

Gender Bias in Asylum Law: Recognizing Persecution Against Women and Girls

Nations grant asylum to citizens of other countries when those citizens are no longer safe in their home country. We traditionally think of granting asylum for political or religious reasons. We grant asylum for what people think, for what they believe. We grant asylum to people for who they are. Race and nationality are both internationally recognized reasons for granting people asylum.¹ But increasingly, asylum is being sought by those who are persecuted not for what they believe or think and not for their race or nationality, but simply because they are female.

Across the globe, women and girls are trying to escape gender persecution in their native lands. Because they are female, women and girls in some societies are subject to persecution, including female genital mutilation (FGM), domestic violence as an accepted part of the culture, and abuses based on their advocacy of women's rights.² The United States has struggled to address these types of asylum claims.³ The U.S. system, like most Western countries, is based on the United Nation's refugee status and protocol conventions, which do not have a category that recognizes gender persecution.⁴ However, while not categorically recognizing gender persecution, the United States has

¹ The United Nations passed two instruments from which the basis of most refugee law can be traced: Convention Relating to the Status of Refugees, art. I A(2), July 28, 1951, 189 U.N.T.S. 137 (defining refugee); Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (signing countries included United States, which then also included 1951 convention as part of its signing).

² Irena Lieberman, *Women and Girls Facing Gender-Based Violence, and Asylum Jurisprudence*, 29 HUM. RTS. 9, 9 (Summer 2002).

³ Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281, *7 (2002).

⁴ Tanya Domenica Bosi, *Yadegar-Sargis v. INS: Unveiling the Discriminatory World of U.S. Asylum Laws: The Necessity to Recognize a Gender Category*, 48 N.Y.L. SCH. L. Rev. 777, 780-81 (2004).

recognized FGM as the basis for a claim of asylum⁵ and the U.S. Department of Justice has proposed that domestic violence be considered as a basis for asylum.⁶

This paper examines how U.S. courts struggle under the current asylum system⁷ to address claims that fall under gender persecution without a gender category and suggests ways to correct the problems while still helping those seeking refuge at U.S. borders. Parts A and B explore U.S. asylum law and the world's slow recognition of gender persecution. Parts C and D explain why the current U.S. system is ill-suited to handle gender-based asylum claims. Part E weighs the arguments for and against a gender category. Part F looks at how far other Western countries have gone in recognizing gender persecution. Finally, Part G suggests how the U.S. can better address gender-based asylum claims, both legislatively and with reforms aimed at the beginning of the asylum process.

A. What Is Asylum—And How Does It Work?

“Asylum offers protection when that of the home state, for whatever reason, has failed.”⁸ Asylum is a claim of last resort for a person who, although not forcibly removed, is compelled to leave his or her home because of fear of persecution.⁹ Under the U.N. Convention Relating to the Status of Refugees¹⁰ and U.S. asylum law,¹¹ a person claiming asylum must first meet the definition of a refugee. The basic criteria for

⁵ Matter of Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

⁶ U.S. Dept. of Justice, *News Release: Proposed Rule Issued for Gender-Based Asylum Claims*, Dec. 7, 2000, <http://uscis.gov/graphic/publicaffairs/newsrels/gender.htm> (last visited Oct. 24, 2005).

⁷ Because of the complexity of U.S. asylum law and international asylum laws and for space considerations, the U.N. Convention Against Torture will not be discussed. For an excellent analysis of how this convention affects asylum, see K. Rosati, *The United Nations Convention Against Torture: A Viable Alternative for Asylum Seekers*, 74 Interpreter Releases 1773–1784 (Nov. 21, 1997).

⁸ Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 772 (2003).

⁹ *Id.* at 772.

¹⁰ Convention Relating to the Status of Refugees, art. I A(2), July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 137.

