onus of proving a well-founded fear of persecution on the basis of one of the five enumerated grounds in the Immigration and Refugee Protection Act rests with claimant. However, the Guidelines clarify how this link can be established in situations specific to women. For example, persecution of a woman can be linked to religion in States where religious customs assign certain roles to women and where women who refuse to fulfill their assigned role are punished. [FN37] A woman who opposes 'male social/cultural dominance in her society may be found to fear persecution by reason of her actual political opinion or a political opinion imputed to her'. [FN38] Moreover, the Guidelines note that claims by women tend to focus on 'membership in a social group', and this has brought about an increase in the number of gender-based claims that rely on this ground. [FN39]

*177 Second, if a claim is brought on the basis of sexual violence or any other prejudicial treatment, the

Board must determine if the treatment constitutes persecution as that term is understood in the jurisprudence. In such cases, the Guidelines assist the Board in evaluating whether the 'violence -- experienced or feared -- is a serious violation of a fundamental human right'. [FN40] The standards which must serve as guidelines are those established by international human rights instruments, most notably by the Convention on the Elimination of all Forms of Discrimination Against Women [FN41] and the Declaration on the Elimination of Violence against Women. [FN42]

The third issue raised in the Guidelines relates to the scope of the evidence decision-makers should consider when dealing with a gender-related claim. The Guidelines state that the decision-maker should consider, among other things, 'the social, cultural, religious, and economic context in which the claimant finds herself'. [FN43]

Finally, the Guidelines highlight the particular problems women face when called upon to testify, particularly when they have had experiences that are difficult to speak about. An example is the reluctance of some women - women from societies that value the preservation of one's virginity or marital dignity - to disclose their experiences of sexual violence. [FN44] In addition, in some cultures women are not kept informed of men's political or military activities and, as a result, the testimony of these women may seem incomplete or contradictory. [FN45] There is also the question of the impact of certain psychological disorders on a claimant's testimony. [FN46]

The Guidelines are administrative directives and, as such, are not strictly binding on the members of the Board. The law affords decision-makers independence, but they must, nonetheless, apply the Guidelines unless there are compelling reasons to depart from them. [FN47] In this way, the Guidelines are considered to 'act as a tool of persuasive reference'. [FN48]

***178 2.4 The impact of the Guidelines**

Canada's approach is undeniably avant-garde: [FN49] the Guidelines were the first of their kind in the world [FN50] and are now being used as a model elsewhere, including the United States, [FN51] Australia, [FN52] and the United Kingdom. [FN53] In other countries, governments have addressed the issue by incorporating references to gender into their existing **asylum** law. [FN54] Commenting in 2003 on the 10th anniversary of the Canadian Guidelines, Joyce Mends-Cole, UNHCR Senior Coordinator for Refugee Women, declared:

The Canadian guidelines on gender-related persecution have had a profound influence on women's rights in international refugee law. It [*sic*] has given refugee women a giant step forward on the long road towards gender equality. In the ten years since the guidelines were issued, UNHCR still finds that it [*sic*] plays an enduring role in raising awareness of protection issues specific to women. [FN55]

In addition to descriptions of the Guidelines as 'bold and courageous initiatives', [FN56] recognizing gender persecution has been referred to as probably one of the most remarkable achievements in the last 100 years of Canadian legal history. [FN57]

***179** There can be no doubt about the impact of the Guidelines, particularly in examining the case law since 1993. Since the *Ward* decision was rendered and the Guidelines were adopted, numerous Board decisions have demonstrated a greater acceptance and understanding of gender persecution. In the year after the Guidelines were published, the Board decided 70 percent of 170 gender-based claims by women in favour of the claimants. [FN58] In 1997, Julie-Marie Campbell examined the Guidelines together with 515 gender persecution claims heard by the Board. [FN59] She concluded that, in most cases, the claimants formulated their claims of fear of abuse as being based on membership of a particular social group, as sugges-

ted by the Guidelines. Spousal abuse, which the Guidelines specifically mention, was the most commonly claimed type of persecution. The Immigration and Refugee Board reports that between 1993, the year the Guidelines were introduced, and December 2002, it had disposed of 2,331 gender-related claims of which 1,345 were accepted and 691 rejected. [FN60]

Since the Guidelines were adopted, favourable decisions have recognized the validity of claims by persecuted women fleeing forced abortion in China, [FN61] rape by military personnel in Guatemala, [FN62] and arranged marriages in Kenya. [FN63] Women victims of spousal abuse have been recognized as Convention refugees as have minor girls betrothed against their will. [FN64] Genital mutilation has been considered a cruel, torturous practice that constitutes persecution, [FN65] as does forced sterilization. [FN66] Women who had violated the social mores or laws of their country and who were, as a result, at risk of human rights violations, have made successful claims for ***180 asylum**. [FN67] For example, punishment for violating a dress code can constitute persecution. [FN68] The Board has recognized the vulnerability of women living alone in assessing the possibility of persecution, [FN69] as well as the risks faced by women who are relatives of men fleeing detention and repression. [FN70]

Should one be satisfied with the progress made since the Guidelines were adopted in 1993? The answer depends on the law's objective. If the goal is to create a process more sensitive to the gender-related dimensions of women's claims, then the developments of the last 15 years are promising. However, if the objective is to establish a refugee determination process that evaluates all cases of gender-related claims in a systematic and integrated way, much progress remains to be made. The difference between these two objectives will be analyzed in the next section.

3. Application of the Guidelines: sexual minorities and men

3.1 Theoretical framework

Before analyzing the Guideline's shortcomings in depth, it is necessary to clarify certain theoretical terms. To avoid confusion and to elucidate the definition of gender-based persecution, the terms 'sex' and 'gender' must be distinguished.

'Sex' refers to the biological category to which a person belongs at birth. However, 'gender' is a concept referring to social, cultural, and psychological values as well as learned beliefs. Gender refers to the social and cultural experience of being a woman or a man and the power relations between men and women. Thus, gender is linked to the hierarchical relationships between men and women and it encompasses the identity, social status, and roles and responsibilities of men and women. Feminists, in particular, have ***181** been discussing this distinction since the 1970s, referring to gender as the social dimension of what can be perceived as biological sex: [FN71]

[T]he concept of 'gender' has functioned as a central explanatory and organising category of the social aspects of 'sex' within feminist discourse. In contradistinction to 'gender', 'sex' is used as a biological category. By now, the category of gender has become the preferred framework of reasoning, as the category of sex involves the risk of biological reductionism. In other words, not every politically interesting aspect of the differences between women and men is related to their biology. [FN72]

Epstein and Straub define the conceptual differences between 'sex' and 'gender' thus: '[g]ender is what we make of sex on a daily basis, how we deploy our embodiedness and our multivalent sexualities in order to construct ourselves in relation to the classifications of male and female'. [FN73] In doing this, males learn masculine attitudes and behaviours (aggression, competitiveness, and courage, for example) and, on

the basis of this process of socialization, they assume certain roles based on their sex (breadwinner, protector, and leader, for example). The same is true of women, as explained by Sylvia Law:

Traditional concepts of gender cast man as strong, woman subservient; man as not responsible for family care, woman as nurturant; man as sexually aggressive, and woman as passive victim, whether virgin or whore. These social meanings ascribed to gender shape our ideas about who we are. [FN74]

Gender therefore refers to the specific expectations a society holds in relation to how men and women shall behave:

For example, women shall be married before they have children, women shall not wear trousers, men shall not fall in love with other men or dress in women's clothes, or women are subordinate to men and shall not have any opinions of their own. [FN75]

Since feminism attempts, in part, to change women's social roles, the broader notion of 'gender', which includes social, political, and psychological elements, 'provides a means to argue that the relative positions of men and women can be challenged and changed'. [FN76] As stated by Pamela *182 Foster, '[w]omen, as a group, are not doomed to be victims due to their biological characteristics, any more than men'. [FN77]

Thus, gender-based persecution is not necessarily the same as persecution due to one's sex, but rather includes persecution of persons who refuse to conform to social criteria specific to men and women. The analysis in this article is based on the premise that the gender categorization of social roles in every society is a result of male-female power relations characterized by patriarchal domination. As Catharine MacKinnon maintains, social roles almost always create a hierarchy, and discrimination on the grounds of gender must be viewed in this context of subordination and domination. [FN78] Therefore, gender-based persecution refers to the repression of those whose failure to conform to social roles threatens the values of the dominant groups. The patriarchal system continues to exist in part because it can suppress the gender and societal non-conformity of members of the society. [FN79] In the case of gender persecution, the punishment or abuse is not as a result of the victim's biological sex, but rather of the way the individual expresses his or her gender identity and roles. [FN80]

The framework established by the Board under the Guidelines, on the other hand, was in response to very specific concerns about a systematic refusal of Board members to recognize that women who are victims of gender-based persecution are also victims of persecution as defined in the Convention. [FN81] After more than 12 years of experience with the Guidelines, it can be said *183 that, in spite of establishing a process that is more sensitive to a greater number of women refugee claimants, the Guidelines are far from having implemented a framework that can identify gender-related elements in all refugee claims.

This failure can be explained by the fact that the prevailing approach to gender-related persecution tends to define the persecution as one based on biological sex:

Claims of **asylum** based upon subjection to persecutory treatment ... have become known as 'gender-based' claims because the acts committed were acts against women as *women*, not as members of a particular race, religion, nationality, or political or social group. The nature of the acts are such that men would not and could not be subjected to them. [FN82]

In a publication preceding the Guidelines, Solange Marion wrote: '*la femme réfugiée présente effectivement un problème distinct de celui des hommes*'. [FN83] Marian Kennedy notes that forced sterilization is a type of persecution aimed at men and women, but that this act constitutes gender-based persecution because the majority of victims are women. [FN84] Pamela Foster says there is no male equivalent of persecution such as genital mutilation, bride burning, and forced abortion, and these acts should, therefore, be recog-

nized as gender-based persecution. [FN85] Jacqueline Castel highlights rape as gender-specific abuse since the majority of victims are women and the aggressors in sexual assaults are exclusively men. [FN86] Rebecca Wallace argues that 'what makes women the target' of persecution is 'primarily if not exclusively their sex'. [FN87] In her view, 'membership of the female sex is what creates the risk'. Nurjehan Mawani, who was Chairperson of the Board when the Guidelines were published, notes that:

[the Guidelines] are designed to ensure that the 1951 U.N. Convention Relating to the Status of Refugees is applied to gender-related refugee claims in Canada, in a way which acknowledges the different forms of persecution experienced by *women* in their countries of origin. (Emphasis added.) [FN88]

Finally, the title of the Guidelines, 'Women Refugee Claimants Fearing Gender-Related Persecution', clearly indicates the Guidelines target the situation of women refugees.

***184** Women are the main victims of gender-based persecution not because of their sex but because power relations between men and women and between the State and the individual systematically favour men. [FN89] It is clear that in all cultures the power relations between men and women afford men a privileged position and superiority over women. [FN90] Women are more vulnerable to violence, persecution, and gender-based discrimination. Every State must tackle the problems related to protecting refugee women within the context of refugee determination. However, it cannot be ignored that relations based on gender affect not only the freedom of women, but also the freedom of those men who, with good reason, challenge the privileged position they hold because of gender-specific power relations.

As discussed above, the refugee determination process has improved, and inadequacies have been addressed in the case of claims for **asylum** made by women. But disparities still exist and must be identified for those refugees -- men and women -- who make claims of gender-based persecution outside the traditional scope of gender-based claims. In order to illustrate this point, decisions rendered on claims for **asylum** made by members of sexual minorities and certain groups of men are examined.

Before discussing the findings, it is important to touch briefly on the research methodology used in this study. The conclusions are based on an exhaustive search of all reported decisions rendered by the Refugee Protection Division of the Immigration and Refugee Board of Canada. Generally, Board members render written reasons for negative but not positive decisions. However, the Board has sometimes required members to render written decisions even for positive outcomes when gender and sexual orientation issues are involved in order to develop case law on these specific issues. [FN91] Thus, while reported decisions generally exclude a large number of positive determinations, they, nevertheless, contain a sufficient number of positive and negative decisions related to gender and sexual orientation to allow for conclusions and trends to be examined.

For decisions involving sexual minorities and certain groups of men, the analysis attempts to establish whether the Board's reasons establish a link between the claimants' fears and gender-based persecution by looking for a reference to the Guidelines or an equivalent gender-specific analysis. Of course, it is not possible to identify situations in which the Guidelines were ***185** raised during the hearing but were not mentioned in the written reasons. However, since members of the Board must apply the Guidelines unless there are compelling reasons to depart from them, they are generally mentioned in the reasons if they formed part of the basis for the decision.

3.2 Sexual minorities [FN92]

The situation of sexual minorities around the world continues to be alarming. [FN93] Countries have executed men and women simply for being homosexuals or transsexuals. Many countries continue to impose

criminal penalties for consensual sex between members of the same sex. If **homosexuality** is not a crime, it is often treated as a disease and, as such, treatable. In several countries, restrictions have been imposed on the freedom of expression and freedom of association of sexual minorities.

Being a member of a sexual minority has already been recognized as a basis for refugee status in Canada, mainly on the grounds that members of these minorities, as members of a particular social group, are persecuted. [FN94] The Supreme Court decision in *Ward* confirmed, *obiter*, that sexual orientation constitutes the basis of a particular social group as defined in the Convention. [FN95] Subsequent Board decisions have recognized that gay men and lesbians could base their fear of persecution on their membership in a social group. [FN96]

This study is not an attempt to challenge **asylum**-granting grounds and procedures for sexual minorities but, rather, to highlight the need to establish a connection between sexuality and gender, and to evaluate its significance within the refugee determination process.

Gender is an important category for sexual minorities because society tends to associate gender and sexual non-conformity. [FN97] Social, political, and legal disapproval of **homosexuality** is more often a reaction to the non-compliance to gender and social roles than a simple expression of contempt for the sexual practices of homosexuals. [FN98] Generally, gender roles *186 are based on a heterosexual orientation. Non-conformance with gender norms by gay men, lesbians, and transgendered persons implies a refusal to behave in ways dictated by their biological sex and social classification.

