

Gender-Based Persecution and US Asylum Policy

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Over the past decades, gender-based persecution has moved into the forefront of the immigration policy debate in the US. Beginning in the 1980s, recognition of the special circumstances women refugees face has slowly dawned on policy-makers and academics alike. The discussion of women refugees' rights comes at a pivotal historical moment in US history; women now make up the majority of refugees, but restrictions have become stricter since 9/11. The current process, designed with the standard of the male refugee in mind, adds extra difficulties for female refugees making their asylum claims and disproportionately penalizes them for an array of reasons. Recent court cases indicate indecision among US justices about whether or not gender-based persecution constitutes legitimate grounds for admittance. The international implications of progressive policy change show the potential for both negative political consequences and positive human rights contributions on a global scale. To remedy the current stalemate in the fight to include gender-based persecution in asylum law, the United States could look to Canada for a progressive model applied to a similar legal system.

Gender-based persecution has recently entered the spotlight as a key debate in the realm of American refugee policy. It invokes discussion amongst a wide range of academics and policy-makers, in the realms of legal, feminist, and international studies. Despite its recent rise in prominence, the debate over gender-based asylum laws is not new. Understanding the historical roots of US asylum policy and the current trends in immigration law are essential to understanding the part women's rights plays in immigration policy. To this aim, this paper is divided into seven sections. First, I will provide a brief background on the history of US asylum policy. Next, I will discuss the increasing pertinence of the debate on gender-based persecution as a basis for asylum in the current historical moment. Third, I will outline the process of applying for asylum, following which I will discuss how this process affects female asylees differently. I will then discuss current court cases as they illustrate the current status of the gender-based persecution debate. After this I will discuss international consequences of possible reforms. Finally, I will suggest possible international legal frameworks already in existence as a model for reform.

Historical Roots of US Asylum Policy

The two fundamental pieces of US legislation on granting safe-haven to refugees came on the heels of the United Nations 1951 Convention Relating to the Status of Refugees. The provisions adopted at the convention evoked an international sense of shame in the way refugees were dealt with during World War II. During the war, thousands of people fleeing the atrocities of Nazi-occupied Europe were denied potentially life-saving asylum. The United States turned

away a cruise ship (the St. Louis) full of Jewish refugees during the war, half of whom later died in the holocaust (Shrag 2008,1). National shame from the incident provoked legislative action. Although not a signatory of the UN 's 1951 Convention, the US soon acted to pass its first refugee protection legislation based upon the language of the Convention. The US passed the Immigration and Nationality Act of 1952, followed in 1953 by the Refugee Relief Act, which loosely defined refugee eligibility and established a quota of refugees from Europe (Bohmer and Shuman 2008,16-17). However, beside alleviating national shame, the acts also served a political function. "Throughout the 1950s and the two decades that followed, U.S. refugee policy reflected priorities in foreign policy. In essence, laws were established to attract refugees from Communist countries as an attempt to encourage defection and shrink Communist populations" (Ziegler and Stewart 2009, 118). Two relevant precedents established in the initial legislation inform current immigration policy and debate: first, the United States followed, but did not directly participate in, international policy making; and second, the US used immigration policy as a political tool.

The next significant legislation in the United States involving refugees passed in 1980 as the Refugee Act. Much of the current immigration debate, particularly with regards to gender-asylum claims, harkens back to the language set down in the Refugee Act as the definition of an acceptable candidate for political asylum. Based upon the original language of the Immigration and Nationality Act, a refugee is defined as:

"[A]ny person who is outside any country of such person's

nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion” (Oxford 2005, 20).

Although gender was conspicuously absent from the language employed, the “particular social group” category would later become the central battleground for proponents of US acceptance of gender-persecution as a legitimate claim for potential asylees.