¹¹ 8 U.S.C. § 1158(b)(1) (2000); 8 C.F.R. § 208.13(a).

qualifying as a refugee are (1) persecution or a well-founded fear of persecution (2) in the person's homeland or country of last residence (3) based on race, religion, nationality, membership in a particular social group, or political opinion.¹²

Additionally, in order to be eligible to apply for asylum, a person must be arriving in the United States or already physically present.¹³ An asylum applicant is interviewed by an Asylum Officer (employed by the U.S. Citizenship and Immigration Services), who determines whether the applicant meets the definition of a refugee and whether the asylum claimed can be granted.¹⁴ If the Asylum Officer does not grant the applicant's claim, it goes to an immigrant judge in the Executive Office for Immigration Review.¹⁵ "The immigration judge may grant the claim or may issue a denial and an order of removal."¹⁶ The decision of the immigration judge may be appealed to the Board of Immigration Appeals, then to the federal U.S. Courts of Appeals, and finally to the U.S. Supreme Court.¹⁷

B. Western Nations Acknowledge Gender Persecution

Though there is a long history of violence toward women, few conventions or treaties directly address the violence as a human rights violation.¹⁸ Even The Women's Convention does not call violence against women a form of discrimination.¹⁹ However, as women's issues garnered attention through the 1970s and '80s in Western nations, the

¹² 8 U.S.C. § 1101 (42)(A) (2000); INA § 101(a)(42)(A).

¹³ INA § 208(a). (Other criteria not relevant to this discussion is omitted but is listed in the statute.)

¹⁴ U.S. Dept. of Justice, Immigration and Naturalization Service, *The Affirmative Asylum Process at a Glance*, <http://uscis.gov/graphics/services/asylum/flowchart.htm> (last visited Oct. 24, 2005).

¹⁵ U.S. Dept. of Justice, Immigration and Naturalization Service, *2003 Yearbook of Immigration Statistics*, ch. 5: Asylees, 46.

¹⁶ *See supra* note 14.

¹⁷ *Id.*

¹⁸ DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS*, 851 (3d ed. 2001).

¹⁹ *See id.*

public began looking at other nations' policies towards women. In the 1980s and 1990s, international developments brought the issue of gender into the definition of refugee.²⁰ "Gender-specific forms of human rights violation[s] such as rape, domestic violence and coerced female circumcision were gradually considered to be forms of persecution."²¹ Both FGM and domestic violence received attention due to the more intimate nature of the abuse. "The physical and mental damage that women who are abused by their partners experience and the environment of terror in which they often live clearly constitute a form of persecution or torture."²²

After there was recognition of gender persecution, came the argument for inclusion of this kind of persecution in asylum law. Advocates compared gender persecution to recognized standards of persecution. "The physical and mental abuse that these primarily female applicants have endured makes their plight poignant. Admitting them seems necessary to realize the humanitarian ideal underlying the doctrine of asylum."²³ "[D]omestic violence meets the legal requirements that an applicant show that she was subject to persecution. It subjects women to cruel and inhuman treatment and places their lives at risk. ... [T]he plight of abused women meets the humanitarian requirements that underlie the doctrine of asylum."²⁴

C. Why Current Asylum Laws Can't Address Gender Persecution Adequately

The calls to include gender persecution also raised arguments that women faced different obstacles from men that were not addressed by asylum law. "[W]omen and

²⁰ Jacqueline Bhabha, *Demography and Rights: Women, Children and Access to Asylum*, 16 INT'L J. REFUGEE L. 227, 230 (2004).

²¹ *Id.*

²² Amanda Blanck, *Domestic Violence as a Basis for Asylum Status: A Human Rights Based Approach*, 22 WOMEN'S RTS. L. REP. 47, 69 (Fall/Winter 2000).

²³ *Id.*

²⁴ *Id.* at 69-70.

girls, as opposed to males, often suffer violence at the hands of family members.”²⁵ This in turn led to arguments for a new gender category for these kinds of persecution. Yet countries hesitated; the United States, in particular, has seemed determined to fit all asylum claims into its current system. Proponents of the gender category argue that women are excluded from the traditional asylum system because the asylum claims they are most likely to make are not likely to be granted without a gender category.²⁶

