

# The Factual and Legal Legitimacy of Addressing Gender Issues

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I believe a preliminary question in addressing gender issues in refugee protection and immigration is the legitimacy of such an approach. In other words, why it is necessary to single out women's problems in refugee protection and immigration, and why it is justified to analyse them in light of our definition of fundamental rights. The Diplomatic Conference on Human Rights in Vienna brought out the tensions regarding this issue and illustrated the need for clarification. The justification for the Immigration and Refugee Board's (IRB) approach rests both on facts and law.

Facts show that the vast majority of refugees are women. Contrary to men, most of them are accompanied by children; they often experience a different kind of persecution than men, for example, of a private or sexual nature; and they do not have the same remedies for state protection as men nor the same opportunities for escape.

International human rights instruments such as the *Universal Declaration of Human Rights*, approved by the vast majority of states, or the *Convention on the Elimination of All Forms of Discrimination Against Women*, to which 104 states are parties, enshrine the duty to offer protection to those in need, without discrimination. These instruments and other relevant international human rights instruments reflect the fact that human rights inherently transcend culture, religion and borders. Universal recognition of these rights serves both as the legal basis and evidence of their universal nature. We must be categorical in this our deepest belief.

We are not alone in bringing this belief to gender issues in refugee protection and immigration: for some years, the United Nations High Commissioner for Refugees (UNHCR) has promoted a gender-conscious approach in the determination of refugee status; the European

Community has formally adopted the same view. On specific gender issues, the United States has recognized forced sterilization as persecution; in France, a recent negative decision on credibility asserts that genital mutilation constitutes persecution; the World Health Organization has stated that genital mutilation is not a protected cultural or religious practice but rather a health hazard that will be the subject of its information program.

I will now turn to the three themes suggested for this agenda setting meeting on Women's Issues in Immigration and Refugee Protection and comment on gender issues in the refugee determination system.

## Theme 1 — Gender Issues in the Refugee Determination System

### The Definition of Refugee as Applied to Women

#### Characteristics of persecution against women

One-third of refugee claimants in Canada are women, and our acceptance rate for 1992 was 64 percent, compared to 58 percent for males.

Addressing gender issues in the refugee determination system reveals that persecution is often of a different nature against women than against men and is experienced differently by women than by men. In addition, substantiating the specific forms of persecution against women runs into specific difficulties.

Persecution against women is characterised mainly by:

- the much higher incidence of sexual assault,
- informal persecution, i.e., continuous, minor acts of harassment,
- indirect persecution, i.e., persecution by individuals, tolerated by the state, and
- intermediary persecution, i.e., persecution for the activities of a relative.

These specific forms of persecution raise particular legal, practical and evidentiary problems.

#### Legal issues in the substantiation of refugee claims by women

From a legal point of view, the notion of responsibility of the state is challenged in its traditional form since, in persecution against women, the state is often not the author of the persecution. Yet, states are responsible for ensuring equality before the law. Therefore, a state that does not afford equal protection to men and women is responsible for persecution by individuals and the lack of protection for women legally amounts to persecution by the state.

Persecution against women also challenges the traditional legal notion of persecution: often, persecution against women is insidious, consisting of continuous harassment with acts that, taken in isolation, would not amount to persecution. Also, the political nature of the persecution is less obvious where it is based on the activities of a relative.

Another legal hurdle to the application of refugee protection to persecuted women is the confusion between persecution on the basis of cultural or religious values and legitimate state measures to maintain social order. My preliminary remark is particularly relevant here to distinguish between state measures that entail a restriction of individual rights proportionate to their objective of social order and measures that contravene universally recognized human rights such as equality before the law, protection against torture or the right to life by imposing sanctions disproportionate to their goal of social order or by applying only to certain persons in a discriminatory way.

The notion of internal flight alternative is another legal issue that warrants specific application in the case of women: it is not realistic to ask a woman to resettle to another part of the country when a woman alone in that country is in constant danger or ostracized. In other

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words, it is unreasonable to expect the same mobility from women as for men and therefore to apply the same criteria to women and men for the existence of an internal flight alternative in the determination of refugee claims.

The last legal trapping I will mention in the application of the refugee definition to the specific situation of women claimants is the traditional view that does not readily recognize rape or sexual assault as a form of torture or persecution, thus complicating the legal substantiation of women refugee claims.