In the early 1980s, the United Nations began to recognize gender as a category under which one could claim persecution. In 1985, the Subcommittee of the Whole on International Protection stated in a report that “there are situations in which refugee women face particular hazards due to the mere fact that they are women” (Alfredson 2009, 98). The reports states that because of gendered language in the initial international instruments, namely the 1951 convention, nations might incorrectly assume that all asylees would be treated equally. Although this was one of the earliest mentions of gender in the context of asylum, it focused upon the particular difficulties women faced during their time as refugees, not specifically on reasons their gender would prompt them to become refugees in the first place. Furthermore, gender-based persecution is mentioned only in a reflective capacity in the report, and is not binding to any member state. Despite these shortcomings, the report first began an international discussion on the place of gender in asylum legislation.

The discussion of gender and refugee status continued into the early 1990s. “In 1991, the UNHCR [United Nations High Commissioner for Refugees] issued ‘Guidelines on the Protection of Refugee Women,’ which provided a framework for evaluating asylum cases with gender-related claims” (Ziegler and Stewart 2009, 118). The guidelines were further updated in 2002 to include a more specific definition of the vague “social group category.” However, these UN guidelines failed to become part of US policy in a concrete way; they are not binding in US courts. “Issued by the INS [Immigration and Nationalization Service] as guidelines for asylum officers, this proposal has not been accepted into the Federal Code of Regulations and currently remains as a guideline and not as policy” (Oxford 2005, 20). Cases in the United States are instead decided by

precedent and discussion based upon the 1980 definition of what constitutes a refugee.

Context for Current Discussion of Gender-Based Persecution and Asylum

Two trends in the current political climate have led gender-based persecution to become a widely discussed, highly polemic topic today. The first trend is an upswing in the proportion of potential asylees to the United States who are female, and with this an increased recognition of the political and humanitarian consequences of policies concerning the plight of female refugees:

“Though women are still underrepresented, their numbers have increased in areas that men traditionally dominated, such as labor migration and as principle applicants. Among refugee populations the change was even more dramatic as women simply became visible. Dubbed ‘the forgotten majority,’ policy makers were surprised to learn that females typically constitute at least 50% of uprooted people” (Alfredson 2009, 93).

In the 1980’s women were suddenly recognized as key members of the refugee community. Since then, women have begun to shift from the background of refugee policy discussions into the foreground. With this shift naturally came the question of whether or not being female might itself be grounds for asylum from some countries. The debate has become more polarized in recent years thanks to high profile court cases and reform campaigns.

The second influence on the urgency of the debate over gender-based asylum laws is rooted in the nationwide security atmosphere following the September 11th attacks and subsequent concern with terrorism in the United States. Following the attacks, the newly created Department of Homeland Security took over a measure of authority from the INS, previously in charge of regulating immigration, and began to initiate more stringent guidelines on immigration and asylum proceedings.

Illustratively, in 2003 the Department of Homeland Security began the Operation Liberty Shield security initiative. The program created a list of 33 countries, mostly in the Middle East, from which potential asylees had to be detained without possibility of bail until their refugee proceedings have been entirely decided. This move is particularly significant given the international policy context surrounding it. The UNHCR had just in 2002 issued an advisory opinion critiquing the recent US increase in prelimi-

nary detention. “The UNHCR advisory opinion also states that subjecting asylum seekers to detention based on their national origin is contrary to Article 3 of the U.N. Refugee Convention, is discriminatory, and constitutes arbitrary detention” (Mailman and Yale-Loehr 2003, np). Important to note is the isolation from international opinion in which US policymakers operated with regards to a refugee policy decision, hearkening to the earliest days of US asylum policy.

The 2003 “Matter of DJ” decision exemplifies the post 9/11 political climate within the executive branch as pertaining to immigration. David Joseph, fleeing Haiti, was captured by the INS and subsequently detained with \$2,500 bail pending a decision in his appeal to the Bureau of Immigrant Affairs (BIA). A review of the decision was sent to Attorney General John Ashcroft, who then overturned the BIA’s decision and ordered that Joseph be detained without possibility of bail for the remainder of the proceedings (Mailman and Yale-Loehr 2003, np). Although Ashcroft’s decision stuck, it became the source of intense domestic and foreign criticism, and demonstrates the anti-immigration sentiment of the time period.

