EXOTIC OTHERS:
GENDER AND REFUGEE LAW
IN CANADA, AUSTRALIA AND THE UNITED STATES

by

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ABSTRACT

In this thesis I argue that race, culture and imperialism intersect with gender at the site of refugee law to produce ‘racialized and exotic others.’ These exotic others are refugee women whose differences from refugee decision makers in destination countries are made crucial to their refugee claims by refugee lawyers, decision makers and the system of refugee determination. I use a comparative methodology to examine the gender guidelines for refugee decision makers and selected key cases from Canada, the United States and Australia.

The gender guidelines represent a human rights approach to refugee law. I critique the guidelines and relevant cases from an anti-essentialist perspective informed by postcolonial, feminist and critical race theory. My discussion is organized by contrasting ‘exotic harms,’ transgression of social mores and female genital cutting, with treatment of ‘familiar harms’, domestic violence and sexual assault. I aim to show how the distinctions between the exotic and the familiar are founded on orientalist notions about other women in other places. I seek to suggest strategies for refugee advocates, decision makers and academic lawyers to avoid perpetuating orientalist notions of other countries and other cultures. I conclude, however, that refugee law is a limited project whose solutions to the problems faced by refugee claimants can only ever be incomplete.
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CHAPTER ONE: INTRODUCTION

In this thesis I argue that race, culture and imperialism intersect with gender at the site of refugee law to produce ‘racialized and exotic others.’ These exotic others are refugee women whose differences from refugee decision makers in destination countries are made crucial to their refugee claims by refugee lawyers, decision makers and the system of refugee determination. I use a comparative methodology to examine the gender guidelines for refugee decision makers and selected key cases from Canada, the United States and Australia.

The gender guidelines represent a human rights approach to refugee law. I critique the guidelines and relevant cases from an anti-essentialist perspective informed by postcolonial, feminist and critical race theory. My discussion is organized by contrasting ‘exotic harms,’ transgression of social mores and female genital cutting, with treatment of ‘familiar harms’, domestic violence and sexual assault. I aim to show how the distinctions between the exotic and the familiar are founded on orientalist notions about other women in other places. I seek to suggest strategies for refugee advocates, decision makers and academic lawyers to avoid perpetuating such notions of other countries and other cultures. I conclude, however, that refugee law is a limited project whose solutions to the problems faced by refugee claimants can only ever be incomplete.

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1. CONTEXT

Refugee law can be seen as a subset of immigration law which, in an age of globalization, constitutes a rare exception to general constraints on the movement of people. Immigration law is the primary instrument by which states control their borders, making it very difficult for all but Western tourists, highly skilled workers and investors to travel or migrate legally. Increasingly, immigration law, rather than citizenship law, also plays a key role in constructing national identity by enforcing the distinction between insiders and outsiders, by including some and excluding others.\(^2\)  

International refugee law is the major exception to this general *de facto* prohibition on movement from non-Western countries to Western countries.\(^3\) Despite the lack of enforcement of removals of failed asylum seekers,\(^4\) and the difficulty of even counting those who do not have a legal right to remain, calls to tighten the asylum system assume that it is an easy target for those who would abuse the international rules regulating movement of people. In this context, laws which may be perceived as making it easier for women to gain refugee status can be regarded as exceptional.\(^5\)

Refugee law stands at the intersection of international law and domestic law. Modern international refugee law was inaugurated with the negotiation of the *Convention*  

The definition of a refugee at international law is established by Article 1A(2) of the Refugee Convention. It states that a refugee is a person who

owing to a well-founded fear of being persecuted of reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...

The text of the definition of a refugee is written in the masculine person and does not include sex, gender or sexuality as a protected ground for persecution. During the negotiations of the conference which drafted the definition of a refugee, the Yugoslav delegate suggested the inclusion of 'or sex' as a protected ground of feared

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7 Hathaway argues that the Convention definition of a refugee was dominated by Cold War politics. James C. Hathaway, The Law of Refugee Status (Toronto: Butterworths, 1991) at 6-9 [Hathaway].
10 The refugee definition also includes stateless persons who possess a well founded fear of persecution: Article 1A(2).
persecution. However, this was rejected by the British delegate because ‘the equality of the sexes was a matter for national legislation.’ The failure to include a reference to sex or gender in the definition of a refugee could mean that women are missing out on protection due to a failure of refugee decision makers to understand their claims as coming within the purview of the refugee definition. It is for this reason that refugee advocates and feminists began organizing around the concept of gender related persecution.

In the countries under discussion, refugee law is both an incorporation of international legal obligations as well as a subset of domestic administrative law. Administrative law aims to limit the power of the executive government by allowing access to information about government and enabling government decisions to be challenged more easily. Administrative law itself could be understood as means of constraining the government action against its citizens and hence fulfilling the same role as international human rights law at a domestic level. While some decisions remain the prerogative of the executive and not susceptible to legal challenge, on the whole there has been a movement away from decision-making by the Executive

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13 The separation of powers doctrine of constitutional law, interpreted differently in each of the three jurisdictions under discussion, is another limit on executive power.
14 For example, decisions made under s 417 of the *Migration Act 1958 (Cth)* are non-compellable, non-delegable and non-reviewable, see Senate Select Committee, ‘Inquiry into Ministerial Discretion in Migration Matters’ 2004 <http://www.aph.gov.au/Senate/committee/minmig_ctte/report/index.htm> (Australia); The U.S. Attorney-General has the power to override some BIA decisions eg *In Re R-A-22* I&N Dec. 906 (AG 2001) discussed in Chapter 4; *Immigration and Refugee Protection Act, S.C. 2001*, c. 27, s. 25 [*IRPA*] decisions are both compellable and reviewable.
branch of government which is overtly linked to foreign policy interests to a more bureaucratic or quasi-judicial system of refugee determination.

2. METHODOLOGY

The methodology of this thesis will be comparative analysis of approaches to gender related persecution in Canada, the United States (U.S.) and Australia. There are several reasons for selecting as these three countries as a basis for comparison. The first is that they have the largest refugee resettlement programs in the world and they also have significant numbers of in country asylum seekers. Secondly, Canada, the U.S. and Australia, in that order, were the first countries in the world to implement guidelines for decision makers which attempted to redress the lack of gender awareness in the Refugee Convention. Thirdly, all three are prosperous, developed, migrant settler societies founded on the dispossession and displacement of indigenous peoples. Myths of migration are central to the stories they tell about themselves and to their sense of nationalism. All three profess policies of non-racist migration and multiculturalism, although multiculturalism means different things in

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15 Officers of the Australian Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) are primary decision-makers in refugee cases under the power delegated to them by the Minister: Migration Act 1958 (Cth), s 496.
16 In Canada the Immigration and Refugee Board is primarily responsible for a decision to grant or refuse refugee status: IRPA, s 95(1)(b).
18 Ibid. UNHCR lists the U.S. as hosting the second largest number of asylum seekers world wide (50 000); Canada is sixth with 31 900; Australia is not listed as it had fewer than 10 000 in 2004.
different countries. All three are predominantly Anglophone countries, although Canada is officially bilingual. While responsibility for immigration law and policy rests with the federal government in each case, in Canada, provincial governments also have a role to play, with Quebec playing an almost autonomous role in selecting economic class migrants. Nevertheless, refugee law and policy is the responsibility of the federal government. The U.S. population and the number of refugees it accepts dwarfs the programs of Canada and Australia. Its role of global political, military and economic hegemon and its approach to the Refugee Convention mean that there are significant differences between the U.S. refugee program and those of Canada and Australia. Finally, the large number of refugee cases which are decided in those countries provides a useful database from which to select cases raising issues of gender related persecution.

My discussion of the Australian, Canadian and U.S. refugee determination systems is limited to applications lodged in country, and should be understood in the context of the different constitutional and legal frameworks and the volume of cases in each country. It is sometimes difficult to compare the countries directly from a legal or statistical perspective, given the differences in terminology. For example, persons who successfully apply for refugee status in a receiving country are known as landed refugees in Canada, onshore refugees in Australia and asylees in the U.S. Persons applying for refugee status outside the intended receiving country are known as government assisted or privately sponsored refugees in Canada, offshore protection visa applicants or refugees in Australia, and as refugees in the U.S. The countries

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22 *IRPA*, ss. 8 and 9 enable federal-provincial agreements to be made under which the province has sole responsibility for determining whether applicants should be accepted as permanent residents.
discussed here provide alternative means of remaining in the country on the basis of Ministerial discretion\textsuperscript{23} or pursuant to obligations of non-refoulement where a person is at risk of torture.\textsuperscript{24} These cases may be included in statistics on refugees, although they will not be discussed here. Nevertheless, the following is an attempt to provide an overview of the volume of applications as it affects the refugee determination systems under discussion.

Aspects of Canada’s immigration system have provided a model for both Australia and the U.S., although Canada accepts a larger number of refugees proportionate to its population.\textsuperscript{25} From 1994 till 2003, the most recent figures available, the refugee component of Canada’s annual intake of migrants ranged from 19,000 to around 30,000 of new permanent residents numbering from 175,000 to 230,000 over this period.\textsuperscript{26} Most refugee claimants are interviewed cursorily when they make a claim, either at a Port of Entry or at an office of Citizenship and Immigration Canada (CIC). Their claim is checked to ensure it is eligible, i.e., that it is their first claim for refugee status in Canada, and they are generally referred to the Immigration and Refugee Board (IRB) for a hearing. There is no opportunity for merits review.\textsuperscript{27}

\textsuperscript{23} In Canada, \textit{IRPA} s. 25; in Australia, \textit{Migration Act}, ss. 417, 501J; in the U.S. the Attorney-General has the power to vacate a decision of the BIA as occurred in the case of \textit{In re R- A-}.
\textsuperscript{24} In Canada, Pre-Removal Risk Assessment, \textit{IRPA}; s.112; in the U.S. withholding of removal and Torture Convention relief is available: Deborah E Anker, \textit{Law of Asylum in the United States} (3d Ed and Supp 2002) (Boston, MA: Refugee Law Centre, 1999) at 2 [Anker 1999]; Australia has no separate procedure for applying for non-refoulement, although when applicants who are scheduled for removal or deportation apply to the Committee against Torture, DIMIA undertakes an international treaty obligation assessment which may result in their being granted a visa via the Minister’s discretionary powers.
\textsuperscript{25} Canada’s population was estimated at around 32 million as at April 2005: Statistics Canada, ‘The Daily’, online <Http://www.statcan.ca/start.html>.
usually legally represented at their hearing and a Minister’s representative may be present to argue against their case where there are security issues at stake. Leave to appeal to the Federal Court, 28 or from there to the Federal Court of Appeal and the Supreme Court of Canada, is rarely granted, which usually means that claimants do not have an effective right of judicial review. This explains the relative paucity of high level jurisprudence on gender related persecution in Canada.

The U.S. deals with the largest caseload and accepts the greatest absolute number of refugees worldwide, although, as noted above, Canada accepts more refugees proportionate to its population. 29 From 1994 till 2003, the U.S. admitted 650 000 - 1 100 000 lawful permanent resident aliens (immigrants) each year. 30 The U.S. is not a party to the Refugee Convention, although it has ratified the 1967 Protocol and has incorporated the Convention definition of a refugee into the Refugee Act of 1980. 31 The Act signaled a move away from ideologically motivated acceptance of refugees towards a more neutral, legal approach, 32 although refugee determination remains formally discretionary. 33 Due to the statutory limit of 10 000 asylees 34 who can change status to a permanent resident each year, it is difficult to assess how many successful claims are made. Each year around 26 000 to 93 000 refugees 35 were

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32 Anker 1999, supra note 24 at 3.
33 Ibid at 5.
34 The definition of asylee is ‘an alien in the U.S. or at a port of entry’ who effectively meets the Convention definition of a refugee: see INA § 208 (a)(1), 8 U.S.C. § 1158(a)(1) (1994 & 1997 Supp.).
35 Refugee is defined by reference to the Convention definition, however, it does not include asylum seekers in the U.S. whose claims are recognized – they are termed ‘asylees’ as above. See INA § 207, 8 U.S.C. § 1157 (1994 & 1997 Supp.) which sets out the process by which refugee numbers and sources are determined through consultation between the President and Congress.

admitted, with total admissions in the refugee and asylee categories for the ten year period over 900,000. Under this system, asylum officers from the Immigration and Naturalization Service (INS) made most primary decisions. If an asylum claim was refused, removal hearings before an Immigration Judge enabled a failed asylum seeker to apply for ‘asylum and withholding protection.’ Appeals from this decision lay to the Board of Immigration Appeals (BIA), from there to a federal court of appeals and finally to the U.S. Supreme Court. Following the September 11 2001 terrorist attacks in the U.S., a new Department of Homeland Security was created. On 1 March 2003, functions and units were transferred to U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security. However, all U.S. cases discussed here were decided prior to 2003.

The onshore refugee component of Australia's immigration program is relatively low in world terms and lower than Canada proportionate to population. Annual immigrant intake 1993-04 to 2003-04 ranged from around 70,000 to 120,000. Between 1999 and 2004, 800 to 6000 onshore refugee applicants were granted permanent residency each year. Australia has a universal visa system and applicants who arrive in Australia without a valid passport and visa are designated as

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37 Anker 1999, supra note 24 at 7.
38 Ibid at 7-8.
40 In 2004 Australia did not rank in the top ten countries worldwide with more than 10,000 new asylum applications: UNCHR, ‘Refugees by Numbers (2005 edition)’ http://www.unhcr.ch/cgi-bin/texto/vtx/home/opendoc.htm?bl=BASICS&id=3b028097c#Asylum%20seekers.
44 *Migration Act 1958*, s42.
unlawful non-citizens and must be detained. Applications for refugee status are determined at first instance by officers of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). If refused, merits review is available at the Refugee Review Tribunal (RRT). If the RRT affirms the DIMIA decision, the applicant may apply as of right to the Federal Court for judicial review and if the appeal is successful, the case will be remitted to the RRT for reconsideration. Leave may be granted to apply to the Federal Court of Appeal or to the High Court of Australia. Hence, although Australia deals with a relatively small caseload, access to judicial and merits review is relatively easy which may explain more high level jurisprudence on refugee law than in Canada which deals with a larger caseload.

Another aspect of my methodology is the selection of key cases for in depth discussion of examples of gender related persecution. In Chapters Three and Four, I select one key case from one country to discuss it in detail, while making reference to relevant jurisprudence and legislation in other jurisdictions. This enables me to trace the development of a jurisprudence of gender related persecution in Canada, the U.S. and Australia, influenced as each country is by the others. So, in Chapter Three, I discuss Nada's case, a Canadian case from 1993 on transgression of social mores attributed with hastening the adoption of the adoption of the gender guidelines. I also

45 Migration Act 1958, s189. New Zealand citizens who meet health and behaviour requirements will be granted a special category visa on presentation of a valid New Zealand passport: s32. Another exception is for the traditional inhabitants of Papua New Guinea to visit islands of the Torres Strait: articles 12 and 16 Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries including the Area known as Torres Strait and related matters, 18 December 1978, [1985] ATS 4, (entered into force 9 May 1979).

46 Migration Act 1958, s.411.

47 The High Court retains jurisdiction to hear claims brought under writs of mandamus and certiorari under s75 of the Constitution and large numbers of refugee applicants issued such proceedings in an effort to circumvent the privative clause purporting to oust Federal Court's jurisdiction. However, the High Court's decision in Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2 (14 February 2003) held that the privative clause set out in s474 of the Migration Act was not successful in ousting the jurisdiction of the court where the application for judicial review was based on jurisdictional error.
discuss *In re Kasinga*, (1997) the leading U.S. case on FGC and arguably the leading U.S. case on gender related persecution. In Chapter Four I discuss the Australian case *Khawar*, a landmark case on domestic violence. The reason I discuss a small number of precedential cases is due to the important role they have played in public discourse, provoking widespread discussion and consideration of what could be considered an arcane aspect of refugee law. Another reason for focusing on key cases is the paucity of gender disaggregated statistics and lack of reporting of many low level cases, making quantitative and qualitative analysis of these cases extremely difficult.

3. GENDER RELATED PERSECUTION

Gender related persecution is not a technical legal term. It is applied to serious harms such as female genital cutting (FGC); trafficking; forced marriage; sexual assault; domestic violence, including dowry violence and honour killings; and violation of reproductive rights such as forced pregnancy, sterilization or abortion. It also covers the risk of serious harm feared due to a person’s sexuality or sexual orientation, transgression of social norms, as well as punishment for behaviour which is actually motivated by, or imputed to be a manifestation of, feminist political opinion.

‘Gender related persecution’ as the ‘experiences of women who are persecuted because they are women’ has been distinguished from ‘gender-specific persecution’ as the ‘particular forms of persecution to which women are particularly vulnerable’ such as forced abortion or genital mutilation. An example of gender specific

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persecution might be sexual assault by police in retaliation for imputed or actual political opinion, and an example of gender related persecution could be FGC. ‘Gender based persecution’ is another term circulating in this debate which could be interpreted as excluding claims where gender is only one element motivating persecution rather than the main basis for persecution. In this paper the term ‘gender related persecution’ is used to include both gender specific and gender based persecution because ‘gender related persecution’ is the most widely used term.

The idea that refugee women deserved treatment different to that of men arose in the context of the second wave of feminism in the 1970s and increasing attention paid to women internationally beginning with the UN decade for women in 1975. The United Nations High Commissioner for Refugees (UNHCR) led more inclusive policy changes then governments followed under pressure from women’s groups and refugee advocates. The Conclusion of UNHCR’s Executive Committee (ExCom) in 1985, recognizing that women could comprise a particular social group under the definition of a refugee, represents the first step in this direction. In 1991 UNHCR issued Guidelines on the Protection of Refugee Women which dealt with the prevention of sexual assault against women in refugee camps as well as determination of refugee status. Canada was the first state to adopt its own gender guidelines in 1993. The U.S. government published its equivalent in 1995 in response to

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guidelines drafted by a coalition of human rights organizations. The Australian government adopted guidelines in 1996 which are currently under review and due to be released at the end of 2005. Since then other countries have also developed guidelines, including Sweden, the Netherlands and the UK, or amended relevant legislation to respond to lobbying on this issue, which includes the adoption of gender guidelines by NGOs in South Africa and Ireland. Just over ten years since the adoption of the Canadian guidelines, and 20 years since UNHCR’s first ExCom Conclusion, there is now a considerable jurisprudence and academic literature on the impact of the gender guidelines and cases decided involving gender issues.

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55 Letter from Mr Peter Hughes, DIMIA, dated 19 August 2005, on file with author.


59 Sweden amended its Aliens Act in 1997 to enable people persecuted on account of their gender to obtain a humanitarian residence permit: Spijkerboer, supra note 11 at 3; the Swiss Asylum Act, Art. 3.2, was amended to make gender-specific flight motives a necessary consideration http://www.admin.ch/ch/d/as/1999/2262.pdf; in Germany ‘when a person’s life, freedom and bodily harm or liberty is threatened solely on account of their sex, this may also constitute persecution due to membership of a particular social group’. Residence Act, s.60 (1); the Irish Refugee Act 1996 s1(1) defines membership of a particular social group includes belonging to the female or male sex: Rodger Haines, ‘Gender-related persecution’ in Erika Feller, Volker Turk and Frances Nicholson, eds., Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection (Cambridge: Cambridge UP, 2003) at 321 n11 [Haines 2003].


Gender is obviously the key aspect of the term ‘gender related persecution’ which distinguishes it from other types of persecution under the Refugee Convention, yet it is a term which is undertheorised in this context. One of the critiques of the gender guidelines developed to recognize gender related persecution is that ‘gender’ can effectively be substituted with ‘women’. Although there is some recognition in the gender guidelines of the difference between ‘sex’ as biology and ‘gender’ as socially constructed, this aspect is not thoroughly understood by refugee lawyers or decision makers, nor are the critiques of this distinction.63 Another criticism is that refugee decision makers frequently confuse gender and sexuality and refer to gender guidelines in sexuality based claims.64 As part of my claim to a feminist methodology, I seek to highlight these issues and pay attention to the difference which a gender based analysis makes throughout this thesis.

Focussing on women’s claims for refugee status appears to assume that they are determined differently from those of men. Statistical estimates of the numbers of women refugees worldwide are generally at 50%;65 however, women reach western countries of permanent resettlement in smaller numbers than do men. Governments do not collect comprehensive statistics on the acceptance rates of female refugee claimants as compared to male claimants. However, in Canada, women have higher success rates then men in applying for asylum,66 whereas in Australia it appears that

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64 Nicole La Violette ‘The Impact of Gender On Decision-making in cases involving sexual orientation’ in Canadian Council for Refugees, International Conference on Refugee Women Fleeing Gender Based persecution, Conference Proceedings, Montreal 2-6 May 2001, 132
65 Crawley states that UNHCR estimates that 51% of persons of concern globally are women: persons of concern include internally displaced persons and other non-Convention refugees.
66 This is also true of the Netherlands 1989-95. In 1995 the Canadian government ceased publishing statistics disaggregated by gender: Spijkerboer, *supra* note 11 at 4.
the opposite is true. The use of different definitions in different countries and failure by governments to collect or release data disaggregated by gender hinders a definitive assessment. Further qualitative and quantitative research on the outcomes of asylum claims by gender would assist this project. However, my aim here is not to conduct further empirical research, rather it is to analyse critically a small number of cases, academic and policy literature on gender related persecution from a perspective informed by the insights of feminist and postcolonial theory.