#### **Practical issues in the presentation of refugee claims by women**

Persecuted women face practical hurdles in the country of origin that compound the effects of persecution: for instance, the difficulty or impossibility for a woman to file a complaint with authorities of states where women have no independent legal status; the problems of filing a complaint against a male state official to another male official; the personal and social consequences of revealing sexual assault that prevent any denunciation or even confiding of the incident; and the confinement of women to the family that precludes access to remedies from persecution or to state protection.

#### **Evidentiary issues in the presentation of refugee claims by women**

From an evidentiary point of view, women must surmount specific obstacles:

- it may be difficult to prove the often informal persecution that is typical against women, taking the form, for example, of continuous harassment rather than warrants or detention which are more easily verifiable,
- it is also particularly onerous for women whose life has been confined to family to express themselves outside the family, let alone before a tribunal, and
- many women victims of persecution do not view their activities as political and therefore will not properly answer questions to substantiate their claim under the Convention; this is all the more pronounced in cases of intermediary persecution, where the woman is not even aware

of the reasons for her persecution, as she is often estranged from the political activities of relatives.

Psychological trauma also complicates substantiation of many refugee claims typical to women. Guilt and shame make sexual abuse extremely painful, if not impossible, to be brought in evidence, particularly as members of the family are often present during the presentation of evidence and may be unaware of the incidence of sexual assault. In addition, lack of self-confidence undermines women's capacity to relate humiliating experiences that substantiate their claims.

Adding to the evidentiary problems pertaining to the claim or the claimant, Canadian decision makers are often trapped in cultural differences in assessing the credibility of the claimant or the evidence presented.

These observations led some members of the IRB to recommend the establishment of a Working Group to address the specific needs of women refugee claimants. The Working Group organized training sessions to sensitize members to gender issues. Ultimately, coupled with extensive consultations, this work culminated in the issuance of guidelines to assist members in applying the refugee definition to women claimants. Essentially, the IRB is seeking to apply the notion of persecution in a way that reflects the reality of persecution against women, an aim not fully envisaged at the time of the adoption of the Convention. A number of recent IRB decisions address the gender-conscious approach.<sup>2</sup>

For my part, the next steps are:

- monitor the impact of the guidelines on individual refugee claims, and
- revise the guidelines accordingly, from time to time, as the law on gender-related persecution evolves.

We are encouraging our members to provide written reasons for positive decisions in gender-related claims. By doing so, we hope to build a body of jurisprudence on gender-related persecution. We believe that this will be of tremendous value in promoting the recognition of gender-related claims not only in Canada but also internationally.

If the IRB guidelines are to be effective, our members need objective and current documentation on the position of women in their countries of origin, on the incidence of sexual and domestic violence and on the adequacy of state protection. Through the resources of our internationally acclaimed Documentation, Information and Research Branch, we are taking steps to provide this documentation. I am also pleased that the United Nations Commissioner on Human Rights recently adopted a resolution "to ensure that information concerning violations of the rights of women is integrated regularly and systematically into all United Nations mechanisms for the promotion, protection and implementation of human rights."

The recent document, "Gender Issues and Refugees," prepared by Employment and Immigration Canada (EIC), asked:

- whether we should monitor the guidelines to determine if they adequately cover situations involving gender persecution, or whether we should press for an amendment of the refugee definition in the Convention, or
- whether Canada should press for strengthening of Conclusion 39 and international acceptance of the guidelines, or
- whether Canada should amend its own legislation to expand the definition or give the guidelines force of law.

So far, in the international forum, we have been persuaded by experts not to tinker with the definition at a time when "Canada is the best player on a very bad team," to quote James Hathaway. On the other hand, promoting Conclusion 39 and international acceptance of the guidelines could present a much more successful approach for incremental change in the interpretation of the definition leading to protection of women persecuted on the grounds of gender.

Domestically, the political context may not be conducive to legislative changes to include gender in the refugee definition. In fact, it may not be necessary: the guidelines present the advan-

tage of being more flexible and easier to monitor than legislative change. As to the suggestion that they be made binding, it runs counter to the fundamental principle of administrative law regarding the independence of decision of members of an administrative tribunal.

It seems to me that the definition should, if properly interpreted, address the situations of women at risk of persecution, whether the persecution is based on gender or not. Consequently, I do not think we should take any action until we have assessed the efficiency of the IRB guidelines in this respect. This being said, my reluctance to favour an amendment of the refugee definition is based on practical considerations—that is, a fear that it may be politically detrimental to refugees to attempt this *now*—and not on philosophical considerations.