The 2005 REAL ID Act further increased the difficulty of immigration proceedings. “[It] mainly focuses on ways to make it harder for immigrants to obtain drivers licenses, but also tightens some of the rules for obtaining asylum in ways which make it harder for an application to succeed” (Bohmer and Shuman 2008, 21). In conjunction with the Patriot Act of 2001, the REAL ID Act provides a much looser framework for what constitutes terrorist support; many refugees are now flatly denied their claims without consideration of context because they fall into the increasingly broad definition of terrorist supporters. “Currently individuals held hostage, robbed of personal goods, or coerced to perform tasks by terrorists groups are ineligible for asylum in the United States, and the DHS has asserted that the IJ [Immigration Judge] has no discretion to waive the material support bar” (Ziegler and Stewart 2009, 134). This illustrates the recent move in US immigration policy towards sweeping disqualifications without recourse to appeal.

Finally, immigration scholarship and value discussions have seen their own shift in the post-9/11 years. In reference to Japanese internment camps during World War II as a historical precedent and about possibility of lengthy detentions for refugees, Jon Ting asserted that, “Suspending civil liberties will not necessarily have a long term impact” (2008.121). The shift in the immigration discussion

from economic and humanitarian concerns towards security concerns has not been an isolated phenomenon. In the last decade, immigration and security have been portrayed as incompatible, and immigrants more often conjure fear and defensiveness than in previous decades. According to Mark Krikorian, executive director of the Center for Immigrant Studies, “Under modern conditions, mass immigration itself is incompatible with security. This is true for two reasons: first, immigration overwhelms our efforts to screen security threats; and, second, it creates large immigrant communities that shield and incubate terrorists” (2008, 37). It is in this charged political atmosphere that the discussion of gender-based refugee protection enters the public sphere.

Current Refugee Application Processes

Understanding women’s difficulties in obtaining asylum within the US first requires a basic understanding of the general processes of admission. The United States currently employs a strenuous process for refugee application, involving a number of legal and cultural pitfalls. Many of these are products of the last two decades, further illustrating the difficult national atmosphere a potential asylee must navigate.

The basic asylum granting process is divided into two parts. The first part, the Affirmative Asylum Process, is supposed to begin as soon as an applicant enters the United States, although applicants are still eligible to apply if they have already spent some time in the country. The asylum-seeker must register with the USCIS (United States Citizenship and Immigration Services), then answer a range of intimate questions, many of which are deceptively simple yet potentially disqualifying (Bohmer and Shuman 2008, 36). The applicant gives fingerprints and information for a background check, then schedules an interview. The interview is conducted by an asylum officer, involving more in-depth questioning of the refugee’s grounds for seeking asylum. The potential asylees are later notified whether or not their requests have been granted. If it has not, they enter into the second part of the process, Removal Proceedings, which has a drastically lower success rate than the Affirmative Asylum Process (Lustig et. al. 2008, 8). Asylees who fail to register with the USCIS and whom the INS incarcerates for illegal immigration also go immediately to Removal Proceedings. They may then request an appeal for an immigration judge to try their case, which would be passed on to the BIA for final adjudication.

It first bears noting that in its asylum proceedings,

the United States does not require that an entering refugee be granted free legal assistance. This is something of a rarity in national asylum policies worldwide. The practice has a tangible effect on the way asylum cases in the United States proceed in comparison to other nations. "Because legal aid is available for asylum in the UK, applicants' stories are much less varied than they are in the US. Asylum seekers are more likely to find a lawyer than their US counterparts, for whom no government paid legal aid is available..." (Bohmer and Shuman 2008, 35). Furthermore, the application process is far from simple. "For the average person, the process of applying for asylum is a bureaucratic maze requiring a native guide and the help of others who have been through it before. This is not only a perception; the asylum process is indeed very complicated..." (Bohmer and Shuman 2008, 35-36). Thanks to this lack of informed support, many asylum-seekers are denied simply because of bad legal advice or a small slip-up that would be easily avoided with some kind of information about the workings of the system.