4. THEORY

The main contribution of this thesis will be its analysis of the jurisprudence and literature on gender related persecution in the context of current feminist debates on race, culture and postcolonialism. It will examine different approaches to gender related persecution in refugee determination, including in particular the critique of international feminism as ‘imperial feminism’ and the development of gender guidelines as an example of Neo-Orientalism. The insights provided by this examination of the raced and gendered aspects of refugee determination will form the basis for recommendations to refugee advocates, decision makers and academic lawyers for recognizing the gendered aspects of persecution while avoiding imperializing impulses.

Feminist interventions into the debate on gender and refugee status have changed over the last two decades. Thomas Spijkerboer proposes a three stage schema for

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67 DIMIA does not publish statistics disaggregated by gender for applications at primary level. RRT statistics show that 73% of applications were lodged by men and 27% by women; 77% of those decisions overturned were for men and only 23% for women over an 18 month period 1999 – 2000: Stephanie Cauchi, Mary-Jane Ierodiaconou, Angela Perry, *The Invisible Women: A Report on Gender-Based Persecution Claims by Women Asylum Seekers in Australia* (2003) at 46 [Cauchi et al.].
understanding feminist theories of gender in refugee law, which I find convincing and adopt here. Spijkerboer sees the first stage as getting gender on the agenda, the second stage as a human rights approach, and the third as an anti-essentialist critique. I locate myself within this third category of anti-essentialist critique. Feminist debates on equality and difference, as well as the critical race and postcolonial critiques of some white, first world feminisms, are particularly pertinent to refugee law, where the roles of decision maker and applicant are structured around the decision maker’s quest to know the claimant and thereby determine whether she is deserving of protection.

Early feminist critics of the Refugee Convention and its implementation argued that the refugee was understood as a male political dissident and it was necessary to reinterpret the Convention to include women as capable of meeting the refugee definition. The failure by refugee decision makers to see women as political activists; to understand that women are targeted for the political activities of their male relatives; or to appreciate the political dimensions of women’s activities, meant that women were denied the protection they deserved. Moreover, refugee decision makers failed to extend protection to women subjected to gender specific harms, such as sexual violence and FGC. As discussed above, some governments responded to lobbying by feminists and refugee advocates by promulgating the gender guidelines.

The gender guidelines adopted by governments are an example of the human rights approach to the problem of women in the refugee determination system. The human

68 Spijkerboer, supra note 11 at 163-171.
rights approach assumes that the challenge women present to a masculinist refugee determination system can be met by promulgating a new law or administrative instrument such as the guidelines. The human rights approach pays attention to the specific experiences of women. The guidelines list categories of persecution that will result in recognition of their claims, barring other reasons for inadmissibility. The guidelines also privilege membership of a particular social group as a persecution ground and emphasise the role of culture in women’s oppression.

Anti-essentialist critiques of the gender guidelines and the human rights approach point to gender and cultural essentialism underlying the representation of western women as emancipated and non-Western women as oppressed. Anti-essentialists argue that the human rights approach works best when refugee claimants are presented as victims of their culture and that the promotion of the Refugee Convention ground of membership of a particular social group, for example, women in Iran, reinforces the idea that other cultures are barbaric and misogynist. Further, it ghettoizes women’s claims as different to men’s claims and sees women as existing prior to their politics, religion, ethnicity and so on. Anti-essentialists also question whether law is the solution to the problem of women in the refugee process, seeing in it rather the risk of reinforcing the traditional and stereotyped ways in which refugees and women are viewed. Anti-essentialists see attention to gender and ethnicity in legal decision making, as well as an awareness of the political dimensions of the reasons women flee, as the way forward, with gender guidelines being but a step along the way.

71 Spijkerboer, supra note 11 at 169.
5. LITERATURE REVIEW

Gender related persecution has generated a large volume of academic legal literature over the last decade. This literature both responds to legal decisions and aims to influence government policy and judicial reasoning. It is usually informed by the insights of feminist theory developed outside law. Interestingly, the term ‘gender related persecution’ does not appear in mainstream, ‘black letter law’ immigration and refugee law texts. Another interesting aspect is that some of the most sustained contributions are made by refugee law practitioners. It is to a discussion of the ‘specialised’ literature on gender and refugees that I now turn.

Given Canada’s leading role in the introduction of gender guidelines, it is perhaps not surprising that the Canadian literature on gender related persecution is among the earliest and the most developed. Audrey Macklin has made a significant contribution to this discussion. Her article ‘Refugee Women and the Imperative of Categories’ was published in 1995 but continues to speak to topical issues. Macklin critiques the Canadian guidelines and addresses strategic questions such as whether to add the ground of gender as a sixth ground or to interpret the refugee definition so as to acknowledge women’s experiences. Her discussion of the case of a Trinidadian woman seeking refugee status on the basis of domestic violence is particularly prescient as it raises questions courts are still grappling with, namely, the distinction between refugee producing and non-refugee producing countries in the absence of

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state protection for women fleeing domestic violence. Her arguments for dismissing cultural relativist critiques of the guidelines are convincing, as is her admonition to refugee decision makers to be conscious of the extent to which they define themselves in defining refugees.

In a later article, Macklin discusses the development of and differences between the Canadian, U.S. and Australian gender guidelines. Although Macklin stated in 1999 that it was not yet possible to measure the impact of the Guidelines, she adverted to considerations mitigating against their effectiveness. Chief among these were the propensity of IRB (Canada) and RRT (Australia) members to use credibility as a means of denying refugee claims and the rejection of the guidelines in the U.S. by INS lawyers. She also identified the lack of a significant change in the number of female claimants entering Canada following the introduction of the gender guidelines as refuting the ‘floodgates’ argument and facilitating the introduction of guidelines in the U.S. and Australia. None of the Guidelines deal with procedural and evidentiary issues in any comprehensive way, suggesting the use of female interpreters and interviewers where available and gender and cultural sensitivity training to be provided. Macklin’s analysis of substantive areas of gender related persecution, such as persecution, objective basis for fear, state protection and nexus will be discussed further in later chapters.

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75 Macklin 1999, supra note 5.
76 Ibid at 278.
77 Ibid at 279.
Sherene Razack’s article ‘Policing the Borders of Nation: the Imperial Gaze in Gender Persecution Cases’ is the pre-eminent example of an anti-essentialist critique of gender related persecution in Canada. Razack situates refugee determination procedures in the context of Canada’s complicity in the ‘genocide of Native peoples’ and notes its importance to the project of nation building. Razack undertakes close readings of a number of significant gender asylum cases, with attention to the role of race, culture and religion and their impact on national stereotypes which affect the outcome of cases. Although Razack’s critique is not alone in the Canadian context, Leti Volpp has noted that such work is rare in the U.S. and I am not aware of any similar critiques in Australia, with the possible exception of Anthea Roberts.

Deborah Anker is the author of a leading text on U.S. Asylum law, was active in the Women Refugees Project which drafted the U.S. Gender Asylum guidelines and has also contributed to the theoretical debate on gender and refugee law. Her article ‘Refugee Law, Gender, and the Human Rights Paradigm’ refers to the role of refugee advocates in preventing sensationalized reporting of practices such as FGC.

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79 Ibid at 89.
80 For example, Macklin 1995, supra note 70 and Kobayashi, supra note 1.
82 Anthea Roberts, ‘Gender and Refugee Law’ 22 Australian Yearbook of International Law 159 at 165 [Roberts].
83 Director of the Harvard Law School Immigration and Refugee Clinic.
and of the possibility for collaboration between refugee and human rights activists on global issues such as trafficking which implicate North and South.  

When the legalized refugee regime consists almost exclusively of states in the North determining refugee claims from the South, these purportedly international human rights – based judgments seem one-sided, patronizing, and hypocritical. This discrepancy is especially pronounced in gender persecution cases since violence against women (including intra-family violence) is prevalent throughout the world.

While at first glance Anker’s intervention may appear to belong to the human rights approach, she is clearly attentive to the postcolonial aspects of the refugee determination process and the wider implications which different strategies of advocacy may have for both women’s rights communities in the South and the capacity for women in the North to feel smug about the extent to which they are better off than their sisters in the South.

Susan Kneebone’s article ‘Women within the refugee construct’ can be seen as an example of the human rights approach to refugee law. It provides a useful survey of Australian case law in the context of the development of gender policy by UNHCR. 

Kneebone’s central argument is that ‘refugee woman’ is constructed culturally and socially rather than by reference to her civil and political status. This results in a focus on women’s role in relation to family and to a narrowing of political opinion as a ground for refugee status. Kneebone does not address the wider problems for feminist methodology which are raised by a discussion of gender in the refugee context, nor does she refer to issues of race and culture which are key to refugee determination in Australia.

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85 Ibid at 152.
86 Ibid at 152-3.
In her article ‘Gender and Refugee Law’ Anthea Roberts highlights the problematique of what I have termed exotic and familiar forms of harm in discussing domestic violence as a basis for asylum. Focussing on the High Court decision in Khawar88 concerning domestic violence as a ground for refugee status, Roberts locates domestic violence in the context of the public/private distinction in international law then discusses how the distinction operates in refugee law to trivialize gender-specific harm such as rape in wartime and domestic violence. Roberts considers Canadian, U.S., U.K. and New Zealand jurisprudence on the interpretation of ‘membership of a particular social group’ before undertaking an extended reading of Khawar, the leading Australian case. Roberts concludes with an evaluation of the potential for the High Court to find persecution on bases other than membership of a particular social group, such as religion and political opinion. Roberts’ approach could be termed a human rights approach, although she is aware of the potential for claims of cultural imperialism in the refugee determination context.

The Invisible Women is a report on gender based persecution claims and their adjudication in Australia. It represents the first attempt of which I am aware to undertake empirical research on gender related persecution in refugee claims in Australia and includes a useful bibliography with a range of international sources. It analyses the limited statistics disaggregated by gender available for refugee claims and outcomes at the Refugee Review Tribunal and it makes recommendations for the improved evaluation of women’s refugee claims. It finds that there is a failure to apply the gender guidelines in a consistent manner and that there is a trend towards

88 Khawar v Minister for Immigration and Multicultural Affairs [2002] HCA 14 [Khawar].
narrowing the definition of a ‘refugee’.\textsuperscript{89} It encompasses all three of Spijkerboer’s phases of feminism, being a pioneering attempt to address gender and asylum in statistical terms; motivated by human rights in using the gender guidelines, yet also aware of anti-essentialist critiques.

Heaven Crawley’s contribution to gender and refugee studies is a significant example of an anti-essentialist critique. Refugees and Gender: Law and Process\textsuperscript{90} is a comprehensive and wide ranging analysis of jurisprudence from a number of jurisdictions, with a focus on the UK, but including key cases from Australia, Canada and the U.S. Published by the UK Refugee Women’s Legal Group, it became the basis for the U.K. Government’s gender guidelines which are reproduced in the appendix. Interestingly, Crawley is not a lawyer but has a background in geography and development studies. Her analysis of case law is situated within theoretical frameworks incorporating feminist critiques of international law and a thorough going examination of political persecution as a basis for gendered claims.

Thomas Spijkerboer’s Gender and Refugee Status contributes to the literature on gender related persecution in two ways.\textsuperscript{91} First, it undertakes a qualitative analysis of a large number of refugee cases of women in the Netherlands, including in depth studies of five cases, on the basis that the refugee women are produced through the interview process, courts and tribunal decisions, and means of counter-strategy.\textsuperscript{92}

\textsuperscript{89} Cauchi et al, supra note 67 at 1. The Acting Deputy Principal Member of the RRT notes that ‘Guidelines may be of assistance in processing applications but cannot themselves be determinative of an application.’ Response, Appendix 3 at 46.
\textsuperscript{90} Crawley, supra note 12.
\textsuperscript{91} See also Thomas Spijkerboer, Women and Refugee Status: beyond the public/private distinction (The Hague: Emancipation Council, 1994).
Secondly, Spijkerboer considers different perspectives within feminism and evaluates them, as well as considering government responses to their critiques. I consider this a very useful contribution and have adopted his schema for understanding the different feminist critiques of refugee law above.

Rodger Haines' paper on gender related persecution for UNHCR is a good example of the human rights approach to gender related persecution. It refers to the non-discrimination principle 'fundamental to the concept of human rights', firmly identifying gender related persecution as a human rights issue, and refers to UNHCR's interventions since 1985 as an effort 'to correct this inequity.' Haines notes that neither sex nor gender was referred to in the Refugee Convention; however, this omission is 'without significance' as 'the ordinary meaning of Article 1A(2) of the 1951 Convention in its context and in the light of the object and purpose of the Convention requires the conclusion that the Convention protects both women and men and that it must therefore be given a gender-inclusive and gender-sensitive interpretation.'

The literature review I have undertaken enables me to identify a 'gap' into which I see my thesis fitting. While much important feminist work on gender and refugee law was undertaken in the mid-1990s, ten years later is an opportune time to reconsider these debates. In particular, I see my contribution as being among the first to apply to the Australian context the anti-essentialist critiques which appeared in Canada almost a decade ago. This is particularly apposite as the Australian gender guidelines are currently being revised and are due for release at the end of 2005. More generally, a

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93 Deputy Chairperson of the Refugee Status Appeals Authority of New Zealand.
94 Haines 2003, supra note 59 at 319.
95 Ibid at 320.
96 Ibid at 323-4.
comparison of the Canadian, U.S. and Australia gender guidelines has not been undertaken since 1999,\textsuperscript{97} which provides the opportunity to consider cases decided under the guidelines in the light of feminist theory informed by the insights of postcolonial and critical race theory.

6. STRUCTURE

This thesis argues that the colonial relations between Western and non-Western societies become particularly apparent in the refugee determination process and that claims of gender related persecution are a site at which these relations are especially visible, albeit undertheorised. It aims to evaluate more than a decade of jurisprudence and academic literature on gender related persecution and to analyse the extent to which feminist calls for greater attention to gender have been heeded by states. It also aims to assess the effectiveness of the gender guidelines and to evaluate the critiques of the guidelines from an anti-essentialist perspective.

This thesis will not attempt to deal with all aspects of gender related persecution. It will not deal with sexuality or sexual orientation as a form of gender related persecution as this issue is too large to be dealt with properly in a paper of this length and is being covered in detail elsewhere.\textsuperscript{98} Trafficking and forced prostitution\textsuperscript{99} is also covered by the UN Trafficking Protocol outside the refugee system, while forced

\textsuperscript{97} See Macklin 1999, \textit{supra} note 5.


\textsuperscript{99} Jeanna Shearer Demir, 'The Trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?' UNHCR Working Paper No 80 (March 2003); RRT Ref.: N03/45573 (24 February 2003); CRDD T-98-06186 (2 November 1999); see also the U.S. T-visa for victims of 'severe' forms of trafficking predates the adoption of the UN Trafficking Protocol: \textit{Trafficking Victims Protection Act of 2000} (P.L. 106-386).
sterilization and abortion, largely in relation to China’s one child policy, has largely been settled in case law or legislation already.\textsuperscript{100}

Chapter Two outlines the theory which underlies this thesis and applies it to the gender guidelines. First, it situates the guidelines in the context of a government, human rights approach to the issue of gender and refugee law. Next, it outlines and compares the Canadian, Australian and U.S. guidelines. Finally, it analyses critiques of the guidelines from the perspective of anti-essentialist and postcolonial feminist theories of gender and cultural essentialism.

Chapter Three presents two examples of gender related persecution, namely, transgression of social mores and FGC, which I discuss as ‘exotic harms.’ Part One focuses on transgression of social mores which is frequently reducing to refusal to comply with strict dress codes (usually veiling). Here I discuss the Canadian case of ‘Nada,’ a Saudi Arabian woman who sought protection due to her fear of punishment for her refusal to veil in public. Part Two focuses on Female Genital Cutting\textsuperscript{101} which is commonly regarded as a paradigmatic example of gender related persecution and is often raised in the context of claims of forced marriage. It discusses the well known U.S. case of \textit{Fauziya Kasinga} and its impact on jurisprudence in other jurisdictions. It also discusses the relevance to refugee claims of domestic legislation aimed at banning FGC in diasporic communities in the U.S., Canada and Australia.


\textsuperscript{101} Also known as female circumcision, Female Genital Mutilation (FGM) and Female Genital Surgery (FGS): see further chapter 3.
Chapter Four addresses domestic violence and sexual assault as the basis for claims of gender related persecution, 'familiar' harms which blur the distinctions between refugee producing and refugee receiving countries. Domestic violence is generally regarded as private, not public, and police failure to protect women from such violence including in the receiving country has been cited by one judge as a reason to refuse a claim.\(^{102}\) I focus here on the landmark Australian case of Khawar where it was found that ‘women in Pakistan’ could comprise a particular social group. Sexual assault is often understood as a private harm motivated by lust and sexual desire and an asylum claim can fail even when it is perpetrated by agents of the state. The recognition of sexual assault as persecution and the protection of citizens from sexual assault remain a challenge for refugee receiving countries.

The thesis concludes in Chapter Five by analyzing the gender guidelines and cases discussed in light of the theory proposed in Chapter Two. It provides recommendations for refugee advocates, decision makers and academic lawyers for avoiding the imperial gaze in cases involving gender related persecution. It also seeks to draw some conclusions about refugee law generally. My discussion begins in the next chapter with an outline of the theoretical framework of this thesis.

\(^{102}\) Khawar, supra note 88 at 30, Callinan J (dissenting) citing MIMA v Khawar (2000) 101 FCR 501 at 504 (Full Court of Federal Court), Hill J (dissenting).
CHAPTER TWO: THEORIZING GENDER AND REFUGEE LAW

This Chapter outlines the gender guidelines adopted by UNHCR, Canada, the United States and Australia. It also sets out the theoretical basis for the critique of the guidelines and the analysis of case studies in Chapters Three and Four. Adopting Thomas Spijkerboer's schema, it discusses feminist interventions into refugee law in three phases: first, early feminist critics; second, the human rights approach exemplified by the gender guidelines; and third, anti-essentialist critiques of the human rights approach. I locate myself within the third phase as making an anti-essentialist critique of the human rights approach informed by the insights of postcolonial and critical race theory although I find myself unable to rule out strategic use of the gender guidelines.

Feminist engagements with refugee law have become increasingly sophisticated, mirroring developments in feminist thought in other disciplines and fields of practice. In the last ten years there has been a shift in terminology away from 'women' to 'gender' as a tool of analysis, both in international legal documents and in the academic literature. For example, UNHCR’s 1991 guidelines are entitled ‘Protection of Refugee Women’ and its 2002 guidelines ‘Gender related Persecution’. A change in terminology is not always accompanied by a change in analysis. So what does it mean to undertake a gender analysis? UNHCR’s 2002 guidelines make the following distinction between sex and gender:

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.

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103 Spijkerboer, supra note 11 at 163 – 171.
104 UNHCR 1991, supra note 50.
105 In this instance, the change in terminology also marks an increased focus on the legal determination of refugee status away from the physical protection of women in refugee camps. UNHCR 2002, supra note 3.
Gender is not static or innate but acquires socially and culturally constructed meaning over time. However, the implications of this distinction tend to be lost in practice. Men may be targeted for certain types of persecution; however, to my knowledge the gender guidelines have not been referred to in any cases of male applicants. Young men have been recognised as a particular social group by virtue of their vulnerability to military conscription both in El Salvador and Afghanistan. This situation was analysed in terms of young men’s membership of a particular social group under the Convention, rather than by any reference to gender guidelines. A failure to analyze the persecution of men in terms of gender is unlikely to be fatal to their refugee claims given the masculinist bias of the Convention which defines a refugee in Article 1A(2) in the masculine person and the jurisprudence interpreting this definition over the last half century. It is precisely this masculinist definition which motivated early activist attempts to get gender on the agenda of international refugee law. Nevertheless, it is important not to neglect the implications of analysing women’s claims in terms of gender, a special new category, while men’s claims are not analysed in these terms.

