THE INTERSECTION OF REFUGEE LAW AND GENDER: PRIVATE HARM & PUBLIC RESPONSIBILITY

ISLAM; EX PARTE SHAH EXAMINED

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I. INTRODUCTION

The aim of the 1951 Refugees Convention Relating to the Status of Refugees ("Refugees Convention") is to enable individuals at risk of serious harm to invoke the protection of the international community where there has been a break-down in national protection. In other words, states party to the Refugees Convention agree to provide international protection to people whose lives or safety are at risk and whose country of origin will not, or cannot, protect them. These protection obligations are contained in Article 33(1) of the Refugees Convention, which states that:

> No Contracting State shall expel or return ("refoule") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.

While there is no limit to the number and type of people to whom international protection obligations extend, the Refugees Convention seeks to protect people from harm inflicted for specific categories of reasons. Article 1A(2) of the Refugees Convention defines a refugee as any person who:

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The authors gratefully acknowledge the guidance and support of the Hon Justice DF O'Connor in the production of this paper. This paper incorporates some material from a paper presented by her Honour at the International Association of Refugee Law Judges, Australia and New Zealand Chapter Conference, 9-10 March 2000, in Auckland, New Zealand.

The views expressed in this paper are those of the authors and do not necessarily reflect the views of the Refugee Review Tribunal, the Federal Court of Australia or the Administrative Appeals Tribunal.

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable, or owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[1]

On the face of it, there is no distinction in the Refugees Convention between the protection obligations owed to men and women who are defined as refugees within the meaning of Article 1A(2). In practice however, women refugee claimants can face numerous difficulties in gaining access to international protection under the Refugees Convention. At the most basic level, women claimants often lack access to economic and social resources which would enable them to flee persecution in their country of origin.[2] While an estimated 80 per cent of the world's refugees are women and children,[3] poverty and lack of mobility mean a disproportionately small number are likely to reach safe havens.[4]

From a legal perspective, women fleeing harm inflicted upon them by reason of their gender may encounter a number of barriers to gaining refugee status under the Refugees Convention definition. For example, women may face difficulties in establishing the existence of a nexus between the types of harm they fear, and a Convention ground, such as political opinion, nationality or religion. There may also be policy concerns preventing women from claiming refugee status on the basis that they are members of a particular social group, that is, 'women'. Several decision-makers and commentators have identified the political fear of 'opening the floodgates' to such a potentially broad group of refugees.[5]

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1 The protection obligations owed under the Refugees Convention are incorporated into Australian domestic law through the operation of s 36(2) of the *Migration Act* 1958 (Cth).

2 Recognised in Australia in Department of Immigration & Multicultural Affairs ("DIMA"), *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996) at paras 2.5 and 2.10. See also, European Council on Refugees and Exiles, *Position on Asylum Seeking and Refugee Women* (December 1997) at para 13.

3 For example, JC McLennan, *The Resource Crisis and the Well-Being of Refugee Women and Children* at 1, UN Doc EGM/RDWC/1990/CS.11 (1990), where it is estimated that eight out of every ten refugees are women or children. See also, A Brazeau, *Gender Sensitive Development Planning in the Refugee Context* (United Nations High Commissioner for Refugees at 2, UN Doc EGM/RDWC/1990/CS.7 (1990), and N Kelly, "Gender-Related Persecution: Assessing the Asylum Claims of Women" (1993) 26 *Cornell International Law Journal* 625.

4 D Anker, L Gilbert & N Kelly, "Women Whose Governments Are Unable Or Unwilling To Provide Reasonable Protection From Domestic Violence May Qualify As Refugees Under United States Asylum Law" (1997) 11 *Georgetown Immigration Law Journal* 709 at 716.

5 For further discussion of gender and refugee law more generally, see A Kobayashi, "Challenging the National Dream: Gender Persecution and Canadian Immigration Law" in P Fitzpatrick (ed), *Nationalism, Racism and the Rule of Law*, Dartmouth (1995) at 61; J Connors, "Legal Aspects of Women as a Particular Social Group" (1997) *International Journal of Refugee Law Special Issue* 114; UNHCR Division of International Protection, "Gender-Related Persecution: An Analysis of Recent Trends" (1997) *International Journal of Refugee Law Special Issue* 79; J Greatbatch, "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989) 1(4) *International Journal of Refugee Law* 518; and A Macklin, "Cross-border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims" (1998) 13 *Georgetown Immigration Law Journal* 25.

This paper focuses specifically on the need to demonstrate 'Convention-related persecution', that is, to establish the degree, risk and character of persecution required to connect the persecution feared to one of the five enumerated grounds in Article 1A(2). In particular, it looks at the difficulties this poses for women asylum seekers who fear types of harm traditionally characterised as 'private' – for instance, domestic violence.[6]

The paper briefly examines the historical background to the Refugees Convention and the challenges to refugee adjudication in light of social change and resulting shifts in notions of gender and state responsibility. It goes on to outline the law on persecution, and the consistencies and inconsistencies between and within the jurisdictions of the United Kingdom, the United States, Canada, New Zealand and Australia. It is argued that inconsistencies arise in cases where issues of gender and refugee law intersect. These differences in approach arguably stem from the complex impact of the public/private dichotomy in the refugee jurisprudence of significant refugee-receiving countries.

The recent decision by the House of Lords in the joined cases of *Islam v Secretary for the Home Department; R v Immigration Appeal Tribunal and Another; Ex parte Shah* ("*Islam; Ex parte Shah*")[7] offers a potentially unifying approach to claims concerning gender-based persecution. This case redefines private harm in a way that extends international protection obligations to female victims of domestic violence, while attempting to maintain the conceptual integrity of the Refugees Convention. The case suggests a way decision-makers might negotiate a path through inconsistent approaches to gender-based asylum claims by attributing responsibility to the state for what has traditionally been regarded as private harm.

While the case of *Islam; Ex parte Shah* has been applied in Australian law, those applications have been inconsistent to date. One approach, highlighted in the Federal Court case *Minister for Immigration and Multicultural Affairs v Ndege*,[8] has been to portray domestic violence as personal harm and therefore lacking a connection to the grounds set out in the Refugees Convention. The second approach, outlined in the Federal Court case *Khawar v Minister for Immigration and Multicultural Affairs*,[9] and by the majority of the Full Federal Court on appeal in *Minister for Immigration and Multicultural Affairs v*

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6 Elsewhere described as "intimate violence", see P Goldberg, "Any Place but Home: Asylum in the United States for Women Fleeing Intimate Violence" (1993) 26 *Cornell International Law Journal* 565 at 569, fn 8. The Special Rapporteur on Violence Against Women defines domestic violence as "violence that occurs within the private sphere, generally between individuals who are related through intimacy, blood or law", see R Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences,* submitted in accordance with Commission on Human Rights Resolution 1995/85 UN Doc E/CN.4/1996/53, (United Nations Human Rights Commission , 5 February 1996) at 7 para 23. The report also notes that domestic violence is always gender-specific, perpetrated by men against women, at 14 para 53. It is acknowledged that domestic violence is also perpetrated by women against men, however, given the overwhelming prevalence of the former relative to female violence against males, this paper focuses on violence by men against women.