In 1996, a piece of legislation passed through Congress adding additional difficulties to the application process:

"In the US, the law was changed in 1996, as part of the Immigration Control and Fiscal Responsibility Act, to what is now known as the one year rule. Under the rule, a person has to apply for asylum within one year of coming to the United States. What this means in practice is that the person must be able to prove when they arrived, so they can show the government they haven't been in the US over a year" (Bohmer and Shuman 2008, 63).

Although the implementation of this rule is seemingly limited, there are various groups that are heavily impacted by the one-year policy, and it has led to a myriad of denied requests based upon a technicality. For example, refugees who have entered the United States with a medical condition and have moved through the hospital system are commonly deported for non-compliance with the one-year policy. Furthermore, mothers or fathers with children who must seek work immediately to support their families often lose the opportunity to apply for asylum and are similarly ejected.

Most damaging of all to a great number of asylum-seekers is the concept of "expedited removal," also a part of the Immigration Control and Fiscal Responsibility Act. Arriving without consent of the country of origin, "Some-

one who arrives in the US has to tell the immigration inspector at the border that she is seeking asylum, and prove before an asylum officer that she has a 'credible fear' of persecution, before being allowed to stay and make an asylum claim. If no credible fear is shown to the satisfaction of the officer, the applicant is deported" (Bohmer and Shuman 2008, 77). The possibility of immediate deportation makes expedited removal a potent and often insurmountable challenge to would-be refugees in the United States. Furthermore, the proceedings of expedited removal deny the applicant a chance to appeal as in the court system. The single check on the expedited removal system is its internal review system. "While the process is subject to further review to determine if the individual's fear of persecution is 'credible,' the review process lacks safeguards and 99.3% of those deported under expedited removal were removed without further review" (Ziegler and Stewart 2009, 119). Expedited removal has a particularly negative effect upon women entering as refugees.

Finally, the admissions criteria mandated for asylum officers and immigration judges give each a great deal of leeway in each decision. This often works to the refugee's disadvantage. According to Bohmer and Shuman, "In some areas of the law, the practice of the law is more liberal than the law as it is written... In the case of asylum law, however, it is the exact opposite" (2008, 78). Thus, recommendations and anything less than codified regulations become lost under the judge's subjective view of the applicant, even as the applicant is faced with all of the other hurdles and pitfalls of the application process. "Acknowledging this reality, court decisions make it clear that the authorities should not demand such high standards. Nevertheless, this is exactly what hearing officers and some judges do. Asylum seekers are held to impossible standards of proof, and denied asylum" (Bohmer and Shuman 2008, 78-79). Coupled with the fact that most asylees lack legal representation, the flexibility of the US asylum codes often works only to their detriment, and is subject to the whims of the current political climate.

Women in the Application Process

As difficult and convoluted as the process to attain asylum may be, it is made more difficult for women in a number of ways. Foreign nations and international organizations frequently accuse the US of not recognizing the specific needs of refugee women, especially considering that the guidelines and regulations employed typically date back to a time when it was taken for granted that they should be

modeled solely off of the male refugee experience. Nonetheless, recognition has slowly increased about the different considerations necessary to analyze and accurately judge the experiences of female asylum seekers.

Female asylum-seekers, especially those fleeing some kind of gender-based persecution, often come from countries that enforce strict norms about a woman's place in society. This is detrimental to their application process. Often, refugee officers do not understand that the very circumstances that caused women to flee in the first place make it hard for them to describe her harsh conditions. In many countries, women are unaccustomed to speak in public, and may be forbidden from speaking outside the household at all. It is common in these places that a woman entrusts her interests to a husband or relative, so that he speaks for her in the public sphere which is considered "unfit" for her (Alfredson 2009, 90). In these situations, the prospect of speaking for herself may be daunting to a female asylee who is unaccustomed to having the right to do so. In cases in which a man speaks for her, there is little assurance that the woman's voice and story are satisfactorily told. Yet as of now, immigration officials are not required to take this into account when hearing a case.