1. THE EARLY CRITICS: GETTING GENDER ON THE AGENDA

Early feminist attempts to get gender on the refugee law agenda argued that refugee law needed to recognise the different experiences of women. In this category Spijkerboer groups Meijer, Indra, Mulligan and Castel. As outlined earlier,

106 UNHCR 2002, supra note 3 at para 3.
107 Oscar Roberto Cruz, Immigration Appeal Board Decision V83-6807, cited in Hathaway, supra note 7 at 163.
109 The first case predates the development of the gender guidelines.
these early feminist engagements with refugee law derived from a perspective that women’s oppression was universal and that law was one of the instruments of patriarchy. Their approach was explicitly political. Further they advocated the addition of a sixth ground of gender to the refugee definition.  

The concerns of the early feminists were articulated at a time when ‘women’s issues’ were receiving unprecedented attention internationally, partly in response to their advocacy. The first World Conference on Women in Mexico inaugurated a UN Decade for Women 1975-1985. These conferences were the result of lobbying and activism by political and social movements whose aim was to highlight the universal nature of women’s oppression and to set an agenda for change. For example, the writings of Susan Brownmiller, Kathleen Barry, Andrea Dworkin and Catharine MacKinnon undertook sweeping global surveys of harms to women as part of their project to bring (western) women to political consciousness. In the context of refugee law, Jane Connors points to the ‘critical activity of feminist

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114 Spijkerboer, supra note 11 at 164 - 5.
commentators, combined with pressure from what is described as the women’s human rights movement’, as responsible for increased international focus on women in international affairs, including in refugee law.121

The ‘early critics’ of refugee law may be seen as a subset of initial feminist interventions into international relations and international law.122 They successfully raised the profile of gender in the refugee context.123 Their calls for the adoption of a sixth ground of ‘gender’ to the Refugee Convention124 or in domestic refugee law125 have since dissipated due to the risk that amending the Convention in the current anti-refugee climate could further undermine protection of claimants126 and amending domestic legislation would quarantine local jurisprudence from international developments.127 Their focus on the global aspects of women’s oppression at the expense of local and specific differences provoked a range of reactions, including appeals for greater attention to class, race, cultural, sexual and other differences.

2. THE HUMAN RIGHTS APPROACH

The human rights approach to refugee law has many synergies with the universalist approach to human rights more generally, in which feminists have attempted to use

122 This trope is continued in the title of the report on gender related persecution in Australia ‘The Invisible Women’ Cauchi et al, supra note 67.
126 Haines 2003, supra note 59 at 326.
127 Macklin 1995, supra note 70 at 262.
the tools of human rights to highlight the particular wrongs done to women.¹²⁸ In the refugee law context, a human rights approach looks to law for the solution to the problem posed by gender in the refugee determination process.¹²⁹ Unlike the early critics who rejected law as part of the problem, the human rights approach holds that the categories of legal analysis can be expanded to take account of the difference gender makes.

Dominant theories of international law are based on liberal notions of a public/private distinction. They hold that prior to 1945 international law purported to regulate relations between states but since then it has regulated relations between states and their citizens through international human rights law, refugee law and international humanitarian law. Feminist critiques of the public/private distinction at both the international¹³⁰ and domestic¹³¹ level have demonstrated how a purported lack of state intervention is itself a form of regulation. These arguments are particularly relevant to asylum claims of domestic violence and sexual assault which require undoing the public/private and international/domestic dichotomies central to liberal theory.

The human rights approach asserts that reinterpretation of existing law is capable of ensuring the protection of women’s human rights and of including gender related

¹³⁰ Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85 A.J.I.L. 613;
persecution within refugee law.\textsuperscript{132} Further, proponents of the human rights approach emphasise particular social group of women as the most relevant Convention ground for an asylum claim.\textsuperscript{133} The gender guidelines embody a guide to reinterpretation of law hence it is important to consider them in this context.

3. THE GENDER GUIDELINES

My analysis of the gender guidelines begins with a consideration of UNHCR policy and then provides an overview of the Canadian, United States, and Australian gender guidelines. Although the different titles of these administrative instruments reflect the legal and administrative settings to which they apply, for the sake of convenience I will refer to policy directives for national decision makers collectively as 'gender guidelines' and to those of each state as 'Canadian guidelines' 'U.S. guidelines' and 'Australian guidelines.' In addition to providing a brief overview of the each of the national guidelines, I consider what reference, if any, the guidelines make to Female Genital Cutting, transgression of social mores, domestic violence and sexual assault, as these are the case studies I have selected for discussion in Chapters Three and Four. I compare the national guidelines to each other and to the UNHCR guidelines. I analyse the guidelines by reference to academic critiques and empirical studies before applying an anti-essentialist critique of the human rights approach to gender in refugee law.

3.1 UNHCR guidelines

UNHCR has been at the forefront of international moves highlighting gender in refugee law. The Executive Committee (ExCom), which meets annually to provide

\textsuperscript{132} Priscilla F. Warren, 'Women are Human: Gender-Based Persecution is a Human Rights Violation against Women' (1994) 5 Hastings Women's L. J. 281 cited in Spijkerboer, \textit{supra} note 11 at 168.

\textsuperscript{133} Nancy Kelly, 'Guidelines for Women's Asylum Claims' (1994) 6 Intl J. Refugee L. 517.
general policy guidance for UNCHR and approve UNHCR programs and budget\textsuperscript{134}.

has issued a number of Conclusions on gender and sexual abuse.\textsuperscript{135} In addition to the UNHCR gender guidelines, ExCom has released a number of conclusions relevant to gender and refugee law. In 1985 ExCom

recognised that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a “particular social group” within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.\textsuperscript{136}

UNHCR plays a crucial role in setting standards for international policy making. Given that the vast majority of refugees world wide never achieve permanent resettlement in a third country, UNHCR determinations based on UNHCR guidelines will affect the greatest numbers of refugees. However, as discussed above, the national policies of Canada, the U.S. and Australia are extremely influential in refugee law, policy and practice, particularly the U.S. due to numbers of refugees resettled and its role as global hegemon. Most refugees resettled from outside the country have no right of appeal against a negative decision and the gender guidelines only apply to refugee claimants making in country claims.\textsuperscript{137}

UNHCR’s 1991 guidelines serve both as an internal document designed for UNHCR field staff and as a standard setting policy document for adoption by governments. While providing suggestions for dealing with problems faced by refugee women\textsuperscript{138} they also make recommendations on legal protection which were incorporated into

\textsuperscript{134} See ‘Executive Committee: ExCom’s mandate’ online, <Http://www.unhcr.ch/>.

\textsuperscript{135} ECOSEC Resolution 672 (XXV) 1958, UN Doc. No. E/RES/672 (XXV) at para 2.

\textsuperscript{136} Ex Com Conclusion, ‘Refugee Women and International Protection’ No 39 (XXXVI) – 1985 at para (k).

\textsuperscript{137} Canada and Australia both have Woman at Risk programs which are available to women applying outside the country: Catherine Dauvergne, \textit{Humanitarianism, Identity and Nation: Migration laws of Australia and Canada} (Vancouver and Toronto: UBC Press, 2004) at 88 – 90.

\textsuperscript{138} such as lowering the risk of sexual assault while gathering firewood or collecting water: UNHCR 1991, supra note 50 at para 79.
national guidelines. These include transgression of social mores discussed above, the lack of clarity in distinguishing between (sex) discrimination and (gender related) persecution, and recognition of sexual assault as persecution. UNHCR’s 1991 guidelines also discuss procedural issues which may prevent women from gaining refugee status, including the need for their claims to be considered separately from male family members, the use of trained female interpreters, the need for female interviewers and gender training for all decision makers, and a potential lack of familiarity among decision makers with the social, political and legal status of women in their country of origin. Clearly, UNHCR’s 1991 guidelines are important both symbolically, in signalling a new attention to the concerns of women refugees, and practically, by providing specific suggestions for adoption by governments in their refugee determination procedures.

UNHCR’s 2002 guidelines focus much more specifically on legal protection issues and build on the national guidelines. They demonstrate a much greater awareness of the theoretical and practical issues at stake in gender related persecution, distinguishing between ‘gender’ and sex as noted above. They reaffirm that ‘adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status’ and engage with academic and international debates, such as whether gender should be added to the Refugee

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139 Ibid. at para 54.
140 Ibid. at para 55.
141 Ibid. at paras 56 and 59.
142 Ibid. at para 57.
143 Ibid. at para 71.
144 Ibid. at para 73.
145 Ibid.
146 ExCom ‘noted with appreciation special efforts by States to incorporate gender perspectives into asylum policies, regulations and practices’: Conclusion no 97 (n), October 1999, cited in UNHCR 2002, supra note 3 at n1.
Convention as a sixth ground, which they argue is unnecessary.\textsuperscript{148} UNHCR's 2002 guidelines also address the universalism versus cultural relativism debate in international human rights law, stating that 'harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds'.\textsuperscript{149}

UNHCR's 2002 guidelines discuss each element of the refugee definition as well as issues of procedure, evidence and implementation. They state that rape, domestic violence, Female Genital Cutting and other forms of gender related violence constitute persecution\textsuperscript{150} and consider the circumstances in which transgression of social mores and opinions on gender roles can be considered persecution on the grounds of religion or political opinion.\textsuperscript{151} Hence, UNHCR's 2002 guidelines cover all the forms of gender related persecution under discussion here.

Whereas UNHCR's 1991 guidelines were a forerunner of national gender guidelines, UNHCR's 2002 guidelines consolidate and build on national guidelines and other measures implemented since then. The 2002 guidelines specifically acknowledge the benefit obtained from the guidance of gender guidelines developed by state and non-state actors.\textsuperscript{152} On procedure, the 2002 guidelines reiterate many of the directives contained in national guidelines and ExCom conclusions, including the desirability of interviewing women claimants separately from male family members; the need for

\textsuperscript{148} Ibid. at para 6.  
\textsuperscript{149} Ibid. at para 5.  
\textsuperscript{150} Ibid. at para 9.  
\textsuperscript{151} Ibid. at paras 25-26 and 32. They also analyse persecution on account of sexual orientation as containing a gender element: ibid at para 15.  
\textsuperscript{152} Namely, the U.S., Australia, Canada, the UK, Sweden, the European Council on Refugees and Exiles, UK Refugee Women's legal group and the South African National Consortium on Refugee Affairs: ibid at para 35.
female interviewers and interpreters and sensitive, compassionate and culturally appropriate questioning and body language; and the importance of country information which examines women’s social, economic, political and legal status. While the UNHCR 2002 guidelines represent ‘best practice’ at an international level in terms of gender guidelines, the national guidelines which were implemented much earlier remain in place. It is to a discussion of the national gender guidelines that I now turn.

3.2 Canadian Guidelines

In 1993 Canada became the first country in the world to adopt comprehensive gender guidelines:153 ‘Guidelines on Women Refugee Claimants fearing gender related persecution’ (the Canadian guidelines).154 The Canadian guidelines, revised in 1996,155 are available to guide IRB members in their decisions but they are not binding on visa officers abroad.156 They take the absence of an enumerated ground of gender under the Refugee Convention as their starting point. The Canadian guidelines provide examples of how women may be persecuted on the grounds of race, religion, nationality or political opinion, and consider the range of particular social groups of which women may be members. The Canadian guidelines refer to all the forms of harm which will be discussed in later Chapters as examples of gender related persecution. Despite being the first national gender guidelines to be adopted, the Canadian guidelines are nevertheless comprehensive.

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153 The Dutch Refugee Council and the European Parliament had earlier adopted resolutions that persecution on the basis of sex was included in persecution for reasons of membership in a particular social group. Macklin 1995, supra note 70 at note 12.
155 Canadian guidelines, supra note 51.
156 Macklin 1999, supra note 5 at 276.
Given that the Canadian guidelines were the first gender guidelines adopted at a national level, they feature strongly in the academic literature. Audrey Macklin has discussed the Canadian Guidelines in some detail in her important article ‘Refugee Women and the Imperative of Categories.’ In this article she provides an overview of the guidelines, discusses their internal consistency and attempts to predict how they will be applied by decision makers. Here I deal primarily with her responses to the ‘floodgate’ argument made by conservatives seeking to mobilise popular opinion against refugee and humanitarian immigration by claiming that the guidelines will open Canada up to ‘floods’ of women who would take advantage of the imperialist desire to impose Canadian standards on the rest of the world.

Since Macklin’s article was published the floodgates argument has been demonstrated to be baseless fear mongering. Yet claims that the guidelines are potentially an imperialist tool remains, now levelled primarily by critical race and postcolonial feminists. Audrey Kobayashi’s reading of the Canadian guidelines sees them not only as aimed at assisting refugee women who experience difficulty in having their claims recognised but, like the rest of immigration law, as constitutive of Canadian national identity.

Official policies of multiculturalism and open-door immigration notwithstanding, most of the women who enter Canada as refugees do not fit the common image of who can and should be ‘Canadian.’ Instead, they are racialized and exotic others, whose numbers must be controlled because they are not imagined as part of the ‘ordinary’ Canadian population.


158 Macklin 1995, supra note 70.

159 Kobayashi, supra note 1 at 70.
Feminist critiques of the imperial motives and effects of the gender guidelines are an important issue which I will explore in greater detail in the third part of this Chapter. I turn now to a discussion of the U.S. guidelines which specifically refer to the Canadian guidelines as ‘ground breaking’ and a ‘model for gender-based asylum adjudications.’

3.3 U.S. Guidelines

The Immigration and Naturalization Service ‘Considerations for Asylum Officers Adjudicating Asylum Claims from Women’ (US Guidelines) were issued in 1995. They are binding only on asylum officers and aim to create a ‘customer-friendly’ asylum interview environment through sensitizing asylum officers to gender issues. The U.S. guidelines present an analysis of relevant U.S. case law dealing with gender related persecution until 1995. The format of the U.S. Guidelines differs from the other gender guidelines in that they resemble a case digest of past decisions, whereas the Canadian and Australian guidelines are written more explicitly as a tool to be used in future decision making. Like the Canadian guidelines, the U.S. guidelines refer to all the forms of gender related persecution selected for discussion here in varying degrees of detail. While the U.S. guidelines themselves represent a positive development in recognising the impact of gender on the refugee determination process, other gender blind aspects of the U.S. refugee determination system may negatively affect the articulation of gender related claims. Macklin refers to problems with the U.S. practice of not tape recording the interviews but relying instead on the

160 U.S. guidelines, supra note 52.
162 Macklin 1999, supra note 5 at 277.
163 U.S. guidelines, supra note 52 at 4.
notes of the interviewing officer\textsuperscript{165} and the problem of requiring the applicant to bring their own interpreter.\textsuperscript{166} Macklin criticises the failure of the U.S. Guidelines to explain that domestic violence may constitute persecution.\textsuperscript{167} The uncertainty as to whether domestic violence constitutes persecution continues in the US.\textsuperscript{168}

3.4 Australian guidelines

The Australian guidelines were adopted in 1996 and are currently under review.\textsuperscript{169} Unlike the other guidelines discussed which apply only to in country determinations, the Australian guidelines aim to assist officers of the Department of Immigration both within Australia and abroad to deal with applications raising gender based claims effectively and sensitively. However, they do not bind the Refugee Review Tribunal or courts. On procedure, the Australian Guidelines require sensitive, sympathetic and confidential treatment of gender-related claims and use of female interviewers and interpreters in this context wherever possible. They suggest that female applicants should not be interviewed in the presence of family members due to the difficulty of recounting sexual torture and also that they may provide claims in writing if they have difficulty speaking about their persecution.\textsuperscript{170} The Australian guidelines also assess the relevance of the Convention grounds to claims of gender related persecution, the availability of state protection and the availability of an internal flight alternative. They refer to all the forms of gender related persecution to be discussed here, although they refer to domestic violence only indirectly. The Australian guidelines

\textsuperscript{165} Macklin 1999, \textit{supra} note 5 at 281.
\textsuperscript{166} Ibid. An applicant who cannot afford to pay an interpreter may be forced to bring a male relative or family friend to act as interpreter, which is likely to significantly hamper her freedom of expression if she has been sexually assaulted, for example.
\textsuperscript{167} Ibid at 284.
\textsuperscript{168} See discussion in Chapter four on \textit{In re R-A-}.
\textsuperscript{169} Australian Guidelines, \textit{supra} note 54, are difficult to access as they are not on the DIMIA website nor are they published as a fact sheet: Cauchi et al, \textit{supra} note 67 at 16.
\textsuperscript{170} Australian Guidelines, \textit{supra} note 54 at para 3.26.
clearly build on the Canadian precedent but are more expansive in their procedural aspects.

On paper, the Australian guidelines appear to promote a gender sensitive approach to dealing with refugee claims; however, their practical impact is difficult to gauge. Although the guidelines apply to DIMIA officers, primary level decisions by DIMIA officers are not made public. The guidelines are not binding on the RRT which refers to the guidelines very rarely in the selected decisions which it publishes. According to the RRT, gender related persecution is an issue in only a very small percentage of cases. In 2001 amendments were passed to the Migration Act 1958 (Cth) limiting the interpretation of ‘persecution’ and Convention nexus. These amendments significantly undermine a decision maker’s discretion and flexibility to interpret ‘persecution’, which conflicts with the expansive and flexible UNHCR interpretation and potentially discriminate against women refugee claimants. It remains to be seen whether the revised guidelines due for release at the end of 2005 will continue this trend.

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172 Sexual assault is in issue in less than 4% of cases and domestic violence in less than 2%, while ‘forced female circumcision, transgression of social mores, forced sterilisation or coerced family planning are even less common, each occurring in less than 1% of cases.’ Sobet Haddad, ‘Gender persecution – developments in the Australian jurisprudence’ in UNCHR, Discussion Paper No 1/2005 (Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific, Canberra, 2005) at 11.
173 Section 91R defines persecution as requiring ‘systematic and discriminatory conduct’ and that the relevant Convention ground be the ‘essential and significant reason’ for persecution.
174 Section 91S requires that where the relevant Convention ground is the particular social group of the family, there must be a Convention nexus for the family member’s persecution as well as for the applicant’s persecution.
175 Haines 2005, supra note 48.
The gender guidelines represent a symbolic acknowledgment of the importance of gender in the refugee determination process. Since the adoption of guidelines on refugee women by UNHCR in 1991, the focus has shifted from a consideration of women to gender, as evident in UNHCR’s 2002 guidelines. The Canadian guidelines served as a model for the U.S. and Australian guidelines. All three national guidelines cover procedural and evidentiary aspects as well as legal interpretation of the definition of a refugee from a gender sensitive perspective. The practical significance of the gender guidelines varies according to jurisdiction as other facially neutral aspects of the refugee determination process have a significant impact on gendered asylum claims. In the third part of this Chapter, I deal with critical and post colonial critiques of the guidelines under the rubric of the anti-essentialist critique of human rights approach.

4. ANTI-ESSENTIALIST CRITIQUES

As noted above, an initial criticism of the Canadian guidelines was that they attempted to impose Canadian standards on the rest of the world in a move reminiscent of colonialism. Initially levelled by conservative critics arguing against an increase in the refugee intake, this charge figured Canadian feminists as imperialists. It has since been made by feminists seeking to highlight the intersection of race and gender as critical to an understanding of the oppression of Third World women in general and of the persecution of particular refugee claimants. Simply put, the charge is that ‘[t]he movement to present women’s asylum claims as gender-based persecution is implicitly orientalist.'177 Anti-essentialists critique the human rights approach for a reliance on culture, rather than politics, for an understanding of

women’s repression; a focus on membership of a particular social group, rather than political opinion or religion, as the relevant Convention grounds; and question whether law can provide a solution, rather than a site for legal reasoning which could support or undermine women’s interests.\textsuperscript{178}

The universalist feminist position has been demonstrated to rest on similar preconceptions of cultural essentialism as it attacks in the form of gender essentialism.\textsuperscript{179} Critiques of some white western feminists’ blindness to class, race, ableism and sexuality as crucial vectors in producing oppression have forced a rethinking of claims to represent other women and a reassessment of feminism’s complicity in colonial projects. Refugee law is a key site at which these issues intersect when Western decision makers are called upon to pass judgment on the human rights record of a (usually) non-Western country in relation to its ability or willingness to protect its female citizens.

4.1 Human Rights Imperialism

One term which has been used to criticize universalist human rights approaches is ‘human rights imperialism.’ Jacqueline Bhabha describes human rights imperialism as a somewhat self-righteous human rights approach, which constructs and reifies an oppressive “culture” or ethnic group or religious identity to vent outrage against, and to juxtapose against absolutist, universal norms-rights- that are presented as existing independently of any cultural trappings.\textsuperscript{180}

\textsuperscript{178} Spijkerboer, supra note 11 at 169-170.
She identifies two possible outcomes of this type of argument in asylum cases. The first outcome is where the asylum seeker is not held to be a refugee because all women in that country are oppressed by the government. For example, an Iranian woman who had been threatened with imprisonment by the Islamic revolutionary guards for violations of the regime’s dress code for women sought asylum in Britain in 1987. She was unsuccessful because ‘women in particular in many instances have suffered horrendous treatment . . . However this is something that applies to all women in Iran.’