The keys to making a successful asylum claim for any applicant are proving a well-founded fear of persecution that is based on one of the five accepted categories: race, religion, nationality, membership in a particular social group, or political opinion. These are the sticking points in gender persecution claims. Although the U.S. courts now recognize FGM as a form of persecution²⁷ and the Department of Justice has proposed that domestic violence also be recognized as such,²⁸ a woman must still fit her claim into one of the five accepted categories—which has proven troublesome for many applicants. Those seeking asylum for gender persecution “have difficulty showing that they are persecuted for the legally acknowledged reasons required by the asylum doctrine. They are forced to fit their situation to a set of criteria that were adopted without giving much thought to the needs of their situation.”²⁹ Gender persecution is based on being male or female, and does not intuitively fit into race, religion, nationality, or political opinion.

So many U.S. courts try to fit gender persecution into the social group category. But “courts have struggled with the boundaries of the social group definition.”³⁰ “U.S.

²⁵ Lieberman, *supra* note 2, at 9.

²⁶ Randall, *supra* note 3, at *7.

²⁷ See *supra* note 5.

²⁸ See *supra* note 6.

²⁹ Blanck, *supra* note 22, at 70.

³⁰ Heyman, *supra* note 8, at 767.

refugee law has yet to grapple adequately with the fact that gender can form the basis of a ‘particular social group,’ and, as a result, some gender claims have been allowed but only through convoluted legal logic, while others have simply been denied.”³¹

For example, in the *Matter of Kasinga*,³² the Board of Immigration Appeals (BIA) established that FGM can be the basis for an asylum claim.³³ But while doing so, the BIA had to fit the applicant, a Togolese woman, into a social group in order to grant the asylum. Forcible FGM, although recognized by the BIA as persecution,³⁴ is not recognized as persecution based on race, nationality, political opinion, or religion. That only leaves social group—the BIA’s determination of the applicant’s social group was “a member of a social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had [FGM], as practiced by that tribe, and who oppose the practice.”³⁵

Yet just this summer in *Gichema v. Gonzales*,³⁶ the Tenth Circuit upheld both the BIA and the immigration judge’s rejection of an applicant’s asylum claim partly due to her failure to identify a recognizable social group.³⁷ The applicant, a young woman from Kenya, was fleeing tribal members determined to subject her to FGM.³⁸ She argued she belonged to a social group of “members of the same family who are uncircumcised Kikuyu women who have been specifically identified and thus targeted by the Mungiki for forcible [FGM].”³⁹ What is the difference between the convoluted social group definition the BIA used to grant asylum in *Matter of Kasinga* and the convoluted social

³¹ Randall, *supra* note 3, at *7.

³² *Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

³³ *Id.* at 358.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Gichema v. Gonzales*, 139 Fed. Appx. 90 (10th Cir. July 6, 2005).

³⁷ *Id.* at 95.

³⁸ *Id.* at 91.

³⁹ *Id.* at 95.

group definition the applicant developed in *Gichema*? Wouldn't it be simpler if the courts could just find that because FGM is recognized as persecution and because the women's fears were well-founded that each of them should be granted asylum based on gender persecution?

For a few asylum claims, relief has been granted by U.S. courts to women fleeing gender persecution because they were able to frame their claims on grounds of "political opinion" or "religion."⁴⁰ *In re of S-A*⁴¹ involved a young Moroccan woman who was physically abused by her father because of her more liberal view of Islam.⁴² The abuse by her father qualified the applicant for a domestic violence claim; the fact that her two brothers were not abused similarly suggested gender persecution; and her liberal view of Islam versus her father's strict interpretation set up a claim of religious persecution.⁴³ The BIA chose to grant the claim based on religious persecution rather than gender or domestic violence.⁴⁴ In *Fatin v. INS*,⁴⁵ the Third Circuit upheld the BIA's rejection of an Iranian woman's petition to be considered part of a "social group of the upper class of Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals."⁴⁶ The BIA stated "that there was no evidence that she would be 'singled out' for persecution,"⁴⁷ and that she would be "subject to the same restrictions and requirements as the rest of the population."⁴⁸ However, the woman had also declared

⁴⁰ Randall, *supra* note 3, at *9.

⁴¹ *In re S-A*, 22 I. & N. Dec. 1328 (B.I.A. 2000).