Furthermore, the cultural norms the woman has fled combined with the intimate nature of the persecution she has suffered often make testimony extremely difficult. In many cultures, the penalties for discussing common crimes against women are severe. "In some cases, a woman who admits during the hearing that she has been sexually mistreated or even raped during detention would normally have to take her own life in accordance with the traditions of her home country in order to restore the honor of her family" (Alfredson 2009, 91). Although the fact that the woman has fled her original culture in some ways demonstrates her rebellion against repressive gender norms, rejection of the culture under which she grew up is an extremely emotionally and psychologically trying process. This is especially true when the woman is put on the spot in the hearing room, in front of typically male officers who may not understand the cultural norms of her country of origin. Furthermore, "loyalty to family members and cultural values may also inhibit a woman from divulging information about persecution perpetrated by kin. In some cultures family members may inflict severe violence, or even death, upon women to punish them for transgressing social mores and sully the family honor" (Alfredson 2009, 91). In such circumstances, simply relating a story of violence or sexual mistreatment may be perceived as a betrayal of the woman's entire fam-

ily.

Following the REAL ID Act, Immigration Judges and Asylum Officials received new, more stringent guidelines to follow when looking for credibility in a candidate. "The [REAL ID Act] allows adjudicators to require corroboration of otherwise credible testimony, and allows them to deny asylum on a number of factors related to credibility, including demeanor, plausibility, and inconsistencies" (Bohmer and Shuman 2008, 115). With the previously described concerns about family and personal honor, more stringent credibility standards disproportionately affect female asylees, who may feel the weight of "betrayed" kin and cultural norms upon themselves while testifying, and thus omit pertinent information the first time they testify. Furthermore, the expedited removal process requires that an asylee convince asylum officers of a "credible fear" of persecution should the asylee be denied entry; otherwise the person faces the prospect of immediate deportation. Again, cultural and familial norms weigh more heavily on women, and whatever inner turmoil a woman might feel from the act of admitting the injustices visited upon her in her country of origin might come across as deceit to an uncomprehending immigration official.

In many cases of gender persecution, a woman is physically battered or even raped, prompting her flight from her home country. In US courts, physical evidence in these kinds of cases is extremely pertinent to judicial proceedings. Asylum proceedings are no different in this regard. A recent study in which the nonprofit "Physicians for Human Rights" provided free medical examinations to aid in asylum hearings documented the enormous effect physical evidence of abuse had upon the outcomes of asylum proceedings. The study found that refugees who could present medical evidence of maltreatment in their home country were granted asylum 89% of the time. The national average for requests granted in this time period, between 2000 and 2004, was 37.5% (Lustig et. al. 2007, 14). This further demonstrates the enormous importance of being able to establish a well-founded fear of persecution if the asylee were to be denied their claim. This poses a particular problem to women, especially those fleeing cultures in which it is taboo to discuss physical abuse by a man, much less show others the physical evidence of abuse. This is particularly pertinent in cases where the victim was raped. In many cultures that subjugate women, they are taught from an early age that rape or sexual abuse is their own fault, and maybe be punished or killed for this unwilling "adultery."

Unsurprisingly, the current structure and guidelines

for asylum proceedings negatively affect female refugees' chances of being granted asylum:

“A higher proportion of women are removed in expedited removal than are men. We can only speculate about the reasons for this disturbing trend; perhaps women have a harder time pushing the authorities to hear their claim of asylum at the border, especially where they would have to disclose gender-based reasons, which are acutely personal and known to be problematic for women” (Bohmer and Shuman 2008, 222)

The system of asylum proceedings, designed with male refugees in mind as the standard for applicants, largely ignores the different circumstances under which women seek asylum in the United States. The unique considerations that female refugees require have only recently come to be recognized among US scholars and policymakers, and change within the law has come even more slowly.

The Status of Potential Applications for Asylum under Gender-Based Persecution

Currently, the United States remains undecided about whether or not to allow gender-based persecution to be recognized as legitimate grounds for asylum. However, there is evidence that this might be changing, if for no other reason than the fact that the possibility of gender-based persecution as a credible claim for asylum has gained greater attention in the United States recently. Three court cases help illustrate the progression of the debate, and the new precedents that will be employed for the adjudication of future cases.