7 [1999] 2 WLR 1015 at 1025 (*Islam; Ex parte Shah*).

8 [1999] FCA 783 (Unreported, Weinberg J, 11 June 1999).

9 (1999) 168 ALR 190, [1999] FCA 1529 (Branson J, 5 November 1999).

Khawar,[10] is to see the state's failure to protect victims of domestic violence as itself constituting persecution under the Refugees Convention, where that failure to protect is Convention-related, that is, motivated by reasons of race, religion, nationality, membership of a particular social group or political opinion. The preferable approach is one which enables decision-makers to deal consistently with claims involving domestic violence and a state's failure to protect women on the basis of their gender, without distorting the meaning and broad humanitarian purpose of the Refugees Convention.

II. HISTORICAL BACKGROUND TO THE REFUGEES CONVENTION: GENDER AND THE DEFINITION OF 'REFUGEE'

Prior to the Second World War, the only international instruments dealing with refugees had been adopted in order to address new problems as and when they arose. The Refugees Convention was therefore a significant development in refugee law, in that it contained the elements of a general definition of the term 'refugee' (as set out above).[11]

Yet is the definition of 'refugee' contained in Article 1A(2) really as inclusive as it first appears? To answer this question it is necessary to examine how decision-makers have dealt with significant conceptual developments of the Refugees Convention over the past 50 years in areas such as gender, power and public responsibility.

The Refugees Convention was drafted in 1950, at a time when social dislocation in the aftermath of the Second World War was uppermost in the minds of the drafters. This is reflected in the fact that the 1951 Refugees Convention dealt only with those individuals who became refugees as a result of events occurring before 1 January 1951. The Refugees Convention listed the most apparent forms of discrimination then known: discrimination against large groups defined by race, religion and political opinion.[12] The ground of 'particular social group' was included in response to contemporary problems such as the displacement of the land-owning classes in Communist countries. In this historical context, the fact that the term 'refugee' may have been conceptually limited was immaterial, as the definition applied to all groups of refugees which were then conceivable.

The adoption of the 1967 Protocol Relating to the Status of Refugees was intended to extend the scope of the 1951 Refugees Convention to cover those individuals who had become refugees as a result of events unconnected with the Second World War. In addition, the principles contained in the 1969 Vienna

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10 [2000] FCA 1130 (Hill, Mathews and Lindgren JJ). This matter is currently the subject of a special leave application to the High Court.

11 *Colloquium on the Development in the Law of Refugees With Particular Reference to the 1951 Refugees Convention and the Statute of the Office of the United Nations High Commissioner for Refugees,* (Italy, 1965), at para1.

12 *Islam; Ex parte Shah*, note 7 *supra* at 1025, per Lord Steyn.

Convention on the Law of Treaties preclude "the adoption of a literal construction which would defeat the object or purpose of a treaty and be inconsistent with the context in which the words being construed appear".[13] This extends the ambit of the Refugees Convention and encourages the adoption of an evolutionary approach to its interpretation. However, questions remain about the effectiveness of the Refugees Convention as an instrument for dealing with newly developing conceptual groups and types of harm not previously acknowledged as warranting intervention.

Since 1950, new groups of refugees have arisen in a large variety of circumstances, ranging from drug wars between guerrilla groups and the government in Colombia, to the rise of Muslim fundamentalism in Iran. In particular, many women are displaced or fear persecution as a result of only recently recognised circumstances specific to women. These include 'private' forms of harm such as domestic violence, sexual violence, forced marriage, female genital mutilation, forced abortion and severe punishment for transgressing social mores such as breach of dress code, promiscuity or disobedience. Our understanding of concepts such as discrimination, human rights, women's rights, gender and inequalities in power has evolved and expanded significantly. These concepts now inform the way in which we think about legal, political and social developments, and therefore have an increasing impact on critical approaches to refugee law.

Such social and conceptual developments demand an evolutionary approach to the interpretation of the Refugees Convention, to enable account to be taken of social change and of discriminatory circumstances which may not have been obvious to the delegates when the Refugees Convention was framed.[14] The increasing recognition that gender is a determinative factor in the way society is structured poses a challenge to decision-makers responsible for applying the Refugees Convention in individual cases. That challenge is to interpret the Refugees Convention such that the protection afforded by its provisions is available to both men and women without discrimination. As Lord Steyn stated in his judgment in *Islam; Ex parte Shah*, quoting from Justice Sedley in the court below, the adjudication of asylum claims:

> is not a conventional lawyer's exercise of applying a legal litmus test to ascertain facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.[15]

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13 Cited in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 240 per Dawson J. Article 31(1) of the Vienna Refugees Convention, entitled 'General rule of interpretation' states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

14 As noted by Lord Hope in *Islam; Ex parte Shah*, note 7 *supra* at 1038.

15 Justice Sedley in *Reg v Immigration Appeal Tribunal, Ex parte Shah* [1997] ImmAR 145 at 153; quoted in *Islam; Ex parte Shah*, note 7 *supra* at 1028, per Lord Steyn. This extract was cited with approval by Kirby J in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 170 ALR 553 at para 46.

III. PUBLIC/PRIVATE DISTINCTIONS: THE MARGINALISATION OF WOMEN'S EXPERIENCES

The degree of willingness to consider women's claims as falling within the Refugees Convention is arguably structured by the gendered dichotomy between the private and public spheres of social interaction and the corresponding social roles attributed to men and women.[16]

It is generally accepted that the public/private dichotomy pervades Western liberal thinking.[17] Indeed "[t]he division between public and private antedates modern liberalism by more than two millennia. In Greek thought, a clear separation existed between the *polis* or public sphere, and the *oikos*, the home or private sphere".[18] International lawyers, including Hilary Charlesworth[19] and Jane Connors, have suggested that the focus in traditional human rights law on violations perpetrated by the state is a manifestation of the concept of public and private spheres.

The notion of the public/private divide assumes a public sphere of rationality, order and public authority, which can be properly the subject of legal regulation, and a private, subjective sphere in which such regulation is inappropriate. In international law, matters which are defined as of public international concern are the proper preoccupation of the international legal system and matters for which states are legally answerable. However, matters perceived as private are the concern of individual states and not the business of the international community.[20]

Feminist literature over the past 30 years has demonstrated the way in which this distinction is gendered. Feminist theorists have demonstrated that women and women's issues have traditionally been relegated to the private sphere, while

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16 See generally M Thornton (ed), *Public and Private: Feminist Legal Debates*, Oxford University Press (1995). In particular, for a historical overview, see M Thornton, "The Cartography of Public and Private", in M Thornton (ed), *Public and Private: Feminist Legal Debates*, pp 2-16; for the operation of the concept throughout the law at large, see N Naffine, "Sexing the Subject (of Law)" in M Thornton (ed), *Public and Private: Feminist Legal Debates*, pp 18, 22-6; for discussion of the concept in an international law context, see H Charlesworth, "Worlds Apart: Public/Private Distinctions in International Law" in M Thornton (ed), *Public and Private: Feminist Legal Debates*, pp 243-260. See also H Charlesworth, "The Public/Private Distinction and the Right to Development in International Law" (1992) 12 *Australian Yearbook of International Law* 190, and C Romany, "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" (1993) 6 *Harvard Human Rights Journal* 87.