⁴² *Id.* at 1329.

⁴³ *Id.* at 1336-37.

⁴⁴ *Id.* at 1336.

⁴⁵ *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

⁴⁶ *Id.* at 1237.

⁴⁷ *Id.*

⁴⁸ *Id.*

herself to be a feminist and to hold feminist views.⁴⁹ The Third Circuit recognized feminism as a political opinion.⁵⁰ Unfortunately for the applicant, the court also held that her political views would not subject her to persecution and denied her application.⁵¹

Another oddity that has shown up in traditional asylum law is the domestic violence issue. “Despite the apparent applicability of traditional asylum doctrine, it has proved to be an inconsistently successful method to obtain the physical protection that victims of domestic violence are seeking. Gender-related asylum claims must be proved on a case-by-case basis.”⁵²

The Ninth Circuit granted the asylum petition of a young woman from Mexico in *Aguirre-Cervantes v. INS*.⁵³ The persecution she was fleeing was the extreme physical abuse she suffered at the hands of her father,⁵⁴ making this a domestic violence claim. She claimed her social group was “immediate family members being abused” and the Ninth Circuit agreed—but noted that this designation would be applied case-by-case.⁵⁵

But in June 1999, the BIA caused an uproar when it denied asylum to a Guatemalan woman who fled horrific and repeated domestic abuse.⁵⁶ The BIA held that she failed to establish membership in a recognizable social group and failed to produce evidence that she was abused by her husband because of membership in any particular social group.⁵⁷ As a direct result, the Department of Justice proposed a new rule for

⁴⁹ *Id.*

⁵⁰ *Id.* at 1242.

⁵¹ *Id.*

⁵² Blanck, *supra* note 22, at 70.

⁵³ *Aguirre-Cervantes v. INS*, 2423 F.3d 1169 (9th Cir. 2001).

⁵⁴ *Id.* at 1172-73.

⁵⁵ *Id.* at 1175-76.

⁵⁶ *See* Matter of R-A-, Int. Dec. #3403, BIA June 2000.

⁵⁷ *See id.*

gender-based asylum claims in 2000.⁵⁸ The proposed rule still has not yet been adopted.⁵⁹ The rule is meant to recognize “the longstanding principle that gender can be the basis for membership in a particular social group[,]” including “victims of domestic violence.”⁶⁰ The Department of Justice released a series of questions and answers to accompany its press release about the proposed rule,⁶¹ including these statements explaining why domestic violence was being included in asylum claims:

[The Department of Justice] believes certain forms of domestic violence may constitute persecution despite the fact that they occur within familial or intimate relationships. Domestic violence centers on power and control over the victim. The proposed rule recognizes that such patterns of violence are not private matters, but rather should be addressed when they are supported by a legal system or social norms that condone or perpetuate domestic violence.⁶²

D. Persecution on Account of Membership in a Particular Social Group⁶³

As the U.S. government struggles with how to change the laws, the courts continue to work with the laws they have. Thus far, persecution on account of social group membership is still the most often-used category for gender-based asylum claims. It is here that the courts have had the most trouble and the most inconsistency,⁶⁴ and here perhaps the best argument exists for creating a sixth category for gender-based abuses.

⁵⁸ U.S. Dept. of Justice, *News Release: Proposed Rule Issued for Gender-Based Asylum Claims*, Dec. 7, 2000, <http://uscis.gov/graphic/publicaffairs/newsrels/gender.htm> (last visited Oct. 24, 2005).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ U.S. Dept. of Justice, *Questions and Answers: The R-A- Rule*, Dec. 7, 2000, <http://uscis.gov/graphics/publicaffairs/questsans/rarule.htm> (last visited Oct. 24, 2005).

⁶² *Id.*

⁶³ WEISSBRODT, *supra* note 18, at 869.

⁶⁴ *See supra* Part C.

