women she has interviewed in Toronto are generally better able and equipped to restructure (re-invent themselves as bicultural-bilingual) new selves as compared to Latin American men. While women are able to establish a continuity of tasks related to their past lives in Latin America, as well as to secure new and meaningful tasks in the Canadian context, men’s core identity/masculinity is challenged by the refugee ordeal. Men experience severe losses due to changes in their work status, and in effective parental and financial-provider roles. In effect, Freire’s research demonstrates that traditional Latin American gender relations can contribute to women’s empowerment and men’s disempowerment in the new country of resettlement.

All of these papers challenge the traditional view of refugee women as solely and always passive “victims,” and demonstrate the need to give “voice” to women as well as the ways in which women have proactively taken “voice.” They describe a feministic approach to refugee issues that is based on a more interactive relationship between refugee women and “others” than traditional, paternalistic approaches.

The preparation of this issue was carried out with Andrea Love, whose insight and skills were an invaluable part of the entire process of selection and editing. Finally, while a special issue on the gender relations of refugee migration is important, so is the mainstreaming of research on gender. Since gender relations involve both men and women, we hope to see more papers that address gender relations in every issue of this journal and encourage your submissions.

Wenona Giles, Guest Editor.

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The Canadian Guidelines On Women Refugee Claimants Fearing Gender-Related Persecution

Judith Ramirez

Introduction

The vast majority of refugee claimants who reach the borders of industrialized countries are men, even though 80 percent of refugees worldwide are women. This fact alone would indicate the need to ensure that our determination systems are equipped to recognize forms of persecution suffered primarily, if not exclusively, by women. Otherwise, we perpetuate a system which doubly disadvantages women refugees. First, their lesser mobility and fewer resources limit their access to countries like the United States and Canada. And second, once they arrive (in disproportionately low numbers), their experiences of persecution and lack of state protection are less readily recognized.

There is a growing awareness that women often fear persecution for different reasons than men. Even when their fear has the same basis as men’s—race, religion, nationality, political opinion, and membership in a particular social group—women often experience persecution differently. This has led the international community to begin to re-interpret the meaning of persecution, a concept which developed primarily in response to the experience of male refugees.

In 1985, the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) recognized that women who face harsh or inhumane treatment for transgressing the social mores of their societies may be considered a “particular social group” within the UN definition of a Convention Refugee (UNHCR 1985). The UNHCR has also issued “Guidelines on the Protection of Refugee Women” (UNHCR 1991), and in 1993 the UN Commission on Human Rights adopted a resolution acknowledging that women are susceptible to particular sorts of human rights abuses.

Development of the Gender Guidelines

The Immigration and Refugee Board (IRB) Chairperson, Nurjehan Mawani, issued Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution on March 9, 1993. The purpose of the Guidelines is to provide substantive legal and procedural guidance in analyzing gender-related issues in refugee claims submitted by women. The legislative authority to issue the guidelines was given to the IRB Chairperson when amendments to the Immigration Act were enacted in February 1993. Canada is the first refugee-receiving country to establish formal guidelines for the adjudication of refugee claims made by women. The Guidelines now serve as the model for countries considering similar initiatives, including the United States and Australia.

The Guidelines are the culmination of a long process of vigorous discussion within the IRB. In 1990, the first Working Group on Women Refugee Claimants was established in Toronto. Co-chaired by Flora Liebich and myself, and the Group’s principal objective was to train all the key participants in the determination process to deal with gender-based refugee claims. To that end, we organized a number of professional development workshops featuring a wide range of speakers, including UNHCR specialized staff, legal and human rights experts, medical practitioners assisting torture victims, and refugee women themselves.

The workshops addressed issues such as gender-based patterns of per-
Similarly, a woman who chooses not to follow the precepts of a state religion or who does not fulfill the specific role assigned to women by religious doctrine, and is punished by the state as a result, may have a well-founded fear of persecution for reasons of religion.

issues, a precursor to the Guidelines. In the following months, we responded to several early drafts. This was followed by a process of internal consultation across the country that was set in motion in March, 1992 at a Toronto workshop sponsored by the Working Group and the UNHCR. The IRB Legal Services became actively involved in canvassing relevant case law and scholarly commentary, and in drafting successive versions of the paper. The final phase consisted of external consultation with a wide range of organizations, including the Canadian Council for Refugees, UNHCR, Canadian Advisory Council on the Status of Women, Status of Women Canada, and the Canadian Council of Churches. From the numerous responses received by the Board, it was evident that our stakeholders viewed the Guidelines as an important initiative.