It is important, therefore, to define the link between gender and sexual orientation, and to do so in the context of the refugee determination process. As Suzanne Goldberg notes:

Asylum dealing with issues of sexuality presents a particular challenge because how a society understands sexuality is one of the most important ways in which a society defines itself [...] how a society understands who men are and what men are supposed to be, who women are and what women are supposed to be, is really at the centre of this discussion [...]. [FN99]

Razack also emphasizes the importance of this link as she highlights the relevance of assessing, within the framework of the refugee determination process, how the combination of a woman's gender, race, religion, culture, sexuality, age, and physical and mental ability creates a particular vulnerability. [FN100] A society's negative attitude toward sexual minorities is almost always closely tied to traditional and sexist notions that also define men and women's respective and exclusive roles. [FN101] In fact, laws condemning people who engage in loving and sexual relations with members of the same sex often also uphold the traditionally defined social roles that are oppressive for women. [FN102]

From this perspective, it must be recognized that sexual minorities greatly threaten gender and social norms. For example, as Sylvia Law maintains, lesbians and gay men, in their existence and behaviour, 'deny the inevitability of heterosexuality'. [FN103] James Wilets describes sexual minorities as 'gender outlaws'. [FN104] He states the following: '[s]exual minorities are also gender outlaws in the sense that their very existence as identifiable minorities is not based upon the sexual acts in which they participate, but rather on their relationship to the spectrum of gender conformity'. [FN105] According to Wilets, non-conformity to gender and social roles by gay men and lesbians is the basis of persecution and discrimination. Men and women who display homosexual tendencies or adopt gender identities other than those prescribed by their societies have generally been penalized when their activities violate the 'norms of male supremacy'. [FN106]

*187 Moreover, it is the rigid and dualist concept of gender that similarly oppresses women and sexual minorities. [FN107] Lynda Peers and Irène Demczuk make this connection in their claim that the oppression of gay men and lesbians is founded upon the universal notion of complementarity of the sexes:

L'union de personnes de même sexe contrevient en effet au modèle de complémentarité naturelle des hommes et des femmes, complémentarité qui se manifeste par une division rigide des rôles et des statuts, et se fonde sur l'appropriation sociale des femmes par les hommes. [FN108]

Gender-based violence is often committed in reaction to the perceived threat to a patriarchal social system posed by groups that do not conform to social norms. In this way, women and sexual minorities who attempt to break out of the gender roles and norms imposed by society often struggle against the same forces, for reasons that are fundamentally the same. [FN109]

Another aspect of the intersection of sexual orientation and gender involves the persecutors. When a society's views about gender roles are reflected in violence against women and sexual minorities, this violence is often committed by individuals who do not represent the State. [FN110] Violent acts such as rape, assault, and torture are employed to pressure both women and sexual minorities to conform to society's gender roles. In addition, persecution of women and sexual minorities serves not only to pressure them to conform, but also to intimidate them by making examples of abused women and sexual minorities.

In spite of the presence of gender elements in claims made by sexual minorities, members of the Board rarely refer to the Guidelines when rendering a decision on a claim made by a lesbian; in the case of gay men and transgendered persons, Board members refer even less frequently to the Guidelines.

3.2.1 Lesbians

The persecution of lesbians can be similar to the persecution of gay men in several ways. For instance, in a comparative study of **asylum** decisions from Canada and Australia, Jenni Millbank found that 'sexual assault was a significant and persistent factor in the persecution of both lesbians and gay men'. [FN111] However, a number of authors have identified ***188** elements of persecution involving lesbians that are similar to those involving women in general. Shannon Minter states that lesbians, as is the case with other women, are often victims of violence at the hands of family members. They are forced to marry; subjected to psychiatric treatment against their will; deprived of their children; and are victims of discrimination with respect to housing, employment, education, and health services. [FN112]

The main threat to the safety and survival of many lesbians is not criminal laws or violence perpetrated by agents of the State, but rather social norms based on gender that subordinate women economically and politically, control the sexuality and reproductive freedom of women, and, generally, do not give women full and free access to exercise their fundamental rights. [FN113] In terms of their sexuality, lesbians are viewed as resisting heterosexual imperatives prescribed by all patriarchal societies:

La société patriarcale a imposé aux femmes certaines règles (explicites et implicites) régissant leur sexualité. Perçues comme étant la propriété des hommes, les femmes ne doivent exprimer leur sexualité que dans le cadre d'une relation avec un homme [...] Par conséquent, toute femme qui ne se soumet pas à cette obligation sexuelle est susceptible d'être marginalisée et frappée d'ostracisme. [FN114]

Jenni Millbank argues that rape is a 'sexualized attack upon lesbians' which serves 'as a punishment for their sexual and social nonconformity'. [FN115] Because lesbianism is largely perceived as an affront to social or cultural norms relating to gender and sexuality, lesbians are particularly vulnerable to different forms of gender persecution designed to punish and to force them to conform to sexist and heterosexist norms. [FN116]

Krista Daley, legal counsel for the Board, states that even though the Guidelines do not expressly mention lesbians, its principles, nevertheless, apply to this group of women. [FN117] Yet, of the 36 decisions

identified for this *189 study involving refugee claims made by lesbians, [FN118] only seven contained explicit references to the Guidelines, [FN119] and only one decision contained a lengthy and detailed analysis of their relevance. [FN120] While some decisions contained analyses of the connection between gender and sexual orientation without making any references to the Guidelines, [FN121] the majority of them made no reference to gender-related issues whatsoever. Yet if the link between gender and sexual orientation is not taken into consideration within the context of the persecution faced by lesbians, lesbian claimants seeking **asylum** risk being denied the protection to which they have a right. [FN122]

The case involving two Israeli lesbians who claimed refugee status in 1993 offers an illustrative example. [FN123] The two members of the Board's panel concluded that the women were not Convention refugees. The facts in the decision indicated that this young couple often met in a park where, from time to time, they engaged in sexual activity. Since rents were very high, they could not afford their own apartment. As a result, they had to live with one of the young women's parents, who both disapproved of **homosexuality**.

The two claimants stated that their fear of persecution was based on two events. One evening, in a park, a police officer questioned them because they were engaged in sexual activity. One of the women was taken to the police station and held for ten hours, beaten about the face, and advised '*que s'embrasser entre femmes est considéré immoral*'. [FN124] Another time, again in a park, they were watched, insulted, and harassed by three young people. *190 One of the claimants alleged she was raped during this incident. When the women tried to file a complaint with the police, they were identified as lesbians and were refused assistance.

The credibility of the statements made by the claimants was not questioned. However, the members of the Board concluded that the feared violence did not constitute a serious violation of a basic human right. In fact, the situations described by the lesbian couple were seen as unfortunate, of course, but inevitable due to the women's behaviour: '*[m]alheureusement, en tant que femmes, les demandereses sont plus vulnérables et risquent d'être attaquées et de subir des agressions si elles se retrouvent dans un parc à 11 heures du soir*'. [FN125] According to the panel members, the rape of one of the women does not constitute persecution but, rather, a serious crime. More importantly, the panel noted that the two women did not make use of the different resources available to them in order to assert their rights. They could have gone to the ombudsman's office, which accepts complaints against the police, or to any of the numerous organizations that help women victims of violence.

How do these facts look under the lens of a gendered analysis? The panel recognized the vulnerability of these young women within the context of Israeli society. However, when the panel was faced with two women who refused to conform to gender norms, that is to say, refused to stay home at night or go out only in the company of a man, the panel seemed to accept social restrictions based on gender without considering that these norms may constitute persecution or discrimination. Even more strikingly, the panel did not analyze the particular situation faced by these two claimants who were not only young women, but also lesbians. It is not surprising that two women lovers would look for a place where they could express their feelings for each other. In numerous cultures, young lesbians do not have access to private places. The possibility was not examined whether these two lesbians, who were unlikely to be able to find a place to live together, were thus rendered more vulnerable to attacks, such as the ones these women described.

The difficulties these two women had in living as a couple within their particular family situation was overlooked, along with the social pressure exerted on them by their families. Their decision to go to public places was not based on a desire to take risks, but more likely on the social reality of their country. Moreover, lesbians are not always in a position to assert their rights and take advantage of the protection of the State. In fact, evidence in this case shows that the ombudsman's office had never received a complaint

against the police by a female victim of violence, let alone a lesbian. More importantly, had the Guidelines been used in analyzing the claim, *191 the panel would have had to consider that 'the fact that the claimant did or did not seek protection from non-government groups is irrelevant to the assessment of the availability of state protection'. [FN126] Instead, the claimants were criticized for not having taken advantage of the non-governmental resources available to them, despite the fact that the panel did not address the attitudes women's organizations may have held toward lesbians, and no evidence was available to support the panel's claim that support organizations for victims of violence would be willing to come to the aid of lesbians. Finally, the panel did not touch on the possibility that rape constitutes a type of persecution against lesbians. Given that lesbians refuse to comply with societal expectations, which require that women have sexual relations with men, they can be the victims of sexual assaults designed to force them to conform to sexual norms. Jenni Millbank argues that overlooking this reality, namely by viewing anti-lesbian violence as merely violence against women, is 'patently disadvantageous to lesbian applicants'. [FN127]

The panel's decision was rendered in 1993, the year that the Board adopted the Guidelines. The shortcomings in the Board's analysis can be explained partly by the fact that the Guidelines had only recently introduced an approach for analyzing gender-related refugee claims. Unfortunately, cases decided since then have also failed to incorporate a sophisticated analysis with respect to the gender dimensions of refugee claims by lesbians. For instance, decision-makers neglect to consult the Guidelines even when **asylum** claims contain allegations that resemble those set out in the Board's policy. For instance, in several cases where lesbian claimants have testified to suffering persecution at the hands of their father or former male spouse, the issue of family violence does not seem to attract an analysis based on the Guidelines. [FN128]

In the split decision *C.D.H.*, [FN129] the claimant, a Chilean woman, brought forward a gender-based claim of membership in a social group. Board member Patricia Rucker indicated that she would take the Guidelines into consideration. Yet, gender was never raised when considering the claim; only sexual orientation was addressed. Even though the woman alleged she was a victim of gender-based persecution, no connection was established between the persecution of lesbians and persecution based on gender. [FN130] In another case, a Colombian woman alleged that '[...] as a result of her physical attributes, including her manner of speaking and walking, physical appearance, and her choice of attire, she is a visible target for *192 cleansing squads and skinhead groups'. [FN131] The two Board members were not convinced:

There is no evidence however that this is the case at the present time [...] The claimant presents as an articulate, professional, well-groomed, and attractive young woman. Based on all these considerations, including the fact that she has yet to be targeted in Colombia as a result of her alleged physical attributes, the panel cannot conclude that the claimant's sexual orientation would be physically obvious to intolerant and bigoted segments of Colombian society. [FN132]

This conclusion is particularly shocking because two members concluded that the woman did not look like a lesbian because she was attractive, articulate, and professional looking. Jenni Millbank comments on this decision as follows:

Being visibly lesbian, if we are to take the reverse of the list enumerated here, entails being badly groomed and unattractive, and perhaps old, inarticulate, and unprofessional. Looking lesbian is coded as an implicit, and implicitly derogatory, butch. Being 'physically obvious' is also strangely unquestioned as a static, essentialized appearance devoid of the possibility of choice or change. What if the applicant had just dressed up that day to impress the tribunal? What if she is a 'femmy' lipstick lesbian who has a taste for queer tee-shirts or is spontaneously affectionate towards her girlfriend? What if Colombian lesbians do not look like Canadian lesbians? Or what if most lesbians do not look like lesbians? [FN133]

Not only was the panel's statement based on stereotypical ideas of how lesbians look, but it also neg-

lected to take into account Colombian cultural and social values and roles related to gender that could, in fact, make this young woman identifiable to agents of persecution; she could become identifiable by living alone or with another woman, refusing the company of men, acting in certain ways with women and men, or dressing in a manner different from heterosexual women in Colombia. It is even more inexplicable given that the panel members were aware that her colleagues had begun to question her orientation after seeing her in a homosexual bar. [FN134]

Another example of the relevance of gender in lesbian refugee claims is provided by a 2004 Federal Court of Canada decision which allowed an application for judicial review. [FN135] The claimant, a 34 year old Iranian woman, was rejected by the Board because her story was found to be implausible. Central to this determination was the Board's view that the claimant's description of living independently from her family, and *193 engaging in a long-term lesbian relationship, was inconsistent with traditional Muslim values in Iran. The Federal Court found fault with this analysis, stating that 'the documentary evidence that the Board relied on deals only with the question of **homosexuality** and lesbianism in Iran, and does not deal with broader cultural attitudes towards employed, single women living in the capital, Tehran'. [FN136] In essence, the Federal Court concluded that by narrowly focussing on sexual orientation, the Board has overlooked a broader gender analysis which may have revealed 'possible differences between the applicant's situation and the generalized norm' applicable to Iranian women as a whole. [FN137]

Only three reported decisions appear to apply the Guidelines in a way that recognizes that lesbians are often persecuted because they represent a threat to established norms of femininity. In the first decision, rendered in 1996, the decision-makers applied the Guidelines in a systematic way. [FN138] In that case, a Venezuelan lesbian had been the victim of violent, cruel, and degrading acts at the hands of police. In deciding the claim, the members of the panel considered the connection between gender and sexual orientation:

The claimant's strong self-identity as a lesbian woman places her at greater risk of detection by the authorities. It seems evident to me that a woman who is easily identifiable as a lesbian is more likely to be a target of harassment and abuse by the police. Such a woman is not only challenging the social norm of heterosexuality, she is also transgressing the social mores regarding the role of women in society. In his affidavit, Mr. xxxxxxxx expresses this fact succinctly:

In machista culture, the woman is subservient to the man in all facets of her existence and in particular to the sexual gratification of the man. As such, women are seen as objects satisfying the needs of men, and therefore subject to the whims and needs of the man. If a woman is also a lesbian she is seen as a danger to the status quo because she has rejected the notion that she is second to a man. [FN139]

According to the panel, the gender Guidelines offer clear guidance in recognizing that some women can fear persecution '... as a consequence for failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin'. [FN140] Judith Ramirez, who wrote the decision, added: 'I therefore find that this claim is based on membership in two particular social groups, women and homosexuals, the two indivisible elements of being a lesbian woman'. [FN141]

*194 In a second case involving a lesbian couple from Mexico, the panel also referred to the Guidelines, stating that 'although the guidelines are absent of mentioning lesbian woman, it is obvious that the guidelines would also be applicable to lesbian women'. [FN142] More importantly, the panel recognized that one of the claimants' 'strong self identity' as a lesbian placed her at risk, since it 'would cause her to be regarded as not conforming to the societal norms as a mother and wife'. [FN143] Finally, in a third decision, despite the Guidelines not being mentioned, the complex intersection of gender, race and sexual orientation was seriously considered in relation to a claim from a Tatar lesbian from Russia. [FN144] In assessing the risk of persecution faced by the claimant, the decision-maker concluded the following:

[...] it is clear that your additional characteristics of being a lesbian and being Tatar significantly increase your vulnerability to rape and physical attack. They do that in several ways. They marginalize you from society, which marginalizes you economically as well as socially. They also make you, certainly this rape incident is an example, more vulnerable to attack because of being perceived as a lesbian. The fact of being a lesbian, in terms of some rapists, is a reason for attacking you. It is also a reason for receiving even less protection from society. [FN145]

The claimant was, therefore, granted refugee status on the basis that her sexual orientation, ethnic identity and identity as a woman made her vulnerable to persecution.