In the *Matter of Acosta*, the BIA set the standards for what a “particular social group” means.⁶⁵ The BIA established that membership in a particular social group was based on an “immutable characteristic,” which might be innate, such as “sex, color, or kinship ties, or in some circumstances it might be a shared past experience.”⁶⁶ This was a significant decision in U.S. asylum law, and showed promise of an expansion to the legal definitions of a particular social group, “especially in recognizing gender as a potential basis of this category.”⁶⁷

Acknowledging that what constituted a particular social group category would have to be defined on a case-by-case basis, the BIA in *Acosta* stated that a particular social group “could be circumstantially specific, as in a shared experience or voluntary status that unites group members. More significantly, however, the legal reasoning in *Acosta* expressly allowed for recognition that a ‘particular social group’ can be organized around fundamental characteristics essential to a person’s identity, which obviously includes such fundamental attributes as gender.”⁶⁸

In the *Matter of A-N-*, a woman who fled abuse from her husband in Jordan was granted asylum on the basis that she was part of the particular social group of “married, educated, career-oriented, Jordanian women.” Thus indicating recognition of gender-based persecution but with a series of major qualifications attached to narrow the ground significantly.⁶⁹ “More problematic than the cases in which ‘particular social groups’ have been constructed extremely narrowly are those cases in which courts have simply refused to recognize gender as forming even part of the group identity, leading to the

⁶⁵ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

⁶⁶ Randall, *supra* note 3, at *7.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

denial of asylum.”⁷⁰ For example in *Matter of R-A-*, the BIA denied asylum to a Guatemalan woman who had been subjected to extreme physical and sexual abuse by her husband, “abuse which the [BIA] has no trouble identifying as constituting persecution.” But, her asylum application was denied because the BIA found her persecution was not on account of her social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”⁷¹ Consistency is the major problem that plagues social group membership as the solution to finding a place for gender-based claims.

The BIA and the courts have too much discretion and not enough guidance with the current laws to decide what is or what is not a particular social group and what besides gender qualifies as an immutable characteristic. But perhaps there is change in the wind. In the courts, “[t]here has been a potentially significant recognition that gender can form the basis, or, more accurately, part of the basis of membership in a ‘particular social group.’”⁷² Of significant note: In March 2005, the Ninth Circuit flat out accepted gender as a basis for asylum: “Although we have not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law.”⁷³

In the Ninth Circuit’s case, *Mohammed v. Gonzales*, a young Somali woman was seeking asylum on the basis being subjected to involuntary FGM and fear of future

⁷⁰ *Id.*

⁷¹ *Id.* at *9 (footnotes omitted).

⁷² *Id.* at *7.

⁷³ *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (footnote omitted). [Note: Mohammed’s name is spelled alternatively in all court documents with both one and two “m”s; for consistency and following case name, this paper will use two “m”s.]

persecution based on her membership in the Benadiri clan.⁷⁴ The court found that there were “at least two ways in which ... [to] define the social group Mohammed belongs.”⁷⁵ The court said that Mohammed could either be determined to be persecuted on account of her membership in the “social group of young girls in the Benadiri clan” or “because the practice of [FGM] in Somalia is not clan specific, but rather is deeply imbedded in the culture throughout the nation and performed on approximately 98 percent of the females,” her membership could be that of Somalian females.⁷⁶

The court relied on a previous holding that a particular social group is “one united by a voluntary association ... *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”⁷⁷ The court stated “we conclude that Mohammed’s claim that she was persecuted ‘on account of’ her membership in a social group, whether it be defined as the social group comprised of Somalian females, or a more narrowly circumscribed group, such as young girls in the Benadiri clan, not only reflects a plausible construction of our asylum law, but the only plausible construction.”⁷⁸ The U.S. Immigration and Naturalization Agency’s guidelines, which provide its agents guidance for dealing with women’s asylum claims, have also been updated so that gender is now listed as an immutable trait that can qualify under the rubric of a “particular social group.”⁷⁹

E. Gender Persecution as an Asylum Category—Pros and Cons

⁷⁴ *Id.* at 789, 791 (applicant filed second motion raising female genital mutilation claim and also claiming ineffectual counsel because her first attorney did not do so).

⁷⁵ *Id.* at 796.

⁷⁶ *Id.* at 797.