17 Use of the concept of 'public/private' is not without its critics. Feminist critiques of the concept include: M Stivens, "Why Gender Matters in Southeast Asian Politics" (1989) *Asian Studies Review* 4 at 7 and K Engle, "After the Collapse of the Public/Private Distinction: Strategizing Women's Rights" in D Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (Studies in Transnational Legal Policy, No 25, American Society of International Law, Washington DC (1993) at 143. For further discussion see H Charlesworth, "Worlds Apart: Public/Private Distinctions in International Law", note 16 *supra*, p 243.

18 M Thornton, "The Cartography of Public and Private" in M Thornton (ed), note 16 *supra* at 2.

19 H Charlesworth, "What are Women's International Human Rights?" in R Cook (ed), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press (1994).

20 J Connors, note 5 *supra* at 119.

men have occupied a more public forum, controlling the various institutions of state power, such as parliament, the courts and the police.

There is increasing recognition that the public/private dichotomy pervades thought, behaviour and attitudes in societies throughout the world. In particular, there is evidence of an increasing awareness of these issues in international human rights law. The former Chief Justice of India, Justice P N Bhagwati, has said that one core reason for the neglect of women's human rights in mainstream human rights discourse has been:

> The mainstream's insistence on a division between public and private responsibility... Traditional human rights theory primarily focuses on violations perpetrated by the State against individuals, such as torture, arbitrary arrest, and wrongful imprisonment. Under this framework, mainstream theorists do not recognise wife assault and other forms of violence against women as human rights violations because such acts are perpetrated by private individuals and not the State. Violence against women is the touchstone that illustrates the mainstream limited concept of human rights. The dichotomy between public and private responsibility when applied to the reality of women's life leads to absurd distinctions. Rape by a police officer, for example, becomes a violation, while rape by a stranger, husband or acquaintance does not. The State should be held responsible for failing to protect the woman on the ground that the physical integrity of the woman is violated. Is it not a violation of the human rights of the woman?[21]

It is often argued that to cast women's rights as human rights is to recognise the need for the international legal system to accommodate and extend protection to female victims of human rights abuses.[22] Private forms of harm, such as domestic violence, are pursued at an international level under the provisions of the 1980 Convention on the Elimination of All Forms of Discrimination Against Women.[23] As noted by Anker et al, direct recognition of domestic violence as a human rights issue encourages serious consideration of it as a basis for asylum protection as well.[24] As described by Charlesworth:

> [t]he association of male life patterns with public spheres and female life patterns with private spheres, and the privileging of the public over the private, contribute to and constantly reinforce women's subordination to men.[25]

This distinction has enabled men to control and define the mechanisms of social regulation, and to determine the ambit of the state's responsibility.[26] In this way,

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21 Quoted in The Hon Justice Dame Silvia Cartwright, "Contemporary Gender Issues in the Refugee Context", IARLJ Conference, New Zealand, March 2000 at 8, taken from Byrnes, Connors and Bik (eds), *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation*, (Commonwealth Secretariat, October 1997) at 22-3. See also A Macklin, note 5 *supra* at 28.

22 See generally C Bunch, "Women's Rights as Human Rights: Towards a Re-vision of Human Rights" (1990) 12 *Human Rights Quarterly* 486.

23 Refugees Convention on the Elimination of All Forms of Discrimination Against Women, GA Res 34/180, 34th Session Supp No 46 UN Doc A/Res/34/46 (1980) (CEDAW). Anker et al, note 4 *supra*, at 721 have noted that CEDAW has been specifically applied in the refugee context; the UNHCR Executive Committee cited CEDAW in noting that severe discrimination against women is prohibited by the Refugees Convention Relating to the Status of Refugees and may provide the basis for the granting of refugee status, see *Conclusions on the International Protection of Refugees*, UNHCR Programme Executive Committee, 36th Session No 39(k) (1985).

24 D Anker et al, note 4 *supra* at 722.

25 H Charlesworth, "Worlds Apart: Public/Private Distinctions in International Law" in M Thornton (ed), note 16 *supra* p 245.

redress for problems perceived as occurring within the private sphere is usually difficult to attain. Many of the serious harms women suffer are not inflicted in a public forum but rather in the form of cultural or customary practices (or violence in the home), by members of women's families or communities.[27]

Domestic violence is a clear example of a problem experienced by women in the private sphere and for which, in many societies, there is no redress in the public sphere. It is what Audrey Macklin has described as "the paradigmatic example of gender-specific abuse committed by 'private actors'".[28] Domestic violence and other forms of harm such as female genital mutilation,[29] have long been consigned to the private sphere and thus are seen as beyond the reach of state intervention, or excluded from the range of matters which can be addressed via public mechanisms of social regulation. Indeed, "[w]hen challenged, representatives of the state often express the inappropriateness or inefficacy of intervention in a so-called 'private' matter".[30] Macklin argues that the invisibility of domestic violence in the international public arena follows almost axiomatically from its characterisation as 'private' at the local level:

> And, of course, it is the very inattention and inaction by the state in relation to battering that tacitly condones and sustains it as a systematic practice. ... [T]he fact that the state does not adequately protect women from domestic (and sexual) violence is both an institutional manifestation of the degraded social status of women, and a cause of its perpetuation.[31]

These developments in the international human rights field indicate that a significant shift has taken place in the international community's understanding of gender issues more generally. Numerous documents in international law record the concern that private forms of harm, such as domestic violence, ought to be recognised as serious human rights infringements.[32] In the context of refugee jurisprudence, concerns about gender issues and the public/private dichotomy have begun to filter through to the level of day-to-day decision-

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26 Connors notes that while, regrettably, women are increasingly the victims of direct and public state actions, in the way that men have been, the suffering of women is predominantly private and is frequently the result of oppression by individual members of women's own families and communities, for which, prima facie, the state is not internationally answerable. See J Connors, note 5 *supra* at 119.

27 D Anker, L Gilbert & N Kelly, note 4 *supra* at 711.

28 A Macklin, note 5 *supra* at 48.

29 While this paper focuses on domestic violence as an issue through which to explore public/private issue in refugee law, the same case might be made for female genital mutilation where a government may do little or nothing to prevent the cultural practice. In the American case *Matter of Fauziya Kasinga* (13 June 1996, Interim Decision 3278), the majority was of the opinion that female genital mutilation might found a refugee claim on the basis that it was a sufficiently serious harm and one which the state was unwilling or unable to curb. For ease of reference, the decision in this case is reproduced in the (1997) *International Journal of Refugee Law Special Issue*, Annexe 3.

30 A Macklin, note 5 *supra* at 28.

31 *Ibid* at 48.

32 For example, the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*; the 1996 *Report of the Special Rapporteur on Violence Against Women*, note 6 *supra*, para 142(o); and the International Refugees Convention on Civil and Political Rights 999 UNTS 171 6 ILM 368, Art 2.

making through the adoption in Canada,[33] the United States[34] and Australia[35] of guidelines for decision-makers.