The reasons given in all three decisions support the argument that the Guidelines must serve to identify the full range of gender-based persecutions. In all these cases, it is clear that the vulnerability of the claimants was due to the intersection of several factors, including gender and sexual orientation. By refusing to conform to the prescribed gendered social norms of their countries and by virtue of their sexual orientation, the claimants became more identifiable to agents of persecution. Krista Daley, legal counsel for the Board, recognizes the importance of making the link between sexual orientation and gender:

From a practical perspective, it is not necessary to deal with both the gender aspects and the sexual orientation aspects of the claim as either alone will suffice. However, an analysis that considers both elements of vulnerability is much more reflective of the realities of these claims. [...] An appropriate analysis allows the two vulnerability factors to be taken into account and gives weight to each element. [FN146]

***195** Yet only the very small number of decisions described above, involving refugee claims by lesbians, have applied such a gender analysis. It is clear that lesbians, even though they are women, have not consistently been viewed as subjects of the Guidelines.

3.2.2 *Gay men*

Over 180 **asylum** decisions involving gay men were examined for this article. The research conducted indicates that refugee claims brought by gay men are more numerous than those brought by lesbian women. [FN147] Just as with lesbians, gay men are victims of abuse because they do not conform to socially constructed gender roles. Shannon Minter explains the problem:

[...] many human rights abuses against gay and transgendered people are also deeply rooted in and expressed through socially imposed gender norms. Like lesbians, many gay and transgendered people are extremely vulnerable to sexual and physical assault in families and communities, with little or no access to meaningful protection from the state. [FN148]

Amnesty International, in a report on abuses of sexual minorities, confirms that gay men are often perceived as traitors, having defied masculine privilege by adopting roles viewed as feminine. [FN149] In fact, in a number of cases, it is obvious that gay men were targeted because they were perceived as having transgressed strict social norms governing the behaviour of women and men.

For example, in a patriarchal society like Mexico, gay men are held in contempt if they are 'effeminate'. [FN150] To a great extent, those who persecute gays perceive a direct connection between male **homosexuality** and femininity: '[t]hus homophobia is not only a fear of the idea of having sex with other men, but also a masculine fear of being considered or appearing in any way weak or feminine'. [FN151] In Saudi Arabia, courts have ***196** ruled in two reported cases that the accused were guilty of imitating women and dressing in women's clothing. [FN152]

This fear of 'male femininity' is reflected in the violence, sexual abuse, and harassment to which gay men are subjected. One claimant testified that police refused to protect him and his partner from a homophobic attack. The police officers allegedly said that they do not interfere in relations between 'husband and wife'. [FN153] In another Board decision, the following incident was reported: '[t]o further shame the claimant, chewing gum was stuck between the pages of his national identity booklet in such a way that when it was peeled off it left a mark which was intended to symbolize a vagina'. [FN154] Another claimant said he was transferred to an administrative unit made up almost entirely of women when military authorities discovered he was homosexual. [FN155]

Even some members of the Board seemed to have adopted the notion that gay men must surely display some 'femininity'. When denying a Bulgarian man's claim for **asylum**, the Board concluded that the claimant was not 'beaten repeatedly by skinheads on account of his **homosexuality**'. [FN156] In support of this conclusion, the Board members referred to the testimony of the claimant's lover: '[h]e is not effeminate. I love him. He looks very masculine'. [FN157] In another case, when the claimant's counsel asserted that her client would be obvious as a homosexual due to how he dresses and carries himself, the Board member disagreed, commenting that 'the claimant at his hearing presents as a very masculine, athletic man', and noted that in photographs 'the claimant is mainly bare-chested, revealing a very masculine, muscular body and in most of the photographs he has drag queens on either side of him with his being the dominant masculine figure in the photographs'. [FN158] In 2004, the Federal Court of Canada allowed an application for judicial review because the Board had erred in stating that 'it is surprising that the claimant did not have any problems with the authorities even though his appearance and his artistic and occupational activities over many years might have suggested a tendency or orientation other than heterosexual'. [FN159] *197 In a similar finding, the Federal Court held in a 2005 ruling that the Board's requirement that a claimant be effeminate in appearance or behaviour constituted a 'thoroughly discredited stereotype which should not have any bearing on the Board's judgment of the Applicant's credibility'. [FN160] Interestingly, it could be argued that viewing gay men as effeminate is an approach that takes into account gender; in reality, it reveals a prejudicial stereotype about gay men, and a narrow understanding of the construction of masculinity and femininity.

Because homosexuals are often perceived as having feminine characteristics and taking on feminine roles, it is not surprising that in the case of homosexuals, as is generally the case with women, sexual assault is a common form of persecution. In fact, a great number of gay claimants state they have been victims of sexual assault or rape. [FN161] To illustrate, reference can be made to a case that was decided in favour of a gay Argentinian. He explains that he was arrested and held at a police station. This is what happened to him:

A police officer put the claimant into a cell holding three large, drunk and dirty men. The officer told the men that they would not have to sleep alone that night but would have a 'girl' to play with. The claimant testified that the men touched him, asked him what he liked and ordered him to take off his clothes and dance for them. When the claimant refused, they hit him until he complied. The claimant was forced to perform fellatio on one man and another man raped him. [FN162]

In hearing the testimony of a gay man from Pakistan describing how he was raped by police officers, member of the Board Arthur Harnett underlines the effectiveness of rape as a method of persecution of gays:

Additionally, the claimant has been raped by the police which, in addition to providing a sexual gratification for his assailants, was a deliberate tactic used by Pakistan police to demean and degrade the claimant, a kind of soul-destroying weapon, which are tactics used by security authorities in many countries, including Pakistan. [FN163]

*198 Gay victims of violence can exhibit a variety of symptoms referred to as rape trauma syndrome, something generally associated with women victims of rape. A Chilean claimant exhibited this syndrome

after he was sodomized by a police officer and then forced to perform fellatio on another officer. [FN164] In his testimony, the claimant said that as a result of the sexual trauma, he felt '*sale, complexé, méprisé*'. [FN165] The panel concluded that his feelings were indicative of symptoms exhibited by rape victims: '*à l'avis du tribunal, le demandeur est victime de violence sexuelle. Lui aussi, comme dans le cas des femmes revendicatrices, peut présenter un ensemble de symptômes connus sous le nom de syndrome consécutif au traumatisme provoqué par le viol*'. [FN166] Another claimant, of Moroccan origin, had been the victim of abuse and torture at the hands of his father. In the reasons for its decision, the panel concluded that he suffered from a psychological syndrome similar to 'battered woman syndrome'. [FN167]

Gay claimants often testify about the family and social pressures that require them to conform to strict gender-based social roles. Some of the claimants had been forced into marriages of convenience, [FN168] and others claimed to have been pressured to have children. [FN169] One claimant said that he had no intention of living openly as a homosexual. If he were to do so, he would be neglecting his social and family duties, and he would be a great disgrace to his father. [FN170] A Polish claimant said he was unable to rent an apartment with a friend: '[i]t is impossible for someone like me to live under the same roof as his friend, or to lead an ordinary, regular life with him'. [FN171]

***199** It is clear from these examples that gay men are often vulnerable to persecution because they do not conform to socially accepted masculine behaviour and roles. In spite of the many accounts given by gay men that show the connection between sexual orientation and gender, the Board considered these claims to have been based exclusively on sexual orientation. The relevance of the conceptual framework of the Guidelines is never raised, and, as a result, the Board fails to take into account some of the key elements of claims made by gay men.

For example, while the Guidelines are silent on the issue, and no specific policy is in existence, the Board usually accommodates requests from counsel that hearings be conducted with all-female personnel when it is believed that this will allow a woman to present her claim more fully. [FN172] But when male victims of sexual abuse began requesting that female personnel be appointed to the hearing, the Board struggled with how to respond. [FN173]

In certain cases, it is the violation of strict social norms governing men's behaviour that shows how the gay claimant became a target of persecution. As Penelope Mathew states:

... it is only, or largely because a society prohibits certain behavior protected by human rights law that a particular social group of persons becomes identifiable -- the group whose common characteristic is the desire to engage in just that prohibited behavior (as in the case of 'sodomy statutes' that serve to identify and stigmatize gay men and lesbians as a particular social group). [FN174]

A case in point is the testimony given by a gay Iranian man, who said that living with his partner revealed his **homosexuality**. In this case, the panel was satisfied that his claim was warranted: '[w]e understand that the claimant lived with his companion for five years. It's plausible that after a certain length of time that such an arrangement would raise suspicion in their neighbourhood and that it would be reported to the authorities'. [FN175] In a similar case, a claimant from Grenada testified that after he moved in with his boyfriend, 'people started to put a mark on them, calling them names'. [FN176] Although an explicit gendered analysis is not contained in these reasons, the decision suggests a link between sexual orientation and gender. In fact, in the Iranian case, the members of the Board clearly concluded that it was the unusual situation of two men sharing an apartment that had attracted the attention of the persecutors.

***200** In another case, a claimant from Colombia testified that he was 'slightly effeminate'. [FN177] The Board member, in reaching a negative decision, concluded that the femininity of the claimant was 'not ap-

parent' to him. [FN178] This conclusion was reached without any analysis of the possible differences between the construction of femininity and masculinity in Colombian and Canadian cultures, which in turn may have explained why the claimant's femininity may not have been apparent to a Canadian decision-maker. Finally, in another negative decision, the Board concluded that since a Mexican claimant has testified that 'he was always careful not to publicly display his sexual orientation', this meant that 'he would not be considered to be effeminate (*afeminados*) or to be a cross-dresser', and he would not be particularly targeted. [FN179] The analytical leap made in this decision is questionable: the fact that a gay man avoids publicly displaying his sexual orientation may simply mean he is careful not to show affection in public or to frequent gay locations. Thus, the Board should not have considered the claimant's assertion to be a statement about the femininity or masculinity of his appearance or behaviour.

By failing to consider the Guidelines, and neglecting to link gendered social roles and sexual orientation, there is a real risk that Board members will continue to overlook the gendered aspects of the refugee claims of gay men.

3.2.3 Transgendered people [FN180]

Since 1992, at least seven transgendered claimants have raised their sexual identity as an issue before the Board. [FN181] Of these decisions, only one took the Guidelines into consideration. [FN182] Nevertheless, these claims clearly raise the issue of persecution based on gender.

In all traditional and patriarchal societies, in which non-conformity to clearly defined gender roles is not tolerated, people who identify as the opposite sex or who habitually wear the clothing or adopt the customs of the opposite sex have reason to fear persecution. As is evidenced by testimony presented before the Board, transgendered persons are directly affected by the disgust society feels toward those who cannot conform to the stereotypical roles for men and women:

***201** If they know about me, she [the claimant's mother] is the one they will blame because she did not do something to me. Because this disgrace is her disgrace, because I am her child. They would kill her, because what she brought to this world is a shame for the religion. [FN183]

You have appeared here today dressed as a woman and you allege that you enjoy doing so and do so most of the time except when you are at work [...] You allege that you became the target of the police as a result of coming across transvestites who were being beaten by the police in September 1997. You attempted to assist them and as a result ended up being detained, raped and beaten. You were subsequently targeted by the police for further abuse, a second rape and bribery as they had learned that you had a wife and son. [FN184]

[...] the panel found that there is a good possibility that the claimant, as a transsexual, would come to the attention of the Iranian authorities should he be returned to Iran. The documentary evidence is replete with evidence of how the restrictive Iranian regime views and represses any sexual expression which is contrary to its own standard. Such behaviour and expression is perceived by the authorities as being a defiant demonstration of political opposition to the current regime. [FN185]

[...] when they arrived at my home and saw me still wearing women's clothes they refused to assist me. They told me that they did not have the time to worry about Puto Maricons and also told me that I deserved what I got for spreading the AIDS virus. [FN186]

Transgendered people are indisputably perceived as a threat to gender and social norms: transgendered persons take on appearances and behaviours completely opposite to those generally expected by society.

Some Board members have difficulty distinguishing 'sexual orientation' from 'sexual identity', which may partially explain the lack of gender-specific analyses. [FN187] For example, a Lebanese claimant testified he was born a female but has dressed and acted like a male since childhood. [FN188] Furthermore, he has undergone a mastectomy and hormone treatments to change his biological sex. Members of the Board considered him to be transsexual, but they suggested that his case fell under 'sexual orientation': 'I find the claimant's evidence regarding the claimant's sexual orientation, as an FTM transsexual who has begun the process of gender *202 reassignment, to be credible'. [FN189] In fact, it is not the claimant's sexual orientation that was raised (he considered himself heterosexual) but rather his sexual identity, that is, the fact that he was in the process of changing his biological sex.

The lack of gender-specific analyses in the cases of transsexual claimants suggests, once again, that the conceptual framework of the Guidelines is not being applied in all instances where the Guidelines are relevant.

3.2.4 Intersection of gender, sexual orientation, and sexual identity

Not all claims for refugee status by members of sexual minorities raise gender-specific concerns. [FN190] In fact, a large number of claims by members of sexual minorities raise fears of persecution based solely on sexual orientation. **Homosexuality** is not only perceived as non-conformity to gender-specific roles but also as a mental disorder or an illness, [FN191] a foreign or Western phenomenon, [FN192] anti-revolutionary behaviour, [FN193] a crime against religion, [FN194] or sexually deviant, and immoral behaviour. [FN195] Furthermore, if the members of the Board do not systematically proceed with a gender-specific analysis of **asylum** claims made by members of sexual minorities, this does not rule out the possibility of the claimants being granted refugee status. Sexual orientation alone is a sufficient basis for a claim.

However, the absence of analytical links between gender, sexual orientation, and sexual identity in the Board's decisions may have an adverse affect on certain claimants, as Sharon Minter maintains with respect to the persecution of lesbians:

Gender alone, however, is no more able to account for the specific persecution lesbians confront than is sexual orientation alone. Gender and sexual orientation rarely function as independent bases of persecution. More typically, they intersect in ways that expose lesbians to unique vulnerabilities to persecution *as a distinct group of women* whose very existence is widely perceived to violate socially imposed gender norms. [FN196]

*203 While quantitative analysis of recent data suggests that 'sexual minority refugee claims are, on average, approximately as successful as traditional refugee claims', [FN197] a qualitative analysis suggests that adjudicators may have preconceptions about sexual minorities that may adversely affect individual claims. For instance, Millbank argues that: '[d]ecision makers are unable to see the other, the applicant and cannot receive stories from them in any real way. Decision-makers ... impose ... self onto other ...' [FN198] Thus the absence of analytical links to gender may contribute to decision-makers overlooking legitimate aspects of the stories of sexual minority claimants, resulting in some of the adverse findings in specific cases outlined in this section.