The first case, the Matter of Pierre, was decided in 1976, before recognition of the “forgotten majority” in the 1980s, and illustrates previous attitudes towards gender based persecution. In the case, a Haitian woman fled to the United States because her husband repeatedly beat and raped her. The case was dismissed under the BIA, which denied her request for asylum. Although her husband was a Haitian deputy, making the Haitian government unlikely to come to her aid, the BIA called the matter “strictly personal” (Seith 1997, 1821). The court distinguished between private and public matters when deciding what constituted “persecution,” operating under the assumption that rape and physical violence, when in any familial context, constituted individual harm but not society-wide persecution. In-coincidentally, the ruling reflected the general understanding of domestic violence in the US at the time. It also

set a precedent for asylum claims that would remain for decades: namely, that domestic violence was an individual's problem within the family, regardless of its acceptance at a societal level within the country of origin (Seith 1997, 1821). For decades afterward, domestic violence was ruled to be an unfortunate individual circumstance, but one unworthy of consideration for political asylum in the United States.

In 1996, the BIA ruled in the Matter of Kasinga, establishing a precedent, albeit minimally, for dealing with asylees fleeing female genital mutilation (FGM). The practice of FGM is common throughout Africa and the Middle East. In 1995, Fauziya Kassidindja fled to the United States from her village in Togo, and claimed persecution based upon the prospect of FGM, which her aunt and husband attempted to force upon her. An immigration official initially ruled against her, which she then appealed to the BIA. The BIA reversed the decision and granted her asylum. The BIA held both that FGM reached the “level of harm [that] can constitute persecution,” and that a claim is recognizable even when the persecution consists of “the infliction of harm or suffering by persons a government is unwilling or unable to control” (Seith 1997, 1834-1853). However, the BIA only narrowly ruled in her favor, and avoided language that would keep the ruling on FGM, a practice that strictly victimizes women, from definitively becoming a precedent for other gender-based claims. Furthermore, the case illustrates the initial difficulties women face discussing highly personal matters in an asylum hearing: “Although the immigration judge found Kasinga irrational, unpersuasive, and inconsistent, the Board, in a lengthy discussion, found Kasinga rational, plausible, and consistent” (Bello et. al. 1997, 141). The inconsistency in the perception of credibility illustrates the subjective nature of the decisions judges and asylum officials have to make about asylum candidates under the current framework.

One of the most recent and polemic cases for asylum under gender-based persecution is the Matter of R.A., which to this day remains undecided. The history of RA involves a Guatemalan woman who was violently abused by her husband for decades. As her husband was an ex-soldier, the police and court in Guatemala ignored her pleas for assistance, and eventually she fled the country from fear for her life (Kumin 2008, 221). In 1996, she arrived in the United States and was initially granted asylum. However, in 1999 the BIA reversed the decision:

“The Board pointed out the prominence or importance of a

characteristic within a society. While not determinative, it found that the ‘mere existence of shared descriptive characteristics is insufficient to qualify those possessing the common characteristics as members of a particular social group.’ According to the Board, ‘the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown’” (Binder 2001, 173).

She appealed again, and her case has become a deciding point in the use of the social group category as a tool for proponents of gender-based asylum in the United States. Thanks to the case’s high profile status, and the potentially enormous precedent it might set with regards to the use to the “social group” in making gender-based asylum claims, the case remains is still being deliberated upon.

As previously stated, high profile court cases and increasing international attention have brought gender-based asylum claims to the forefront of policy discussions regarding asylum. In recent years, scholarship has begun to focus upon the initial impetus to create asylum laws: to protect politically valuable refugees, with refugee males taken as the standard in policy consideration. Although the language of the initial refugee conventions purports to be neutral, increasing attention have been given to the fact that males were the intended recipients of the asylum policy, and that women and children were incidental. Further scholarship concerning the initial intentions of refugee policy suggests the possibility of increasing public acceptance of policy change by investigating the historical roots of asylum policy in the US (Ziegler 2009, 115-118).