⁷⁷ *Id.* (citation omitted).

⁷⁸ *Id.* at 800 (footnote omitted).

⁷⁹ INS Office of International Affairs, *Gender Guidelines, Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, 4 (May 26, 1995).

Despite the ample evidence that the current asylum system does not adequately address gender-based persecution,⁸⁰ critics attack both the need for a gender category and the effects such a category would have. One of the strongest voices against the need for a gender category has been Dan Stein, the Executive Director of the Federation for American Immigration Reform. He strongly believes that a gender category would move the United States from the murky area “of rendering judgments about the actions of foreign governments to the even murkier area of judging social and cultural practices. If the United States has sometimes been viewed as the world’s policeman, these recent expansions of political asylum are moving us toward the role of the international nanny.”⁸¹ However, Stein does claim that “violence of any kind perpetuated against women is an evil itself to be avoided if possible.”⁸² But he still believes that asylum is not the place to combat these atrocities. “While all these practices are reprehensible, they hardly fit the definition of political persecution.”⁸³ He mostly focuses his arguments on how the need for a gender category stems from a social consciousness to right the world’s wrongs. “I would argue that asylum policy is not the place to battle the world’s cultural, political, and ethnic fault lines. We should try to spread our Western values through cultural exchange, mass exchanges, and diplomatic pressure. But we cannot save the world through immigration.⁸⁴ Asylum is designed to provide people protection from governments, not prevailing social norms—no matter how much we may dislike them.⁸⁵

A criminal offense, rape, for example, does not become political merely because the local

⁸⁰ See discussion *supra* Parts C & D.

⁸¹ Dan Stein, “Political Asylum Should Not Be Turned Into Social Asylum,” *Bloomsburg Press-Enterprise*, May 6, 2001.

⁸² *Id.*

⁸³ Dan Stein, “Political Asylum Should Not Be Turned Into Social Asylum,” *Bloomsburg Press-Enterprise*, May 6, 2001.

⁸⁴ Dan Stein, “Gender Asylum Reflects Mistaken Priorities,” *The Human Rights Brief* (1996).

⁸⁵ *Id.*

political system fails to prosecute the offense—even for political reasons.⁸⁶ [W]e unfortunately must pick and choose who we will offer protection.⁸⁷ Political asylum must not become social asylum, or it will destroy our ability to help anyone.”⁸⁸ Supporters fire back that opponents such as Stein miss the problem at the heart of gender persecution. “Women are impacted differently and adversely by certain practices and traditions than men.”⁸⁹

Critics who argue against creating the gender category do so based on two main objections. The first, and by far of the most concern, is the floodgate theory: “Opponents of gender-based asylum argue that opening up the doors for women to seek asylum on account of their gender would overwhelm our immigration system.”⁹⁰ Stein agrees: “Virtually everyone who is subjected to any injustice, whether perpetuated by a government, social group, or a relative, [could] seek protection by the United States.”⁹¹

In 1996, in the *Matter of Kasinga*, the BIA recognized FGM as a persecution basis for a claim of asylum.⁹² Despite FGM being a common practice around the world, the U.S. immigration authorities have not seen “an appreciable increase in the number of claims based” on FGM in the years following the decision.⁹³ Similarly, Canada in 1995 issued guidelines about treating domestic violence as the basis for a claim of asylum.⁹⁴ Instead of receiving an increasing flood of applications, the Immigration and Refugee

⁸⁶ *Id.*

⁸⁷ Dan Stein, “Political Asylum Should Not Be Turned Into Social Asylum,” *Bloomsburg Press-Enterprise*, May 6, 2001.

⁸⁸ *Id.*

⁸⁹ Blanck, *supra* note 22, at 69; *see also* discussion *supra* Part C.

⁹⁰ Lieberman, *supra* note 2, at 9.

⁹¹ Dan Stein, “Political Asylum Should Not Be Turned Into Social Asylum,” *Bloomsburg Press-Enterprise*, May 6, 2001.