The importance of establishing a link between gender, sexual orientation and sexual identity is, it is suggested, evident. Persecution against sexual minorities is based on the same notions of patriarchy and misogyny as repression against women. It is, therefore, imperative that the intersection of gender and sexual orientation be established to reflect the reality, impact, and scope of persecution suffered by refugees. A gender analysis recognizing that the repression of women's rights is analogous to the repression of non-conformity to social and sexual roles will undoubtedly improve the protection refugee law offers to both women and

sexual minorities.

3.3 Gender-related persecution of men

The application of the Guidelines to **asylum** claims made by men was an issue in the 1993 case of a Sikh man who alleged that the Guidelines were discriminatory because they applied only to women. [FN199] Mabel Paetkau, a member of the Board, rejected his argument for the following reasons:

The title of the *Guidelines* refers to females and pertains to women. By title and content they also refer to 'gender-related' persecution. The word 'gender' applies to both sexes. No place in these *Guidelines* prohibits the decision maker from applying the same arguments in the case of a male claimant. The *Guidelines* identify concerns which are particular and more common to women. They were created to remind and sensitize decision makers to gender related concerns. There is no indication in the *Guidelines* that they cannot apply equally to male claimants. [FN200]

*204 It would, therefore, seem that the conceptual framework of the Guidelines is not limited to women but that it can be applied to gender-based claims made by men. However, as already seen in the case of gay men and transsexuals, a link is seldom, if ever, established between the Guidelines and claims specific to men.

In fact, the research for this study unveiled only one decision dealing explicitly with the Guidelines in a claim made by a man. In that case, a citizen of Trinidad and Tobago claimed to have been the victim of abuse by his spouse and her family. [FN201] He based his claim for **asylum** on gender, alleging he was a male victim of domestic violence. The members of the panel, while rejecting his claim, acknowledged that the Guidelines do state that female victims of domestic violence can fall under the definition of a Convention refugee. They add that it is logical to expect that the Guidelines could apply to men in such situations. However, in this particular case, the panel concluded that there was no evidence of gender bias against men in Trinidad and Tobago.

It is possible to conclude that the absence of gender-related claims by men is a result of the existing universal social context: most societies are to varying degrees patriarchal, thus, women are the main victims of gender-based persecution. While there is no doubt that gender-specific norms and roles overwhelmingly and disproportionately disadvantage women, men can also fear persecution for having transgressed social roles. In fact, Diane Otto suggests that 're-imagining men as injured by the hierarchies of gender' could be one way of disrupting the socially constructed hierarchies of gender. [FN202] In her view, human rights law, and I would argue refugee law, are limited to enumerating women's injuries and disadvantages without recognizing gender-specific injuries to men resulting from their male privilege. In this way, the law fails to challenge and disrupt gender hierarchies which currently favour masculinity and subordinate femininity. [FN203] Only if both women and men are seen as the victims of certain aspects of masculinity and femininity can the current deleterious constructions of gender be transformed.

For the purposes of this study, two situations in which male refugee claimants could potentially benefit from the gender-specific analysis of the *205 Guidelines have been identified: compulsory military service and crimes of honour.

3.3.1 Compulsory military service [FN204]

Many nations do not maintain military conscription during peacetime and, instead, rely on a volunteer or professional military. [FN205] But military service remains compulsory in many other States where mandat-

ory conscription is enforced with penalties ranging from imprisonment to the loss of citizenship rights. [FN206] The rights of 'conscientious objectors', that is, individuals who refuse to comply with compulsory military service 'for reasons of conscience or profound conviction', [FN207] are gradually being recognized in international law as a 'legitimate exercise of the right to freedom of thought, conscience and religion'. [FN208] Yet it is also true that many States still do not recognize the validity of individuals' objections to compulsory military service and will refuse to provide alternative service in addition to imposing penalties on conscientious objectors.

Compulsory military service has been raised in claims for refugee status for many years and can be presented in a variety of ways: the claimant may be a deserter, he may have refused to enlist, or he may know that he will soon be called to do military service but will refuse to go. [FN209] The **asylum** claim may be based on an absolute conscientious objection from an individual who is a true pacifist, or on a selective conscientious objection from an individual who objects to a particular military action. [FN210] The courts have established some very basic starting points for the analysis of claims made by conscientious objectors and deserters. In some cases, **asylum** may be granted to persons who refused to participate in military operations that *206 contravene international standards under international law [FN211] or who are conscientious objectors and were refused exemption from military service or appointment to a different type of service. [FN212] Furthermore, in order for persecution to exist, the punishment imposed for refusing to perform military service must be severe. [FN213]

As mentioned previously, in order to be granted **asylum**, a claimant must establish the link between the feared harm and one or more of the grounds enumerated within the definition of a Convention refugee. To date, decisions of the Board have not examined any gender-based aspects of the claims of conscientious objectors, choosing instead to link the claimants' fears to their political or religious beliefs. Yet, the vast majority of countries with compulsory military service impose this service only on men. [FN214]

There are no obvious reasons for limiting military service to men; history abounds with situations where women have taken up arms during armed conflict. But imposing this civic duty on men can be explained by the fact that policies on military service are often based on highly gendered and essentialist views of social roles: man is the warrior, protector of the weaker and more vulnerable members of society -- women and children. Human males are viewed 'as naturally aggressive, women, by contrast, are more peaceful, more cooperative'. [FN215] As Sandra Whitworth argues, 'soldiering thus becomes the natural activity of young males' [FN216] and, as soldiers, they receive 'messages about masculinity, about manliness, about race and about belonging'. [FN217] A young woman who resisted mandatory military service in Israel, where conscription is imposed on both men and women, argued that the military is a 'strongly patriarchal institution' and that men who spend 'a formative period of their lives in the military ... are likely to receive positive reinforcements for the use of brute power and violence'. [FN218]

Compulsory military service, as a highly gendered institution, greatly disadvantages men. Dianne Otto characterizes conscription into the *207 armed forces as the enforcement 'of forms of masculinity which many men find coercive and oppressive'. [FN219] In her analysis of international human rights law, Otto argues for a gendered analysis of the harm caused by conscription:

While human rights law provides a remedy for conscientious objectors, this does not extend to those who object to compulsory service as a form of gender injury. In fact, the discourses that support war have generally constructed objecting men as suffering the injury of gender; as too feminised ('wimpish' or 'gay') to be fighters. If human rights law could produce, instead, the militarised man as the injured subject, the gendered discourses that legitimate war as a means of muscular men protecting vulnerable women, or saving non-European women from backward men and cultures, would be seriously disrupted. [FN220]

The injury to the rights of forcibly conscripted men are wide-ranging. In addition to the physical and psychological danger inherent in participating in armed conflict, compulsory military service - whether during wartime or peacetime - implies forced labour, coercive detention, and limiting fundamental rights such as freedom of expression, conscience, and assembly. [FN221] Furthermore, a man who refuses to perform compulsory military service can be subject to, among other things, imprisonment. [FN222]

Subjecting men to forced conscription and labour, depriving them of basic rights for the duration of their service, and the link between this situation and their gender seems to provide the basis for an analysis similar to the one set out in the Guidelines. Although a claimant fleeing compulsory military service must also establish other elements of the definition of refugee, in particular, fear of persecution and absence of protection from the State, [FN223] the recognition of a link between military service and gender has the potential to elucidate a potentially key aspect of these claims. While feminists have long argued that militaries uphold traditional and rigid conceptions of masculinity and femininity, a gender-based analysis is absent in refugee determination decisions dealing with military service despite the existence of the Guidelines.

3.3.2 Crimes of 'Honour'

Whether called 'crimes of honour', 'crimes of passion' or even 'dowry deaths', these human rights violations are similar in motive and circumstances. Women, and some men, who challenge patriarchal, cultural and *208 traditional customs are assaulted, arrested or murdered to save the 'honour' of the family. While it is most often women who are considered to have dishonored their families by engaging in unacceptable relationships, reports by human rights organizations reveal that, in some countries, men are also victims of persecution for having consensual sexual relations with women or for marrying according to their will. Torhild Holth points out that in addition to homophobic persecution, which this study examined in the previous section, gender-persecution can also affect men when it comes to the right to marry:

It is important to point out that both **asylum** applications from both women and men can contain a gender aspect. For example, homosexual men can be persecuted because by their sexual orientation they can break with the traditional roles of the sexes. Both women and men who refuse to accept the family's choice of spouse can be persecuted because they break the social rules by refusing The gender aspect includes both the female and the male sex. [FN224]

In a number of countries, such as Pakistan, Jordan, Turkey and Brazil, women and men can face assault, confinement, imprisonment, forced marriage or even death for committing adultery, being involved in sexual relations outside marriage, or having entered into an unauthorized marriage contract. [FN225]

In Pakistan, since Islamic penal laws were enacted in 1979, adultery and sexual relations outside marriage are illegal and result in punishments such as stoning, flogging, or imprisonment. While all Pakistanis, regardless of their sex, suffer under the system, the laws are most severely applied to women. However, men are also victims of the penal laws, which are based on exclusive, rigid, and strict roles assigned to men and women in the society. Couples in sexual unions or marriages that are not approved by their families can suffer reprisals at the hands of family members. [FN226] A report by Amnesty International states that 'expressing a desire to choose a spouse and marrying a partner of one's choice are seen as major acts of defiance *209 in a society where most marriages are arranged by fathers'. [FN227] Such behaviour is considered 'to damage the honour of the man who negotiates the marriage and who can expect a bride price in return for handing her over to a spouse'. [FN228]

For example, it was reported in 2004 that a Pakistani man shot and killed his sister and a male villager after accusing them of adultery. [FN229] Amnesty International reported that, in Pakistan, a father killed his daughter and the man with whom she was suspected of having a romantic relationship. [FN230] In another

case in Pakistan, the marriage of an adolescent against her family's will had disastrous consequences for the young woman's husband. [FN231] Following riots in Karachi sparked by the marriage, the spouse was charged with kidnapping. During his trial he was shot and seriously injured. In addition, he and his family received numerous death threats. [FN232] In 1986, a man accused his wife of having unlawful sexual relations with a family friend. [FN233] The courts sentenced the two to 10 years in prison and 30 lashes. [FN234] In another well-known case, a Pakistani man and woman were sentenced to 100 lashes and to death by stoning for their unlawful sexual relations. [FN235] In 2005, when Khalid Aman convinced his wife, Dr Shazia Khalid, to report her brutal rape to the police, he had to stand up to his own grandfather who declared that Dr Khalid must be killed to erase the stain on the family honour caused by the sexual assault. [FN236] The family's patriarch began gathering a mob to murder Khalid's wife and the couple was forced to flee to the United Kingdom where they sought refugee status. [FN237]

In all these cases, the heterosexual couples opposed Pakistan's patriarchal system by defying the country's traditions, customs, and laws. The *210 men refused to obey social mores and defied social roles that deprived them of a fundamental right, that is, the right to make choices about marriage and family life, free from restrictions. For example, by defying the choice made for a daughter by her father, a couple is defying the power of men and, in particular, the patriarchs, to make decisions on the most intimate aspects of men's and women's lives.

The Board, taking into account the excessively severe penalties and sentences for these types of offences, has already granted refugee status to a number of claimants because the women feared the consequences of being accused of adultery. [FN238] And, given the gender-specific factors of such claims, gender was recognized as the basis for the women's fear of persecution. However, this same gender-specific analysis does not seem to have been made in the case of male claimants. [FN239] For instance, a married couple from Bangladesh experienced, among other things, a situation where the woman's ex-husband accused her of adultery, an offence that is punished severely in their country. Referring to the Guidelines, the members of the Board recognized that the claimant was fleeing gender-based persecution. [FN240] In the case of her spouse, his claim was accepted not because he had defied patriarchal customs, but because of his position as a member of the claimant's family.

In conclusion, if some men fear persecution in their country of origin after having been victims of serious gendered acts, or because they violated certain customs, laws, or religious practices discriminatory to men and women, an analysis based on the Guidelines should be relevant. [FN241] Yet, as seen, the Guidelines do not seem to form the basis for this type of analysis or to lead to conclusions of gender-based persecution, whether the cases involve sexual minorities or men in other situations.

3.4 A new direction

Although a leader for a number of years, the Board now has some catching up to do with respect to gender-related persecution. Guidelines that are truly responsive to gender-related persecution must clearly reflect all the ways in which the gendered social hierarchies injure women and men. The concept of gender-related persecution, as it is currently defined in the Guidelines, must be revised in favour of the adoption of a more clearly social constructionist interpretation of the notion of 'gender'.

*211 First, the Guidelines must include a broader definition of 'gender', one that is not constrained by biological notions of sex. Audrey Macklin notes that during her tenure at the Board, members had difficulty identifying gender-related claims as there was 'no consensus on what constituted a gender-claim'. [FN242] For instance, it was unclear if it included 'situations in which men were persecuted in gender-specific ways'. [FN243] This confusion can be resolved by amending the Guidelines to make it clear that 'gender' refers not

to women, but to socially constructed roles to which both men and women are required to conform in a given society. The 2002 UNHCR Guidelines on Gender-Related Persecution explicitly adopt this approach:

Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time. [FN244]

A similar approach is taken by the National Consortium on Refugee Affairs, a South African non-governmental organization active in refugee law. In its guidelines relating to **asylum** and gender-based persecution, 'gender' as a social category is defined as follows:

Gender refers to the social construction of power relations between women and men, and the implications these relations hold for the identity, status, roles and responsibilities of women (and men). Gender is fundamentally concerned with the inequalities of power within all spheres of society. [FN245]

Certainly the hierarchy of power relations between men and women systematically places females in secondary and subordinating roles. The UNHCR, while advocating for a social constructionist interpretation of 'gender', recognizes that while 'gender-related claims may be brought by either women or men', particular types of persecution will mean that these claims are 'more commonly brought by women'. [FN246] On the other hand, clearly defining 'gender' as a socially constructed concept will reveal the gender-specific factors that interfere with the rights of certain men and contribute more effectively to making the links between gender and other causes of persecution, like sexual orientation, more visible. [FN247]

*212 This social constructionist approach explains why the United Nations High Commissioner for Refugees does not believe that an analysis based on gender must be limited solely to the needs of women as a biological group:

[...] it should be noted that UNHCR recognizes that 'gender' is not synonymous with addressing the needs of one particular segment of the population, such as women. Nor is it about setting up discrete projects for women. Gender affects girls and boys, women and men, elderly women and men as well as disabled women and men. [FN248]

The United Kingdom's guidelines at the appellate level are just as explicit on this issue: 'In these guidelines, the terms 'woman', 'women', 'she' and 'her' apply equally to men'. [FN249] The policy of the UK's Home Office is also clear that gender-related issues can be relevant in claims brought both by women and men:

Gender-related claims may be brought by either women or men, but are more commonly brought by women. Many gender-related issues only affect women **asylum** seekers but there are some aspects of this guidance (for example, on sexual orientation and social norms) which will affect men. [FN250]

It is also worth highlighting the broad provision in the Convention on the Elimination of All Forms of Discrimination Against Women, which states that the stereotyped social roles of women and men must be changed:

Article 5

States Parties shall take all appropriate measures:

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; [...]. [FN251]

Finally, Ireland's Refugee Act, enacted by Parliament in 1996, recognizes gender - whether male or female - as a basis for defining a social group. [FN252]

***213** Furthermore, numerous developments in the area of refugee law support the argument that the intersection of gender and sexual orientation must be an integral part of any gender-specific analysis under the Guidelines. The UNHCR, when enumerating situations which have typically constituted gender-related claims, includes 'discrimination against homosexuals'. [FN253] The UNHCR gender guidelines recognize that 'the refugee definition has traditionally been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognized'. [FN254] To counter this neglect, the UNHCR gender guidelines affirm that 'refugee claims based on differing sexual orientation contain a gender element'. [FN255] The UNHCR explains:

[a] claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse or severe or cumulative discrimination. [FN256]

Non-governmental organizations like Amnesty International also describe the persecution of sexual minorities as gender-based violence:

Defiance of the 'heterosexual norm' can provoke moral condemnation, exclusion and violence, including torture. In this sense, violence against [lesbian, gay, bisexual and transgendered] people is gender-based violence, inflicted on those who challenge or fail to conform to traditionally defined gender roles. [FN257]

The United Kingdom's gender guidelines explicitly mention homosexuals, thus also forging a link between sexual orientation and gender:

Social and cultural norms regarding appropriate gender roles and behaviour may mean that homosexuals face violations of their human rights and suffer persecution. [...] Social, cultural and other restrictions which oblige homosexuals to marry persons of the opposite sex may violate the right to marry only with full and free consent and the right to respect for private life. [FN258]

It therefore seems relevant that the Canadian Guidelines explicitly reflect the link between gender and sexual orientation within the refugee determination process. The current Guidelines should follow the UNHCR's lead by explicitly acknowledging the gender dimensions of many claims based on sexual orientation. Without clearer directives on the ***214** issue, Canadian decision-makers are likely to continue to overlook the gender aspect of the persecution of sexual minorities.

The changes suggested in this article conform to principles now recognized by the United Nations High Commissioner for Refugees, and in several jurisdictions around the world. Having once been the leader in the area of gender-based persecution, the Canadian Immigration and Refugee Board now faces the challenge of expanding its gender analysis in order to avoid falling further behind.

4. Conclusion

This article demonstrates that the Board does not adequately take gender-related persecution into ac-

count in all relevant cases. The analytical weaknesses of the Guidelines are due in part to a blurry distinction between biological sex and the notion of gender as a social reality. The Canadian Guidelines are based mainly on the need to integrate female victims of persecution into the refugee determination process and much less on the need to systematically integrate a gender-specific analytical framework into the decisions of the Board, a step that could benefit all victims of gender-related persecution. Indeed, this study has identified situations where refugee women and men could have gained from a more in-depth gender-specific analysis.

The Guidelines must continue to recognize that women are more often faced with difficulties related to gender-specific factors in their claims for **asylum**. This continues to be as valid as ever and should not be underestimated. However, as was maintained throughout this article, it is now time to re-evaluate the approach to gender-specific persecution in the Guidelines. Although considerable progress has been made in improving the situation of women refugees, gender-related persecution is a complex problem, the dimensions of which are not clearly reflected in the Guidelines. The current approach must be re-examined and a more sophisticated analysis of gender must be adopted, one that will reflect the reality of gender-based persecution and, ultimately, provide a better guarantee of protection for all refugees.

[FN1]. Associate Professor, Faculty of Law, University of Ottawa. This is a translated, revised and updated version of a French language article the author previously published: see Nicole LaViolette, 'Les revendications du statut de réfugié fondées sur le sexe: constats et orientations nouvelles' (2001) 13:2 *Canadian Journal of Women and the Law/Revue Femmes et Droit* 285. The author is grateful to Kim Nesbitt for her translation of the French article into English. The author also wishes to thank Frederico Pasquarelli for his contributions as research assistant; Hilary Young for editing the text; and the *IJRL*'s anonymous reviewer for providing helpful feedback. The author gratefully acknowledges the support of the Social Sciences and Humanities Research Council and the Law Foundation of Ontario.

[FN1]. *P. (F.V.)(Re)*, [1991] CRDD No. 1096 (QL).

[FN2]. *Ibid.*

[FN3]. Jacquie Miller, 'The Nature of Persecution: Refugee Laws Unclear in Case of Saudi Woman Protest-ing Restrictions', *The Ottawa Citizen*, 4 Sept. 1992, A2.

[FN4]. *P. (F.V.) (Re)*, n. 1 above.

[FN5]. As a result of the outcry by feminist non-governmental organizations and human rights organizations, Nada was given permission to stay in Canada in Jan. 1993. See Jacquie Miller, 'Feminist Refugee Can Stay', *The Ottawa Citizen*, 30 Jan. 1993, A1 and A2; 'Canada Broadens Refugee Claims', *The Globe and Mail*, 30 Jan. 1993, A6.

[FN6]. Canadian Immigration and Refugee Board, *Women Refugee Claimants Fearing Gender-Related Persecution* (Guidelines issued by the Chairperson of the Board in accordance with subsection 65(3) of the Immigration Act) (Ottawa: 9 Mar. 1993); *Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Updated version of the Guidelines issued by the Chairperson of the Board in accordance with subsection 65(3) of the Immigration Act) (Ottawa: 25 Nov. 1996) [Guidelines].

[FN7]. [1993] 2 SCR 689 [*Ward*].

[FN8]. Guidelines, n. 6 above.

[FN9]. 28 July 1951, 189 UNTS 150 (entered into force 22 Apr. 1954) [Convention]. See also Protocol Relating to the Status of Refugees, 31 Jan. 1967, 606 UNTS 267 (entered into force 4 Oct. 1967).

[FN10]. S.C. 2001, c.27. The definition of a 'Convention refugee' is as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

[FN11]. Presently, neither the Immigration and Refugee Protection Act nor the Convention cites 'gender' among grounds of persecution.

[FN12]. In *Rajudeen v. Canada (MEI)*, (1984), 55 NR 129, at 133-4 (FCA), the Federal Court of Appeal defined persecution as follows: '[t]o harass or afflict with repeated acts of cruelty or annoyance [...] to afflict or punish because of particular opinions [...] a particular course or period of systematic infliction of punishment [...]'. Case law recognizes torture, rape, arbitrary arrest and detention, assault, and repeated harassment as forms of persecution. See especially *Chan v. Canada (MEI)*, (1993), 20 Imm. LR (2d) 181 at 208, [1993] 3 FC 675, 156 NR 279 (FCA), aff'd on other grounds (1995), 128 DLR (4th) 213. See also *Thirunavukkarasu v. Canada (MEI)*, (1993), 109 D.L.R. (4th) 682 (FCA); *Surujpal v. Canada (MEI)*, (1985), 60 NR 73 (FCA).

[FN13]. *Ward*, n. 7 above, at 709. The agents of persecution can be higher authorities of the state as well as subordinates or persons not attached to the government. According to *Ward*, it must be shown that the state is tolerating the persecution by non-state agents or is incapable of protecting the individual who is the target of the persecution. See *Ward*, n. 7 above, at 709, 713, 717, 720, 721, LaForest J.

[FN14]. See Anders B. Johnsson, 'The International Protection of Women Refugees - A Summary of Principal Problems and Issues', 1 *IJRL* 221 (1989), at 223. See also Jacqueline Greatbatch, 'The Gender Difference: Feminist Critiques of Refugee Discourse', 1 *IJRL* 518 (1989), at 525.

[FN15]. Switzerland, *Bureau federal de l'égalité entre femmes et hommes, Les femmes victimes de persécutions et la notion de réfugié*, (Berne: 1992), at 4. See also Felicite Stairs & Lori Pope, 'No Place Like Home: Assaulted Migrant Women's Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds' (1990) 6 *J. L. & Soc. Pol'y* 148, at 163.

[FN16]. *P.(F.V.) (Re)*, n. 1 above.

[FN17]. Kristina Folkelius & Gregor Noll, 'Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act', 10 *IJRL* 607 (1998), at 611, citing Thomas Spijkerboer.

[FN18]. Stairs and Pope, n. 15 above, at 163. See also Rebecca M. Wallace, 'Men, Their Rights and Nothing More; Women, Their Rights and Nothing Less' (1994) 58 *Sask. L. Rev.* 217 at 219; Krista Daley, 'Gender and Sexuality in Canadian Immigration and Refugee Law' in *L'influence du droit international sur la pratique du droit du Canada: Travaux du 27^e Congrès du Conseil canadien de droit international* (The Hague: Kluwer Law International, 1999), at 73-4.

[FN19]. UNHCR Executive Committee, Conclusion No. 39 (XXXVI), 'Refugee Women and International Protection', 1985.

[FN20]. UNHCR, 'Guidelines on the Protection of Refugee Women', UN doc. EC/SCP/67 (22 July 1991). For the most recent version of the UNHCR Guidelines, see: UNHCR, *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*, UN doc. HCR/GIP/02/01 (7 May 2002) [2002 UNHCR Guidelines].

[FN21]. Nurjehan Mawani, 'Violations of the Rights of Women in the Refugee Context' (1994) 5 *NJCL* 61, at 66; Judith Ramirez, 'The Canadian Guidelines On Women Refugee Claimants Fearing Gender-Related Persecution' (1994) 14:7 *Refugee* 3, at 3; Audrey Macklin, 'A Comparative Analysis of the Canadian, US and Australian Directives on Gender Persecution and Refugee Status' in Doreen Indra (ed.), *Engendering Forced Migration* (Providence: Berghahn Books, 1999), 272, at 275 ['A Comparative Analysis'].

[FN22]. Ramirez, *ibid.*, at 3.

[FN23]. *Ward*, n. 7 above.

[FN24]. The three categories are: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence. *Ibid.*, at 739.

[FN25]. *Ibid.*

[FN26]. For an analysis of *Ward*, see Audrey Macklin, '*Canada (Attorney-General) v. Ward*: A Review Essay', 6 *IJRL* 362 (1994).

[FN27]. The following articles reported on the case of Nada: '*La persécution contre les femmes devrait-elle être prise en compte pour le statut de réfugié?*', *La Presse* [Montreal], 25 Jan. 1993, A4; Linda Hossie, 'For Women, Oppression is Often a Way of Life', *The Globe and Mail*, 5 Feb. 1993, A15; Estanislao Oziewicz, 'Why a Change of Heart Does Not Change Policy', *The Globe and Mail*, 5 Feb. 1993, A7; 'Just to Be a Human Being', *The Ottawa Citizen*, 4 Sept. 1992, A1; Jacquie Miller, 'Fleeing Persecution: Two Women's Cases at the Heart of the Debate', *The Ottawa Citizen*, 30 Jan. 1993, A2; Jacquie Miller, 'Minister won't help Saudi 'feminist refugee'', *The Ottawa Citizen*, 9 Sept. 1993, A1. The following reports refer to the situation of women refugee victims of spousal abuse and the efforts made by different groups in support of their cause: Bob Cox, 'Battered Refugee', *Le fil de presse de La Presse canadienne*, 16 Sept. 1992; Bob Cox, 'Women Refugees', *Le fil de presse de La Presse canadienne*, 17 Sept. 1992; Janet Bagnall, 'They can't stay: Abused Women Refused Refuge in Canada', *The Gazette* [Montreal], 20 Oct. 1992, A3; Estanislao Oziewicz, 'No Plan to Accept Victims of Sex Bias', *The Globe and Mail*, 16 Jan. 1993, A6; Michelle Landsberg, 'To Valcourt, Raped, Beaten Women Aren't Refugees', *The Toronto Star*, 19 Jan. 1993, C1; David Scanlan, 'Consider Gender', *The Gazette* [Montreal], 25 Jan. 1993, C1; Tim Harper, 'Groups Plead Cause of Female Refugees', *The Toronto Star*, 3 Feb. 1993, A10; Janet Bagnall, 'NAC Will Air Conjugal-Violence Cases in Bid to Stop Deportation of Women', *The Gazette* [Montreal], 25 Feb. 1993, A4; Isabelle Paré, '*En instance de déportation, Maria vit un cauchemar*', *Le Devoir* [Montreal], 5 Mar. 1993, A2; Richard Héту, '*Moratoire demandé sur l'expulsion de femmes victimes de violence conjugale dans leur pays*', *La Presse* [Montreal], 5 Mar. 1993, A4; Allan Thompson, 'Woman Forced to Leave Six Children in Canada', *The Toronto Star*, 9 Jan. 1993, A5.

[FN28]. In 1993, the National Action Committee on the Status of Women (NAC) exposed the case of 14 refugee claimants faced with deportation who feared they would be victims of spousal abuse once they returned to their countries. NAC asked the government to declare a moratorium on the deportation of women who would face abusive situations in countries where the government would not or could not protect them:

Rebick: Ottawa ne doit plus déporter de femmes menacées de persécution, *La Presse* [Montreal], 3 Feb. 1993, A8.

[FN29]. David Scanlan, 'Woman Wins Deportation Fight', *The Calgary Herald*, 30 Jan. 1993, A1.

[FN30]. Peggy Curran, 'Is Sexual Equality a Universal Value?', *The Gazette* [Montreal], 15 Feb. 1993, C1.

[FN31]. Guidelines, n. 6 above. The Chairperson's authority to issue the Guidelines to assist Board members is provided for in the Immigration and Refugee Protection Act, n. 10 above, at subsection 159(1)(h).

[FN32]. Guidelines, n. 6 above. For a discussion of the omissions that led to a revision of the Guidelines in 1996, see Valerie Oosterveld, 'The Canadian Guidelines on Gender-Related Persecution: An Evaluation', 8 *IJRL* 569 (1996) ['Canadian Guidelines']. See also Canada, *Minutes of Proceedings of the Standing Committee on Citizenship and Immigration* (Ottawa: Queen's Printer, June 1995).

[FN33]. Valerie Oosterveld, 'Refugee Status for Female Circumcision Fugitives: Building a Canadian Precedent' (1993) 51(2) *U.T. Fac. L. Rev.* 277, at 287.

[FN34]. Guidelines, n. 6 above, at 1.

[FN35]. '(1) Women who fear persecution on the same Convention grounds, and in similar circumstances, as men [...] (2) Women who fear persecution solely for reasons pertaining to kinship, i.e., because of the status, activities or views of their spouses, parents, and siblings, or other family members [...] (3) Women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons [...] (4) Women who fear persecution as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin [...]'. *Ibid.*, at 4-5.