The Debate Within International Context

Any policymakers making decisions concerning the treatment of refugees must bear in mind the potential consequences to international relations. It should be recognized that at an international level, refugee problems are seen as political problems. (ICHI 1986, 30). Present in any successful asylum claim is the understanding that persecution exists in a societal level in the country of origin. Therefore, it is necessary to look at negative reactions in other countries related to regulations concerning their refugees in the United States, as this could be viewed as an indirect form of condemnation. In the Matter of Kasinga, for example, the US avoided outright condemnation of the acceptance of domestic violence in Togo by asserting that the government there was “unwilling or unable” to control the practice of FGM, allowing for the fact that any governmental failings

might be unintentional.

However, there also exist potential positive consequences on the international humanitarian level to accepting a greater range of refugee cases:

“We need to enlarge conceptualizations of refugees’ social change functions. In fact, under conditions of globalization, individual opportunities and capacities for ‘voting with one’s feet’ in legitimate political actions may actually be increasing. Refugees’ social change function may occur not only in sending countries but also in receiving countries where their claims may conflict with national policies as well as political ideologies and agendas” (Alfredson 2009, 57).

The implication here is that, by providing an outlet for people to make a rational choice about where to live, and bearing in mind the great expense in leaving their country of origin and entering a new one, refugees are voicing a political opinion. Thus, different refugee regulations could affect change in the plight of women on a global scale.

Policymakers must strike the appropriate balance between cultural relativism and respect for international human rights, which has never been easy task. Furthermore, strained and antagonistic relations between the US and many of the more socially conservative nations from which female asylees often flee give enormous weight to any decision made concerning the establishment of precedents in asylum granting. This is particularly true in nations where Western culture is seen as a “corrupting force” upon traditional values, and opponents of the US view its influence as a conscious effort to undermine their traditional beliefs. However, even when bearing these considerations in mind, the US still lags behind most of the industrialized world and the UN in recognizing the special considerations female refugees merit.

Proposed Policy Reforms

Currently, Canada’s Guidelines for adjudicating cases of gender-based persecution are lauded as among the most progressive in the world. The Immigration and Refugee Board Guidelines, adopted in 1993, establish an extensive framework for the analysis of women’s claims to asylum within the preexisting Canadian asylum law. Although the United States has instated guidelines for judging women’s asylum claims, they have no substance in policy and are administered only as recommendations for asylum officials. Canada’s guidelines provide a more comprehensive framework and establish concrete criteria for judging asylum

cases. A decade after implementation, the effects of Canada's guidelines have been recognized at the international level: "At the tenth anniversary of the of the instatement of the Guidelines, Ruud Lubbers of the United Nations High Commission for Refugees (UNHCR) remarked: 'Canada was the trailblazer in developing an asylum process that takes proper account of gender-based persecution'" (Alfredson 2009, 4).

Although the Guidelines had existed before 1993, they truly became viable following the passage of the amendments to the Canadian Immigration Act in that year. Previously, they had been administered much in the same way that the US administers the UN Guidelines on the Protection of Refugee Women: that is, as recommendation only. Although still not strictly binding in Canadian courts, the adjudicators must now prove that they have attempted to adhere to the Guidelines. "The nonbinding nature of the Guidelines protects Canada's sovereignty but obliges adjudicators to take the Guidelines into account and give well-founded reasons for any decisions that deter them from, making the 'burden of proof' more balanced for women asylum seekers"(Alfredson 2009, 208). Furthermore, the Guidelines function in such a way that they maintain Canada's fundamental definition of "refugee," based upon the five-points definition also employed in the US. The Guidelines merely require that officials consider the special circumstances of women when attempting to define their persecution as based on race, religion, nationality, membership in a particular social group, or political opinion