⁹² *Matter of Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

⁹³ U.S. Dept. of Justice, *Questions and Answers: The R-A- Rule*, Dec. 7, 2000, <http://uscis.gov/graphics/publicaffairs/questsans/rarule.htm> (last visited Oct. 24, 2005).

⁹⁴ *Id.*

Board of Canada reported gender-based asylum claims steadily dropped from a peak in 1995 through 1999 (the last year data was available in this report).⁹⁵

Irena Lieberman in *Women and Girls Facing Gender-Based Violence, and Asylum Jurisprudence* explains why the numbers of gender-based asylum claims remain low despite their growing recognition in the West:

It is extremely traumatic for a refugee to flee his or her country, let alone for the most disenfranchised members of a society to do so. Flight requires, among other things, financial and other resources, some degree of physical and emotional health, assistance from others, and opportunities. It will be a long time before most women who face severe violence and degradation on a daily basis in their countries are able to escape. In short, the women who need us the most might never even know they have a place to escape to.⁹⁶

Another argument is that asylum claims are handled individually, and though the number of claims might increase, the number granted would not necessarily go up. “[T]he ‘floodgates’ concern misses the essential nature of the refugee remedy, which is a case-by-case individual one.”⁹⁷ “[C]laims based on gender, as claims made under other enumerated grounds, only stipulate the reasons for the persecution in any individual case and do not suggest that this renders large segments of the population eligible for asylum.”⁹⁸

⁹⁵ *Id.*

⁹⁶ Lieberman, *supra* note 2, at 9.

⁹⁷ Randall, *supra* note 20, at *10.

⁹⁸ *Id.*

The second objection that critics voice against a gender category is the legitimacy of the claims. Stein again makes the best argument for opponents: “Many gender-based claims appear to have fact patterns that make it difficult for the trier of fact to verify the claim.”⁹⁹ [H]ow does the United States monitor what is taking place in every village square and in every bedroom around the world?¹⁰⁰ Credibility is an issue in every asylum claim—not just one based on gender persecution. Courts have not addressed this issue any differently in gender-based claims. They rely on State Department reports to tell them what is going on in the area¹⁰¹ and the claimant’s testimony and credibility.¹⁰²

F. Other Nations’ Recognition of Gender Persecution

The awareness of gender-persecution has become increasingly recognized by the international community. The 1993 Declaration on the Elimination of Violence Against Women condemns domestic violence as one of the “crucial social mechanisms by which women are forced into a subordinate position compared with men.”¹⁰³ Individual nations, however, have been slow to address how to address gender persecution in asylum claims. Canada was the first country to recognize gender persecution as a basis for asylum in 1993.¹⁰⁴ In 1995, Canada also issued guidelines about treating domestic violence as a claim for asylum.¹⁰⁵ By 2000, Canada, the United Kingdom, Australia, and New Zealand

⁹⁹ Dan Stein, “Gender Asylum Reflects Mistaken Priorities,” *The Human Rights Brief* (1996).

¹⁰⁰ Dan Stein, “Political Asylum Should Not Be Turned Into Social Asylum,” *Bloomsburg Press-Enterprise*, May 6, 2001.

¹⁰¹ *See* *Fiadjoe v. Attorney General of the United States*, 411 F.3d 135, 138 (3d Cir. 2005) (relying on State Department report of human rights practices about violence against women in Ghana).

¹⁰² *See* *Mohammed v. Gonzales*, 400 F.3d 785, 789 (9th Cir. 2005) (using credibility as part of the process to assess validity of asylum claim).

¹⁰³ Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993).

¹⁰⁴ Canadian Immigration and Refugee Board., *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Mar. 9, 1993).