[FN36]. *Ibid.*, at 3.

[FN37]. *Ibid.*, at 6.

[FN38]. *Ibid.*, at 7.

[FN39]. With a reference to *Ward*, the Guidelines define the basis of women as a social group as follows: '[g]ender is an innate characteristic and, therefore, women may form a particular social group within the Convention refugee definition'. Other innate or unchangeable characteristics, such as age, race, and marital status, may also serve to identify sub-groups of women. *Ibid.*, at 11.

[FN40]. *Ibid.*, at 13.

[FN41]. 18 Dec. 1979, 1249 UNTS 455 (entered into force 3 Sept. 1981).

[FN42]. GA Res. 48/104, UN GAOR, 48th Sess., UN Doc. A/RES/48/104 (1994).

[FN43]. Guidelines, n. 6 above, at 16.

[FN44]. *Ibid.*, at 18.

[FN45]. *Ibid.*

[FN46]. *Ibid.*, at 19. It is appropriate that Board members be understanding toward claimants who exhibit

patterns of symptoms known as Rape Trauma Syndrome or Battered Woman Syndrome.

[FN47]. In such cases, the members must specify in their reasons why they departed from the Guidelines. Audrey Macklin suggests that this procedure encourages Board members to take the Guidelines seriously: Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 *HRQ* 213, at 221 ['Imperative']. She also concludes that 'few IRB members explicitly reject the Guidelines in their decisions': 'A Comparative Analysis', n. 21 above, at 278. In *Narvaez v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 FC 55 at 62 (TD), the Court reiterated, '[the Guidelines] while not law, are authorized by Immigration Act, subsection 65(3), and are intended to be followed unless circumstances are such that a different analysis is appropriate'.

[FN48]. 'Canadian Guidelines', n. 32 above, at 582. Oosterveld also discusses the concerns refugee advocates had about the non-binding nature of the Guidelines when they were first introduced: *Ibid.*, at 580-3.

[FN49]. Dorothy Q. Thomas, Director of the Women's Rights Project of Human Rights Watch, describes the developments in Canada as follows: 'Canada may be leading the world in finally realizing that women suffer violations on the basis of their sex and that the well-founded fear of those violations constitutes grounds for **asylum**'. Cited in Todd Stewart Schenk, 'A Proposal to Improve the Treatment of Women in **Asylum** Law: Adding a "Gender" Category to the International Definition of "Refugee"' (1994) 2 *Ind. J. Global Legal Stud.* 301, at 333.

[FN50]. Ramirez, n. 21 above, at 3.

[FN51]. The US directives explicitly acknowledge the influence of the Canadian Guidelines: Immigration and Naturalization Service, *Gender Guidelines -- Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, 7 *IJRL* 700 (1995), at 702. New rules relating to, among other things, spousal abuse were proposed in the United States: US, *Asylum and Withholding Definitions*, 65 *Fed. Reg.* 76588 (2000) (to be codified at 8 C.F.R. § 208).

[FN52]. Austl., Commonwealth, Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants -- Guidelines on Gender Issues for Decision-Makers* (July 1996), Special Issue *IJRL* (1997) 195.

[FN53]. Nathalia Berkowitz & Catriona Jarvis, *Asylum Gender Guidelines* (United Kingdom: Immigration Appellate Authority, 2000) [**Asylum** Gender Guidelines]. In Mar. 2004, the Home Office elaborated policy guidelines on gender issues for its caseworkers: Immigration and Nationality Directorate, *Asylum policy Instructions: Gender Issues in the Asylum Claim*. (Home Office: London, Mar. 2004), online: Home Office 'Asylum Policy Instructions -- Gender Issues in the Asylum Claim' [Home Office Guidelines].

[FN54]. Norway refugee policy states that gender-based persecution may constitute persecution: State Secretary Kristin <<EmptySet>>men Johnsen, *The New Draft Regulation in Norway*, UNCHR Workshop, Oslo Plaza (18 June 2002), online: Kommunal-OG Regionaldepartementet <http://odin.dep.no/odinarkiv/norsk/krd/2002/eng/016081-090022/dok-bu.html>.

[FN55]. Canadian Council for Refugees, *Comments on the Occasion of the Tenth Anniversary of the Immigration and Refugee Board Gender Guidelines* (Mar. 2003), online: CCR <http://www.web.net/ccr/gendergcom.htm>.

[FN56]. 'A Comparative Analysis', n. 21 above, at 302.

[FN57]. Sherene Razack says: '[t]hat women can now seek **asylum** from gender-related persecution is per-

haps one of the most remarkable achievements in Canadian legal history in this century'. See 'Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender' (1995) 8 *Revue Femmes et Droit* 45, at 47. Melanie Randall, on the other hand, is of the view that the Guidelines do have some shortcomings: (2002) 25 *Harv. Women's L.J.* 281.

[FN58]. Margaret Young, *Gender-related Refugee Claims* (Ottawa: Library of Parliament, 1994), at 14. See also 'Imperative', n. 47 above, at 275.

[FN59]. Julie-Marie Campbell, *Reflections on the Canadian Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (Master of Laws Thesis, York University, 1997) [not published].

[FN60]. Immigration and Refugee Board, Refugee Protection Division, 'Refugee Claimants Fearing Gender-Related Persecution' (Ottawa, Mar. 2003).

[FN61]. For cases of forced abortions, see *Lai v. Canada (MEI)*, [1994] FCJ. No. 754 (TD) (QL); V95-02063 (22 Apr. 1997) (CRDD); VA0-00592 (21 June 2000) (CRDD).

[FN62]. *P. (K.W.) (Re)*, [1993] CRDD No. 41 (QL).

[FN63]. *Vidhani v. Canada (M.C.I.)*, [1995] 3 FC 60 (TD).

[FN64]. For cases of spousal violence, see *Narvaez*, n. 47 above. See also *Diluna v. Canada (MEI)*, [1995] FCJ. No. 399 (TD) (QL); *P. (H.I.) (Re)*, [1995] CRDD No. 24 (QL); *Q.Y.O.(Re)*, [1998] CRDD No. 81 (QL); MA0-03034 (18 Oct. 2000) (CRDD); MA1-03752 *et al.*, (4 Jan. 2002) (CRDD); TA0-06676 *et al.*, (4 Mar. 2002) (CRDD). In T97-06758 *et al.*, (3 Feb. 1999) (CRDD), a claimant feared persecution as a consequence of a forced betrothal at the age of 10. See also T99-07761 (27 Sept. 2000) (CRDD); T99-09887 (17 May 2000) (CRDD).

[FN65]. See, e.g., *Annan v. Canada (M.C.I.)*, [1995] 3 FC 25 (TD); *Sanno v. Canada (M.C.I.)*, [1996] FCJ. No. 566 (TD) (QL); *X.J.V.(Re)*, [1996] CRDD No. 15 (QL); MA1-00356 *et al.*, (18 Dec. 2001) (CRDD); MA1-07929 (13 Mar. 2002) (CRDD).

[FN66]. This is true whether the victim is male or female: *Chan v. Canada (MEI)*, [1995] 3 SCR 593; *Ch-eung v. Canada (MEI)*, [1993] 2 FC 314 (FCA); CRDD V99-03499 (15 Feb. 2002).

[FN67]. A young Pakistani rape victim who became pregnant as a result, obtained refugee status in Dec. 1993. Board members recognized the well-founded fear she had of her father, who may have killed her to save the family honour: *Y. (M.J.)(Re)*, [1993] CRDD No. 339 (QL). An Iranian claimant feared abuse for having refused to give up custody of her child at the request of the boy's grandfather, in keeping with Iranian laws: *A.I.P.(Re)*, [1999] CRDD No. 102 (QL). A divorced woman of Libyan origin risked losing custody of her son because of laws that were discriminatory against women. She was granted refugee status for this reason: *L. (H.X.)(Re)*, [1993] CRDD No. 259 (QL). A Tanzanian woman opposed polygamy and female circumcision, and obtained **asylum** in part because of her views in favour of women's rights: M93-08606 (12 May 1996) (CRDD). A Syrian woman who married someone of whom her family disapproved and who met privately with a man who was not a family member was found to have a well-founded fear of persecution: T93-11934 (5 July 1994) (CRDD).

[FN68]. See, e.g., *Fathi-Rad v. Canada (SEC)*, (1994), 77 F.T.R. 41. See also *H.F.U.(Re)*, [1996] CRDD No. 40 (QL); V96-02102 *et al.*, (28 May 1999) (CRDD).

[FN69]. See U95-04832 (16 Aug. 1996) (CRDD); T99-09129 (13 Mar. 2001) (CRDD); T98-05792 (29 Nov. 1999) (CRDD); U97-03981 (2 Dec. 1998) (CRDD).

[FN70]. U92-08151 *et al.*, (2 Sept. 1993) (CRDD).

[FN71]. Folkelius & Noll, n. 17 above, at 610; Sari Kouvo, 'Gender Mainstreaming and International Human Rights' in Doris Buss & Ambreena Manji (eds.), *International Law: Modern Feminists Approaches* (Portland, Oregon: Hart, 2005) 237, at 245.

[FN72]. *Ibid.*

[FN73]. Julia Epstein & Kristina Straub (eds.), *Body Guards: The Cultural Politics of Gender Ambiguity* (New York: Routledge, 1991), at 3.

[FN74]. Sylvia Law, '**Homosexuality** and the Social Meaning of Gender' (1988) 2 *Wis. L. Rev.* 187 at 208.

[FN75]. Torhild Holth, *Implementation of a Gender Perspective in Norwegian Refugee Law* (Oslo: Institutt for offentlig rett, Universitetet i Oslo: Unipub, 2004), at 6.

[FN76]. Kouvo, n. 71 above, at 247.

[FN77]. Pamela Foster, 'The Gender Guidelines: From the Margins to the Centre?' (1999) 19 *Canadian Woman Studies* 45, at 48. It is, however, necessary to point out that the distinction between the biological notion and the social notion is much more complex than it would first seem, because it presumes that everyone belongs to one of the two biological categories from birth. See generally Judith Butler, *Gender Trouble; Feminism and the Subversion of Identity* (New York: Routledge, 1990). For example, transsexual people often feel there is a conflict between their biological sex and their psychological sex. See, e.g., Patience W. Crozier, '[Forcing Boys to Be Boys: The Persecution of Gender Non-Conforming Youth](#)' (2001) 21 *B.C. Third World L.J.* 123. In addition, the distinction presupposes certain fixed cultural norms tied to gender to which men and women should conform. Yet, relations between men and women and social differences related to gender are historically, geographically, and culturally distinct -- which indicates that what it means to be a woman or a man changes depending on the times and location. See Victoria Foote, 'Refugee Women as a Particular Social Group: A Reconsideration' (1994) 14:7 *Refuge* 8, at 11. Furthermore, other factors have an impact on gender relations, such as race, age, social class, religion, and physical and mental capacity. See Razack, n. 57 above, at 87.

[FN78]. Cited in Schenk, n. 49 above, at 338.

[FN79]. In '[Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective](#)' (1997) 60 *Alb. L. Rev.* 989 at 1006, James D. Wilets says: '[g]endered violence is frequently the consequence of perceived threats to a male dominated societal system by groups that do not conform to the norms appropriate for the continuation of such a system'.

[FN80]. *Ibid.*, at 997.

[FN81]. Challenges faced by refugee women are broken down into two groups. The first is procedural, giving rise to issues such as how to make it easier for women rape victims to give testimony. See Ninette Kelley, 'Report on the International Consultation on Refugee Women: Geneva, 15-19 Nov. 1988, with particular reference to protection problems', 1 *IJRL* 234 (1989), at 235. See also Johnsson, n. 14 above, at 49. The second group of challenges relates to the substantive definition of a Convention refugee and involves the extent to which the definition is able to capture the experiences of female victims of persecution.

[FN82]. Marian Kennady, '[Gender-Related Persecution and the Adjudication of Asylum Claims: Is a Sixth Category Needed?](#)' (1998) 12 *Fla. J. Int'l L.* 317, at 320.

[FN83]. Solange Marion, *Un objectif de reconnaissance pour la femme réfugiée* (Ottawa: National Association of Women and the Law, 1991), at 20.

[FN84]. Kennady, n. 82 above, at 336.

[FN85]. Foster, n. 77 above, at 45-50. See also Foote, n. 77 above, at 9.

[FN86]. Jacqueline Castel, 'Rape, Sexual Assault and the Meaning of Persecution', 4 *IJRL* 39 (1992), at 40, 47.

[FN87]. Rebecca M. Wallace, 'Making the Refugee Convention Gender Sensitive: The Canadian Guidelines' (1996) 45 *Int'l & Comp. L.Q.* 702.

[FN88]. Nurjehan Mawani, 'Violations of the Rights of Women in the Refugee Context' (1994) 5 *NJCL* 61, at 62, n. 1.

[FN89]. Law, n. 74 above, at 209: 'The social significance of gender is fabricated to systematically favour men'.

[FN90]. Margareth Etienne, 'Addressing Gender-Based Violence in an International Context' (1995) 18 *Harv. Women's L.J.* 139, at 165.

[FN91]. 'Canadian Guidelines', n. 32 above, at 581: 'The IRB Chairperson has directed that written reasons be provided on all decisions under the Guidelines'.

[FN92]. The expression 'sexual minority' refers to people whose minority status is a result of either their sexual and emotional activities with partners of the same sex, or their refusal to conform to social roles tied to their biological sex at birth. Thus, the notion of sexual minorities regroups gays, lesbians, bisexuals, and transgendered people -- which includes transsexuals and transvestites.

[FN93]. See Amnesty International, *Human Rights and Sexual Orientation and Gender Identity* (30 Mar. 2004), online: Amnesty International <http://www.amnestyusa.org/outfront/document.do?id=9F25DB548B5696C680256E5C00688E96>; *Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity* (London: Amnesty International Publications, 2001).

[FN94]. For an analysis of sexual orientation and the refugee determination process, see generally Nicole LaViolette, 'The Immutable Refugees: Sexual Orientation in *Canada (A.G.) v. Ward*', (1997) 55 *UTLJ* 1.

[FN95]. *Ward*, n. 7 above, at 739.

[FN96]. LaViolette, n. 94 above, at 22.

[FN97]. Simon Levay & Elisabeth Nonas, *City of Friends: A Portrait of the Gay and Lesbian Community in America* (Cambridge, Massachusetts: MIT Press, 1995).

[FN98]. Law, n. 74 above, at 187.

[FN99]. Suzanne Goldberg, 'Symposium -- Shifting Grounds for **Asylum**: Female Genital Surgery and Sexual Orientation' (1998) 29 *Colum. H.R.L. Rev.* 467, at 496 ['Symposium'].

[FN100]. Razack, n. 57 above, at 87.

[FN101]. Law, n. 74 above, at 221.