The second outcome is where ‘the universality of western rights is the justification for using them to trump alien, oppressive behaviours.’ For example, a Jordanian woman was successful in establishing a claim for refugee status in the UK because she was seen as having ‘continued to express her belief in Western values through her actions’ by fleeing domestic violence. Both these UK cases involve women from countries where Islam is the majority religion and the human rights abuses of the women are understood in relation to Islam. Refugee determinations by decision makers in other western countries frequently understand violations of women’s human rights as a product of religion or culture, rather than as political, and this directly affects the outcome of the case.

4.2 Neo-Orientalism

The complicity of refugee advocates and feminists in presenting women’s refugee claims as resulting from an abusive culture or religion is particularly problematic.

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Susan Akram uses the term ‘neo-Orientalism’ to refer not only to what Edward Said described as orientalism, but ‘as promoted by more recent movements such as modern feminists and human rights promoters including universalists and cultural relativists’\textsuperscript{184} to stereotype and simplify the range and complexity of social, political and religious formations found in Islamic societies. Akram argues that neo-Orientalism damages asylum seekers’ cases as the incomplete and misleading views of Islam can be disproved by government research and silence the refugee herself.\textsuperscript{185}

In a discussion of refugee claims of Iranian women in the United States, Akram demonstrates how all the claims failed due to an understanding their basis as the persecutory nature of Islam. Had the claims been put as women’s political opposition to particular government endorsed interpretations of Islam, or the government’s failure to protect the right of those women to practice their religion in ways which the government did not accept, they may have succeeded.\textsuperscript{186}

Is there a way to avoid the universalism versus cultural relativism debate, mapped into feminist debates as ‘feminism versus multiculturalism’?\textsuperscript{187} Sherene Razack’s analysis of the imperial gaze in asylum cases engages with the problematic of feminist approaches to refugee law. In the context of migration, she calls for an examination of the motives for rescuing third world women and accountability for the reasons they are forced to leave.

As Western women we perform ourselves as dominant when we engage in a politics of saving other women. Instead of seeking to save women we consider less fortunate than ourselves, we might begin to organize against the racism that structures migration and flight, and that continues to structure the lives of women fleeing to the North.\textsuperscript{188}

\textsuperscript{184} Akram, \textit{supra} note 177 at 8.
\textsuperscript{185} Ibid at 10.
\textsuperscript{186} Ibid at 38.
\textsuperscript{187} Leti Volpp, ‘Feminism versus multiculturalism’ (2001) 101 Colum. L. Rev. 1181.
\textsuperscript{188} Ibid at 160.
Sherene Razack proffers some suggestions for ways in which Western women may act constructively rather than themselves becoming part of the problem. Her reading of the Canadian guidelines identifies race and culture as essential to understanding the outcomes in particular cases. Razack argues that making a successful claim for refugee status necessitates a portrayal of the claimant’s culture as alien and dysfunctional. This facilitates the ‘pity and compassion’ which motivate humanitarian impulses and enables the fantasy of Canadians rescuing oppressed Third World women.

When a claimant cannot successfully present herself as a Third World supplicant or Exotic Female Other, it is more likely that panels will accept the skeletal country reports and reach negative decisions. Making an argument around cultural dysfunction, however, requires the use of well-known stereotypes. In this respect, I suggest that, in the Canadian context, Indian and continental African women are more easily perceived as exotic victims of exceptionally patriarchal cultures than are African-Caribbean women, who are viewed as mammies and matriarchs as well as criminals and, hence, more able to survive the violence of their cultures and families.190

Razack asserts that current refugee determination processes enable refugee receiving countries to ignore their own complicity in the creation of economic and social conditions which render individual women vulnerable.191 This forces a reliance on cultural stereotyping which results in women being refused who do not fit this stereotype at a cultural level, because their culture is not ‘anthropologized’ as ‘non-Western, inferior, and unusually barbaric towards women.’192 Similarly, ‘mutilation, barbaric customary rites, severe penalties for adultery, forced veiling, and polygamy are all highly powerful symbols of the barbaric East or South and, correspondingly, the civilized West or North.’193 Less exotic claims, such as domestic violence or

189 Razack, supra note 78 at 126.
190 Ibid. at 107.
191 Ibid. at 118.
192 Ibid. at 124.
193 Ibid. at 125.
sexual assault, face greater difficulty in succeeding as a basis for refugee status. Finally, individual women who have demonstrated their strength in coping by resisting and escaping risk having their refugee claim refused due to a failure to fit within the stereotype of the oppressed Third World woman. Razack contends that their similarity to us makes them less likely to be accepted. 'The real task is to critically examine our own stake in keeping them out.'

4.3 Representing Others

Analysis of the peril of "representation" is particularly pertinent to the role of lawyers representing refugees. As discussed above, the neo-Orientalist framework which refugee advocates sometimes bring to their work has the potential to undermine the claims of an asylum seeker, as well as perpetuating stereotypes which undermine the effectiveness of oppositional struggles in the country of origin. Kennedy describes the production of 'authentic victims, or victim authenticity' by human rights lawyers as 'an inherently voyeuristic or pornographic practice'. The tendency for refugee lawyers to 'run' their clients' cases as either a victim or a dissident has been noted by Spijkerboer which also refers to the role played by cultural stereotyping in this portrayal.

The victim strategy has the advantage of being consistent with the cultural stereotypes of Third World Brutality but has the disadvantage of being too general ("we can't admit all victims of backward cultures"). The dissident strategy has the disadvantage of going against cultural stereotypes (Third World women are often considered incapable of the things it takes to be a dissident); once the applicant has passed that hurdle, however, the dissident strategy has the advantage of making the case so exceptional that admitting her will not be a real problem.

194 Ibid. at 113.
195 Ibid. at 129.
197 Spijkerboer, supra note 11 at 156.
Kennedy also refers to the risk that descriptions used by the human rights movement have the effect of stereotyping women in order to achieve some other goal.198 This is particularly a problem in the refugee determination context, where women are usually portrayed as victims. According to Spijkerboer, paradoxically, the stereotyping of refugee applicants as either victims or dissidents requires that they be exceptional.

Both strategies force the lawyer to argue that this applicant, as opposed to others, should be admitted. As a result, a lawyer doing a good job for one applicant is making it harder for others. In this way, lawyers are forced to reproduce restrictive immigration discourse in a very practical sense.199

Feminists working in an international frame have sought to define an ethics of representation which avoids doing violence to other women. As discussed above, the initial invocation of a ‘global sisterhood’ has come to be understood as disavowing the differences between women. As an example of universalism, its attempts to discredit sexism are undermined by its use of arguments based on cultural essentialism, which effectively amounts to ‘fighting sexism with racism.’200 Uma Narayan’s careful examination of the role of cultural essentialism within feminism leads her to recommend ‘critically interrogating scripts of “cultural difference” that set up sharp binaries between “Western” and various “Non-western” cultures’201. ‘What postcolonial feminists need to do is not to endorse “cultural relativism” but to resist various forms of cultural essentialism, including relativist versions.’202

198 Kennedy, supra note 196 at 105.
199 Spijkerboer, supra note 11 at 156.
200 Razack, supra note 78 at 113.
202 Ibid at 96.
5. CONCLUSION

This Chapter has provided an overview of a range of feminist approaches to gender related persecution. It outlined the advocacy of early feminist critics who campaigned for recognition of gender at an international level in refugee law. It introduced the human rights approach to refugee law and provided an overview of the gender guidelines adopted by UNHCR, Canada, the U.S. and Australia. It also engaged with some of the anti-essentialist critiques of refugee law and proposed strategies to avoid presenting a monolithic portrayal of 'Third World Woman' as the 'Exotic Other Female.' This danger is particularly acute given that the focus of my discussion is refugee law, a site at which predominantly Western adjudicators pass judgment on the human rights practices of predominantly non-Western countries in order to determine whether state protection is available to a particular asylum seeker.

In Chapters Three and Four, I examine four examples of gender related persecution by reference to some landmark cases. I have selected cases on transgression of social mores and female genital cutting as examples of 'exotic' claims which can be contrasted with the treatment of more familiar harms such as domestic violence and sexual assault. Through reading these cases, I aim to draw some conclusions regarding the role of race and culture in refugee decision making on gender related persecution.

CHAPTER THREE: ‘EXOTIC HARMs’

In this Chapter I discuss two examples of ‘exotic’ forms of gender related persecution, namely transgression of social mores and Female Genital Cutting (FGC). This Chapter aims to analyse particular instances of gender related persecution in the light of the guidelines and anti-essentialist critiques of the human rights approach outlined in the preceding Chapter. As foreshadowed, my methodology here will be to focus in detail on one well known case and to discuss that case as an example of the issues raised. I also summarise relevant jurisprudential developments in the countries under discussion and highlight any significant differences.

In interpreting these cases, it is useful to recall that often ‘violence in nonwhite communities is understood as a kind of cultural practice particular to a specific community.’ By contrast, violence in white communities is understood to be the result of deranged individuals, rather than a cultural characteristic of that community. To succeed, gender asylum claims must usually be cast in ways which do not remind decision makers of the complicity of their society in the reasons why a female claimant is at risk of persecution. Razack argues that ‘the successful asylum seeker must cast herself as a cultural Other, that is, someone fleeing from a more primitive culture.’ The validity of this claim can be assessed by comparing treatment of claims of ‘exotic’ harms with treatment of more ‘familiar’ forms of violence against women, which will be the focus of Chapter Four.

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204 Volpp, supra note 81 at 152.
205 Razack, supra note 78 at 92.
In the first part of this Chapter, I focus on transgression of social mores. Most of the cases decided under this rubric feature women from Islamic countries whose actions are perceived to conflict with state supported interpretations of Islam. While this could ground a refugee claim on the basis of religion or imputed political opinion, unfortunately, the complexity of a woman’s political and/or religious differences with the state is sometimes reduced to a dislike of wearing ‘the veil’. The case which I have selected is Nada’s case which provided significant impetus for the adoption of the Canadian guidelines. I will also discuss relevant developments in the U.S. and Australia which raise transgression of social mores as a basis for asylum.

In the second part, I discuss Female Genital Cutting (FGC) as a ground of feared persecution, primarily in Africa. The U.S. case In Re Kasinga was decided following the adoption of U.S. gender guidelines and was considered an important test case for gender related persecution internationally. I also discuss the controversy surrounding the U.S. Abankwah case, where claims of FGC were accepted by the court but later revealed to be fraudulent, and consider its implications both for credibility findings in refugee hearings and for the anti-essentialist critiques of gender related persecution. In this part I survey the range of legislation designed to prevent FGC, long considered a test case for multiculturalism, in diasporic immigrant communities. The discussion of ‘exotic’ harms recognized as gender related persecution can be contrasted with the treatment of ‘familiar’ harms discussed in the next Chapter.

206 An indicative list of ‘Islamic countries’ is provided by the 54 members of the Organization of Islamic Conference: http://www.oic-oci.org.
207 FGC was recognized as a ground for refugee status in 1993: Canada (MEI) v Khadra Hassan Farah, Federal Court, 13 July 1994. [Farah]
1: TRANSGRESSION OF SOCIAL MORES

Transgression of social mores potentially covers a wide range of behaviour and its content is necessarily dependent on its political, legal, social and cultural context. It is predominantly a claim made by women, although ironically men have been successful in claims for refugee status on this basis despite the impact on women being more severe.\textsuperscript{208} Women have claimed to fear persecution for being in the company of a man other than a male relative;\textsuperscript{209} living as a single or widowed woman where they are expected to be accompanied by a male relative at all times;\textsuperscript{210} refusing to abide by strict dress codes;\textsuperscript{211} engaging in extra-marital sex and becoming pregnant outside marriage;\textsuperscript{212} asserting the right to end their marriage or refusing to agree to marriage;\textsuperscript{213} and refusing to accept separation from their children where the laws on custody dictate this.\textsuperscript{214} As noted above, these claims are associated with Islamic societies, which are generally understood in the West as particularly oppressive of women.\textsuperscript{215} As noted above, the complexity and the political nature of such claims may be collapsed by some decision makers into a distaste for adhering to strict dress codes, particularly compulsory veiling, resulting in a refusal to grant asylum.

'The veil' frequently operates as a metaphor for the condition of women generally in Islamic societies. 'The image of the veiled woman comes to inhabit our imaginations

\textsuperscript{208} A male applicant who was tortured for 'interfaith dating' was granted refugee status: Bandari \textit{v} INS 227 F.3d 1160 (9th Cir. 2000); Cf a decision in which the Federal Court of Australia set aside an RRT decision finding that an Iranian man who had a relationship with a married woman was a refugee: \textit{MIMA v Darboy} (1998) 931 FCA (6 August 1998), Moore J.
\textsuperscript{209} RRT Ref: N97/14234 (26 May 1998).
\textsuperscript{210} CRDD V91-04008; RRT Ref. V00/11181.
\textsuperscript{211} \textit{Fatinv INS} 12 F.3d 1233 (3d Cir. 1993).
\textsuperscript{212} CRDD M96-13487, Beaubien-Duque, Berger, 13 July 2001.
\textsuperscript{213} CRDD MA1-67929, Tshisungu, 13 March 2002. This was in the context of a forced polygamous marriage with FGC as a prerequisite to the marriage.
\textsuperscript{214} RRT Ref: N97/14886 (22 May 1998).
in ways that are totalizing of the culture and its treatment of women. What constitutes ‘the veil’ differs between different countries and within a country. In Iran, for example, women cover all parts of their body in public apart from their face and hands. Some wear pants and a coat whereas others wear the chador, a long black cloak, with head scarves. Variations occur between country and city areas, between young and older women, and according to workplace. Moreover, social class and age play a role in determining which women veil and which do not. ‘For Muslim societies, the veil’s significance and functions have varied historically whereas for the West, the veil has remained a static colonial image that symbolizes Western superiority over Eastern backwardness.

1.1 Postcolonial feminism and the veil

Lama Abu-Odeh explores the variety of meanings attributed to the veil in her article ‘Postcolonial feminism and the Veil: considering the differences.’ As Abu-Odeh notes, the seclusion of upper class Arab women driving cars from the general public is not available to middle and working class women who use public transport and are therefore socially conspicuous because they are not at home. As a result, upper class women have the liberty of not veiling whereas women using public transport view it as a safeguard against sexual harassment. Abu-Odeh also considers the contested meanings of the veil, showing how the veil may empower women by discouraging sexual harassment and eliciting more public support against harassment.

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218 Razack, supra note 78 at 120.
if it occurs while a woman is veiled, but may also disempower women at work by marginalizing them from men and thereby from the location of power.

Abu-Odeh discusses how some women decide each day whether or not to wear the veil. This, and the conflicting tendencies of capitalism and traditionalism in postcolonial societies which are played out on the female body, alert us to the need to avoid cultural stereotypy and generalizations in the context of gender and refugee law. As Sherene Razack notes, monolithic understandings of Muslim culture in the West mean that Muslim women are most likely to succeed in refugee claims where their story matches a cultural stereotype viewed through an imperial lens.

The changing and contested meanings of the veil are also emphasized by Homa Hoodfar, whose perspective as an Iranian-Canadian feminist is valuable for the light it sheds on the exclusionary and racist practices of some Western feminists. Hoodfar historicises the changing practices of veiling in Iran by reference to changes in political regimes and examines the differential impact on women according to their class and urban/rural location. The Shah’s father mandated de-veiling in 1936 as part of a plan to modernize Iran which curtailed the independence of many women who were then forced to rely on men to undertake many tasks which they had previously done themselves. Women demonstrated political resistance to the Eurocentric project of the Shah by veiling. When the Shah was overthrown in the Islamic

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220 Ibid at 1530.
221 Ibid at 1534.
222 Ibid at 1528.
223 Razack, supra note 78 at 121.
224 Homa Hoodfar, 'The Veil in their Minds and on Our Heads: the Persistence of Colonial Images of Muslim Women' (1993) 22 Resources for Feminist Research 5
225 It was socially unacceptable for women to go about these tasks unveiled: Halper, supra note 217 at 124.
Revolution of 1979 and veiling made compulsory in 1981 with infringements punished by public flogging, imprisonment and monetary fines, women resisted this imposition as a compromise of the democratic rights of women.

In the context of Iranian women in Canada, Hoodfar identifies feeling compelled to choose between fighting racism or sexism. She attributes this to the racism of white Canadian feminists whose ignorance of Islam and inability to hear the point of view of Muslim women is coupled with their denial of historical practices of veiling and seclusion in Christianity and Judaism. Both Hoodfar and Abu-Odeh articulate a need for attention to historical specificity in relation to the contested practice of veiling in Islamic societies. It is with these insights in mind that I turn to a discussion of Nada’s case.

1.2 ‘Nada’ s case

‘Nada’ is the name used by a Saudi Arabian woman who was refused refugee status in Canada in 1991. She had refused to veil and had attempted to drive a car and as a result had been beaten and stoned in Saudi Arabia. She had been harassed on the streets by individual men and had been threatened with a virginity test by members of the Morality commission. As a Shi’ite Muslim, a minority in Sunni Muslim majority Saudi Arabia, she was denied easy access to education. She could not travel without the permission of a male relative. Despite a UNHCR ExCom conclusion in

229 Kobayashi, supra note 1 at 66. For details of media coverage see Kobayashi, supra note 1 at n3.
230 IRB Montreal (24 September 1991) in Razack, supra note 78 at 120.
231 Jacque Miller ‘Feminist refugee can stay; strong message to decision makers’ The Ottawa Citizen (30 January 1993) A1.
1985 encouraging states to interpret women who transgressed social mores as members of a particular social group. Nada’s claim for refugee status in Canada was refused, with the Convention Refugee Determination Division notoriously stating that ‘il lui faudrait bien, comme toutes ses compatriotes, se conformer aux lois d’application générale qu’elle dénonce.’ She went into hiding in Montreal and took another name due to fears that her family in Saudi Arabia would be harmed. She appealed to the Federal Court unsuccessfully but was eventually allowed to stay on the basis of Ministerial intervention.

Nada’s case was accompanied by high levels of publicity and provided a focus for public discussion of gender related persecution. Previous decisions had held that laws requiring women to veil, restricting their freedom and banning makeup were inconvenient and discriminatory but not persecutory, with the exception of some claims by Iranian women. Determined two months before the introduction of the Canadian guidelines and in the context of hunger strikes by refugee claimant women outside the Vancouver IRB office, Nada’s case is widely credited with accelerating the release of the gender guidelines. Whereas Ministerial intervention can be used as a political tool to defuse negative publicity in an individual case without changing the refugee determination system, the Canadian guidelines have had a wider impact on the treatment of gender asylum cases within the refugee determination system both

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232 UNHCR ExCom Conclusion No 39 (XXXVI) –1985 ‘Refugee Women and International Protection’ UN Doc No A/AC96/673.
233 Macklin 1995, supra note 70 at 214.
234 ‘Saudi woman’s refugee claim rejected by Ottawa’ The Vancouver Sun (10 September 1992) A8.
235 Jacquie Miller ‘Feminist refugee can stay; strong message to decision makers’ The Ottawa Citizen (30 January 1993) A1.
236 Shahabaldin, Modjgan v MEI [IAB V85-6161; CRDD T90-01845, 21 December 1990] cited in Kobayashi, supra note 1 at 6; Razack, supra note 78 at 119.
238 Kobayashi, supra note 1 at 68.
in Canada and internationally. For the purposes of this discussion, I am most interested in the debates around cultural relativism and arguments that Canada was imposing its standards on the rest of the world which were made in response to Nada’s case.

The arguments about Nada’s case could be understood as a debate between cultural relativist and universalist approaches to human rights. The cultural relativist position was also an anti-refugee position which employed a charge of cultural imperialism against those who supported Nada’s claims as a basis for refugee status. The cultural relativist position could be summarized as follows: ‘Sure Nada was treated badly from a Canadian perspective, but all Saudi women are treated this way.’\textsuperscript{239} The universalist approach to human rights asserted that denying Nada freedom of movement, education and dress constituted a denial of human rights which are acknowledged internationally as universal and indivisible.\textsuperscript{240} To refute the charge of imperialism, Nada’s supporters required an anti-essentialist analysis which was alive to the risks inherent in an orientalist approach, namely, that if Saudi society were not understood as irretrievably oppressive of women, the claim could fail.\textsuperscript{241} An anti-essentialist approach would also draw attention to the political, and in some cases legal, mechanisms by which women are persecuted, rather than relying on assumptions regarding culture or religion. ‘Although Nada insisted that her experience had nothing to do with Islam, and continued to insist on this in her public interviews . . . , she was mostly ignored on this point.’\textsuperscript{242}

\textsuperscript{241} Razack, \textit{supra} note 78 at 122.
\textsuperscript{242} Ibid at 120.
When I was in Saudi Arabia, I thought that women in other countries were more respected and more powerful. I was naïve. I first realized my naivete when they laughed at me at the airport when I said I have problems because I am a woman. Once in Canada, I realized that women here face violence and rape in their daily lives. Anti-esentialists advocate acknowledging the political aspect of a claim of transgression of social mores rather than viewing it as persecution directed at the particular social group of women. Heaven Crawley proposes political opinion as more appropriate than membership of a particular social group where a refugee claimant fears transgression of social mores, 'both strategically, insofar as it is a more accepted ground for refugee status, and politically, in that it recognizes the diversity of women's experiences and locates them in their political and social context.' Although UNHCR has provided clear guidance that transgression of social mores may be linked to the Convention through membership of a particular social group, it has also recognised political opinion or religion as an appropriate Convention nexus in this context.