¹⁰⁵ *See supra* note 63.

all recognized domestic violence as a basis for an asylum claim.¹⁰⁶ As of Nov. 1, 2005, Argentina, Ireland, Romania, Spain, and Hungary had also granted asylum claims based on FGM and/or domestic violence.¹⁰⁷

In the United Kingdom, what a “social group” is defined as has been largely expanded due to one case in particular. In *Islam (A.P.) v. Secretary of State for the Home Department*,¹⁰⁸ Lord Steyn found that “women in Pakistan seems to be a logical application of the seminal reasoning of *Acosta*.”¹⁰⁹ This meaning that women were a recognizable social group. Lord Hoffman in that same case stated that “while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even to cause the creation of a particular social group.”¹¹⁰

The United States needs to get in line with other countries such as Canada, Australia, New Zealand, and the United Kingdom, all of whom have taken more steps to recognize gender persecution.¹¹¹ Canada, in particular, has recognized gender-based asylum claims for a decade without seeing the floodgate effect in applications.¹¹²

G. How Could the Current U.S. System Be Reformed?

The inherent promise in *Acosta* of recognizing gender as an immutable characteristic in social group membership has remained largely unrealized in U.S. asylum law.¹¹³ The law still lacks a consistent message that persecution suffered by many

¹⁰⁶ See *supra* note 6.

¹⁰⁷ Melita Sunjic, *Abused Woman Granted Refugee Status in Hungary*, UNHCR, Nov. 1, 2005, www.unhcr.ch/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=436788e94

¹⁰⁸ *Islam (A.P.) v. Sec’y of State for the Home Dep’t*, [1999] U.K.H.L.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *supra*, note 125.

¹¹² See *supra*, note 123.

¹¹³ Randall, *supra* note 20, at *7.

women based on their gender is grounds for asylum.¹¹⁴ There are judicial and administrative decisions on the books and proposed rules that would ease the burden on women and girls fleeing gender persecution¹¹⁵—if they were consistently applied.

However, “[t]he United States must begin to take responsibility for those women who have a well-founded fear of persecution and cannot be properly categorized within one of the five enumerated classes of a refugee.”¹¹⁶ The abuses women face are unique from men, and so too should be the asylum process that recognizes the abuses against them. Therefore, “[t]he United States should amend its current asylum laws in order to formally recognize a category for gender specific crimes.”¹¹⁷ In order to address critics’ concerns about the legitimacy of gender-based asylum claims, an applicant would have to not only fulfill all the asylum law requirements, but also “prove that the harm she faces rises to the level of persecution encompassing more than threats to life or freedom.”¹¹⁸ The United States can do this by simply changing the statutory definition of who can be a refugee to include gender persecution as a viable reason for asylum.

But the United States will have to do more than just change the law, however. It will also have to amend the process of interpretation and analysis for handling gender-based claims, “such as using gender sensitive techniques to analyze an applicant’s claim.”¹¹⁹ These techniques include making female asylum officers and interpreters available to women who will be required to recount abuses both physical and sexual against them in order to qualify for asylum. In order to get the truth, an applicant must be

¹¹⁴ *Id.*

¹¹⁵ *See supra* notes 123 & 125.

¹¹⁶ *See Bosi, supra* note 4, at 803.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 804.

¹¹⁹ *Id.*

as comfortable in telling her story as the circumstances allow. “[I]t may be necessary to provide these women with counselors or cultural experts in order to fully comprehend their grounds for asylum and the seriousness of the claims.”¹²⁰ By taking these steps the United States can bring itself in line with its world peers in terms of asylum law.

Conclusion

An asylum of mankind is certainly what the countries of the United Nations thought they were creating in 1951. The five categories of asylum were not meant to be exclusionary, but rather to open the door to recognizing oppression and tyranny in many forms. So now more than fifty years later, a newly recognized, yet old as time, form of oppression presents itself to the countries of the West. Recognizing gender persecution is as important as recognizing political or racial persecution. Though gender persecution worries critics that fifty percent of the world’s population would suddenly have an asylum claim simply because they are female, the numbers just don’t support this. Canada has recognized gender-based claims for a decade and has not seen a “flood” of gender-based asylum applications.

However, being forced to fit gender persecution into social group membership has lead to convoluted legal decisions and inconsistent outcomes for applicants as well as a pattern of reversals through the appeals process. Recognizing gender persecution as a separate claim for asylum will clean up the legal mess the courts have made trying to make this category fit where it was never meant to, and it will put the United States back on equal footing with its contemporaries, rather than a step behind in asylum law.

¹²⁰ *Id.* at 805.