However, while the adoption of an evolutionary approach to the Refugees Convention in different jurisdictions has enabled decision-makers to take a more 'gender-sensitive' approach to the interpretation and application of refugee law, this has tended to happen at the expense of consistency.[36] An example of this inconsistency in relation to the law on persecution in the Australian context is discussed below.

IV. JURISPRUDENCE REGARDING 'PERSECUTION' AND THE CONCEPT OF STATE PROTECTION

A. International Jurisprudence

It is possible to identify commonalities in approach in various jurisdictions to defining the term 'persecution'. Of the jurisprudence on this issue in the United Kingdom, the United States, Canada, New Zealand[37] and Australia,[38] the main themes in defining persecution include: a recognition of the considerable breadth of the term 'persecution';[39] a recognition that the agent of persecution is not

33 Canadian Immigration and Refugee Board, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*, (March 1993, updated November 1996). For a discussion of Canadian immigration law and women refugees specifically see A Kobayashi, note 5 *supra* at 61.

34 INS, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women* (26 May 1995). D Anker et al claim that although not technically binding as law, the Canadian and United States guidelines have had a 'major impact' on the recognition of women's rights and on the protection afforded to individual women claiming refugee status, note 4 *supra*, at 710.

35 Department of Immigration & Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers*, (July 1996).

36 See *Applicant A*, note 13 *supra* at 260-3, per McHugh J.

37 For discussion, see RPG Haines, "Gender-Based Persecution: New Zealand Jurisprudence" (1997) *International Journal of Refugee Law Special Issue* 129. See also the recent Refugee Status Appeals Authority case concerning gender–based claims: *Refugee Status Appeals Authority Reference 71427/99.*

38 The jurisdictions focused upon in this paper are Australia, the United Kingdom, the United States, Canada, and New Zealand, all of which are signatories to the Refugees Convention. Not only are these countries five of the most significant refugee-receiving countries under the Refugees Convention but their legal systems all derive from the British common law system, making comparison between legal developments more meaningful.

39 In relation to US law, see INS, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women* (26 May 1995) at 8-9. See also: *Matter of Acosta* 19 I&N Dec 211, 222 (BIA, 1985), overruled on other grounds by *Matter of Mogharrabi* 19 I&N Dec 439 (BIA, 1987); and *Balazoski v INS* 932 F2d 638 (7th Cir, 1991) at 642. In *Fatin v INS* 12 F3d 1233 (3rd Cir, 1993), at 1240-1, the Court held that "the concept of persecution is broad enough to include governmental measures to compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that person's deepest beliefs". This was affirmed in *Fisher v INS* 37 F3d 1371 (9th Cir, 1994). In relation to Canadian law, see *Gladys Maribel Hernandez*, Immigration Appeal Board Decision N81-1212, (6 January 1983), and *Marc Georges Severe* (1974) 9 IAC 42 at 47, per J-P Houle.

necessarily a constituent part of the state;[40] the view that claimants must, in general,[41] first seek the protection of their own state before turning to international protection;[42] and that actual physical mistreatment is not a necessary element of persecution.[43]

It is widely recognised that states have a responsibility to their citizens to take all reasonable steps to protect them from harm.[44] The United Nations High Commissioner for Refugees ("UNHCR"), the Canadian and Australian *Guidelines* and the United States' *Considerations* address the issue of state protection by providing that an applicant for refugee status may succeed where the state engages directly in the persecution or where the persecutor is a private actor but the state is either unwilling or unable to protect the claimant.[45] The *UNHCR Handbook* notes that private acts of violence constitute persecution "if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection".[46]

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40 For an example of the US approach, see *Bartesaghi-Lay v INS* 9 F3d 819 (10th Cir, 1993) at 822; *Sotelo-Aquije v Slattery* 17 F3d 33 (2nd Cir, 1994), at 37. See generally, J-Y Carlier (ed) *Who is a Refugee?*, Kluwer Law International, (1997), pp 705-6. In relation to UK law, see *R v Secretary of State for the Home Department; Ex parte S Jeyakumaran*, (28 June 1985), QBD CO/290/84; and *R v Secretary of State for the Home Department; Ex parte Choudhury*, Court of Appeal (Civil Division), (19 September 1991). In relation to NZ law, see *Refugee Appeal No 11/91* (5 September 1991). For an example of the Canadian approach, see *Ganganee Janet Permanand* Immigration Appeal Board Decision T87-10167, (10 August 1987).

41 An exception is in situations where it would be unreasonable to demand that an individual seek State protection, as "it would seem to defeat the purpose of international protection if the claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness ... only in situations in which State protection 'might reasonably be forthcoming', will the claimant's failure to approach the State for protection defeat his [or her] claim", in *Canada v Ward* [1993] 2 SCR 689, at 724 citing JC Hathaway, *The Law of Refugee Status*, Butterworths (1991).

42 For an example of the UK approach, see *Re Fernando Manuel* (8 November 1993) No 10454 (IAT). In relation to Canadian law, see *Canada v Ward* [1993] 2 SCR 689 at 724, where the Supreme Court of Canada held that a claim involving a non-state agent of persecution may be brought against the state if the state turns a blind eye to the actions of the persecutor or the state is unable to protect the claimant. In relation to Australia, see *Randhawa v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 124 ALR 265 , at para 8, per Black CJ.

43 In relation to Canadian law, see *Amayo v Canada* [1982] 1 FC 520 (FCA); *Luis Enrique Toha Sequel* Immigration Appeal Board Decision 79-1150, (13 November 1980). For the NZ position, see *Refugee Status Appeals Authority Reference 71427/99*, where it was found that gender discrimination in Iran constituted sustained systemic violation of basic human rights (at para 78). In the Australian context, see *Applicant A*, note 13 *supra* and *El Merhabi v Minister for Immigration & Multicultural Affairs* (2000) 96 FCR 375, where the relevant persecution was the rape of the applicant's wife. See also *Chen Shi Hai v Minister for Immigration & Multicultural Affairs*, note 15 *supra*.

44 See for example, Department of Immigration & Multicultural Affairs (Cth), note 35 *supra* at paras 4.11, 4.13. See also: *Randhawa v Minister for Immigration, Local Government & Ethnic Affairs, ibid* at para 8, per Black CJ; J Hathaway note 41 *supra*, p 125; and A Shacknove, "Who is a Refugee?" (1985) 95 *Ethics* 274 at 277.

45 See: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, note 32 *supra*, at para 65; Canadian Immigration and Refugee Board, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*, note 33 *supra*; Department of Immigration & Multicultural Affairs (Cth), *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers*, note 35 *supra*; and in the US, Immigration and Naturalization Service, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, note 34 *supra*. See also J Hathaway note 41 *supra*, pp 103-4.

46 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, note 32 *supra*, at para 65.