The U.S. cases on transgression of social mores view political opinion as the most appropriate Convention nexus, which is facilitated by a construction of the claimants' views as pro-Western and therefore anti-government. They feature predominantly Iranian women who refuse to conform to the Iranian government's gender specific laws. *Fatin* is the leading authority for the proposition that feminism can constitute a political opinion. However, the court 'ultimately sent a woman back to persecution because she was reluctant to become a martyr.' She was urged to comply with the

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245 *Fatin v INS* 12 F.3d 1233 (3d Cir. 1993).
246 Saso at 289.
laws in question and thereby avoid persecution. Other claims failed because women were not punished severely enough.\footnote{247} In \textit{Fisher}\footnote{248} the gender specific nature of laws establishing dress codes was ignored and the applicant's failure to comply with these was held to constitute violation of laws of general application for which she was being punished, not persecuted. Finally, \textit{Sharif}'s\footnote{249} inability to enjoy freedoms enjoyed by American women did not equate with a threat of affirmative persecution by the Iranian regime based on her 'pro-western' views. Findings that the claimant has not suffered enough persecution ignore the well established interpretation of the Refugee Convention that although past persecution is a good indicator of future persecution, the key element in the definition of a refugee is the well founded \textit{fear} of persecution.\footnote{250}

While viewing transgression of social mores as political is potentially a refreshing change from a fixation on culture as the source of women's oppression, it can be problematic. If it fails to acknowledge feminism as a political opinion on its own terms, it effectively imputes pro-Western political opinion to women who contest their own oppression. Further, despite acknowledging feminism as a political opinion or punishment of transgression of social mores as capable of constituting persecution, the U.S. cases find against the claimants in the result on a variety of pretexts, thereby leaving them unprotected. At this point it is instructive to refer to the theoretical analysis in Chapter Two which contrasts the human rights approach, associated with

\footnote{247} The applicant was held not to have a well founded fear of persecution where she had endured harassment and hardship by being forced to wear 'Islamic garb' but was never detained or physically assaulted \textit{Yadegar-Sargis v INS} 297 F.3d 596 (7th Cir. 2002); the applicant failed because she had not been harmed because of her beliefs, which were not deep or strong enough to warrant a grant of asylum: \textit{Safaie v INS} 25 F.3d 636 (8th Cir. 1994).\footnote{248} \textit{Fisher v INS} 79 F.3d 955 (9th Cir. 1996) (en banc) at 964. See Akram, \textit{supra} note 177 at 32-35.\footnote{249} \textit{Sharif v INS} 87 F.3d 932 (7th Cir. 1996).\footnote{250} UNHCR \textit{Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees}, UN Doc. No. HCR/IP/4/ENG/Rev.1 (Geneva: UNHCR, 1992) at para 45.
the Refugee Convention ground of particular social group, with anti-essentialist critiques in which the grounds of political opinion or religion are preferred. However, these examples highlight the need to complicate the categories of analysis and recognise that their strategic implementation in actual legal cases may not reflect what theory alone would predict.

Clearly, many of the issues which arise under the heading of transgression of social mores could be analysed in terms of issues discussed elsewhere in this thesis, as demonstrated by a number of Australian cases. These include attempting to divorce one’s husband due to domestic violence,\footnote{SDAV v MIMA [2002] FCA 1022 (26 August 2002).} refusing to undergo FGC or to allow one’s daughters to undergo it\footnote{Salad v MIMA [1999] FCA 987 (22 July 1999): the applicant was unsuccessful in the Federal Court but eventually granted a visa on humanitarian grounds.} and refusing marriage, a condition of which is unwanted FGC. FGC is another form of ‘exotic harm’ which has captured the western imagination as a paradigmatic example of non-western violence against women. Analysing it from an anti-essentialist perspective requires acknowledgment of the specific forms it takes in different contexts. Representing female refugee claimants who fear forced FGC demands iteration of the legal and political mechanisms through which it operates, rather than invoking the imagery of a barbaric culture.

2: FEMALE GENITAL CUTTING

In this part I discuss risk of female genital cutting (FGC) as a ground for refugee status. FGC is associated with claims of women from Africa.\footnote{See Efua Dorkenoo, Cutting the Rose: Female Genital Mutilation: the Practice and its Prevention (London: Minority Rights Publications, 1994) at viii-xi for maps of the geographic distribution of and variations in practices of FGC.} It is often understood as required by very strict interpretations of Islam, although it is practised around the
Female Genital Cutting (FGC) is known by a variety of terms including female genital mutilation (FGM), female circumcision, female genital modification, female genital surgery (FGS) and harmful traditional practices affecting the health of women and girls. One strategy used in anti-FGC campaigns, particularly by development organizations, is to define it as a health issue in order to circumvent cultural relativist arguments against outside interference. Hence there is frequent reference in the legal literature to medical definitions. I include here the World Health Organization definition used in the legal literature:

Female genital mutilation (FGM), often referred to as 'female circumcision', comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural,

255 Razack, supra note 78 at 97.
of’y 42
257 Spijkerboer, supra note 11 at 111.
religious or other non-therapeutic reasons. There are different types of female genital mutilation known to be practised today.258

There are a number of reasons given for performing FGC. These include ensuring virginity before marriage and preventing extra-marital sex; birth control; hygiene; initiation into womenhood; a fear that an unaltered clitoris is damaging to a man during sex or to a baby during birth; and religious reasons.259 Negative health consequences include complications such as hemorrhage, infections including HIV/AIDS and Hepatitis B, septicaemia, retention of urine or shock and death. Retention of menstrual blood can result in infections, as can retention of urine. Intercourse can be difficult or impossible and women who have been infibulated must give birth following defibulation or by Caesarian section due to obstruction of the birth canal. Cliteridectomy may result in diminished sexual pleasure, although some women have reported continued sexual response following FGC.260 Fistula is another problem. FGC is usually performed by older women who are traditional midwives or grandmothers of the children to be cut.

As might be expected from the proliferation of terms available, naming this practice is highly contested and the terms used can often reveal the politics of the speaker in

258 Type I - excision of the prepuce, with or without excision of part or all of the clitoris; Type II - excision of the clitoris with partial or total excision of the labia minora; Type III - excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening (infibulation); Type IV - pricking, piercing or incising of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterization by burning of the clitoris and surrounding tissue; scraping of tissue surrounding the vaginal orifice (angurya cuts) or cutting of the vagina (gishiri cuts); introduction of corrosive substances or herbs into the vagina to cause bleeding or for the purpose of tightening or narrowing it; and any other procedure that falls under the definition given above. The most common type of female genital mutilation is excision of the clitoris and the labia minora, accounting for up to 80% of all cases; the most extreme form is infibulation, which constitutes about 15% of all procedures. World Health Organization, Fact Sheet No 241 Female Genital Mutilation (June 2000) available at: <http://www.who.int/mediacentrefactsheets/fs241/en/>


relation to the practice. The term ‘female circumcision’ is commonly used as an English approximation by those who accept the practice. However, ‘circumcision’ is rejected by some lawyers\textsuperscript{261} and doctors\textsuperscript{262} as a misleading understatement of the damage done by the cutting which far exceeds that of male circumcision.\textsuperscript{263} However, some African feminists have drawn attention to the naming practices of Westerners as a continuation of colonial practices which do little to promote the empowerment of African women:

In this name game, although the discussion is about African women, the subtext of the barbarism of African and Muslim cultures, and the relevance (even indispensability) of the West in purging the barbaric flaw, mark another era where colonialism and missionary zeal determined what ‘civilization’ was, and figured out how and when to force it on people who did not ask for it. Only imperialist arrogance can imagine what Africans want, determine what they need, and devise ways to deliver the goods.\textsuperscript{264}

My own adoption of the term ‘Female Genital Cutting’ attempts to respond to some of the critiques of Western feminists’ advocacy on this issue.\textsuperscript{265} My position is that FGC involves both immediate and long term pain and injury to women and that such injuries have the potential to prejudice women’s physical and psychological health.

While there are a range of cultural practices which are undergone despite the pain and injury they cause, for example, western cosmetic surgery, they need to be evaluated in


\textsuperscript{262} Royal Australian College of Obstetricians and Gynaecologists, ‘Female Genital Mutilation: Information for Australian Health Professionals’ (1997) online \url{http://www.ranzcog.edu.au/womenshealth/whpublications.shtml} at 11.


\textsuperscript{264} Obioma Nnaemeka, ‘If Female Circumcision did not exist, Western Feminism would invent it’ in Susan Perry and Celeste Schenk, eds., \textit{Eye to eye: Women Practicising Development Across Cultures} (London and New York: Zed Books, 2001) at 178 [Nnaemeka].

\textsuperscript{265} See for example, the critiques of Alice Walker and Prathiba Parmar’s film, \textit{Warrior Marks} by Stanlie M James and Clair C Robertson, eds., \textit{Genital Cutting and Transnational Sisterhood: Disputing U.S. Polemics} (Urbana and Chicago: University of Illinois Press, 2002) [James and Robertson].
terms of the extent to which pressures to conform better to a culturally encoded notion of beauty or to make oneself more marriageable are gendered. Further, the fact that genital cutting is frequently performed on children and that certain forms are not completely reversible raises questions about the rights of parents to impose their beliefs and practices on their children, an issue not addressed here.  

2.1 Does FGC constitute persecution?

A threshold question connected to the naming controversy is whether FGC constitutes serious harm or persecution. ‘FGM’ is now included as a human rights abuse by a significant number of international instruments and in the Women’s Rights Protocol to the Banjul Charter, which could be used as evidence that there is an emerging African consensus against the practice. The UNHCR position is that where women and girls do not consent to the practice and where state authorities are unable or unwilling to provide protection, female genital mutilation could provide the basis for an asylum claim.

In a provocative article challenging the parameters of the debate on FGC, Richard Shweder refers to the research done by anthropologist Fuambai Ahmadu to contest the extent of medical difficulties accompanying the practice. Ahmadu explained how

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266 Minow, supra note 177.
268 Article 5: elimination of harmful practices; Article 6 prohibits forced marriage and sets 18 years as a minimum age for consent to marriage: Protocol to the Charter on Human and People’s Rights on the Rights of Women in Africa, 11 July 2003, online http://www.achpr.org/english_info/women_en.html>. The Protocol will enter into force 30 days after the deposit of the fifteenth instrument of ratification: Article 29. As at August 2005, there were 21 signatories and no ratifications or accessions.
270 Richard A Shweder, "What about Female Genital Mutilation?" and why understanding Culture matters in the first place" in Richard A Shweder, Martha Minow and H R Markus, eds., Engaging
she decided to undergo ‘circumcision’ at the age of 23. Ahmadu’s position brings into relief the problems with analyzing FGC solely as a breach of the right to health. When performed under sanitary conditions which would avoid transmission of diseases, certain forms of genital modification such as “‘Sunna’ circumcision” (rather than excision and infibulation) may well have a neutral impact on women’s health.\textsuperscript{271} Where there would be no health risks related to FGC, a successful claim for refugee status would need to show that it constitutes persecution for other reasons.

\textbf{2.2 In re Fauziya Kasinga\textsuperscript{272}}

Although not the first,\textsuperscript{273} the most famous case which recognized a risk of female genital cutting as persecution in the U.S. is \textit{In re Fauziya Kasinga}.\textsuperscript{274} Kassindja\textsuperscript{275} was a young woman from Togo who had avoided FGC due to her father’s opposition to the practice. Following his death when she was 17 years old, her paternal aunt arranged for her to be ‘circumcised’ in preparation for marriage to a 45 year old man with three wives. With the help of her sister, Kassindja fled to Ghana and from there to Germany where she bought a British passport on which she traveled to the United States. Upon arrival in December 1994, she sought asylum and was detained until April 1996 when the Board of Immigration Appeals overturned the decision of the Immigration Judge and granted her asylum.


\textsuperscript{273}Lydia Oluluru’s claims that her daughters would be subjected to FGC if returned to Nigeria resulted in a grant of asylum in the US: Claire C Robertson, ‘Getting beyond the Ew! Factor: Rethinking U.S. Approaches to African Female Genital Cutting’ in James and Robertson, 54 at 74 [Robertson].


\textsuperscript{275}Kassindja’s book provided an opportunity to correct the spelling of her name, an error made by an airport official perpetuated throughout her detention in U.S. prisons and up the appeals system. Fauziya Kassindja and Layli Miller Bashir, \textit{Do they hear you when you cry} (New York: Delacorte Press, 1998).
The Board’s decision, although narrowly expressed, was the first made under the U.S. guidelines and was hailed as a landmark decision recognizing gender related persecution. The Chair’s decision, representing the opinion of eight board members, held that the applicant’s evidence was credible and that ‘FGM’ can constitute persecution. It held further that the applicant risked persecution by reason of her membership of the particular social group of ‘young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to FGM, as practiced by that tribe, and who oppose the practice.’ The requirement to oppose the practice incorporates an element of political opinion into what would otherwise be a narrowly defined social group. In discussing the jurisprudence on membership of a particular social group it considered the U.S. case *Matter of Acosta* and held that ‘the characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.’

Three Board members concurred in the majority opinion and expanded upon questions raised by the INS with regard to the precedential value of the case. In relation to whether FGC constitutes persecution, they observed that ‘the level of suffering associated with FGM, as practiced by the applicant’s tribe, would be more than enough to constitute persecution if inflicted exclusively on a religious or political minority.’ While this formulation risks conflating the persecution element of the refugee definition with the nexus requirement, it serves to underline the reluctance to identify persecution as directed against women (as opposed to a group linked by their political opinion or religious belief). The INS also found the ‘one off’ nature of

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276 19 I. & N. Dec. 211 (BIA 1985)
277 *In re Kasinga*, supra note 272 at 23.
278 Ibid at 31, Filppu.
FGC problematic, as it apparently attempted to develop a policy which would grant asylum to ‘persons who may prospectively face FGM, but would not routinely make asylum available to persons who have simply previously suffered FGM’.\textsuperscript{280} There was one dissent – Board Member Vacca – without opinion.

Adelaide Abankwah was also granted asylum in the U.S. based on her fear of FGC, which was later discovered to be fraudulent. She arrived in the U.S. in 1997 aged 27\textsuperscript{281} and applied for refugee status, claiming that she belonged to the Nkumssa tribe in Ghana\textsuperscript{282} and that she was next in line to become the queen mother of her tribe, for which virginity was a prerequisite.\textsuperscript{283} She claimed to fear ‘FGM’ would be inflicted on her as a punishment when it was discovered through a virginity test that she was no longer a virgin.\textsuperscript{284} Abankwah failed in her claim before an Immigration judge and also at the BIA; however, she succeeded at the Second Circuit Court and was granted asylum.\textsuperscript{285}

The INS investigated her case and later a \textit{Washington Post} reporter sent to Ghana concluded that ‘the woman claiming to be Adelaide Abankwah was really Regina

\textsuperscript{280} \textit{In Re Kasinga, supra} note 272 at 38. The one off nature of FGC is disputed: its effects are life long and it is customary for women to be resutured following delivery of children. A 24 year old woman was granted asylum after she had been circumcised at age 12: \textit{Matter of U.S. No. A}, Immigration Court, Anchorage, Alaska, 19 December 1996.

\textsuperscript{281} FGC is not usually performed on adult women of Abankwah’s age: Kratz, \textit{supra} note 261 at 330.

\textsuperscript{282} Ghanaian and non-Ghanaian scholars argued that FGC was not practiced in the area of Ghana from which Abankwah claimed to come and that she appeared to have invented the Nkumssa tribe: ibid at 331.

\textsuperscript{283} Queen mothers are nowhere else in Ghana required to demonstrate virginity, although demonstrating fertility through producing children would be an asset and a queen mother candidate would not be forced to become queen mother if she were unwilling: ibid.

\textsuperscript{284} In communities which practice FGC, the practice is universal, not limited to a small group of women (those who fail virginity tests). Punishment for loss of virginity would be banishment rather than FGC. FGC had never been used as punishment for loss of virginity in Ghana or anywhere else in Africa: ibid.

Norman Danson.' Although she was convicted of fraud, her case remains a precedent for FGC constituting a basis for asylum. The fact that Abankwah/Danson was able to succeed in her claim which was shown to be fraudulent raises questions about the potential for the integrity of the refugee determination system to be corrupted by assumptions about the barbarity of African societies which are unrelated to current practices in fact.

In Canada there have been a number of successful claims for refugee status based on risk of FGC. The first case in which FGC was held to constitute persecution was Khadra Farah in 1994, that is, three years before Kasindja was granted status in the USA. Farah was a Somali woman who sought refugee status from her violent husband who had abducted their son. She feared that if returned to Somalia, her daughter would be subjected to FGC. According to Razack, FGC helped 'to transform the situation of a man oppressing a woman to the point of persecution from an ordinary case into an extraordinary one.' As in Kassindja’s case, where forced marriage faded into the background as the spotlight focused on the claim of FGC, in Farah’s case, her husband’s violence against her, the threats and abductions combined with police inaction which should have been sufficient to ground an asylum claim were subsumed into a discussion of FGC.

289 Razack, supra note 78 at 124.
Despite a specific reference to 'FGM' as capable of constituting persecution in particular circumstances in the Australian Gender Guidelines, there have been few reported decisions in which refugee claimants have been successful on this basis.

The Department of Immigration has also recognized that persecution may occur 'even in the absence of enmity or malignity,' using the example of 'female genital mutilation which may be performed as an important cultural rite.'

Although the RRT has found a risk of 'FGM' to be capable of amounting to persecution and granted refugee status to claimants from Ghana and Nigeria, claims of feared persecution in the form of FGC may fail due to the availability of an internal flight alternative; lack of a real chance of persecution for opposing FGC evidenced by laws against the practice; or a perceived lack of credibility often caused by delay in asserting the claim. There may be a variety of reasons for this delay, including the fact that the claim is often made on behalf of girl children following the submission of claims of a parent; a lack of awareness by refugee lawyers of the practice of FGC; and lack of understanding among applicants of the relevance of this issue to their claim for refugee status.

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290 Australian guidelines, supra note 54 at para 4.10.
291 For a discussion of the implications of In Re Kasinga for Australia, see Nicholas Pengelley, 'Female Genital Mutilation: Grounds for Grant of Australian Protection Visa? The Ramifications of Applicant A' (1998) 24 Monash U. L. Rev. 94.
293 RRT Ref.: N93/02141 (8 September 1995).
294 RRT Ref.: N97/19046 (16 October 1997).
298 Salad v MIMA [1999] FCA 987 (22 July 1999). The potential claim of Ms Salad's minor daughter, born in detention in Australia, for refugee status on the basis of risk of FGC was overlooked by her first lawyer and her claim was refused. Ms Salad and her two daughters were eventually granted visas under the Migration Act 1958, s.417. Discussions with Paul Fisher, Victoria Legal Aid.
2.3 Towards an anti-essentialist critique of FGC

FGC has been criminalized in a number of jurisdictions with diasporic immigrant communities which practise FGC. These include the U.S., Canada, and Australia. FGC has also been prosecuted in France under the Penal Code which criminalizes violence against minors. As France is not one of the jurisdictions under discussion, I will not examine these prosecutions in detail. Nevertheless, lawyer Weil-Curiel’s motivation for taking these cases is worth quoting for the light it sheds on my discussion about the judgements refugee decision makers must make about the status of women in other countries and cultures.

As a French citizen and lawyer, I cannot permit a second, tacit set of laws for the African population living in France, one that condones practices that are illegal for the rest of us. Moreover, young African women born in France wish to live like other young women of their generation. To consider them as somehow under a ‘community authority’ would be to negate the idea of a nation, and would also subject them to discrimination which would constitute a form of exclusion.

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300 Criminal Code, R.S.C. 1985, c. C-46, s.268, as am. S.C. 1997, c.16, s.5, which includes performance of FGM as an aggravated assault. Section 273.3(1) also prevents removal of a person from Canada with the intention of performing FGM on her. Under s21, the penalty for aggravated assault is imprisonment for a term not exceeding fourteen years. See also Lawrence C Buhagian, 'Criminalizing FGM in Canada: the excision of multiculturalism' (1997) 9 Current Issues in Criminal Justice 184.

