



CANADA'S PERIODICAL ON REFUGEES

REFUGEE

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FOCUS ON GENDER ISSUES AND REFUGEE LAW

Reflections on the Gender Guidelines

It has now been several months since the Immigration and Refugee Board released its *Guidelines for Women Refugees Fearing Gender-Related Persecution*. They were released on March 9, 1993, coincidental with International Women's Day.

Canada has been lauded as making a massive leap forward with the introduction of the guidelines; we are much the envy of those lobbying for similar action in their respective jurisdictions. Nurjehan Mawani was given the American Immigration Lawyers Association (AILA) "Humanitarian Award" citing her ability to forge ahead with the gender agenda in times where the national mood of host states in the Western world is one typically characterized as increasingly restrictionist, not expansive. But all reaction has not been laudatory. Essentially, criticism of the potential effect or reach of the guidelines generally falls into three broad categories.

First, they are criticized as being a defective mechanism of change, given that they are in the form of guidelines and not regulations; that is, they are not law. Generally, this argument is met by reference to the difficulty in the legislative route required to put regulations in

place. Furthermore, goes the argument, while the guidelines may not have the force of law, they present the advantage of flexibility and can be monitored and changed more easily than legislation. They will be applied by decision makers who are being encouraged to provide

written reasons and initially will be subject to scrutiny by the Board and the advocacy community in keeping with the fundamental principle of administrative law of the independence of decision makers. In the meantime, the general mood is that we should feel quite

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REFUGE

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A note of welcome from the new Editor

With this issue we bid farewell to Howard Adelman's distinguished editorship of *Refuge*. Throughout the past five years of momentous change in the world refugee situation and the policy of Canada on refugee matters, Howard has deftly steered a course which avoided the shoals of superficiality and navigated steadily through the currents of controversy. Following the tradition of the Centre, Howard will take the helm as Editor of *Refuge* with a new voyage plan—but not before expressing to Howard my admiration and gratitude. Fortunately, he will be remaining outside for a few months. The Editorial Committee and I shall continue to profit from his clear vision and deliberate charting—however murky the weather! Ready, aye, ready!

C. Michael Lamphear

Letter to the Editor:

Re Special Issue on Sri Lanka, Vol. 13, No. 3, June 1993

• I found this to be nicely presented and informative. It might have benefited by having one piece contributed by a Sinhalese or Sinhalese-speaking scholar in order to give it the advantage of ethnic balance. I also thought that essay [on Ethnic Conflict in Sri Lanka], although good, grinds to a halt too soon on p. 8. Several vital aspects of the scenario you are discussing really need to be developed. First, in my opinion, the failed District Development Councils of 1981-82 are a watershed event in modern Lankan history. They demonstrated that no Sinhalese head-of-state, no matter how theoretically powerful in terms of executive authority and control of a parliament, has the political will or strength to give federal concessions to Ceylon Tamil demands. Second, mention should have been made about the very destabilized situation in the country due to the referendum of 1983 and the rise of the Janatha Vimukthi Peramuna. Third, something might be put forward about the ethnic policies of [the late President] Rana-singhe Premadasa. (It might be argued that he had none, but in fact he was careful to cultivate good relations with both Ceylon and Indian Tamil communities in his own way.) I think he was prepared to let the civil war fester as a low-scale infantry engagement for a long time. Those who have taken over from him now, particularly [Prime Minister] Ranil Wickremesinghe, will blunder along in the same messy way for the time

being. At any rate, these are mere observations. The main thing is you have produced a nice special issue, and I welcome your initiative.

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Authors' note: The essay did conclude on page 8 since we were primarily interested in the evolution of the conflict up to the period of the solidification of the Tamils position to the ethnic conflict, as enunciated by Tamil United Liberation Front's Vaddukoddai resolution in 1976, and its subsequent 'ratification' in the general election of 1977 by the Ceylon Tamil population. The explosive development in Sri Lanka (literally and figuratively) since that period will form the subject of a separate essay.

• I read the entire issue with care and thoroughness. I thought it constituted a very special focused issue on that unfortunate island. The contributors were well informed and packaged their presentations in a readable and excellent style.

[On Professor Howard Adelman handing over his responsibilities as the editor of *Refuge*], the community owe considerable debt for the significant work, especially his leadership qualities and talents, and the work of his Centre for Refugee Studies for work on the unfortunate victims of the world. I wish there was some award that could be made for the work of such great humanitarian worth.

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fortunate to be this advanced on a comparative basis in bringing a gender-conscious approach in refugee status determination.