New Zealand jurisprudence also explicitly recognises that non-state or 'private' violence can constitute grounds for refugee status. New Zealand's Refugee Status Appeals Authority has found:

> no justification for the interpretation adopted by some Western European countries, especially Germany, Sweden and France, which restricts the application of the concept of agents of persecution to the extent that refugee status is only granted to victims of persecution by State authorities or by other actors encouraged or tolerated by the State. On this view, inability of the State to afford adequate protection does not lead to refugee status, as UNHCR has observed.[47] We [are] in agreement with the UNHCR position in this regard, which is largely in accord with the [*Canada v*] *Ward* analysis.[48]

Thus all these jurisdictions explicitly recognise that a fundamental concept underlying the Refugees Convention is the notion that states have the primary responsibility for the protection of citizens. States are obliged to provide their nationals with effective protection from all kinds of harm and, by extension, this includes private harm. Further, states must do so without discrimination, for instance, on the basis of gender. It is only when a state fails in its protective responsibility that the obligations of the international community under the Refugees Convention are triggered. States party to the Refugees Convention must provide international protection to people whose lives or safety are at risk and whose country of origin will not, or cannot, protect them:[49]

> The intention of the drafters was ... to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population ... [P]ersecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.[50]

While it cannot be said that a state has an obligation to provide absolute protection from harm to every person under all circumstances, the standard against which effective protection may be measured can be characterised as due diligence, or the seriousness with which a state undertakes to protect its citizens.[51] The availability of services such as shelters, official recording and investigation of victims' complaints, bona fide prosecution of offenders and the imposition of appropriately grave penalties are all indicia of the attitude of a state takes to protecting its citizens. But the existence of a law against such assault is not sufficient; a thorough and undiscriminating application of the law to reported offenders is also required. So extensive data on the availability – both in principle and fact – of such measures and services is required in order to determine which countries have met their protection obligations.

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47 UNHCR, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR* (1995) 1 (3) *European Series*, 27-30.

48 RPG Haines, note 37 *supra* at 139. See also *Refugee Status Appeals Authority Reference 71427/99* at para 60, and *Refugee Status Appeals Authority Reference 11/91 Re S* (5 September 1991).

49 See Article 33(1) of the Refugees Convention.

50 JC Hathaway, note 41 *supra*, p 103-5.

51 D Shelton, "Private Violence, Public Wrongs, and the Responsibility of States" (1989-90) 31(1) *Fordham International Law Journal*, 21-6; D Anker et al, note 4 *supra* at 730-37. See also R Cook, "Accountability in International Law for Violations of Women's Rights by Non-State Actors" in D Dallmeyer (ed), note 17 *supra* at 93-116.

B. Australian Jurisprudence

In Australian domestic law, there are numerous cases commenting on the meaning of the term 'persecution'. Specifically, the Australian courts have identified several key elements which will generally need to be considered by decision-makers when determining whether the harm feared by an applicant amounts to persecution as defined by the Refugees Convention. These elements include: the motivation of the persecutor; the nature of the harm feared; and whether the harm feared is serious enough to amount to persecution.

In *Ram v Minister for Immigration and Ethnic Affairs*, Justice Burchett said:

> Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.[52]

This statement has been widely accepted by the courts in Australia as a principle of law: in determining whether the harm an applicant fears amounts to persecution within the meaning of the Refugees Convention, decision-makers should examine the motivation behind the harm. The notion of persecution is therefore inherently bound up with the reasons behind the persecution – in other words, the necessity of establishing a nexus between the Convention and the harm feared. As stated by Chief Justice Brennan in *Applicant A v Minister for Immigration and Ethnic Affairs*:

> The victims are persons selected by reference to a criterion consisting of, or criteria including, one of the prescribed categories of discrimination ("race, religion, nationality, membership of a particular social group or political opinion") mentioned in Art 1A(2). The persecution must be "for reasons of" one of those categories. This qualification excludes indiscriminate persecution which is the product either of inhuman cruelty or of unreasoned antipathy by the persecutor towards the victim or victims of persecution.[53]

The courts have also held that the notion of discrimination is inherent in the concept of persecution, and that harm which amounts to persecution under the Refugees Convention is harm which can be seen as "part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class".[54] In many societies, women can be seen as constituting a class of people who experience entrenched and systematic disadvantage and discrimination on the basis of their gender.

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52 (1995) 57 FCR 565 at 586.

53 Note 13 *supra* at 233, per Brennan CJ.

54 *Ibid* at 429-30, per McHugh J. See also Justice McHugh's discussion in *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55 (26 October 2000) at [55] to [65]. While there has been an extensive debate in Australian case law over the use of the term 'systematic' to explain the concept of persecution, it is generally accepted that harm which is random, non-selective or non-purposive does not meet the test for persecution. See, for instance, *Chopra v Minister for Immigration and Multicultural Affairs* [1999] FCA 480 (Unreported, Lee, Whitlam & Weinberg JJ, 23 April 1999) at [46] and *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55 (26 October 2000) at [55] to [65], per McHugh J.

In relation to the nature of the harm feared, the overwhelming consensus in Australian courts is that there is no limit to the varieties and types of harm which might constitute persecution. The High Court recently confirmed in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*[55] that qualities such as 'enmity' or 'malignity' do not need to be attributed to the persecutor before persecution can be found to exist.[56] Justice Kirby commented that, on the contrary:

> Some of the most fearsome persecutions of people on the grounds of race, sex, religion, sexuality and otherwise have been performed by people who considered that they were doing their victims a favour. Persecution is often banal.[57]

Various Australian courts have found that treatment as diverse as revenge, extortion, social disapproval and denial of access to employment or education *may* amount to persecution, depending upon the circumstances of a particular matter. As the High Court has commented:

> [P]ersecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society.[58]

In determining whether a particular type of harm constitutes persecution, decision-makers are required to assess its severity and seriousness. Chief Justice Mason has referred to 'persecution' as requiring "some serious punishment or penalty or some significant detriment or disadvantage".[59] Physical mistreatment, including harm such as domestic violence, will almost always be sufficiently serious to lead to a finding of persecution. The types of harm recorded in cases of domestic violence include severe beating, whipping, burning, throwing acid, stoning and imprisonment in the home.[60]

Finally, and most relevantly, it is accepted in Australian case law that states have a responsibility to protect their citizens from harm caused by non-state actors. At this point, citizens who have no choice but to flee such a situation will find a potential avenue to refugee status.[61] As stated by the High Court in *Chan Yee Kin v Minister for Immigration and Multicultural Affairs*:

> The threat need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution.[62]

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55 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*, note 15 *supra*.

56 Cf the interpretation in *Refugee Status Appeals Authority Reference 71427/99* at [46]-[48].

57 Note 15 *supra* at [63], per Kirby J.

58 *Applicant A v Minister for Immigration & Ethnic Affairs*, note 13 *supra*, at 258, per McHugh J.

59 *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379 at 388, per Mason CJ.

60 See, for instance, the facts of *Khawar v Minister for Immigration & Multicultural Affairs*, note 9 *supra*..

61 See generally DQ Thomas and ME Beasley, "Domestic Violence as a Human Rights Issue" (1993) 15 *Human Rights Quarterly* 36.

62 Note 15 *supra* at 430, per McHugh J.

V. INCONSISTENCIES IN APPROACHES TO GENDER-BASED REFUGEE CLAIMS

Despite the apparently settled nature of the jurisprudence on 'persecution' and the concept of state protection, a close examination of cases involving gender-based claims reveals important differences both within and across jurisdictions, indicating a degree of uncertainty about how to approach matters in which issues of gender and refugee law intersect.