[FN102]. Ibid., at 228.

[FN103]. Ibid., at 210.

[FN104]. Wilets, n. 79 above, at 992.

[FN105]. Ibid., at 1011.

[FN106]. Ibid., at 992.

[FN107]. Ibid., at 1007.

[FN108]. Lynda Peers & Irène Demczuk, '*Lorsque le respect ne suffit pas: intervenir auprès des lesbiennes*', in Irène Demczuk (ed.), *Des droits à reconnaître: les lesbiennes face à la discrimination* (Montreal: Les éditions du remueménage, 1998), at 83.

[FN109]. Wilets, n. 79 above, at 1007.

[FN110]. Ibid., at 991. See also 'Symposium', n. 101 above, at 500.

[FN111]. Jenni Millbank, 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (2003) 18:1 *Georgetown Immigration Law Journal*, at 77.

[FN112]. Shannon Minter, 'Lesbians and **Asylum**: Overcoming Barriers to Access' in Sydney Levy (ed.), *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996), at I.B. 5-6.

[FN113]. Ibid., at I.B. 6. An Amnesty International report confirms the following: '[t]he imposition of such penalties for same-sex relations must be viewed in the context of the repression of other forms of consensual sexual behaviour which are seen to transgress strict religious or political codes, such as sexual relations between men and women outside marriage. Where gender discrimination is enshrined in law, women accused of any sexual activity outside marriage are particularly at risk of such penalties'. Amnesty International, n. 93 above, at 19.

[FN114]. Monique Gauvin, '*La discrimination des lesbiennes en milieu de travail: de l'occultation à la prise de parole*', in Demczuk, n. 108 above, 133, at 143.

[FN115]. Millbank, n. 111 above, at 77.

[FN116]. Minter, n. 112 above, at I.B. 14.

[FN117]. Daley, n. 18 above, at 77.

[FN118]. See *A.(E.C.)(Re)*, [1993] CRDD No. 238 (QL); *M92-08129*, 24 Feb. 1994 (CRDD); *W.(U.K.)(Re)*, [1995] CRDD No. 123 (QL); *U.Y.O.(Re)*, [1996] CRDD No. 163 (QL); *V.L.W.(Re)*, [1996] CRDD No. 112 (QL); *C.L.Q.(Re)*, [1996] CRDD No. 145 (QL); *C.D.H.(Re)*, [1996] CRDD No. 210 (QL); *L.J. v. Canada (M.C.I.)*, [1996] FCJ. No. 1042 (TD) (QL); *A-98-00286*, 13 Aug. 1999 (CISR); *Q.U.Q.(Re)*, [1997] CRDD No. 242 (QL); *K.V.R.(Re)*, [1997] CRDD No. 312 (QL); *B.D.Q.(Re)*, [1997] CRDD No. 308 (QL); *E.D.F.(Re)*, [1998] CRDD No. 58 (QL); *T.Q.B.(Re)*, [1998] CRDD No. 101 (QL); *M.R.D.(Re)*, [1998] CRDD No. 164 (QL); *L.L.R.(Re)*, [1999] CRDD No. 18 (QL); *E.K.B.(Re)*, [1999] CRDD No. 175 (QL); *P.W.Z.(Re)*, [2000] CRDD No. 47 (QL); *P.T.F.(Re)*, [2000] CRDD No. 117 (QL); *D.A.K.(Re)*, [2000]

CRDD No. 338 (QL); *Q.D.D.(Re)*, [2001] CRDD No. 11 (QL); *C.U.V.(Re)*, [2001] CRDD No. 397 (QL); *Q.K.K.(Re)*, [2001] CRDD No. 250 (QL); *V.Z.D.(Re)*, [2001] CRDD No. 37 (QL); *G.Y.J.(Re)*, [2001] CRDD No. 46 (QL); *K.R.U.(Re)*, [2002] RPDD No. 165 (QL); *W.K.C.(Re)*, [2003] RPDD No. 233 (QL); *K.O.C.(Re)*, [2003] RPDD No. 420 (QL) (the claimant in this case was a bisexual women); *Q.K.T.(Re)*, [2003] RPDD No. 390 (QL); *L.L.L.(Re)*, [2003] RPDD No. 112 (QL); *Montero c. Canada (M.C.I.)*, [2004] RPDD No. 248 (QL); *Sosa Villa v. Canada (M.C.I.)*, [2004] RPDD No. 169 (QL); *V.C.U.(Re)*, [2004] RPDD No. 6 (QL); *Ruiz Ruiz v. Canada (M.C.I.)*, [2004] RPDD No. 178 (QL); *Saldivar c. Canada (M.C.I.)*, [2004] RPDD No. 406 (QL); *TA2-05237*, 14 Mar. 2005 (CRDD).

[FN119]. *C.L.Q.*, *ibid.*; *C.D.H.*, *ibid.*; *Q.U.Q.*, *ibid.*; *E.K.B.*, *ibid.*; *P.W.Z.*, *ibid.*; *Q.K.K.*, *ibid.*; *V.Z.D.*, *ibid.*

[FN120]. *C.L.Q.*, *ibid.* In her study of the Australian gender guidelines and their application to lesbian refugees, Jenni Millbank also concluded that ‘there was no reference to the Guidelines on Gender in any of the 42 lesbian claims decided by the Australian tribunal’: Millbank, n. 111 above, at 76-7.

[FN121]. *V.L.W.*, n. 118 above; *M.R.D.*, n. 118 above.

[FN122]. Minter, n. 112 above, at I.B. 13.

[FN123]. *A.(E.C.)*, n. 118 above.

[FN124]. *Ibid.*

[FN125]. *Ibid.*

[FN126]. Guidelines, n. 6 above, at 9.

[FN127]. Millbank, n. 111 above, at 79.

[FN128]. See *P.T.F.*, n. 118 above; *D.A.K.*, n. 118 above; *C.U.V.*, n. 118 above; *K.R.U.*, n. 118 above; *W.K.C.*, n. 118 above. However, see *V.S.D.*, n. 118 above for a decision that refers to the Guidelines in relation to the lesbian claimant's allegations of violence by her former spouse.

[FN129]. Above, n. 118.

[FN130]. *Ibid.*

[FN131]. *P.W.Z.*, n. 118 above.

[FN132]. *Ibid.*

[FN133]. Millbank, n. 111 above, at 103.

[FN134]. *Ibid.*

[FN135]. *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)* [2004] FCJ. No. 316 (QL).

[FN136]. *Ibid.*, at para. 22.

[FN137]. *Ibid.*, at para. 19.

[FN138]. *C.L.Q.*, n. 118 above.

[FN139]. *Ibid.*

[FN140]. Ibid.

[FN141]. Ibid.

[FN142]. *V.S.D.*, n. 118 above.

[FN143]. Ibid.

[FN144]. *M.R.D.(Re)*, n. 118 above.

[FN145]. Ibid.

[FN146]. Daley, n. 18 above, at 78-9.

[FN147]. The majority of decisions consulted for this article are published in Quicklaw in the 'CRDD' and 'RPDD' databases. In addition, some unreported decisions were the subject of media coverage and copies of media reports are on file with the author. Because of the large number of decisions, only cases referred to in the text are cited in the footnotes.

[FN148]. Minter, n. 112 above.

[FN149]. Amnesty International, n. 93 above, at 4.

[FN150]. Research Directorate, Immigration and Refugee Board, *Mexico: Treatment of Sexual Minorities* (Ottawa: Immigration and Refugee Board, 1999), at 1.

[FN151]. Ibid. A similar statement can be made in the case of Asian culture: '[g]ay men are, moreover, usually associated with femininity or individuals who enjoy receptive anal intercourse that implies subordinate roles or being conquered. Such notions violate the traditional gender roles that 'men' are superior and which are so essential to many Asian cultures': Maurice Kwong-Lai Poon, 'Inter-Racial Same-sex Abuse: The Vulnerability of Gay Men of Asian Descent in Relationships with Caucasian Men' (2000) 11 *Gay & Lesbian Social Services* 39, at 43.

[FN152]. See Human Rights Watch, 'Saudi Arabia: Men "Behaving Like Women" Face Flogging', 7 Apr. 2005, online: Human Rights Watch http://hrw.org/english/docs/2005/04/07/saudia10434_txt.htm. See also International Gay and Lesbian Human Rights Commission, *Communiqué*, 'Alleged Transvestites Sentenced to Brutal Flogging' (20 Apr. 2000), online: IGLHRC <http://igl-hrc.org/site/iglhrc/section.php?id=5&detail=412> (accessed: 24 Mar. 2001).

[FN153]. *H. (Y.F.)(Re)* [1994] CRDD No. 185 (QL).

[FN154]. *S.Z.R.(Re)*, [1995] CRDD No. 150 (QL) [*S.Z.R.*].

[FN155]. *O.P.K.(Re)*, [1996] CRDD No. 88 (QL).

[FN156]. *W.R.O.(Re)*, [2000] CRDD No. 284 (QL).

[FN157]. Ibid.

[FN158]. *Valdes v. Canada (Minister of Citizenship and Immigration)* [2004] RPDD No. 140 (QL).

[FN159]. *Slim v. Canada (Minister of Citizenship and Immigration)* [2004] FCJ. No. 879, at para. 3. The Federal Court held that these comments betrayed a stereotypical and prejudicial view of homosexuals 'and

cannot be used to discredit the applicant's stated fear of being persecuted by the Lebanese authorities on the basis of his sexual orientation'.

[FN160]. *Herrera v. Canada (Minister of Citizenship and Immigration)* [2005] FCJ. No. 1499, at para. 12.

[FN161]. *N.(L.X.)(Re)*, [1991] CRDD No. 47 (QL); *J.(F.H.)*, [1993] CRDD No. 98 (QL); *H.(Y.N.)(Re)*, [1994] CRDD No. 13 (QL); *S.Z.R.*, n. 127 above; *B.(W.B.)(Re)*, [1995] CRDD No. 108 (QL); *I.(X. W.)(Re)*, [1995] CRDD No. 100 (QL); *D.(C.J.)(Re)*, [1995] CRDD No. 86 (QL); *J.J.Y.(Re)*, [1996] CRDD No. 50 (QL); *C.D.T.(Re)*, [1996] CRDD No. 90 (QL); *V.Y.F.(Re)*, [1996] CRDD No. 91 (QL); *G.E.K.(Re)*, [1996] CRDD No. 264 (QL); *O.R.C.(Re)*, [1997] CRDD No. 66 (QL); *C.R.H.(Re)*, [1997] CRDD No. 178 (QL); *B.W.L.(Re)*, [1997] CRDD No. 316 (QL); *S.E.X.(Re)*, [1997] CRDD No. 77 (QL); *J.K.D.(Re)*, [1997] CRDD No. 307 (QL); *T.B.E.(Re)*, [1997] CRDD No. 304 (QL); *D.E.A (Re)*, [1998] CRDD No. 2 (QL); *J.M.E.(Re)*, [1998] CRDD No. 19 (QL); *F.V.Y.(Re)*, [1998] CRDD No. 20 (QL); *U.O.D.(Re)*, [1999] CRDD No. 106 (QL); *Y.J.E.(Re)*, [1999] CRDD No. 288 (QL); *N.P.Q.(Re)*, [1999] CRDD No. 249 (QL). *P.J.X.(Re)*, [2000] CRDD No. 128 (QL); *P.J.X.(Re)*, [2000] CRDD No. 128 (QL); *I.T.L.(Re)* [2001] CRDD No. 26 (QL); *B.Y.U.(Re)* [2003] RPDD No. 353 (QL).

[FN162]. *S.Z.R.*, *ibid.*

[FN163]. *H.(Y.N.)*, n. 161 above.

[FN164]. *C.D.T.*, n. 161 above. See also *H.(Y.N.)*, *ibid.*

[FN165]. *C.D.T.*, n. 161 above.

[FN166]. *Ibid.*

[FN167]. *O.R.C.*, n. 161 above.

[FN168]. *F.I.N.(Re)*, [1995] CRDD No. 151 (QL); *L.U.M.(Re)*, [1996] CRDD No. 193 (QL); *O.P.K (Re)*, [1996] CRDD No. 88 (QL); *G.U.S.(Re)*, [1996] CRDD No. 66 (QL); *O.R.C.*, *ibid.*; *E.N.U.(Re)*, [1997] CRDD No. 67 (QL); *U.V.G.(Re)*, [1997] CRDD No. 250 (QL); *Q.N.W.(Re)*, [1998] CRDD No. 38 (QL); *U.O.D.(Re)*, [1999] CRDD No. 106 (QL); *V.P.F.(Re)*, [1999] CRDD No. 191 (QL). It is ironic that, in certain cases, a marriage or relationship of convenience is the only possible way to escape persecution: *L.M.D.*, [1992] CRDD No. 328 (QL); *P.E.U.*, [1992] CRDD No. 397 (QL); *Burgos-Rojas v. Canada (M.C.I.)*, [1999] FCJ. No. 85 (TD) (QL); *O.R.R.(Re)*, [2000] CRDD No. 122 (QL); *C.R.N.(Re)*, [2001] C.R.D.D No. 526 (QL). The situation of a Nigerian claimant shows how far family members may go to try to force someone to conform to social norms. 'The claimant's father and his three brothers confronted the claimant while he was at university, broke the information that they had about his **homosexuality**, horsewhipped him, and mistreated him, whereupon the father involved the village elders in a ritual and gave his son, the claimant, an ultimatum: either get married or be gotten rid of by the father'. *A.M.A (Re)*, [2000] CRDD No. 103 (QL).

[FN169]. *L.U.M.*, *ibid.*: '[b]eing unmarried and without children would always subject me to ridicule and detection as a homosexual, and therefore always at risk'. See also *C.Y.T.(Re)*, [1998] CRDD No. 186 (QL); *U.F.S.(Re)*, [1999] CRDD No. 81 (QL); *K.V.T.(Re)*, [1999] CRDD No. 64 (QL).

[FN170]. The fact that the claimant stated he would continue to hide his **homosexuality** was the basis for the negative decision rendered by the Board. *E.P.O.(Re)*, [1997] CRDD No. 188 (QL).

[FN171]. *X.(J.K.)(Re)*, [1992] CRDD No. 348 (QL). See also *O.P.K.*, n. 155 above: '[...] I moved back with my family and X went back to his family. We knew that we could not live together any more because of the pressure and the fear of exposure': *R.M.W.(Re)*, [1998] CRDD No. 76 (QL); *R.Z.L.(Re)*, [1997]

CRDD No. 311 (QL).

[FN172]. 'A Comparative Analysis', n. 21 above, at 281.

[FN173]. During a training session the author gave to members of the Board in 1999 on claims based on sexual orientation, Krista Daley, legal counsel for the Board, commented to the author on the absence of a policy on this issue.