301 Crimes Act 1900 (NSW), s. 45; Crimes Act 1958 (Vic), ss. 32-33; Crimes Act 1900 (ACT), s74; Criminal Code Act 1928 (Tas), ss. 178A, 178B, 178C; Criminal Code (NT), ss. 186A, B, C and D; Criminal Law Consolidation Act 1933 (SA), ss. 33, 33A and 33B; Criminal Code Act 1899 (Qld), ss. 323A and 323B; Criminal Code (WA), s222. There is a defence for performing female genital surgery for therapeutic medical but not cultural or religious purposes. See Mary-Jane Ierodiaconou, "Listen to us!" Female Genital Mutilation, Feminism and the Law in Australia" (1995-96) 20 Melb. U.L. Rev. S62 for discussion of prosecution under child welfare legislation of infibulation performed on two girls aged 3 years and 18 months prior to entry into force of legislation prohibiting ‘FGM’.

302 See Weil-Curiel, supra note 263.

303 Ibid at 195.
Anti-essentialist critiques of the human rights approach to gender related persecution have focused on FGC as a paradigm case. Isabelle Gunning has critiqued class, race and gender politics of the criminalization of 'Female Genital Surgeries (FGS)' in the United States. She states that 'conservatives who are otherwise busy attacking welfare, health care and other programs that benefit poor, working and middle-class people have suddenly found a concern for colored women.' Lewis and Gunning are concerned that treating 'FGS' as child abuse and prosecuting parents is not the most effective way to deal with a complex issue. Moreover, in the context of continued violence against migrant women in destination countries, singling out FGC for legislative attention suggests that something else is at work here apart from concern to protect women’s human rights.

One way to reduce the level of Western sensationalism directed at FGC is to compare it to Western surgical practices aimed at modifying the female body. Elisabetta Grande compares FGC to breast augmentation in the West as an example of a non-therapeutic practice which has comparable medical long term risks and side effects and operates similarly in terms of its social and economic function by enhancing a woman’s marriageability. However, ‘female circumcision is not just an African or an Islamic problem; it is a global problem. It was not imported into the West by ‘third World’ immigrants, as some would suggest. It happened in the West before the

305 Lewis and Gunning, supra note 267 at 137.
306 For example, the U.S. has not ratified the Convention on the Elimination of All forms of Discrimination against Women or the International Covenant on Economic, Social or Cultural Rights and lacks comprehensive health care; problems remain with domestic violence and anti-immigrant legislation among other issues: ibid at 139.
immigrants arrived.' FGC might be better contextualised by recalling that clitoridectomy was practised in many European and North American countries through the 1950s as treatment for insomnia, sterility and masturbation. FGC continues today in the West both for cosmetic reasons such as vaginoplasty undertaken to increase men’s sexual enjoyment and to ‘determine’ ambiguous genitalia. As Leti Volpp notes,

the idea that certain bodies are mutilated fascinates and repels, and is used to differentiate between the self/West and the other even while women’s bodies are not free from mutilation —including surgery to alter women’s vaginas, labia and pubic mounds — in the United States.

Membership of the particular social group ‘women’ appears to be the most logical nexus to the Refugee Convention if FGC is not performed in retaliation for expressions of political opinion or transgressive behaviour. However, FGC has been interpreted as motivated by a desire to control women’s sexuality, in which case opposition to FGC could be seen as opposing a key element of the current social structure. The formulation of particular social group in Kasinga incorporated an element of political opinion, encompassing women ‘who oppose the practice’, meaning that FGC could potentially be analysed as transgression of social mores. While I associated membership of particular social group with the human rights approach, and political opinion with anti-essentialist critiques in Chapter Two, refugee lawyers and decision makers must make strategic decisions about whether to analyse FGC as persecution based on membership of a particular social group or as

308 Nnaemeka, supra note 264 at 183.
310 Razack, supra note 78 at 98.
312 Volpp, supra note 81 at 159.
political opinion. While anti-essentialist critics might prefer political opinion as the relevant Convention ground, it is more difficult to prove than membership of a particular social group of women. However, a claim of FGC for reasons of membership of the particular social group of women must be formulated in specific terms and by reference to lack of state protection, or it risks sensationalising the issue in ways which continue the tropes of barbaric African practices typified by colonial discourse.

3. CONCLUSION

This Chapter has considered two forms of ‘exotic harm’, transgression of social mores and female genital cutting. Social mores necessarily vary according to the political, social and legal context, while the rubric ‘transgression of social mores’ covers a range of issues. It includes demonstrating an opinion about women’s right to behave in certain ways which are inconsistent with dominant interpretations of the prevailing religion or political regime. The heterogeneous practices which can be grouped under this heading are often subsumed into a woman’s refusal to veil in an Islamic country.

The term Female Genital Cutting is associated with claims of African women and Islam, despite its geographical incidence and religious affiliation being much wider. Further, the range of cutting practices is not necessarily understood in western countries, where images of barbaric mutilation of downtrodden African women predominate and understanding of ‘female genital mutilation’ usually confined to awareness of infibulation. Feminists approaching these issues from an anti-essentialist perspective need to acknowledge the colonial history of attempts to eradicate female
genital cutting\textsuperscript{313} as well as legislative restrictions on performing FGC in refugee receiving countries. This enables articulation of a politics of representation which renounces reliance on cultural essentialism. In contrast to the exotic harms discussed here, the next Chapter examines domestic violence and sexual assault as examples of ‘familiar harms’.

\textsuperscript{313} ‘Clearly the failure of these legislative efforts [to abolish FGM in Sudan and Kenya] lies partly in their colonial origins. Such a history has led African people to view the outside interest in the surgeries as just another form of imperialism’: Gunning, \textit{supra} note 259 at 228.
CHAPTER FOUR: FAMILIAR HARMs

In this Chapter I focus on two examples of gender related persecution which occur all over the world. Unlike the subjects of the previous Chapter, which are usually seen by refugee decision makers as exotic harms happening in other places to other women, domestic violence and sexual assault continue to be widespread in refugee receiving countries. Interestingly, the ‘exotic’ forms of domestic violence, such as sati, ‘honour killings’ and dowry violence, may ground refugee claims more successfully than those in which the violence seems too familiar. An awareness of the pervasiveness of these forms of violence against women has the potential to undercut distinctions between refugee producing and refugee receiving countries. 314

The first part of this Chapter focuses on domestic violence. The case study is Khawar, an Australian decision which recognised women in Pakistan as a particular social group and domestic violence as persecution in the absence of state protection. In addition to its landmark status on gender related persecution and on membership of a particular social group in Australia, the judicial references to sati and dowry violence in this case and the explicit comparison between levels of state protection available to women in refugee producing and refugee receiving countries make it especially relevant to this discussion. This case is contrasted with that of Jessica Dolamore, a citizen of Australia and New Zealand who was initially successful in her refugee claim on the basis of domestic violence in Canada. 315 Contrasting domestic violence with the ‘foreign’ violence of sati and dowry killings within part one of this Chapter replicates the larger structure of this thesis, which examines exotic harms in Chapter three by contrast with the familiar harms highlighted in this Chapter.

314 Roberts, supra note 82 at 182.
315 It was overturned by the Federal Court on the issue of state protection: see discussion below.
The second part of this Chapter discusses sexual assault in the refugee context. Although initially regarded as a private sex crime, even where undertaken by government agents, sexual assault has since been recognized in refugee law as a form of torture and persecution directed particularly at women. There is now case law supporting a grant of asylum to a victim/survivor of sexual assault where it is motivated by a Convention ground, such as actual or imputed political opinion, religion, race or nationality, and there is a lack of state protection. This is perhaps attributable to the powerful yet statistically unfounded myth of stranger rape. In fact most sexual assault is perpetrated by persons known to the victim/survivor, usually partners or family members. Unlike domestic violence, authoritative precedents establishing sexual assault as persecution for which the risk factor is membership of the particular social group of women remains elusive.

In preparing this Chapter, I noted two difficulties which I did not expect. The first was that, although claimants continue to struggle to argue for a Convention nexus to their sexual assault, key precedents were established years ago, linking rape to political opinion, religion, and race. Ironically, I found much more to write about domestic violence, which has been linked to the Convention ground of membership of a particular social group only since 1999 in the UK and since 2002 in Australia.


317 Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629 (H.L.)
Secondly, there is a strong tension between advocating for the expansion of human rights categories to include women’s experiences of gender related persecution while simultaneously attempting to adopt an anti-essentialist critique of this area of refugee law. While these two positions are not necessarily incompatible, both the case law and strategic interventions into the development of future refugee law necessitate complication of the theoretical categories set out in Chapter Two.

1: DOMESTIC VIOLENCE

Domestic violence is a form of violence, perpetrated overwhelmingly by men against women, which has historically been regarded as private and outside the state’s purview. It incorporates physical, sexual and psychological abuse. In the context of refugee claims, it is ‘the paradigmatic example of gender-specific abuse committed by “private actors”.’\(^{318}\) Although reported refugee claims based on domestic violence are characterised by an extreme level of physical and/or sexual assault, there appears to be no reason why psychological abuse alone, such as threats and controlling behaviour, could not constitute persecution, just as other threats of death and of serious harm are capable of constituting persecution.\(^{319}\) Violence between same sex partners\(^{320}\) and by women against men in the context of intimate relationships is increasingly being discussed; however, this Chapter will focus on ‘private’ violence against women by men in the context of asylum claims. Further, domestic violence sometimes takes specific forms such as so called ‘honour killing,’ dowry-death,\(^{321}\)

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\(^{319}\) Hathaway, *supra* note 7 at 112. Hathaway notes that ‘the threat of rape, for example, is a sufficient basis to fear persecution’ at note 109.


\(^{321}\) Cf Dowry Prohibition Act 1961 (India).
bride-burning and the custom of *sati*\(^{322}\) raising a question whether women claiming to fear these ‘exotic’ harms are more likely to be granted asylum than those fearing more familiar forms of domestic violence.

As discussed in Chapter Two, one of the key targets of the feminist movement has been the public/private distinction integral to liberal theory. Jenni Milbank uses the public/private divide to examine the refugee claims of lesbians and gay men. She shows that violence perpetrated against lesbians is both more sexualised and more domestic than violence against gay men although they are treated as one category.\(^{323}\) In the Canadian and Australian cases surveyed, violence against lesbians was more often at the hands of family members, former male partners or current female partners’ families. Perhaps to a worse degree than in cases of violence against women presumed to be heterosexual, decision makers routinely ignored the role of the family in enforcing societal control over women in sexuality based claims. Milbank also cites a case in which a lesbian was subjected to violence, harassment and sexual assault after her male relative told people she was a lesbian, hoping she would change if they attacked and insulted her. The RRT found that her relative’s motivation was ‘purely private’ and directed ‘solely at the applicant, a family relation.’\(^{324}\) This has strong parallels with reasoning in cases of violence against women not identified as lesbians where the fact that their husbands only attacked their spouse or children was held to prevent an asylum claim on the basis that the violence was purely personal and not directed at a claimant by virtue of her membership of a particular social group such as women.

\(^{322}\) Crawley 2001, *supra* note 12 at 129.
\(^{323}\) Millbank, *supra* note 171 at notes 63-63.
\(^{324}\) RRT Ref: N99/27828 (Unreported, D. Kelleghan, 29 June 1999) cited ibid at note 70.
The recent recognition of domestic violence as public and political such that it is capable of grounding a claim for refugee status must be understood within this context. Although decision makers in the last decade usually agreed with claimants that the extent and seriousness of the abuse feared constituted persecution, many claimants were unsuccessful on the basis that there was no nexus to a Convention ground or that the harm feared emanated from non state actors. Both these reasons effectively amounted to an argument that the harm feared was not public or political.

The House of Lords decision in *Shah and Islam* posited a new test for persecution and also broke new ground in recognising women in Pakistan as capable of constituting a particular social group. It forms an important backdrop to the decision in *Khawar*.

1.1 *Minister for Immigration and Multicultural Affairs v Khawar* 325

*Xhawar* is the landmark Australian case on gender related persecution. Mrs Khawar fled from Pakistan to Australia to escape her husband after suffering severe domestic violence for more than ten years. The violence included slappings, beatings requiring hospitalisation, threats to throw acid on her, threats to kill by setting fire to her, and dousing her with petrol.326 She approached the police on four occasions but they ignored her requests for assistance, blaming her for the problem. Her claim for refugee status was rejected by the Department of Immigration and the Refugee Review Tribunal on the basis that there was no Convention nexus to the serious harm she feared. She applied to the Federal Court for judicial review and was successful.327

The Minister for Immigration appealed this decision which was upheld both by the

325 *Khawar*, supra note 88.
326 Ibid at para 50, McHugh and Gummow JJ.
327 *Khawar v Minister for Immigration and Multicultural Affairs* (1999) FCA 1529 (5 November 1999), Branson J.
Full Court of the Federal Court (Justice Hill dissenting)\textsuperscript{328} and again by the High Court (Justice Callinan dissenting). In the result, the case was remanded to the RRT for a finding on the facts in the light of the High Court decision on the law.

The decision in \textit{Khawar} is the highest level precedent recognising gender related persecution in Australia, although it does not use the term ‘gender related persecution’ and does not refer to the gender guidelines. It recognises domestic violence as a form of persecution where there is a lack of state protection. Justices McHugh and Gummow found there was persecution on the basis of a lack of state protection alone,\textsuperscript{329} while Chief Justice Gleeson\textsuperscript{330} and Justice Kirby\textsuperscript{331} adopted the test of persecution put forward in the House of Lords decision in \textit{Shah and Islam}: ‘persecution = serious harm + failure of state protection.’ Justice Callinan, dissenting, held that persecution could not be made out in the case of failure to act but required positive action.\textsuperscript{332}

\textit{Khawar} expanded interpretation of the Convention ground ‘particular social group.’ The High Court justices propose a number of formulations of ‘particular social group’ ranging from ‘women in Pakistan’\textsuperscript{333} to ‘married women who lived in a household without a blood relative to whom the woman could look for protection against

\begin{itemize}
\item \textsuperscript{328} Minister for Immigration and Multicultural Affairs \textit{v} Khawar (2000) FCFCA 1130 (23 August 2000).
\item \textsuperscript{329} \textit{Khawar}, supra note 88 at para 77.
\item \textsuperscript{330} Ibid at paras 27-31.
\item \textsuperscript{331} Ibid at para 118.
\item \textsuperscript{332} Ibid at para 149.
\item \textsuperscript{333} Ibid at para 32, Gleeson CJ.
\end{itemize}
violence by members of the household. Justice Callinan did not recognise any of the proposed groups as a particular social group.

For the purposes of this discussion, I will focus on the analysis of the nature of domestic violence and the state’s failure to protect, as this was directly addressed in the judgments and is a key element of feminist critiques of gender related persecution. Justice Kirby sets out the specific violence faced by Mrs Khawar in greater detail than do other members of the majority who refer to serious domestic violence. This can be read in at least two ways. First, the greater specificity with which the acts of violence are spelled out underlines the seriousness of Khawar’s situation and her need for protection. Second, the references to throwing acid and setting fire to Mrs Khawar potentially sensationalize her claims and play on lingering colonial sentiments which recall sati as an unchanging South Asian cultural practice. Both Mrs Khawar and the Tribunal attributed the violence she suffered at the hands of her husband and her husband’s family to their dissatisfaction with the circumstances of the marriage and their perception of her dowry as inadequate.

It is important to consider whether naming the violence as dowry related, or reminiscent of attempted bride burning, thus rendering it culturally alien to Australia and Mrs Khawar as radically Other, facilitated the court’s decision. In citing Justice Hill’s reasons for finding that persecution required positive action rather than mere

334 Ibid at para 81, McHugh and Gummow JJ.
335 Since Khawar was decided, a Federal Court decision has recognised ‘women in Iran’ as a particular social group: SDAV v MIMA [2002] FCA 1022 (26 August 2002) although the RRT decision was held to be exempt from judicial review by operation of the privative clause in the Migration Act 1958, s. 474(1). See now Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2 (4 February 2003).
336 Justice Kirby refers to this specifically as abolished by British Rule: Khawar, supra note 88 at para 98.
337 Ibid.
inaction by the state, Justice Callinan approved his reference to the failure of Australian police to respond to requests for protection by Australian women facing domestic violence.

There is, and it is not a matter of which we can be proud, a lack of enthusiasm in the authorities in Australia to come to the aid of women who are victims of domestic violence, but it would not be suggested that the State is, or for that matter the police are, persecuting those women in Australia.\(^{338}\)

The failure of Justice Callinan to consider seriously whether the authorities in Australia are persecuting women demonstrates the uncomfortable similarities between women in Pakistan and women in Australia who seek protection from domestic violence. The difficulties in obtaining protection from domestic violence faced by non-refugee women who migrate to Australia on spouse and fiancé visas are exacerbated by their status as temporary migrants and their ensuing dependence on their sponsor.\(^{339}\) Rather than concluding as Justice Callinan did that because women in Australia have the same problems as women in Pakistan that the latter are not persecuted, this similarity provides the opportunity to evaluate and improve the performance of Australian authorities in protecting women from intimate violence.

As in many refugee cases and in most cases of sexual assault in domestic legal systems, the credibility of the complainant was at issue in *Khawar*. The Department of Immigration received two anonymous letters suggesting that Mrs Khawar was lying and by implication, colluding with her husband. All decision makers, from the Immigration officer up to the High Court, gave Mrs Khawar the benefit of the doubt.

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\(^{339}\) Ironically, most of the leading cases on domestic violence leading to an exceptional grant of permanent spouse visa have been taken by men claiming to have been victims of violence by their sponsors: *Theunissen v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1097 (11 August 2005); *Cakmak v MIMIA* [2003] FCAFC 257; *Meroka v MIMA* [2002] FCA 482 (19 April 2002).
and made a decision on the basis that her claims were true. Nevertheless, the doubts raised by the letters remained in the background, being referred to by the High Court.\footnote{Khawar, supra note 88 at para 8, Gleeson CJ.} There is a parallel here with the problems faced by victims of sexual assault, in which a discourse of women fabricating accounts of rape circulates. In the context of a criminal trial, this discourse effectively shifts the burden of proof from the defendant to the complainant; in a refugee context the applicant is already ‘on trial’.\footnote{Robert Barsky, Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing (Philadelphia: John Benjamins Publishing, 1994).}

It is interesting to consider whether Mrs Khawar was a ‘fraud’ but, like Adelaide Abankwah/Regina Dawson, was successful in her claim due to the orientalist lens through which her case was viewed. Imagine that Mrs Khawar made fraudulent claims but was successful due to the close match between her claims and Western stereotypes of South Asian culture as irretrievably misogynist, underlined by the references to wife burning and acid throwing. How could a South Asian woman succeed in a genuine claim of domestic violence without being forced to rely on colonial stereotypes which figure her culture as exceptionally patriarchal? I argue that feminists need not feel forced to choose between recognising violence against women wherever it occurs and engaging in a critique of modern day Orientalism. It is important for anti-essentialist feminists to engage in a ‘both . . . and’ type of critique, rather than an ‘either . . . or . . .’ analysis of these types of cases. It is possible both to acknowledge violence against women \textit{and} to warn against the dangers of homogenizing whole cultures as intrinsically repressive of women. Recognising domestic violence at home, in refugee receiving countries, acknowledges the political, rather than cultural, aspect of violence against women.
Bearing in mind these concerns, *Canada (Minister of Citizenship and Immigration) v Dolamore*[^342] provides a useful contrast with *Khawar*. Jessica Dolamore was a citizen of New Zealand and Australia who suffered years of physical and sexual abuse from her husband. They lived together in the U.S. during which time he beat her so violently that he was convicted of aggravated assault and deported from the U.S. to Australia. She remarried and relocated to New Zealand where her ex-husband in Australia persisted in harassing and threatening to kill her and her new family. She fled to Canada and was initially successful in her claim for refugee status on the basis that she belonged to a persecuted social group - women - and feared harm and possibly death from her abusive former husband, an Australian citizen. However, the Minister successfully applied for judicial review at the Federal Court where Justice Blais found that ‘the Board erred in not examining the issue of state protection’[^343] and remanded the case for re-hearing by another panel.