As the refugee jurisdiction is a fact driven area of the law, it is possible to explain a number of apparent inconsistencies by reference to the claimant's particular circumstances.[63] There are, however, certain salient points at which the application of law regarding Convention-related persecution diverges, resulting in differing applications of the law to the facts of similar cases. These variations occur across jurisdictions and also, more alarmingly, within domestic jurisdictions. For example, there are differences in the degree to which traditionally private harms are recognised as public and therefore within the ambit of the Refugees Convention. As Carlier concludes in light of his extensive comparative study of refugee law across 15 jurisdictions:

> Case law ... adopts differing positions when it comes to examining the extent of the responsibility of the state when the persecution is the act of a third party, private parties or entities... A restrictive view considers that it is necessary to prove that the state "tolerates or encourages" such persecution, at least by passive tolerance. A more expansive view holds that it is sufficient for the state to be unable to assure protection ... in a manner such that, in certain cases, the persecution can be of a very private level [such as the family]. An isolated decision in Germany clearly expresses this point: 'from the point of view of the refugee, it is of no importance that the feared persecution depends on the state, state authorities or uncontrollable groups. It suffices to establish that the state cannot or will not offer the necessary protection'.[64]

Audrey Macklin has highlighted recent instances of inconsistent decision-making in cases involving gender-based claims, illustrating the perceived difference between private and public forms of harm. She observes that:

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63 An example of this might be the variation in findings of the availability of state protection, a difference which may well depend on the nature of the evidence before the decision maker at a particular moment in time and the particular region of the country in question. For instance, in May 1996 the Tribunal found no effective police protection from domestic violence existed in the Phillipines (RRT Reference N93/02263 (8 May 1996, Member Toohey)); by December 1997, other forms of government assistance to victims of domestic violence in that country were seen to constitute effective protection (RRT Reference N97/15572 (1 December 1997, Member Morris)). This conclusion was then reversed again in February 1998, when it was found that such measures were often ineffective (RRT Reference N97/17056 (17 February 1998, Member McIllhatton)). See also S Cason, "The Effect of Gender on Refugee Determination in Australia" (unpublished manuscript, 1999).

64 J-Y Carlier (ed), note 40 *supra*, pp 705-6, citing VG Frankfurt/Main (9th division) 28 March 1994, 9 E 11871/93.A (V).

> Beating a man was obviously a form of persecution; raping a woman was not.[65] Ethnically motivated attacks by thugs in the face of state indifference constituted persecution; systematic domestic abuse of women in the face of state indifference did not.[66] Torture of political dissidents in the name of social control was not protected as a legitimate cultural practice; excising a girl's genitalia in the name of controlling women's sexuality was protected.[67] "Women" was too large and amorphous a group to warrant refugee protection; "Christians", "Sikhs", and "Blacks" were not.[68]

The types of strained reasoning adopted in matters in which gender and refugee law intersect demonstrates that decision-makers can have difficulty with these issues.[69] For instance, in *Minister of Employment and Immigration (Canada) v Mayers*,[70] the Canadian Court of Appeal upheld a finding that a Trinidadian woman who had been abused by her husband for many years was a refugee because she was a member of a particular social group, namely "Trinidadian women subject to wife abuse".[71] Such a group is impermissibly defined by the persecution feared,[72] and this decision has been widely criticised in other jurisdictions. In addition, in an effort to avoid the difficulty of attempting to define and delimit social groups consistent with the terms of the Refugees Convention, courts in the US have sought to use the Refugees Convention ground of 'political opinion' to legitimise gender-based claims of persecution by casting feminism as a political position.[73]

VI. RECENT LEGAL DEVELOPMENTS: PRIVATE HARM AND PUBLIC RESPONSIBILITY

The divergent approaches to claims involving 'private' harm against women indicate that gender-based claims are often problematic. The difficulties encountered by many decision-makers are arguably attributable to the conflicting influences of the traditional public/private dichotomy and the (increasing)

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65 See, for example, *Campos-Guardado v INS* 814 F2d (5th Cir, 1987), cited in A Macklin, note 5 *supra* at 27-8.

66 See, for example, *Matter of Pierre* 15 I&N Dec 461 (BIA, 1975), cited in the quoted text.

67 See, for example, "No Plan to Accept Victims of Sex Bias" *Toronto Globe & Mail*, 16 January 1993 at A6, quoting the comments of the then Minister for Immigration, Bernard Valcourt, cited in the quoted text.

68 See, for example, [1992] CRDD No 318 No T92-03227 (18 November 1992), cited in the quoted text. A Macklin, note 5 *supra* at 27-8.

69 Macklin also discusses two Canadian IRB decisions which, although decided only two months apart, came to opposite conclusions about whether female victims of domestic violence could access state protection in Jamaica. See A Macklin, note 5 *supra* at 60-1.

70 [1993] 1 FC 154.

71 This decision was criticised by the Australian High Court in *Applicant A*, note 13 *supra* at fn 148, per McHugh J.

72 That is, the group 'Trinidadian women subject to wife abuse' is defined by the persecution or abuse (domestic violence) feared by its members. However, as McHugh J stated in *Applicant A*: "The concept of persecution can have no place in defining the term 'a particular social group'." For this reason, the case was cited unfavourably by McHugh J in *Applicant A*, *ibid* at 260-3.

73 See *Lazo-Mojano v INS*, 813 F2d 1432 (9th Cir, 1987) and *Lopez Gularzo v INS*, 99 F3d 954 (9th Cir, 1996). See also A Macklin, note 5 *supra* at 40, 53-5.

recognition that many female applicants fearing domestic violence face certain harm, and sometimes death, if returned to their country of origin. This conflict is complicated by the demanding task of determining applications for refugee status within the confines of a Refugees Convention drafted fifty years ago.

The inconsistent choices made by decision-makers have given rise to two divergent approaches. The first approach involves a narrow view of the concept of state responsibility for private harm; harm such as domestic violence is seen as belonging to the sphere of personal relationships, and therefore not within the ambit of the Refugees Convention. The second approach is broader; analysing situations involving private harm in terms of state responsibility. Significantly, the House of Lords adopted this broader view in its judgment in *Islam; Ex parte Shah*.

A. Islam; Ex parte Shah

The case involved the joined appeals of two Pakistani women whose claims for asylum in the United Kingdom had been rejected. The central issues were whether the appellants could claim to be members of a 'particular social group', and whether the harm they feared amounted to persecution within the meaning of Article 1A(2) of the Refugees Convention.[74] Both women were victims of domestic violence at the hands of their husbands in Pakistan, in a legal and social context in which the state was unwilling or unable to offer protection. A great deal of evidence was brought to illustrate the poor social and economic status of women in Pakistan, and the prevalence and indeed tolerance of domestic violence and abuse of women in Pakistani society. The Law Lords cited evidence of institutionalised discrimination against women by the police, the courts and the legal system – the central organs of the state.[75] This lack of state protection proved crucial in their Lordships' determination of causation.