As a model for potential reform, Canada has always existed in a similar situation to the United States in its status as a Western refugee haven. Additionally, Canada has not suffered the ill-effects feared by opponents of more progressive refugee criteria in the US. "There is ill-founded concern that [US] reforms... will open the floodgates and overwhelm our country with eligible asylees. This has not been the case in Canada or other countries, and under current conditions the United States is not settling as many refugees as it might" (Ziegler and Stewart 2009, 135). Furthermore, although it has been so heavily congratulated on its progressive stance towards gender-based asylum claims, Canada's Guidelines are far from radical. They do not fundamentally change the definition of refugee, and have quickly affected change within a legal system that is very similar to the United States. A model for future reform might draw upon the Canadian experience as both an empirical example of the lack of ill-effects suffered under more open immigration policies and also as a better ex-

ample of humanitarian responsibility.

Conclusion

Although the discussion of gender-based persecution as grounds to apply for asylum in the US has gained enormous attention in recent years, United States courts and policymakers still have not definitively laid out an official position on the matter. Unfinished immigration cases and increased policy discussion contrast against the anti-immigrant post 9/11 atmosphere, all leading only to further ambiguity about what stance the US should take. By analyzing the historic contexts of the definitions of a refugee and legislation exploring the effects of current procedures upon refugee women in particular, policy-makers in the United States might overcome gender discrimination within an asylum system founded upon the notion of the male as the standard for refugees.

References

- Alfredson, Lisa S. *Creating Human Rights: How Noncitizens Made Sex Persecution Matter in the World*. Philadelphia: University of Pennsylvania Press. 2008.
- Bello, Judith H., Linda A. Malone, and Gillian Wood. "In re Kasinga." *The American Journal of International Law* 91(1997) 140-147).
- Binder, Andrea. "Gender and the 'Membership in a Social Group' Category of the 1951 Refugee Convention." *Columbia Journal of Gender and Law* 10(2001): 167- 187.
- Bohmer, Carol and Amy Shuman. *Rejecting Refugees: Political Asylum in the 21st Century*. New York: Routledge. 2008.
- Convention Relating to the Status of Refugees. Article 1A)2. General Assembly resolution 429 (V) of 14 December 1950.
- IHICI (Independent Commission on International Humanitarian Issues). *Refugees*. London: Zed Books. 1986.
- Kenney and Shrag. *Asylum Denied: A Refugee's Struggle for Safety in America*. Berkeley, CA: The University of California Press. 2008.
- Krikorian, Mark. "Mass Immigration Defeats Homeland Security." Pp. 37-51 in *Immigration Policy and the Terrorist Threat in Canada and the United States*, edited by Alexander Moens and Martin Collacott. Toronto, Canada: The Fraser Institute. 2008.

- Kumin, Judith. "Protecting Refugee Women: UNHCR and the Gender Equity Challenge." Pp. 219-227 in *Not Born a Refugee Woman: Contesting Identities, Rethinking Practices.*, edited by Maroussia Hadjukowski-Ahmed, Nazilla Khanlou, and Helene Moussa. New York: Berghahn Books. 2008.
- Lustig, Stuart L., et. al. "Asylum Grant Rates Following Medical Evaluations of Maltreatment among Political Asylum Applicants in the United States." *Immigrant Minority Health* 10(2007):7-15.
- Mailman, Stanly and Stephen Yale-Loehr. "Detaining and Criminalizing Asylum Seekers." *New York Law Journal* April 28th. 2003.
- Oxford, Connie G. 2005. "Protectors and Victims in the Gender Regime of Asylum." *NWSA Journal* 17(3) : 18-39.
- Seith, Patricia A. "Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women." *Columbia Law Review* 97(1997):1804-1843.
- Ting, Jan C. "The Need to Balance Liberty and Security." Pp. 111-127 in *Immigration Policy and the Terrorist Threat in Canada and the United States*, edited by Alexander Moens and Martin Collacott. Toronto, Canada: The Fraser Institute. 2008.
- Ziegler, Sara L. and Kendra B. Stewart. "Positioning Women's Rights within Asylum Policy." *Frontiers* 30(2009): 115-142.