The public debate on a number of IRB decisions relating to women (Dench 1994) gave added impetus both to our internal deliberations on gender issues and to the sustained process of external consultations. In Canada, government policy on immigration and refugee matters is an entrenched part of public discourse. Our leading newspapers have reporters who specialize in the field, and it is not uncommon to see front-page articles and editorials on the subject. The voice of nongovernmental organizations is routinely reported and it is the commitment of these organizations to key issues that often serves as the engine for public debate. Chairperson Mawani later constituted a permanent consultative committee of IRB stakeholders and it met for the first time in February 1994. In addition, she has appointed a special advisor who is also the National Co-ordinator on Gender

The use of expert witnesses is encouraged by the Board and, where circumstances warrant it, a claimant may give evidence through a statutory declaration or on video rather than through viva voce testimony.

Overview of the Guidelines

The Guidelines make several important points that reflect key issues in any gender-based analysis (Liebich and Ramirez 1993). The existing body of jurisprudence on the meaning of persecution is primarily based on the experience of men. Aside from some cases of rape, the Convention definition has not been widely applied to such women’s experiences as female infanticide, genital mutilation, bride-burning, forced marriage, forced abortion, compulsory sterilization, or domestic violence.

The fact that certain forms of harm experienced by women, such as sexual and domestic violence, are universal, is irrelevant when determining whether these gender-specific crimes constitute forms of persecution. Just like religion, race, nationality, and political opinion, a gender-based “particular social group” may encompass large numbers of similarly-situated persons.

The Guidelines outline common forms of persecution directed primarily against women:

- persecution on the basis of kinship, where a political opinion is imputed to them due to the political views or activities of family members;
- severe discrimination based on the fact that they are women;
- persecution for transgressing against religious precepts, social mores, and legal or cultural norms; and
- exposure to violence by the authorities or private actors, including domestic violence, from which the state is unable or unwilling to protect them.

The “Framework of Analysis,” which accompanies the Guidelines, is an important tool in analysing the link between gender, the feared persecution, and one or more of the grounds in the definition of a Convention refugee. The “Framework” includes an assessment of the following factors:

- the particular circumstances that give rise to the claimant’s fear of persecution;
- the general conditions in the claimant’s country of origin, including the nature of oppressive laws imposed upon women;
- the seriousness of the treatment feared by the claimant;
whether or not the claimant’s fear of persecution is based on one or more of the grounds in the Convention Refugee definition;

- whether there is adequate state protection available to the claimant; and

- whether the claimant’s fear of persecution is well-founded under all of these circumstances.

The Guidelines also point out that claims made by women which fall under the enumerated grounds of race, religion, nationality, or political opinion, may also require a gender-based analysis. For example, a woman who opposes institutionalized discrimination of women, or expresses views of independence from the male social/cultural dominance in her society, may be found to fear persecution for reasons of women’s experience invisible and prevented the recognition of women’s societal rights as human rights, deserving of national and international protection. Canadian refugee jurisprudence has long recognized that violations of fundamental rights by non-state actors can form a basis for a refugee claim. The Guidelines apply this idea to severe discrimination on grounds of gender or acts of gendered 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.” Thus, domestic and sexual violence (actual or threatened) by private citizens (i.e., husbands or boyfriends not susceptible to state control) can found a refugee claim. The critical issue is the availability of state protection. The Guidelines state:

Decision-makers should consider evidence indicating a failure of state protection in that governing institutions and/or their agents in the claimant’s country of origin may have condoned the instances of sexual violence if they had been aware of them or did nothing to prevent them (IRB 1993, 8).

Since the advent of the Canadian Charter of Rights and Freedoms, jurisprudence on women’s rights has challenged the public/private dichotomy in cases involving domestic and sexual violence by a male spouse. In R. v. Lavaller, the Supreme Court of Canada took issue with the prevailing societal pattern of accepting domestic violence. The view that the home is a private sphere within which the husband has unfettered control over his wife was directly challenged. Madam Justice Wilson said for the Court that “no man has a right to abuse any woman under any circumstances.” According to leading feminist lawyer Mary Eberts, “[t]his is a real breakthrough, not only putting women at the centre of judicial analysis of cases involving women, but also in expressing severe social opprobrium of what had long been tolerated” (Eberts 1993, 8).

Similarly, in McGraw v. The Queen,9 the Supreme Court addressed the question of whether the threat of rape could be seen as a threat of grievous bodily harm. In his reasons, Mr. Justice Cory concluded that, “for women, rape under any circumstances must constitute a profound interference with their physical integrity.” He referred to unwanted sexual intercourse as “the ultimate violation of personal privacy,” citing with approval the literature on the “rape trauma syndrome.”