Also, we have accepted that however broadly the guidelines or the definition are interpreted, the refugee protection system will never apply to all situations of violence or discrimination against women.

For consideration in our common agenda development, I believe the situation of women refugee claimants calls for:

- taking into account in the refugee determination process the specific difficulties of presenting evidence of persecution typical to women, particularly sexual assault, and showing general sensitivity to gender issues through administrative measures such as ensuring that claims are heard by female members, if that is proven to be helpful, or by excluding family members from the hearing,
- providing cross-cultural training to decision makers to decipher various social codes of behaviour and treating claimants with respect and in a way that will best bring out the relevant evidence, and
- most importantly, building and resorting to the expertise necessary to determine women refugee claims, for example, with regard to country conditions and psychological trauma from sexual assault.

Another question submitted in the EIC's "Gender Issues and Refugees"<sup>3</sup> re-

fers to the determination process. We have addressed the need for improvement in gender and cultural sensitivity among IRB members and refugee hearing officers, for user-friendly hearing rooms and for special procedures to hear evidence of sexual assault. We are also encouraging the use of experts on country conditions and sexual assault trauma.

## **Theme 2 — Gender Issues Related to Alternative Inland Mechanisms for Protection**

### **The complementary nature of refugee protection and alternative inland mechanisms for protection**

It is also crucial in our current agenda to make the distinction between treatment of women that constitutes persecution within, the meaning of the Convention and situations that, however intolerable, do not give way to the refugee protection regime as established. This is where alternative inland mechanisms for protection become complementary to the refugee determination system and essential in the full protection of those in need.

Alternative inland mechanisms for protection are a requirement both to the preservation of the integrity of the refugee determination system and to the protection of women in danger, albeit not Convention refugees.

### **Post-Determination Refugee Claimants Class**

It follows that the automatic Post-Determination Refugee Claimants Class (PDRCC) is an essential tool in offering the necessary protection. As it applies to situations akin to those giving rise to refugee status, the PDRCC is all the more relevant to women, considering the difficulties of substantiating claims of persecution based on gender or against women in general, as I mentioned earlier, and considering the precarious situation of women in so many states.

In this context, the Acting Executive Director for Immigration Operations stated in a memorandum to all regional directors that EIC is recommending that decisions in the PDRCC cases and applications for humanitarian and compassionate review be taken in light of the IRB guidelines. I believe this reflects the general basis of the guidelines and will en-

sure consistency in our sensitivity to gender issues.

It does not seem to me that changes to the PDRCC criteria or humanitarian review process are necessary as long as they are applied in a way that is gender sensitive, that takes into account the particulars of violence or persecution against women in terms of remedy and protection.

### **Compassionate and humanitarian reviews**

Although not necessarily based on conditions in the country of origin and thus not directly within the purview of international protection, humanitarian and compassionate review is also a crucial tool in addressing problems typical to women. One that is coming more frequently to the fore, and that I am glad to see listed in EIC's "Immigration and Gender," is that of the vulnerability of women waiting in Canada for landing as sponsored spouses. Specifically, their vulnerability to conjugal violence and, in some cases, subjugation to the status of the sponsor locks them into abusive or unhappy relationships, particularly where the marriage includes children.

It would seem pressing to include in our agenda further examination of domestic violence as a complicating factor for women sponsored as spouses, waiting for landing in Canada. We must also address the issue of the subjugation, legal or de facto, of a woman to her husband's status in Canada.

EIC's suggestion in "Immigration and Gender," that the abusive spouse could not be sponsored by a spouse admitted under humanitarian review based on conjugal violence, seems to impose itself as logical and as a valid protection to both Canadian society and the abused spouse, who could be lured into reconciliation so that the abuser may gain entry into Canada and then fall back into his abusive behaviour.

Humanitarian review may serve as a case-by-case solution where, for example, a marriage will break down before landing of the sponsored spouse but after the birth of a child. However, special provisions may be needed to take into account the vulnerability of sponsored spouses landed in Canada. I agree that

the Australian example mentioned in EIC's document may be too cumbersome, but it is clear to me that exceptional measures must be taken to allow consideration of conjugal violence in the determination of a sponsored woman's status in Canada. Perhaps the Australian example could be simplified by eliminating the requirement of a court order so as to leave the decision as to the existence of domestic violence to an immigration official.