By a majority of four to one (Lord Millett dissenting), the House of Lords found that women in Pakistan constituted a particular social group within the meaning of Article 1A(2). While the judgments of Lords Hope and Hutton are relatively brief, those of Lords Steyn, Hoffman and Millett warrant close examination. Of particular interest is the way in which Lord Millett's reasoning differs from that of Lords Steyn and Hoffman on several key issues.

After examining the history and context in which the Refugees Convention was drafted, Lords Steyn and Hoffman held that the phrase 'particular social group' in Article 1A(2) was intended to cover persecution for reasons of gender. Lord Hoffman held that the inclusion of 'particular social group' as a ground indicated that there might be other forms of discrimination just as offensive to

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74 For further discussion of this aspect of the *Islam* and *Shah* cases see: C Harvey, "Mainstreaming Gender in the Refugee Protection Process" (1999) 149 *New Law Journal* 534; I Hager, "The Current and Future Viability of a Social Group Argument in Gender-Based Asylum Claims" (1998) 12 (4) *Immigration & Nationality Law & Practice* 132 (concerning the cases at the Court of Appeal level); and P Mathew, "Women Refugees: Victims or Agents of Change?" (Unpublished paper, 2000).

75 *Islam: Ex parte Shah*, note 7 *supra* at 1025-6, per Lord Steyn.

human rights principles as the forms of abuse covered by the other grounds.[76] Lord Millett on the other hand, thought it noteworthy that gender was included as a basis for discrimination in the Universal Declaration of Human Rights, but not among the grounds in the Refugees Convention.[77]

While all three judges agreed that the nature of each appellant's experience raised issues relating to the 'particular social group' ground of the Refugees Convention, Lord Millett differed with Lords Steyn, Hoffman and Hope in his approach to these issues. In answer to the question whether or not the women belonged to a particular social group, the appellants had identified two possible groups, namely, women in Pakistan and women in Pakistan who are unprotected by the state and who transgress social mores. Lords Steyn, Hoffman and Hope agreed that, in the circumstances, both groups could constitute 'particular social groups' within the meaning of the Refugees Convention. Lord Millett, on the other hand, considered that the second formulation suggested by the appellants was circular, in that it sought to define the group by the persecution feared.

The Law Lords also disagreed on whether there was a sufficient nexus between the harm feared by the appellants and the grounds set out in the Refugees Convention. Lord Millett found that, even if the wider group 'Pakistani women' did constitute a 'particular social group', the appellants did not fear persecution for reason of their membership of that group. While recognising that women in Pakistan were discriminated against, his Lordship distinguished this from Convention-related persecution. In his view, the appellants feared harm because they had transgressed social norms, not because they were women. His Lordship stated:

> The evidence clearly establishes that women in Pakistan are treated as inferior to men and subordinate to their husbands and that, by international standards, they are subject to serious and quite unacceptable discrimination on account of their sex. But persecution is not merely an aggravated form of discrimination; and even if women (or married women) constitute a particular social group it is not accurate to say that those women in Pakistan who are persecuted are persecuted because they are members of it. They are persecuted because they are thought to have transgressed social norms, not because they are women. There is no evidence that men who transgress the different social norms which apply to them are treated more favourably.[78]

Lord Millett's approach to the issue differed markedly from that of Lords Steyn and Hoffman. While Lord Millett saw the reason for the women's fear as the threat of punishment for transgressing social norms, Lords Steyn and Hoffman took a more holistic view, taking into account the situation of women in Pakistani society and the attitude of the state. Lord Steyn found that, given the central feature of state-sanctioned gender discrimination in Pakistan, the argument that the appellants feared persecution not because of their membership

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76 *Ibid* at 1032, per Lord Hoffman. See also Lord Steyn at 1021. (For Australian discussion of this aspect of the Refugees Convention, see particularly Kirby J in *Chen Shi Hai v Minister for Immigration & Multicultural Affairs*, note 15 *supra*, at paras 45-47.)

77 *Ibid* at 1041, per Lord Millett.

78 *Ibid* at 1044, per Lord Millett.

of a social group but because of the hostility of their husbands was unrealistic.[79] Lord Hoffman concluded that, while the husbands' violence was 'personal', that is, directed towards the appellants as individuals, the evidence established that the state would not assist them because they were women. It therefore denied them protection against violence which it would have given to men.[80]

The majority view is illustrated by the following example, contained in Lord Hoffman's judgment:

> Suppose oneself in Germany in 1935. There is discrimination against Jews in general, but not all Jews are persecuted. ... Suppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. *It is true that one answer to the question "Why was he attacked?" would be "because a competitor wanted to drive him out of business." But another answer, and in my view the right answer in the context of the Convention, would be "he was attacked by a competitor who knew that he would receive no protection because he was a Jew".*[81]

Interestingly, Lord Millett accepted that a state may, in some cases, be seen as persecuting members of a particular social group by openly withdrawing its protection and leaving them to the mercy of criminal elements. However, he distinguished situations of domestic violence, finding that the appellants had failed to prove that Pakistan had withdrawn its protection for a Convention reason.[82]

Perhaps the major difference between the approaches of the majority and Lord Millett lies in their dissimilar assumptions about gender and the extent to which each was prepared to conceptualise what is traditionally 'private harm' (domestic violence) as serious harm which should be addressed in the public sphere, and for which the state must bear some responsibility. The majority accepted that in certain circumstances where a state fails to protect its citizens, private, gender-based harm can constitute persecution within the meaning of the Refugees Convention. Their reasoning indicates that the 'persecutor' or 'agent of harm' in the case was the state, and that the 'persecution' was the act of withholding

79 *Ibid* at 1028, per Lord Steyn.
80 *Ibid* at 1035, per Lord Hoffman.
81 *Ibid.* (Emphasis added).
82 *Ibid* at 1045, per Lord Millett.

protection for a Convention reason, in combination with the abuse by the women's spouses.[83] As described by Lord Hoffman:

> What is the reason for the persecution which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. There is nothing personal about this. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the Convention. As the Gender Guidelines for the Determination of Asylum Claims in the UK (published by the Refugee Women's Legal Group in July 1988) succinctly puts it ... 'Persecution = Serious Harm + The Failure of State Protection'.[84]

Lord Millett on the other hand, construed the harm suffered by the appellants as restricted to the violence inflicted by their husbands. He concluded that the harm feared was therefore personal, not Convention-related, and that the state's discriminatory attitude towards women did not amount to persecution in these cases. Significantly, Lord Millett commented that "it is difficult to imagine a society in which women are actually subjected to serious harm simply because they are women".[85] Such a statement shows a complete ignorance of the many forms of gender-based disadvantage now recognised, such as the inability to work; the inability to own property; the inability to vote; the inability to obtain divorce; the receipt of lower pay for equal work; the inability to borrow money; the imposition of a 'glass ceiling'; and subjection to sexual harassment and sexual violence – all forms of harm imposed on women for no reason other than that they are women. Lord Millett's comment also implies that gender-based harm, even if recognised, is not serious enough to amount to persecution. Implicitly, his Lordship did not conceptualise private forms of harm, such as domestic violence, as harm which should be addressed by the international community alongside long-recognised forms of 'public' harm, such as imprisoning individuals because of their political opinion, religion or race.