Cultural Relativism

A critical issue in the international discourse on women’s human rights is the universality of human rights versus “cultural relativism.” In issuing the Guidelines, IRB Chairperson Mawani noted that, for Canada, “[t]his is not a matter of imposing western standards on other countries. It is a matter of respecting internationally accepted human rights standards” (IRB 1993). The 1948 Universal Declaration of Human Rights (UDHR) defines the basic principle of international human rights as “the inherent dignity and the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world.”

According to Ed Broadbent, President of the International Centre for Human Rights and Democratic Development, based in Montreal, “the universality of human rights derives from the notion that all human beings are fundamentally equal in principle, and that neither culture, nor gender, nor race can detract from the entitlement of all people to the rights needed to uphold that dignity” (Broadbent 1994, 2). Mr. Broadbent states that “today universality is evolving, becoming more inclusive of historically marginalized populations. The principles of universal human rights are finally being applied to the protection—at least in theory—of the rights of women” (ibid. at 3).
The Final Declaration, issued by the World Conference on Human Rights in Vienna in June 1994, mandated governments not only to protect but also to promote universal human rights:

All human rights are universal, indivisible, interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be kept in mind, it is the duty of states, regardless of their political, economic and cultural systems to promote and protect all human rights and fundamental freedoms (Broadbent 1994, 5).

The Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa of September 10, 1969, regards the granting of asylum to refugees as a peaceful and humanitarian act that shall not be regarded as an unfriendly act by any member state. As well, the United Nations Convention on Territorial Asylum signed in Caracas on March 28, 1954, affirms that every state has the right to decide on the admission of a refugee. The social, cultural, traditional and religious norms and the laws affecting women in the claimant’s country of origin ought to be assessed by reference to the legal systems in other countries. The same principles which underlie Canada’s national standards for recognizing women refugees are evident in the draft Guidelines for Women Asylum Seekers, which outlines three categories that would constitute a “particular social group,” one of which describes the group by “an innate or unchangeable characteristic.” This category “would embrace individuals fearing persecution on such bases as gender, linguistic background, and sexual orientation.”


It is interesting to note that when the Guidelines were first issued, one of the criticisms levied at the IRB was that inordinately large numbers of women would arrive on Canada’s doorstep claiming refugee status. In fact, there has been little change in the number of claims made by women since the Guidelines were introduced. As mentioned earlier, although the overwhelming majority of the world’s refugees are women, women lack the resources and mobility to travel to countries like Canada.

Post-Guidelines Jurisprudence

In the sixteen months since the Guidelines were issued, the IRB has been monitoring their implementation in the hearing room. A number of decisions illustrate the effect of the Guidelines on refugee claims made by women. Since the Guidelines were issued, the Supreme Court of Canada has handed down its landmark decision in Canada (Attorney General) v. Ward, which, along with other recent decisions of the Federal Court of Canada, elaborates on the interpretation of “membership in a particular social group.” The Ward case outlines three categories that would constitute a “particular social group,” one of which defines the group by “an innate or unchangeable characteristic.” This category “would embrace individuals fearing persecution on such bases as gender, linguistic background, and sexual orientation.” Significantly, the Ward case also recognizes that “underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination.”

As well, the Federal Court of Canada (Trial Division) has recently handed down its first decision which refers directly to the Guidelines. In the Mohamed decision of February 14, 1994, the Court ruled that if gender-related persecution is dealt with implicitly in the reasons, “this is not sufficient to discharge the obligation of the Board to provide clear reasons on all material issues raised by an applicant in support of a refugee claim.” Madam Justice McGillis added, “I am satisfied that the Board failed to deliver reasons in the case at bar which squarely addressed the issue of gender-related persecution and therefore committed an error of law.” The case was referred back to the IRB for a redetermination before a different panel.

Conclusion

The Guidelines are currently being updated to reflect recent developments in the jurisprudence on gender-related persecution. The decisions of the IRB reviewing courts as well as the IRB’s own case-law will inform the revision process. The IRB is confident that the steps Canada has taken to assess gender-related claims equitably can be successfully applied to determination systems in other countries. The same principles which underlie Canada’s Guidelines are evident in the draft Guidelines for Women Asylum Seekers, presented by the Women Refugees Project at Harvard University to the Immigration and Naturalization Service in the United States.

In a recent address to the Carnegie Endowment for International Peace in Washington, D.C., Mawani said:

While I am gratified by our accomplishments for women refugee claimants, I am aware that there is still much to be done; I continue to be aware that respect for and an understanding of these rights need to be translated into the fair and sensitive treatment of the individual woman refugee claimant. This is the challenge for all of us as we continue in the quest of guaranteeing meaningful gender inclusiveness for refugee women throughout the world (Mawani 1994).
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