As Melanie Randall notes, this case is notable example of how ‘one liberal democratic First World nation might conduct a legal inquiry into the extent to which another liberal democratic nation, also of the First World is able to extend protection to women from violent male intimates.’[^344] Dolamore sought protection from her husband in Australia, New Zealand, the U.S. and Canada. Her situation takes one step further the case of migrant women subjected to domestic violence in the country to which they migrate: Dolamore was already a citizen but the states in question failed to protect her from her husband. This brings into question the ‘undisturbed

[^342]: *Canada (Minister for Citizenship and Immigration) v Dolamore* [2001] FCT 421, 14 Imm LR (3d) 174, 203 F.T.R. 137 [Dolamore].
[^343]: Ibid at para 21.
assumption that the “we” of the receiving country have dealt with these problems, and that “they” are very different from us in that regard.\footnote{345} She advocates a shift in emphasis away from those whom ‘we’ are ‘rescuing’ to a focus on the extent to which the receiving state has demonstrated a capacity to protect women’s human rights.\footnote{346}

The implied invocation of difference between refugee receiving states and refugee producing states is also present in a number of high profile Canadian cases of women claiming refugee status on the basis of domestic violence. Dularie Boodlal’s husband was convicted eleven times in Canada of threats to kill and physical violence until he was deported back to Trinidad, where he continued to threaten her by email and phone. Her claim for refugee status was initially rejected due to lack of a Convention nexus, as was her application to stay on humanitarian and compassionate grounds.\footnote{347} The Minister eventually lifted a deportation order due to overwhelming public support for her.\footnote{348} Boodlal’s case demonstrates that while the Canadian state did not manage to protect her from her husband, at least her husband was tried and imprisoned for his crimes in Canada, whereas in Trinidad he had benefited from impunity.

This contrasts with the case of E.R.M, a woman from Jamaica fleeing domestic violence who was unsuccessful on the basis that new legislation had been implemented which was designed to target domestic abuse. Audrey Macklin analyses the Panel’s decision in terms of its pitting of Canada against Jamaica to measure the effectiveness of the protection of women from domestic violence.

The tacit message is that if systemic defects also exist in Canada, they are not indicative of a failure of state protection, but of a ‘normal’ fluctuation in law

\footnote{345} Ibid at 309.  
\footnote{346} Ibid at 315-316.  
\footnote{347} Ibid at 288.  
\footnote{348} Razack, \textit{supra} note 78 99-100.
enforcement. It is important to recognize the resort here to Canada as a normative referent against which other states will be judged: if Canada does it (or does n't do it), it cannot be a problem.\textsuperscript{349}

Razack's discussion of the case of 'Indra', an Indian woman from Trinidad who fled her violent husband and was successful in a claim for refugee status in Canada, points to an anti-imperialist strategy for analysing violence against women. In the context of violence against women, a focus on the actions of the perpetrator and the failure of the state to prevent violence, rather than on the pathology of the woman as victim, is the best strategy for eliminating violence against women while avoiding the 'epistemic violence'\textsuperscript{350} done by racist generalisations about entire societies. In Razack's words, '[P]athologizing the victim is, however, a short-hand means of communicating gender-based harm and racism is a handy tool in this endeavour.'\textsuperscript{351}

At this point it is useful to consider to what extent the gender guidelines have influenced decisions to recognise women fleeing domestic violence as refugees. V, an indigenous woman from Ecuador fled to Canada fearing spousal abuse. Her original application was dismissed due to lack of a Convention nexus as V's husband's motives for abusing her were held to be purely personal.\textsuperscript{352} However, following the implementation of the gender guidelines she had a new hearing at which she was granted refugee status. The IRB found she had no internal flight alternative due to her husband's connections and that, as an indigenous woman, it would be difficult for her to survive economically outside her region.\textsuperscript{353} In this case, the guidelines appear to be

\textsuperscript{349} Macklin 1999, supra note 5 at 289.
\textsuperscript{350} Gayatri Chakravorty Spivak 'Can the Subaltern speak?' in Cary Nelson and Lawrence Grossberg, eds., \textit{Marxism and the Interpretation of Culture} (Urbana: University of Illinois Press, 1988) at 280-81.
\textsuperscript{351} Razack, supra note 78 at 112.
\textsuperscript{352} V. (A.P.) CRDD T92-03227, 18 November 1992.
\textsuperscript{353} V. (A.P.) CRDD T93-009539, 29 October 1993
directly responsible for a different decision on the same facts, and a recognition of the intersection of indigeneity and gender as constituting a particular social group.\textsuperscript{354}

Melanie Randall considers the Canadian guidelines to be inadequate because they fail to explicitly recognise gender as constituting a particular social group, but instead compel the creation of sub-categories which focus on women's identities rather than on the perpetrator and lack of state protection. She discusses the case of Marcel Mayers, a Trinidadian woman hospitalised several times due to injuries caused by her husband, whose refugee claim was rejected.\textsuperscript{355} Randall argues that 'because the Guidelines do not recognize that gender can itself constitute the social group facing persecution, the same taxonomic problem persists; increasingly narrow sub-groups of women sharing specific characteristics are identified as the relevant and persecuted social groupings.'\textsuperscript{356} Razack formulates the problem faced by Mayers in arguing her claims in the face of the implementation of legislation targeting domestic violence specifically in terms of culture: 'it became even more necessary to focus on the claimant's cultural context in order to explain why she did not have access to the state's protection.'\textsuperscript{357}

In the U.S., unlike in Canada or Australia, claims of domestic violence have been successful as a basis for asylum where decision makers have found a Convention nexus to political opinion. For example, in \textit{Lazo-Majano},\textsuperscript{358} it was held that the sexual

\textsuperscript{355} \textit{Mayers, Marcel v Canada (Minister of Employment and Immigration)} (1992), 97 DLR (4\textsuperscript{th}) 729 (F.C.A.)
\textsuperscript{356} Randall, supra note 344 at 291.
\textsuperscript{357} Razack, \textit{supra} note 78 at 108-9.
\textsuperscript{358} \textit{Lazo-Majano v INS} [1987] 813 F.2d 1432 (9th Cir.)
abuse and domestic violence to which the claimant was subjected was a result of her political opinion that women should not be treated as subordinate in Salvadorean society. 

Both Randall and Macklin have objected to an analysis of domestic violence which reinforces a focus on individual victims while ignoring the group nature of the oppression and which requires women to hold a political opinion that “women are entitled to be treated as human beings.” This straining of the category of political opinion risks denying protection from women not deemed to hold a political opinion against the subordination of women to men. As Macklin notes,

If a belief that women should not be abused by their male partners really was a fundamental ‘Western value’, one would expect domestic violence to be rare in the West. It is, of course, pervasive in the United States, Canada, and other ‘refugee receiving’ countries, and none of the states adequately protect women from domestic violence.

1.2 In re R-A-

The Matter of R- A is the most high profile U.S. case on domestic violence with potentially precedential value but it remains unresolved after almost a decade. Rodi Alvarado Pena is a Guatemalan woman whose asylum application was granted by an immigration judge. The INS appealed the decision which was overturned by the BIA in 1999 on the basis that there was no evidence that her husband persecuted her for any political opinion that she had, or that he thought she had. Then Attorney-General Janet Reno vacated the BIA’s decision in 2001 and remanded it to the BIA for further proceedings after new regulations on these issues had been promulgated.

The draft regulations, which were designed to be far more receptive to claims like

360 Randall, supra note 344 at 298.
361 Macklin 1999, supra note 5 at 298.
those presented in *R-A*, were published in December 2000.\textsuperscript{365} On 19 January 2005 then Attorney-General John Ashcroft remanded the case to the BIA for reconsideration in light of rules to be published.\textsuperscript{366} As at September 2005 Attorney-General Alberto Gonzalez had taken office, the Regulations were still not finalized, and Rodi Alvarado remained in legal limbo, awaiting a decision on her case.

In a useful exposition of the role of culture in claims of gender related persecution, Anita Sinha contrasts the decisions *In re R-A* and *In re S-A*. Unlike Rodi Alvarado, S-A succeeded in her claim. S-A was a young Moroccan woman whose ‘strict Muslim’ father burned her thighs with a heated razor as punishment for wearing a short skirt and on another occasion beat her after seeing her speaking to a man in public.\textsuperscript{367} The BIA found her father’s behaviour to be in ‘conformity with his fundamentalist Muslim beliefs’\textsuperscript{368} and found that she had suffered persecution on the basis of her religious beliefs. The BIA found that ‘because of the religious element in this case, the domestic abuse suffered by the respondent is different from that described in *Matter of R-A*.’\textsuperscript{369} It is likely that the notion of violence against women to protect the honour of the family was at play here.

The decision in *R-A* and the fact that the issue remains unresolved means that women fleeing domestic violence may be forced to demonstrate that their abuser persecutes them due to their political opinion as a prerequisite to a grant of asylum in the U.S.

\textsuperscript{365} 65 Federal Register 76588 (2000); ‘INS Issues Proposed Rule on Gender and Domestic Violence-based Asylum Claims’ 77 Interpreter Releases 1737 (2000).


\textsuperscript{368} Ibid.

\textsuperscript{369} Ibid at 1591.
This has been an issue of concern to refugee lawyers in U.S. but also in Canada.\textsuperscript{370} The entry into force of the Safe Third Country Agreement between the U.S. and Canada on 29 December 2004 has seen refugee claimants arriving in Canada via the U.S. turned back.\textsuperscript{371} Based on the case law, it appears that women fleeing domestic violence who would succeed in Canada may well fail in their claim for asylum in the U.S. if U.S. decision makers require them to demonstrate a political opinion that they should not be subjected to domestic violence.\textsuperscript{372} The most obvious Convention ground in a case of domestic violence is membership of a particular social group of women, although claims have also been successful in the U.S. where the abuser’s family was held to constitute a particular social group.\textsuperscript{373}

Domestic violence has only recently begun to be accepted as a ground for refugee status. Although the level of violence was previously acknowledged to constitute persecution, claimants failed on the grounds of a lack of Convention nexus and the decision makers’ failure to consider a lack of state protection where, as is usual, the perpetrators were non-state actors. A recognition of domestic violence as political rather than personal has resulted in grant of asylum on that basis. Ironically, in the U.S., requiring the asylum seeker to demonstrate that the domestic violence was

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{370} Canadian Council for Refugees, \textit{Closing the Front Door on Refugees: report on Safe Third Country agreement 6 months after implementation}, August 2005, online \url{http://www.web.ca/~closingdoor.pdf} at 9-10
\item \textsuperscript{371} \textit{Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries}, 5 December 2002, (entry into force 29 December 2004) online \url{http://www.treaty.accord.gc.ca/Treaties_CLF/Details.asp?Treaty_ID=104943}, Article 4.1 provides that the Party of the country of last presence shall examine... the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim (subject to certain exceptions for minor children, based on presence of family).
\item \textsuperscript{372} Cf David A Martin, ‘Treatment of Gender-Based Asylum Claims in the United States: Memorandum prepared for the Attorney-General of Canada’ March 31, 2003, online \url{http://www.cic.gc.ca/english/poliey/gender-us.html} [Martin].
\item \textsuperscript{373} \textit{Aguirre-Cervantes v INS} 242 F.3d 1169 (9th Cir. 2001) vacated, 273 F.3d 1220 (9th Cir. 2001). Martin notes that the parties reached agreement out of court so the decision cannot be cited as a precedent: Martin, supra note 372 at 6.
\end{itemize}
\end{footnotesize}
perpetrated in response to her political opinion that women should not be subjected to such abuse continues to present a barrier to protection.

Domestic violence blurs the boundaries between refugee receiving and refugee producing countries, between ‘us’ and ‘them’. The fact that it also occurs, and is widespread, in developed first world countries such as Australia, Canada and the U.S., has been for some decision makers a reason to deny protection to asylum seekers fleeing intimate violence.\(^{374}\) A focus on the cultural, religious and national differences of refugee claimants appears to correlate with higher success rates in refugee claims. For refugee lawyers developing strategic arguments to advance feminist objectives, ‘fighting sexism with racism’ might facilitate the success of a few at the expense of many. Similar issues are at stake in refugee claims based on sexual violence.

2. SEXUAL ASSAULT

Like domestic violence, sexual assault is commonly understood as a private crime and hence claimants have experienced considerable difficulties in gaining asylum on this basis. Sexual violence against women ‘plays a major role in forced migration, despite the widespread underreporting of sex crimes.’\(^{375}\) The fact that sexual assault is commonly used by government agents as a form of torture has become more widely known following more detailed reporting from human rights organizations on the infringements of women’s human rights.\(^{376}\) Moreover, the publicity surrounding the ‘rape camps’ established in the successor states of the former Yugoslavia in the early

\(^{374}\) See discussion of Justice Callinan’s reasoning in Khawar above.

\(^{375}\) Crawley 2001, supra note 12 at 80.

to mid 1990s and the rape campaign which accompanied the genocide in Rwanda in 1994 raised public awareness of sexual assault as a weapon of war undertaken as government policy. Prosecution of sexual assault in these circumstances as a breach of international humanitarian law has assisted in sexual assault becoming recognized in refugee law as a form of torture and persecution.

Like domestic violence, sexual assault occurs everywhere. It is therefore potentially vulnerable to the ‘floodgates’ argument used against the gender guidelines when they were first implemented. Where sexual assault is motivated by actual or imputed political opinion, religion, race or nationality, and there is a lack of state protection, a grant of refugee status should be uncontroversial. However, sexual assault motivated by the applicant’s membership of the particular social group of women is not widely acknowledged as grounding a grant of asylum even though conceptually, there is no good reason to refuse a grant of refugee status in this circumstance. I argue that sexual assault against women qua women suffers as a form of violence which may be all too ‘familiar’ to western decision makers and that those claimants who can present their persecution as ‘exotic’ may have a better chance of success.

2.1 Sexual assault motivated by political opinion, religion, and ethnicity

Sexual assault constituted the basis for an asylum claim in a number of U.S. cases. Perhaps the most notorious example of a refusal on the grounds that rape is personal, rather than Convention related, is *Campos-Guardado v INS*. A Salvadoran woman was visiting her uncle who was the chair of an agricultural cooperative when they

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were attacked by paramilitaries. She and her three female cousins were bound and
gagged and forced to watch while the uncle and a male cousin were hacked to death.
Following this, they were raped by multiple attackers while another attacker chanted
political slogans. Both an immigration judge and the BIA determined that the rape and
trauma imposed on her were of a personal nature. Other decisions have found that the
rape was random violence and not politically motivated.380

The U.S. guidelines, acknowledging widespread criticism of *Campos-Guardado*, state
that the ‘appearance of sexual violence in a claim should not lead adjudicators to
conclude automatically that the claim is an instance of purely personal harm.’ Since
then a number of decisions have recognised sexual assault as founding a grant of
asylum. These include a case in which a Haitian women was raped by members of
the Haitian military who were found to be motivated by her religion and political
opinion;381 a Nicaraguan woman was granted asylum where the rape was not a
personal harm but was inflicted on account of her perceived opposition to the
Sandinistas;382 and a case in which the Salvadoran claimant was successful on the
basis that she evinced resistance to the opinion of an army sergeant whose
housekeeper she was that men have a right to violently dominate women.383 Ethnicity
was the Convention nexus where an Ethiopian woman raped by an ethnic Tigrean
government official was granted asylum as it was held the official was at least partly
motivated by her Amharic ethnicity.384

380 *Ochave v INS* 254 F.3d 859 (9th Cir. 2001) in which a woman from the Philippines was raped by
Marxist guerrillas who did not know that she was daughter of a government official; *Melgar de Torres
v Reno* 191 F.3d 307 (2d Cir. 1999) in which it was held that the applicant did not establish that rape by
soldiers was other than random violence.
382 *Lopez-Galarza v INS* 99 F.3d 954 (9th Cir. 1996).
383 *Lazo-Majano v INS* [1987] 813 F.2d 1432 (9th Cir.).
384 *Shoafera v INS* 228 F.3d 1070 (9th Cir. 2000).
Sexual assault has been recognised as persecution in Canada, most often linked to Convention grounds other than membership of a particular social group. For example, ethnicity was the Convention nexus in the case of an Indo-Fijian woman threatened with rape by native Fijian gangs.\textsuperscript{385} A lack of state protection and lack of internal flight alternative was found in the case of a woman raped by her stepfather who was an officer in the Bolivian National Police.\textsuperscript{386} Nevertheless, refugee status was granted in another case where the Convention nexus appears to have been membership of the particular social group of women, although not explicitly stated in the case summary available.\textsuperscript{387} There is not yet any high level precedent on this point.

2.2. Sexual Assault and women as a particular social group

A more in depth analysis of women as a particular social group where the persecution was sexual assault is available in a recent Australian Refugee Review Tribunal case.\textsuperscript{388} The applicant from Papua Niuguini (PNG) claimed that she had been subjected to gang rape by virtue of her membership of the particular social group of women. The Tribunal accepted her argument, based on extensive country information which indicated that women were 'treated as second class citizens' and 'seen as separate from and different to men in terms of their place in society.'\textsuperscript{389} On the incidence of rape in PNG, the Tribunal referred to research which indicated that 55\% of women had been forced into sexual activity against their will and that around 60\% of men surveyed reported having participated in gang rape.\textsuperscript{390} Of the women raped,

\textsuperscript{386} TAB-19536, Alidina, May 26, 2005.
\textsuperscript{387} A Mexican woman who caught her father-in-law trying to rape her eldest daughter but did not seek police protection was granted refugee status on the basis that the main obstacles to enforcement of the laws against domestic violence were the police and judges: MA1-07954, Ethier, August 26, 2002.
\textsuperscript{388} RRT Ref: V02/14674 (13 February 2004).
\textsuperscript{389} Ibid. at 21.
\textsuperscript{390} Ibid. at 12.
only 8% reported being raped by strangers or unknown gangs, with 46% of offenders family members and another 11% known to victims/survivors.\textsuperscript{391}

This case involves ‘stranger rape’, a statistically less likely event than rape by family members or other persons known to the victim/survivor. The applicant in the case under discussion was raped by men who ambushed the bus in which she was travelling as part of an armed robbery and were not known to her.\textsuperscript{392} Stranger rape is less frequent than rape by known persons in PNG according to the research referred to in the case. Stranger rape is also infrequent when compared to sexual assault by family members and friends in refugee receiving countries such as Australia.\textsuperscript{393} While the numerous incidents of violence and armed robbery which the applicant witnessed prior to her rape were characterised by the Tribunal as ‘random criminal behaviour’\textsuperscript{394} where men and women were attacked without discrimination, the ‘gang rape’ suffered by the applicant and the other women was held to constitute persecution due to the Convention ground of membership of a particular social group ie women in PNG.

The former colonial relationship between Australia, as refugee receiving country, and PNG, as refugee producing country, forms a backdrop to this case. The Tribunal referred to a 2003 article in the Melbourne \textit{Age} which discussed the Australian government’s attempts to make continued aid to PNG conditional on acceptance of about 200 Australian Federal Police by the PNG government as ‘threatening a schism

\textsuperscript{391} Ibid. at 12.
\textsuperscript{392} Ibid. at 4.
\textsuperscript{393} The Australian Centre for the Study of Sexual Assault states that based on police reports of Recorded Crimes in 2003, victims of sexual assault were four times more likely to know the offender than not: Australian Institute of Family Studies, ‘Statistical Information’ available at: http://www.aifs.gov.au/acssa/statistics.html.
\textsuperscript{394} RRT Ref V02/14674 (13 February 2004) at 19.
in a strained relationship amid claims of Australian neo-colonialism.\textsuperscript{395} Australia’s history as a colonial power administering the territory of PNG until it gained independence in 1975 again highlights a tension between expanding the categories of gender related persecution to include women as a particular social group in the context of sexual assault and applying an anti-essentialist and postcolonial critique of the refugee determination process.

However, as with domestic violence, awareness of the colonial histories of refugee producing and refugee receiving countries does not entail that women from the former can never be granted asylum. Jacqueline Castel’s discussion of sexual assault as persecution offers a strategic solution which can aid refugee applicants while avoiding ‘epistemic violence’ to their countries of origin.

Because so many women in Canada and the United States are sexually assaulted, refugee status would not protect a woman fleeing rape in her home country from rape. The argument is, however, misguided. The fact that no country can guarantee a woman’s safety from rape should not be an excuse for not granting refugee status, as refugee status has never carried with it a permanent guarantee of safety.\textsuperscript{396}

3. CONCLUSION

In the context of refugee law, sexual assault and domestic violence can be characterised as forms of persecution which know no borders. Sexual assault, while initially rejected as a ground for refugee status on the basis that it is private or personal, is increasingly recognised in refugee law as a gender specific form of persecution where the Convention nexus is political opinion, religion, ethnicity or

\textsuperscript{395} 18 September 2003, Ibid. at 16. A finding by a PNG court that immunity from prosecution for Australian Federal Police officers in PNG was unconstitutional resulted in the Australian government withdrawing them from PNG: ABC 16 May 2005, http://www.abc.net.au/pm/content/2005/s1369674.htm

\textsuperscript{396} Castel, supra note 113 at 48.
nationality. At least one low level decision has granted asylum where the Convention
nexus is membership of the particular sexual group of women in Australia; however,
this is unusual and of limited precedential value. The fact that this concerned a
'stranger rape' probably increased the applicant's likelihood of success due to refugee
decision makers' (past) proclivity for holding that sexual violence is personal, rather
than public, political or Convention related. Moreover, attacking the credibility of the
victim/survivor of sexual assault is a well known feature of the criminal law trial;
refugee applicants whose claims include sexual assault must deal with this in addition
to the testing of their credibility which is a feature of the refugee hearing.