[FN174]. Penelope Mathew, '*Islam v. Secretary of State for the Home Department, and Regina v. Immigration Appeal Tribunal, Ex Parte Shah*. 999 2 AC 629'. (2001) 95 *Am. J. Int'l L.* 671, at 676.

[FN175]. *R.Z.L.*, n. 171 above.

[FN176]. *Charles v. Canada (Minister of Citizenship and Immigration)* [2003] RPDD No.569 (QL).

[FN177]. *Cuesta c. Canada (Minister of Citizenship and Immigration)* [2003] RPDD No. 603 (QL).

[FN178]. *Ibid.*

[FN179]. *Perez c. Canada (Minister of Citizenship and Immigration)* [2004] RPDD No. 78 (QL).

[FN180]. Transgendered claimants comprise, for the purposes of this article, the following people: (1) transvestites: persons of the male or female sex at birth who dress and act like the opposite sex; (2) transsexuals: persons of the male or female sex at birth who dress and act like the opposite sex, and who have started or completed sex reassignment treatments.

[FN181]. *J.(H.A.)(Re)*, [1994] CRDD No. 404 (QL); *N.(O.I.)(Re)*, [1995] CRDD No. 11 (QL); *U.J.J.(Re)*, [1999] CRDD No. 45 (QL); *F.L.V.(Re)*, [1999] CRDD No. 125 (QL); *E.H.F.(Re)*, [1999] CRDD No. 142 (QL); *B.D.K.(Re)*, [2000] CRDD No. 72 (QL); *J.I.C.(Re)*, [2002] CRDD No. 176 (QL)

[FN182]. *B.D.K.*, *ibid.*

[FN183]. *U.J.J.*, n. 181 above. In this matter, the **asylum** claims of a transsexual claimant and his mother were heard jointly because the mother's fear of persecution was founded on the fact that she was the parent of a transsexual and was equally condemned by Lebanese society.

[FN184]. *B.D.K.*, n. 181 above.

[FN185]. *J.(H.A.)*, n. 181 above.

[FN186]. *J.I.C.*, n. 181 above.

[FN187]. *Ibid.*; *U.J.J.*, n. 181 above. But in other cases the distinction is clearly identified: see *N.(O.I.)*, n. 181 above; *F.L.V.*, n. 181 above; *B.D.K.*, n. 181 above.

[FN188]. *U.J.J.*, *ibid.*

[FN189]. *Ibid.*

[FN190]. Willets asserts: '[...] the analogy between sexual minorities and oppression of women only operates to the extent that sexual minorities threaten social and sexual gender role expectations and the hierarchical social positions that accompany those expectations' See Willets, n. 79 above, at 1011.

[FN191]. *L.(M.D.)(Re)*, [1992] CRDD No. 328 (QL); *G.J.M.(Re)*, [2002] CRDD No. 71 (QL).

[FN192]. *H.F.P.(Re)*, [1999] CRDD No. 188 (QL); *C.X.S.(Re)*, [1995] CRDD No. 134 (QL); *U.F.S.(Re)*, [1999] CRDD No. 8 (QL).

[FN193]. *U.L.X.(Re)*, [1998] CRDD No. 83 (QL); *C.Y.T.(Re)*, [1998] CRDD No. 186 (QL); *V.(O.Z.)(Re)*, [1993] CRDD No. 164 (QL).

[FN194]. *C.X.S.(Re)*, [1995] CRDD No. 134 (QL); *P.L.Z.(Re)*, [2000] CRDD No. 97 (QL).

[FN195]. *L.(M.D.)*, [1992] CRDD No. 328 (QL); *P.(E.U.)(Re)*, [1992] CRDD No. 397 (QL); *B.B.Y.(Re)*, [2003] RPDD No. 29 (QL).

[FN196]. Minter, n. 112 above, at 6.

[FN197]. Sean Rehaag, 'Patrolling the Borders of Sexual Orientation: Bisexual refugee claims in Canada' (2007) [unpublished manuscript, on file with author]. Rehaag examined data from 2004 and concluded that the 'actual grant rate for sexual minority claimants exceeds the average grant rate for all refugee claims'. His research determined the successful grant rate for sexual minorities to be 49% in 2004, while the overall success rate for refugees was 45% in 2004.

[FN198]. Jenni Millbank, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia' (2002) 26 *Melbourne U. LR* 144 at 177.

[FN199]. *D.(W.Z.)(Re)*, [1993] CRDD No. 384 (QL).

[FN200]. *Ibid.*

[FN201]. *D.(H.R.)(Re)*, [1993] CRDD No. 341 (QL).

[FN202]. Dianne Otto, 'Disconcerting Masculinities: Reinventing the Gendered Subject(s) of International Human Rights Law' in Doris Buss & Ambreena Manji (eds.), *International Law: Modern Feminists Approaches* (Portland, Oregon: Hart, 2005) 105 at 125.

[FN203]. Otto warns, however, that there is a danger in focussing on gender-based injuries to men: '[w]hile men's experience of gender power can be contradictory, and may involve pain and alienation, this kind of injury cannot be equated with the injury that comes from lack of gender privilege, not least because male gender injury does not benefit women ... So, while there are many disruptive possibilities in the idea that men's injuries resulting from their male privilege could be made legally cognisable, turning the attention back on men in this way runs the risk of shifting the focus away from the operation of gender hierarchies and erasing women all over again'. *Ibid.*, at 125-6.

[FN204]. The link between the Guidelines' conceptual framework and men fleeing military service was the subject of a presentation by Vancouver lawyer, Martin Jones, Canadian Council for Refugees Conference, Vancouver, 1 June 2000.

[FN205]. For a worldwide study and survey of compulsory military service, see: Bart Horeman & Marc Stolwijk, 'Refusing to Bear Arms: a World Survey of Conscriptation and Conscientious Objection to Military Service' (1998: London, War Resisters' International), online: War Resisters' International, <http://wri-irg.org/co/rtba/>.

[FN206]. Marie-France Major, 'Conscientious Objection to Military Service: The European Commission on Human Rights and the Human Rights Committee' (2001) 32:1 *California Western International Law Journal* 1, at 2.

[FN207]. Major, *ibid.*, at 3.

[FN208]. *Ibid.* See also Matthew Lippman, 'The Recognition of Conscientious Objection to Military Service as an International Human Right' (1990-1991) 21 *Cal. W. Int'l L.J.* 31.

[FN209]. Legal Services, Immigration and Refugee Board, *Interpretation of the Convention Refugee Definition in the Case Law* (Ottawa: Immigration and Refugee Board, 2002), at 9-15 [Interpretation]. See also Kevin Kuzas, 'Asylum for Unrecognized Conscientious Objectors to Military Service: Is there a Right Not to Fight?' (1990-1991) 31 *Va. J. Int'l L.* 447.

[FN210]. Kuzas, *ibid.*, at 449-50. For a successful **asylum** claim based on selective conscientious objections, see Mark Hamblett, 'Exception to **Asylum** Ban over Military Service is Recognized' *New York Law Journal* (27 June 2005).

[FN211]. See *Zolfagharkhani v. Canada (MEI)*, [1993] 3 FC 540 (FCA); *Ciric v. Canada (MEI)*, [1993] 71 F.T.R. 300 (T.D).

[FN212]. See *Talman v. Canada (Solicitor General)* (11 Jan. 1995), IMM-5874-93 (FCTD); *Frid v. Canada (MEI)* (15 Dec. 1994), IMM-6694-93 (FCTD).

[FN213]. *Frid v. Canada*, *ibid.*, at 3.

[FN214]. Some exceptions include: Peru, Libya, Israel, and Eritrea. See 'Refusing to Bear Arms', n. 205 above. In *Spotl v. Austria*, the European Commission on Human Rights held that the difference in treatment between men and women was justified in part because excluding women from mandatory military service was the common standard among European State: Major, n. 206 above, at 34.

[FN215]. Sandra Whitworth, *Men, Militarism & UN Peacekeeping* (Boulder, Colorado: Lynne Rienner, 2004), at 153.

[FN216]. Whitworth, *ibid.*

[FN217]. Whitworth, *ibid.*, at 152.

[FN218]. See the case of Idan Halili in Amnesty International, 'Conscientious Objectors - Previous Appeals' (4 January 2006), online: Amnesty International http://web.amnesty.org/pages/iot_previous_appeal_cases.

[FN219]. Otto, n. 202 above, at 125.

[FN220]. *Ibid.*

[FN221]. Jones, n. 204 above.

[FN222]. For example, Mexico's *Military Service Law* imposes penalties for conscription evasion that vary from imprisonment for one month to one year: Research Directorate, Immigration and Refugee Board, *Mexico: Military Service* (Ottawa: Immigration and Refugee Board, 1999), at para. 3.

[FN223]. See Interpretation, n. 209 above, at 9-15 - 9-19.

[FN224]. Holth, n. 75 above, at 29.

[FN225]. See Amnesty International, *Pakistan; Honour Killings of Girls and Women* (1 Sept. 1999), online: Amnesty International <http://web.amnesty.org/library/Index/engASA330181999>; Human Rights Watch,

Honoring the Killers: Justice Denied For 'Honor' Crimes In Jordan (New York: Human Rights Watch, 2004), online: Human Rights Watch [http:// www.hrw.org/reports/2004/jordan0404/jordan0404.pdf](http://www.hrw.org/reports/2004/jordan0404/jordan0404.pdf); Molly Moore, 'In Turkey, "Honor Killing" Follows Families to Cities', *Washington Post*, 8 Aug. 2001, A01; Human Rights Watch, Women's Rights Project, *Criminal Injustice: Violence Against Women in Brazil* (Oct. 1991), 20-26. Honour killings are also reported in western industrialized countries: 'Boyfriend was stabbed 46 times in "honour killing", court told', *The Times*, 6 Oct. 2005, online: Timesonline [http:// www.timesonline.co.uk/article/0,,2-1813149,00.html](http://www.timesonline.co.uk/article/0,,2-1813149,00.html).

[FN226]. 'A man's honour, defiled by a woman's alleged or real sexual misdemeanour or other defiance, is only partly restored by killing her. He also has to kill the man allegedly involved': Amnesty International, *Pakistan; Honour Killings of Girls and Women* (1 Sept. 1999), online: Amnesty International <http://web.amnesty.org/library/Index/engASA330181999>.

[FN227]. Ibid.

[FN228]. Ibid.

[FN229]. United States, Department of State, *Country Reports on Human Rights Practices for 2004* (Report Submitted to the Committee on Foreign Relations US Senate and Committee on International Relations) (Washington, DC: United States House of Representatives, 2004), online: US Department of State [http:// www.state.gov/g/drl/rls/hrrpt/2004/41743.htm](http://www.state.gov/g/drl/rls/hrrpt/2004/41743.htm).

[FN230]. United States, Department of State, *Country Reports on Human Rights Practices for 1998* (Report Submitted to the Committee on Foreign Relations US Senate and Committee on International Relations) (Washington, DC: United States House of Representatives, 1999), at 1956.

[FN231]. Ibid., at 1957.

[FN232]. Ibid.

[FN233]. Asia Watch, *Double Jeopardy: Police Abuse of Women in Pakistan* (New York: Asia Watch, 1992), at 62.

[FN234]. Ibid. An appeal was filed and the couple was acquitted due to lack of evidence.

[FN235]. Ibid., at 63-4. The couple fled in order to marry, and the father filed a complaint with the police. He accused the husband of kidnapping, an offence that carries the most severe penalty in the Penal Code. The couple presented a defence that their marriage was consensual (ibid., at 64). The Supreme Court of Pakistan quashed the decision on lack of evidence.

[FN236]. Nicholas Kristoff, 'A Pakistani Rape, and a Pakistani Love Story', *The New York Times*, 2 Aug. 2005, at 21.

[FN237]. Ibid.

[FN238]. *Y.(M.J.)(Re)*, [1993] CRDD No. 339 (QL); *W.(Y.J.)*, [1994] CRDD No. 91 (QL); *C.(I.J.)(Re)*, [1995] CRDD No. 30 (QL); *N.(B.B.)(Re)*, [1995] CRDD No. 80 (QL); *B.G.I.(Re)*, [1997] CRDD No. 266 (QL); *X.O.M. (Re)*, [2000] CRDD No. 100 (QL).

[FN239]. The issue of adultery was raised by the male claimants in the following decisions: *H.I.U.(Re)* [2002] RPDD No. 291 (QL); *L.J.U.(Re)*, [1999] CRDD No. 207 (QL) (the claim was rejected for the reason that the claimant's testimony was not credible); *I.Y.V.(Re)*, [1997] CRDD No. 221 (QL).

[FN240]. *C.(I.J.) (Re)*, n. 238 above.

[FN241]. Guidelines, n. 6 above, at 4-5.

[FN242]. 'A Comparative Analysis', n. 21 above, at 279.

[FN243]. *Ibid.*

[FN244]. 2002 UNHCR Guidelines, n. 20 above, at 2.

[FN245]. Nahla Valji & Lee Anne De La Hunt, *Gender Guidelines for Asylum Determination* (Cape Town: University of Cape Town Legal Aid Clinic, 1999), at 6.

[FN246]. 2002 UNHCR Guidelines, n. 20 above, at 2.

[FN247]. On this last point, my analysis is partially in line with that of Sherene Razack, who asserts that analyses of claims for **asylum** made by racialized women too often neglect to make the link between gender-based persecution and persecution based on race: Razack, n. 57 above.

[FN248]. Executive Committee of the United Nations High Commissioner for Refugees, *Refugee Women and A Gender Perspective Approach*, UN ESCOR, 49th sess., UN Doc. EC/49/SC/CRP.22 (1999), online: UNHCR <http://www.unhcr.org/cgi-bin/texis/vtx/excom/opendoc.pdf?tbl=EXCOM&id=3cc41bce7> (accessed: 28 Mar. 2001).

[FN249]. *Asylum Gender Guidelines*, n. 53 above, at para. 1.5.

[FN250]. Home Office Guidelines, n. 53 above.

[FN251]. Above, n. 41.

[FN252]. Note, however, that the Act uses term 'sex' and not 'gender':

1. (1) In this Act, unless the context otherwise requires-[...] 'membership of a particular group' includes membership of a trade union and also includes membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation.

Refugee (Republic of Ireland) Act, S.I. 290/1996, online: Government of the Republic of Ireland <http://www.irishstatutebook.ie/ZZA17Y1996S1.html> (accessed: 30 Mar. 2001).

[FN253]. 2002 UNHCR Guidelines, n. 20 above, at 2.

[FN254]. *Ibid.*, at 2.

[FN255]. *Ibid.*, at 4.

[FN256]. *Ibid.*, at 4-5.

[FN257]. Amnesty International, n. 93 above, at 4.

[FN258]. *Asylum Gender Guidelines*, n. 53 above, at para. 2A.25.

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