### Theme 3 — Gender Issues Relating to Refugees and Immigrants Abroad

#### Facts

With respect to gender issues relating to refugees and immigrants abroad, a few facts must first be recalled as relevant to the kind of protection called for and its urgency. As I mentioned earlier, women form the greater part of the refugee population, and they are usually in charge of children and sometimes of handicapped men. All the problems previously mentioned in regard to the substantiation of refugee claims are applicable in the process abroad, perhaps even more so. There is usually less opportunity to reach authorities for protection and refugee status and to express a claim in such a fixed, structured procedure as exists in the Canadian refugee determination process. Abroad, problems of presenting evidence of persecution are difficult to resolve in the presence of family members, and access to state authorities for protection is complicated.

#### Needs

It follows that the need for expertise that I stressed in the context of the refugee determination system in Canada is at least as important to secure abroad: visa officers must receive assistance such as cross-cultural training and information on country conditions as well as on the psychological manifestations and consequences of sexual assault trauma.

Considering that most women refugees cannot reach Canada, any shortcoming of our selection process abroad only compounds their disadvantage. In other words, are we failing to reach those most in need?

I believe that, in an agenda for consultations on gender issues relating to refugees and immigrants abroad, we should provide for:

- development of strong expertise to integrate the overseas refugee selection process (the IRB training program provides an appropriate model),
- improvement of the Women at Risk program, which I understand from EIC's documents is under way (the application of the program to only 500 people, including children, since 1988, would seem to point to operational problems), and
- further examination of the alleged disadvantage of women as refugees and immigrants with regard to our selection system.

To answer EIC's question, I would definitely recommend the application of EIC's guidelines to selection staff abroad as a natural extension of the protection we seek to provide: the bases for gender sensitivity in Canada are the same for applicants abroad; the facts about persecution against women are as true for applicants abroad as in Canada. Moreover, I understand that our visa officers abroad are in great need of the assistance the guidelines may provide.

EIC also asked us at the agenda-setting meeting to suggest ways to improve the Women at Risk program, and we replied that improvement requires an in-depth revision of the sponsorship requirement.

As a related issue, I would also add to our agenda consideration of the role of counsel and non-governmental organizations (NGOs) in assistance to women refugee claimants or immigrants. In particular, our experience points to two pressing matters:

- delivery of information to NGOs, and
- assessment of the impact of legal aid cutbacks on women refugee claims.

#### Integration

As to the specific challenges of the integration of women immigrants and refugees, significant efforts have been made to tailor Canada's integration programs to women's needs. Language and occu-

pational training programs are now fully available to independent or family-class women immigrants, and efforts are made to accommodate their family obligations; most immigrant women end up on the labour market whether it was their initial intention or not. I believe EIC should be commended for its efforts and encouraged to pursue this effort crucial to both the well-being of new Canadians and to the social peace and economic prosperity of Canada.

Still, I echo the remarks in EIC's "Immigration and Gender" stressing the need to address the specific issues for the integration of women, such as the redefinition of their role and the development of their autonomy outside the family.

#### Conclusion

I think it is as important to recognize Canada's leading role and exceptional progress with respect to women's issues as it is to identify the need for improvement. Canada's leadership in this area was striking at the World Conference on Human Rights in Vienna. The United States and Australia are looking at our guidelines on Women Refugee Claimants as an example, and some of our members are assisting them in developing similar instruments. We must keep our role as leader in mind, as an unfairly critical approach may deflate the enthusiasm that led to the progress already made and which is still crucial to further progress. ■

#### Notes

1. These comments were prepared by Mrs. Mawani regarding the National Consultation on Women's Issues in Immigration and Refugee Protection Agenda Setting Meeting held at the Centre for Refugee Studies on June 28, 1993 under the sponsorship of Employment and Immigration Canada.
2. See in particular the following: Immigration and Refugee Board Decision U92-06668, February 19, 1993; Immigration and Refugee Board Decision M92-11219, April 29, 1993; Immigration and Refugee Board Decision T91-02744, 02745, 02743, March 12, 1992; Immigration and Refugee Board Decision V92-00883, 00884, March 23, 1993; and Immigration and Refugee Board Decision U92-08714, June 4, 1993.
3. See page 7 of "Gender Issues and Refugees," Ottawa: Employment and Immigration Canada, (March 9, 1993).