It is instructive to consider whether cultural difference makes refugee decision makers
less sceptical about the veracity of the claims of Third World women. ‘Exotic’ forms
of violence, such as sati, dowry violence and acid throwing are linked to South Asia
and honour killing to the Middle East. These ‘exotic’ harms appear to be more distant
from decision makers than the widespread but unremarked violence against women in
the West and hence more likely to ground a successful asylum claim. Refugee lawyers,
when faced with a choice, may choose to run such cases as transgression of social
mores and to play up the ‘foreign’ elements of such claims by relying on preexisting
stereotypes about barbaric cultures and religious traditions, such as Islam. Rendering
foreign the domestic violence Mrs Khawar claimed to have suffered may have
assisted the presentation of her claim for refugee status. However, references to tropes
of violence such as sati, dowry violence and wife burning were unavailable in
Dolamore’s case.
A feminist anti-essentialist critique of these cases would not reject the claims of women from non-Western countries but seek to negotiate advocacy and representation of their claims which does not rely on cultural stereotypes of backward, downtrodden women from irrevocably misogynist cultures. Instead, it would focus on the political aspects of their persecution, which are usually constituted by widespread discrimination against women by the police and the legal system. It would call attention to government inaction against abuse and tolerance of so-called private harms against women perpetrated by their family members. Refugee lawyers could focus on failures of state protection, rather than sensationalising claims as exotic and the result of barbaric foreign practices. Such representational strategies could also acknowledge women's activism and agency in organising for change.

In the concluding Chapter which follows, I seek to compare the treatment by refugee law of 'exotic harms' of FGC and transgression of social mores discussed in Chapter Three with the 'familiar harms' of domestic violence and sexual assault discussed in this Chapter. The final Chapter also provides an opportunity to reflect on the gender guidelines discussed in Chapter Two in the light of these case studies.
CHAPTER FIVE: CONCLUSION

In this final Chapter, I aim to draw some conclusions on gender related persecution in the refugee determination systems of Australia, Canada and the United States based on the gender guidelines and cases discussed. As signalled at the outset, I regard refugee law as a key site at which first world decision makers must pass judgments on third world countries. Due to the emblematic role of women in national cultures, as well as the intersection of gender with other aspects of identity, an investigation of gender related persecution is productive for what it reveals about race, culture and colonialism. Through an investigation of feminist politics, it is possible to reach some conclusions on representational and advocacy strategies for refugee lawyers and advocates, as well as for decision makers and academic lawyers engaged with the problematic of gender and refugee law.

Analysis of gender related persecution is also instructive for what it reveals about refugee law generally. Refugee law attempts to deal with the consequences of a select proportion of forced migration, rather than to prevent the human rights abuses which force people to flee.\(^{397}\) In this context, refugee law provides a limited solution to problems which occur on a global scale. Efforts to broaden the category 'refugee' to facilitate the inclusion of women represent an attempt to widen the scope of this partial solution. Arguments about the scope of the refugee definition do not engage seriously with the arguments for discarding the distinction between refugees and others in the case for open borders,\(^{398}\) nor do they consciously endeavour to

\[^{397}\] This is the purview of international human rights law, the law relating to humanitarian intervention and where a situation is declared by the Security Council to represent a threat to international peace and security, potentially a site for enforcement of resolutions under Chapter VII of the UN Charter.

ameliorate the conditions which force people to flee their homelands. Indeed, anti-essentialist critics of the gender guidelines claim that policies such as the gender guidelines rely for their efficacy on painting a picture of Third World barbarity, and force refugee advocates to replicate the restrictiveness of refugee law discourse as the best chance for achieving refugee status for asylum seekers. While not addressing the broader question of the legitimacy of restrictions on the movement of people, this thesis has attempted to evaluate these criticisms and provide strategic alternatives for representing and portraying female asylum seekers in ways which do not perpetuate Orientalist stereotypes of non-western cultures nor understate the effectiveness of local activism for progressive change.

This is also an appropriate moment to reflect on the usefulness or otherwise of the schema of feminist approaches to refugee law which I adopted from Spijkerboer. Even though I consider myself to be approaching the question of gender related persecution from an anti-essentialist perspective, the gender guidelines have strategic uses. They can be used to include within protected categories those who were previously excluded by making the basis of their exclusion, that is, gender, a special case. However, the human rights approach of expanding categories and refugee law in general does not question the existence of categories. Moreover, the ‘categorical’ approach to gender risks ghettoising and segregating women while failing to account for other factors, such as race, political opinion and religion, which may be relevant to their claims for asylum.

399 This task is left to development assistance led by multilateral development banks and the world trading system, although it is not a high priority of the latter.
400 For example, see Akram, supra note 177 and Razack, supra note 78.
401 Spijkerboer, supra note 11 at 156.
1. GENDER ANALYSIS

One of my aims in this thesis was to analyse whether an explicitly gendered analysis affects the outcome or the process of refugee determination. As argued above, much discussion of gender in the refugee context elides the distinction between sex and gender, collapsing the two into a focus on refugee women. While UNHCR has moved from a focus on refugee women to an analysis of the role of gender in refugee determination, the distinction appears not to have been noted explicitly by refugee decision makers in the three jurisdictions under discussion.

It is nevertheless possible to discern the development of more sophisticated understandings of gender in refugee law. An example of this is the movement from a discussion of gender in substantive law limited almost solely to the Convention ground of 'women' as a particular social group to a consideration of the role gender plays in persecution on the basis of political opinion, religion, race and nationality. Anti-essentialist critics could be expected to welcome consideration of claims made by Iranian women contesting state supported interpretations of Islam in terms of political opinion or religion, for example, rather than as members of the particular social group of women in Iran.

However, the tendency in U.S. cases on domestic violence to require the claimant to demonstrate a political opinion in opposition to men's right to commit violence against women is problematic. From the perspective of a human rights approach, it could be expected to fail if the claimant could not prove such a political opinion, either actual or imputed, and so it would be safer to argue the ground of membership of a social group. From an anti-essentialist perspective, it is worrying as several cases
have linked such an opinion to 'western' values. This is an example of the complexity of gender in the refugee law context and demonstrates that the delineation of neat categories of gender related persecution is not always possible nor desirable.

2. ANALYSIS OF GENDER GUIDELINES

A focus by decision makers on refugee women effectively achieves the aim of the 'early critics' to put gender on the agenda. The development of gender guidelines can be seen as an example of the human rights approach to gender in refugee law, which advocates reinterpreting existing law through broadening the categories of human rights. Anti-essentialist critiques of the gender guidelines highlight their reliance on cultural stereotyping in order to achieve recognition of women’s claims as deserving of protection. In this thesis I have attempted to avoid cultural essentialism while articulating the claims of asylum seekers in ways which remain gender sensitive.

The gender guidelines have contributed to a cultural change in refugee determination, both substantively and also procedurally, which in turn impacts on substantive claims. The guidelines provide an indicative list of issues relevant to gender related persecution which enables claimants to refer to an official document as providing a framework for the determination of their claim, rather than having to expend time and effort on making threshold arguments. Moreover, the guidelines' directions on procedure facilitate discussion of issues which could be central to a claim yet not otherwise discussed. An example would be the desirability of female interviewer assisted by a female interpreters assessing sensitive claims such as sexual assault which may lead to development of the substantive law regarding sexual assault. Although the gender guidelines do not have the status of law in any of the
jurisdictions discussed, they have been referred to in judicial review of administrative decisions and may assist a claimant in establishing that relevant factors were not considered.

However, the efficacy of the gender guidelines is limited due to at least three factors. First, the fact that the gender guidelines remain the primary, if not the only, recognition of the importance of gender in the refugee context is problematic because the gender guidelines under discussion are now about a decade old and do not discuss the implications of a sex/gender distinction. Secondly, the gender guidelines of Australia, Canada and the U.S. focus primarily on the refugee determination process. This brackets out of the discussion the role gender plays in the life experiences of asylum seekers before and after the refugee determination hearing. Thirdly, the value of the guidelines in providing policy guidance to decision makers varies from country to country, as discussed below.

The Canadian guidelines have become closely integrated into the refugee determination culture of the IRB and are explicitly referred to on judicial review. Since the Canadian guidelines were issued, they have been updated and the Immigration Act has been replaced by the Immigration and Refugee Protection Act (IRPA), which requires a gender analysis of the impact of the Act to be tabled annually in Parliament. Clearly they have raised the profile of gender issues in the refugee determination context. Nevertheless, the primary charge against them remains that they encourage cultural stereotyping based on the cases decided under them.

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404 *IRPA*, s.94 (2)(f).
The U.S. guidelines are arguably the least useful in a strictly legal sense as they amount to a summary of relevant case law circa 1995. However, they have achieved high visibility due to the publicity surrounding causes célèbres like the Kasinga case which contributed to awareness of the gender guidelines and made it more difficult to deny their relevance in future cases. The ongoing saga of *In re R-A-* could be seen as the result of the failure of the guidelines to provide direction on domestic violence.

The usefulness of the Australian guidelines is difficult to gauge due to lack of reporting of primary level decisions but it appears to be low as the guidelines are rarely referred to in reported decisions. Unlike in Canada and the U.S. there has been little community involvement in Australia in lobbying for adoption of or changes to, the gender guidelines. There is also a low level of awareness of their existence perhaps due to difficulties accessing them. The Australian guidelines are currently being updated by the government, apparently in response to international developments and changes in case law, rather than public campaigns.

While acknowledging the difficulty of comparing different jurisdictions, the guidelines appear to have been most effective and relevant when first adopted when they represented a new approach to gender in the refugee context. In Canada and the U.S they also provided the opportunity for refugee advocates and feminists to organise and develop their own policy, mount a campaign which was successful in reaching large numbers of the public, and present texts to the government which forced governments to respond. Further, important legislative developments in

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405 Spijkerboer, supra note 11 at 181.
Canada and Australia\textsuperscript{406} potentially undermine the guidelines, but as the status of administrative instruments is lower than that of legislation, the legislation will prevail. However, as noted above, the gender guidelines adopted by the governments of Canada, the US and Australia apply only to a narrow segment of the continuum of experiences of refugees.\textsuperscript{407}

3. ANALYSIS OF CASE STUDIES

While it is difficult to generalise about the impact of the guidelines on the basis of a limited number of exemplary cases, the cases selected are representative of tendencies in the jurisprudence which holds them out as precedents. My discussion of selected landmark cases was structured by contrasting the ‘exotic harms’ of transgression of social mores and female genital cutting in Chapter Three with the ‘familiar harms’ of domestic violence and sexual assault dealt with in Chapter Four. In discussing each issue I attempted to undercut these distinctions by showing how the ‘exotic’ harm of female genital cutting, for example, also occurs within western societies. I also argued that the presentation of domestic violence as dowry related might increase its impact as a ground for refugee status. My motivation for adopting this structure was to throw into relief the cultural politics at work in cases argued as gender related persecution.

In relation to the case studies, the role of the gender guidelines varied from case to case and from country to country. In Canada, Nada’s case arose before the gender guidelines were adopted and the public outrage her case provoked was an important catalyst for the adoption of the guidelines. \textit{In re Kasinga} was the first case decided

\textsuperscript{406} Amendment of the definition of persecution and membership of a particular social group \textit{Migration Act 1958 (Cth)}, ss. 91S and 91R.

under the U.S. guidelines and is regarded as a significant precedent not just for FGC but for gender related persecution. Despite Khawar's status as the foremost precedent on gender related persecution in Australia, the guidelines were not referred to at any of the five stages of the proceedings.

The credibility or otherwise of the refugee claimants is determinative in many cases and is present as an important subtext in several of the cases I discuss. It is important to note that the guidelines do not appear to assist on this issue. Fauziya Kassindja lost her case before an Immigration Judge on credibility, forcing the BIA to make an explicit finding on her credibility before it could grant her asylum. By contrast, Abankwah/Dawson was revealed as a fraud whose manufactured claims of FGC were nevertheless accepted by the BIA which granted her asylum. Letters, apparently from Mrs Khawar's husband's relatives, were sent to Australian authorities claiming that her case was fabricated and that she planned to have her husband join her after she had succeeded in gaining permanent residence in Australia. All decision makers decided her case on the basis that these allegations were baseless, yet they continued to haunt Mrs Khawar and would no doubt have been reopened when her case was remanded to the RRT for a decision on the facts.

Sexual assault represents the epitome of cases in which credibility is in doubt, particularly when it may not be revealed at first instance. Unlike in a criminal trial, in a refugee hearing the other side is not usually available to present evidence so most evidence comes from the complainant herself and 'independent' country information which is often not specific enough to be determinative of a range of facts in issue. In this situation, decision makers have explicitly referred to their own experience and to
how they imagine the situation to be like for persons in the position of the claimant, even where this is contradicted by the claimant. In this context, the gender, racial, cultural and colonial location of the claimant takes on added significance. As argued in Chapter Two, two outcomes are possible: a grant of asylum on the basis of ‘persecution by culture’ or a refusal because what the claimant experienced is normal in her culture. Neither of these is desirable from an anti-essentialist perspective.

4. ANTI-ESSENTIALIST CRITIQUE

One of the aims of this thesis was to explore gender related persecution from an anti-essentialist position which avoids ‘fighting sexism with racism.’ The examples discussed in Chapters Three and Four all set precedents in their respective jurisdictions. They support a conclusion that it has taken longer for domestic violence than for more ‘exotic’ harms to be acknowledged as persecution, while sexual assault remains contentious as a ground for refugee status. This finding is consistent with Razack’s argument that a refugee claimant is more likely to succeed if she presents her situation as exotic and unusual, relying on stereotyped assumptions about nations, culture and race to do so. Interestingly, Nada identified the similarities in the levels of repression and disadvantage of women in the west and elsewhere, implicitly arguing against the dichotomy which Razack considers most appeals to refugee decision-makers.

There is a tension between engaging in a postcolonial feminist analysis of gender in refugee law and advocating the recognition of gender related persecution as encompassed by the gender guidelines. Locating the sources of women’s oppression

\[408\] Millbank, supra note 171 at note 16.
in their culture is encouraged by the structure of the human rights approach and its preference for a Convention nexus of membership of the particular social group of women. This emphasises the differences between refugees and judges, between asylum seekers and their lawyers. However, acknowledging the political dimensions of violence against women and foregrounding the failure of states to protect female citizens as urged by anti-essentialist critics highlights the similarities between refugee producing and refugee receiving countries. This is most evident in claims of domestic violence and sexual assault, which are nevertheless susceptible to being read in terms of imperial tropes.

Despite the risks of focussing on culture at the expense of politics or religion as the source of persecution, the human rights approach can work together with anti-essentialist arguments. As detailed in my recommendations below, non sensationalist and specific reporting of country situations can support a claimant’s case. Further, in practice the biggest hurdle to a grant of asylum is usually not refugee law but attacks on the credibility of the claimant. Human rights reporting which includes analysis from a gender perspective may help to explain such lack of knowledge of a male relative’s political activities or failure to report a sexual assault in an initial interview, perhaps at a port of entry, which could otherwise discount a claimant’s testimony.

A gendered analysis of refugee law raises fundamental questions about refugee law as a whole and the location of first world women within it. This appears to be a situation which could be described, in Anne Orford’s paraphrase of Gayatri Spivak, as ‘white
women . . saving brown women from brown men'. Orford’s prescription for avoiding this dynamic is to focus on the similarities, rather than the differences, between colonizer and colonized.

A feminist reading could also attempt to undo the opposition between colonizer and colonized, by seeking to show ‘strategic complicities’ between the terms in which the ‘other’ is constructed . . . and the self that is there constructed.

Applying this to the roles of refugee advocate and claimant requires acknowledging the extent to which there remains a failure by the state to protect women in refugee receiving countries. It also highlights the reliance of refugee law generally on essentialist notions of race, culture and nation to fit successful claimants into its restrictive categories of protection.

5. RECOMMENDATIONS

Refugee advocates play a key role in the development of legal doctrine such as on gender related persecution by the claimants and issues which they select as worthy of representation and the arguments which they raise. This has particular relevance where ‘exotic’ harms are involved. The temptation to play on pre-existing notions of barbaric cultural practices, nations and cultures may well assist a particular refugee claimant. However, such a strategy risks making it more difficult for subsequent claimants whose life story does not match the required stereotypes.

Moreover, this representational strategy relies on simplifying, homogenizing and denigrating cultures, nations, religions and beliefs, rather than acknowledging the

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410 Ibid. at 287.
411 Spijkerboer undertakes a detailed analysis of the strategy of an experienced refugee lawyer in the Netherlands whose strategy is to avoid presenting individual cases as unique because she is aware that this will make it more difficult for subsequent claimants to obtain refugee status. Spijkerboer, supra note 11 at 162-3.
political and social causes of refugee flows. In many cases, it undermines the efforts of activists whose effectiveness is precisely what has made them a target for reprisal and intimidation. Both on an individual level, including the claimant in a particular case and subsequent claimants, and in respect of the cultural and political context, Orientalist strategies of representation may see short term success in individual cases at the expense of later failures to apply refugee law to a range of experiences.

Decision makers obviously have an opportunity to contribute to the development of jurisprudence on gender related persecution and to processes which take gender into account. While some female applicants may prefer to discuss their experiences with a female interviewer rather than a male interviewer, governments have not prioritised funding to refugee determination processes capable of allocating only female decision makers to gender persecution cases. Indeed in the U.S. claimants are expected to provide their own interpreters, which raises issues about competence and confidentiality in excess of the problems of gender sensitivity. For the purposes of feminist strategising, demanding only female interviewers assess asylum claims could be seen as ‘ghettoising’ gender issues as ‘special cases’, in contrast to the moves towards ‘gender mainstreaming’ encouraged by the U.N. over the last two decades. As argued above, these procedural issues have a real impact on the development of substantive law.

Evidently, decision makers make strategic choices in the reasoning on which they base their decisions. In the context of gender related persecution, the issue of a Convention nexus is always a live one. For instance, deciding whether to find gender

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related persecution as linked to the Convention on the ground of membership of the particular social group of women, or on the grounds of religion or political opinion. In some cases, a Convention nexus of particular social group of women might rely on and perpetuate Orientalist tropes which figure those countries as barbaric and misogynist. A better strategy would be to elucidate the political dimensions of government decisions to condone and tolerate traditional cultural practices based on gender inequality or the failure of states to uphold the right to practise a religion or interpretation of a religion at odds with the dominant one.

Academic lawyers are called upon to analyse the existing body of law and share their visions of new directions. Academic lawyers have demonstrated a long standing and continuing interest in gender related persecution. As well as cataloguing the development of legal doctrine and making cross jurisdictional comparisons, academic lawyers have highlighted areas of tension and conflict in the law and made suggestions for their resolution. More recently, academic lawyers have approached gender related persecution through the insights of disciplines such as cultural studies, sociology, politics and feminist studies. These contributions have provided a more political and contextualised understanding of refugee law. Attention to personal and political stakes in the debates around race and sex in the refugee context facilitates a more transparent analysis. In particular, awareness of our own orientalising impulses assists in development of litigation and representational strategy for refugee advocates and adoption of a coherent and sophisticated approach to gender related persecution for refugee decision makers.
By contrasting exotic and familiar forms of harm, my analysis of gender related persecution brings into relief the similarities and differences between refugee producing and refugee receiving countries. A marked similarity is the consistency of harms to women, albeit in different cultural, religious and political contexts. Nnaemeka’s question, posed in the context of her discussion of the treatment of female genital cutting in the west, has a broader relevance:

In my view, the important question should not be about ‘tradition’, geography (Africa or the Middle East) or religion (Islam). The crucial question should be: Why is the female body subjected to all sorts of abuse and indignity in different cultures and different places (including the West)?

Evidently refugee law cannot provide a response to Nnaemeka’s question.

Although refugee law claims to protect the most vulnerable by establishing categories of protection, the existence of such categories renders more vulnerable those who are excluded. Expanding the categories to include women on the basis of systemic gender discrimination as advocated by proponents of the human rights approach is not a desirable solution, although it may have strategic uses in specific contexts. I have attempted to demonstrate how the creation of such categories and their application in practice rest on assumptions about the oppression of Third World women. Exotic others perform the role of demarcating the boundaries between ‘us’ and ‘them’, between refugee decision maker and refugee claimant. Given the reliance of refugee law on analytical boundaries even as its purpose is to protect those forced to cross state borders, it is clear that it can only ever be an incomplete solution to the problems faced by refugee claimants in the context of globalized migration.

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413 Nnaemeka, supra note 264 at 183.
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