A second category of criticism has to do with what might be typically referred to as the "floodgates argument" against any holus bolus change to any rules about how Canada fulfils its international obligations to protect women refugees. Consider the reaction typified by Barbara Amiel in her recent *MacLeans* editorial. According to Amiel, the inclusion in the guidelines of "gender discriminating religious or customary laws and practices in their country of origin" as a foundation for a refugee claim is the biggest offence, not only because it smacks of "100 percent Canadian-Fem cultural imperialism," but, if applied as written, she suggests that "immense numbers of people from all over the world will make that claim, come here and be accepted. Those who do will then turn around and sponsor husbands or family members whose approach to gender relations gave them refugee status in the first place." While it is difficult to know to whom this type of argument appeals, it must be addressed.

The floodgates criticism fails under any sort of serious scrutiny on several grounds, the most evident of which is the fact that because of other obstacles, only a third of refugee claimants accepted to Canada are women. It is well accepted that it is the males, mobile and moneyed, that actually make it to these shores. This more-considered position is reflected by the comments of James Hathaway as quoted in the *Globe and Mail*, ("Domestic Abuse Accepted for Refugee Status," February 10, 1993) that "we are not going to see a flood of refugee claimants. Most women can't get out of their countries, and when they can, they're lucky to make it to the next country." Essentially, it is Canada's duty, at a minimum, as a member of the international community ascribing to international standards to protect those who do make their way to our shores. It is indeed sobering to look at North America's miniscule refugee population compared with that in the

African continent and continued references to "floodgates arguments" are tiresome and offensive to the very idea of what it is to be a refugee in need of asylum.

The third fundamental criticism of the guidelines goes much deeper and has to do with a vision of why and how gender persecution ought to be addressed in refugee determination. That is, the guidelines do not create a separate category of persecution labelled as "gender," and that to not separately categorize gender as one of the five grounds upon which to found a refugee claim, renders the gender approach—through the "membership of a particular social group"—a deficient approach. In addition to the location of the Convention definition ground upon which to plead the specific gender-related aspects to any claim is the content of the claim. The proposition put forward in the guidelines is, in one instance, that the claimant must show an individuated persecutory foundation to her claim, and, in another instance, it would seem that a situation of generalized oppression of and violence against women will not be a ground for a claim to be rejected. In the absence of a number of decisions being made yet under the guidelines it is difficult to know when an individual basis for the fear of persecution need be shown and when it need not. Clearly, the relative merits of the content of the current gender guidelines and the effect of not providing a separately enumerated category of gender as a ground upon which to found a Convention refugee claim is a debate that will continue. However, we now have the guidelines and the opportunity to examine how they have changed the face of refugee determination in Canada and, for that matter, internationally.

In this issue of *Refuge*, the spill over effect of the guidelines is shown in the efforts to have their provisions applied to at-risk women who fall under the rubric of the entire immigration and refugee protection mandate of the federal government. The beginning of this process is reviewed in the following pages where the results of an agenda-setting meeting for future consultations between the government and refugee ad-

vocacy and interest groups is provided. The expectation is that the principles enunciated in the guidelines will be applied to at-risk women in the overseas refugee protection process, humanitarian and compassionate immigration programs domestically and in the post-determination refugee claimant designated class. Again, as with the gender guidelines applied by the Immigration and Refugee Board, an international precedent is being set.

Additionally, the recent decision of the Supreme Court of Canada in *Canada v. Ward* is reviewed in terms of elaborating the Convention refugee definition and elucidating its constructs. Fundamental to the *Ward* decision is the vision of refugee law as being international in formulation and a backup to the protection one expects from the state of which an individual is a national. In keeping with this theme is the article by Diana Bronson regarding violence against women as an international human rights law issue and her critique of the adequacy of human rights approaches to "women's rights."

The following pages are provided in the rather insecure state of refugee policy matters in Canada today given the political and bureaucratic shifts. Apparently, the federal agenda in refugee matters has not changed, according to the recent speech given by the new minister responsible for refugee issues to a group of ethnocultural agencies that deal with immigrants and refugees. While it is not clear yet what the implications of the new Public Security affiliation will be, admittedly, the Orwellian-sounding title itself suggests some seemingly obvious clues, as does the fact that within the same department are the RCMP, CSIS, the Office of the Solicitor General and the parole board. However, in Minister Lewis' speech, he stated that "there is no hidden agenda in the creation of this new department." In any event, the public relations value of the Public Security affiliation in and of itself may appeal to an increasingly xenophobic and intolerant populace, but it will likely prove to be a very unhelpful addition to how refugees are viewed in Canada. ■

Leanne MacMillan, Guest Editor