B. After Islam; Ex parte Shah

Islam; Ex parte Shah is not a 'floodgates' case. The Law Lords were careful to note at several points in their judgments that the case turns upon its facts: while the claimants were successful as Pakistani women, this does not mean that all Pakistani women will be successful in the future.[86] Each case must be examined on its merits; a successful claim requires satisfaction of all elements of the definition. The presence of a reasonable internal flight alternative and the

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83 This is significant in the Australian context, as it is necessary for the decision-maker to determine the identity of the persecutor in order to determine why the agent was motivated to persecute the claimant. This in turn enables the decision-maker to determine whether the persecution is for a Convention reason, see *Ram v Minister for Immigration and Ethnic Affairs*, note 52 *supra* at 568, per Burchett J; approved in *Applicant A v Minister for Immigration and Ethnic Affairs* , note 13 *supra* at 284, per Gummow J.

84 *Islam; Ex parte Shah*, note 7 *supra* at 1034-5, per Lord Hoffman.

85 *Ibid* at 1042, per Lord Millett.

86 See, for example, *Islam; Ex parte Shah*, *ibid* at 1018, per Lord Steyn.

availability and quality of state protection in a particular area of territory are examples of facts that might mitigate against an otherwise successful claim. Nonetheless, some parts of the reasoning adopted by the majority will have significant implications for the way in which decision-makers approach gender-based asylum claims.

Apart from challenging the way we conceptualise constituent parts of the definition of 'refugee' in Article 1A(2), namely, what constitutes persecution and the agents of harm, the importance of *Islam; Ex parte Shah* for decision-makers is twofold. First, the judgment is an example of the way in which decision-makers can benefit from cross-jurisdictional discourse in difficult areas, a feature which also encourages the evolution of high quality decision-making. In analysing the pertinent principles of law, *Islam; Ex parte Shah* canvasses case law from other jurisdictions. Both Lords Steyn and Hoffman discuss the Australian case *Applicant A v Minister for Immigration and Ethnic Affairs*,[87] the US *Acosta* case[88] and the Canadian case *Canada v Ward*[89] among others. The judgments provide an overview of relevant law from other common law jurisdictions, refer to independent, non-governmental organisations reports, and cite the views of prominent refugee law scholars.[90]

More importantly, implications arise for gender-based claims from the Law Lords' discussion of state complicity and its relationship to persecution. The majority decision signals a move towards breaking down the conceptual barriers created by the public/private dichotomy in the context of refugee law. This is achieved by attributing state responsibility for traditionally 'private' harm.

To date, there have not been any reported judicial references to the *Islam; Ex parte Shah* decision by United States or Canadian courts. In New Zealand however, the Refugee Status Appeals Authority has recently adopted the formula employed in *Islam; Ex parte Shah,* that defines 'persecution' as composed of two separate but essential elements: risk of serious harm and failure of State protection.[91] In the United Kingdom, several cases have explored the ramifications of the Law Lords' judgments. However, the case law has tended to focus on the House of Lords' treatment of the issue of state complicity rather

87 Note 13 *supra*.

88 Note 39 *supra*.

89 Note 41 *supra*.

90 See, for example, *Islam; Ex parte Shah*, note 7 *supra* at 1022-5, per Lord Steyn, at 1033, and per Lord Hoffman.

91 *Refugee Status Appeals Authority Reference 71427/99*, at paras 67 and 112.

than commenting upon the ramifications of their reasoning for gender-based claims.[92]

In Australia, the case has been considered in detail at least three times at the Federal Court level.[93] In *Minister for Immigration and Multicultural Affairs v Ndege* ("*Ndege*"), Justice Weinberg distinguished it from the case then before him.[94] In *Khawar v Minister for Immigration and Multicultural Affairs* ("*Khawar*"),[95] Justice Branson drew on some of the principles expressed in *Islam; Ex parte Shah* in obiter, particularly in relation to the concept of state responsibility for private harm.[96] The case of *Khawar* was appealed, and has recently been determined by the full bench of the Federal Court in *Minister for Immigration and Multicultural Affairs v Khawar*.[97] Interestingly, the House of Lords decision in *Islam; Ex parte Shah* was central to both the majority and minority judgments in the latter case, indicating that the concepts developed in the English decision have, in some way, begun to take root in Australian case law.

VII. APPROACHES TO GENDER-BASED CLAIMS IN AUSTRALIA

In the Australian context, two divergent approaches to the determination of matters involving gender-based claims have emerged. As mentioned in the

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92 See, for example, *R v IAT and Secretary of State for the Home Department; Ex parte Lupsa*, No CO/4116/98, (High Court Of Justice, 2 July 1999); and *Horvath v Secretary of State for the Home Department* [2000] INLR 15. In the *Horvath* case, Slovakian Roma Milan Horvath and his family had been victims of racial violence. The Court dismissed the appeal, concluding that *Islam; Ex parte Shah* required either some degree of connivance or collusion by the state, or proof that the state was unable to provide protection before victims of violence at the hands of a non-state actor could be granted refugee status. Clearly no state can guarantee the complete safety of its citizens, so state protection will be deemed adequate where an existing criminal justice system affords a degree of protection proportionate to the threat. Asylum cannot be claimed on the basis that the system failed to protect an individual applicant from harm. The House of Lords dismissed Horvath's subsequent appeal, stating that if it can be shown that the state tried to provide protection, a claim for asylum is unlikely to be successful, see [2000] 3 WLR 379: *The Guardian*, 7 July 2000. *Horvath* was distinguished in *Minister for Immigration & Multicultural Affairs v Khawar*, note 10 *supra* at [148], per Lindgren J .

93 The following cases also refer to *Shah; Ex parte Islam* but either do not consider it in detail or do not focus on persecution in the manner addressed by this paper: *Tin v Minister for Immigration & Multicultural Affairs* [2000] FCA 1109 (Unreported, Sackville J, 14 August 2000); *Sarrazola v Minister for Immigration & Multicultural Affairs* [2000] FCA 919 (Unreported, Madgwick J, 23 August 2000), which dealt with the purpose of the Refugees Convention; *Jayawardene v Minister for Immigration & Multicultural Affairs* [1999] FCA 1577 (Unreported, Goldberg J, 12 November 1999), citing both *Shah; Ex parte Islam* and *Applicant A*, note 13 *supra*, as authority for the proposition that a particular social group cannot be defined by reference to fear of persecution alone. Justice Branson also referred briefly to *Islam; Ex parte Shah* in *Hellman v Minister for Immigration & Multicultural Affairs* (2000) 175 ALR 149 at [20].

94 Note 8 *supra*.

95 Note 9 *supra*.

96 Justice Branson referred to her judgment in *Khawar* in *Mendis v Minister for Immigration & Multicultural Affairs* [2000] FCA 114 (Unreported, Branson J, 18 February 2000), at [13] and in *Hellman v Minister for Immigration & Multicultural Affairs*, note 93 *supra*, at [20] and [39].

97 Note 10 *supra*.

previous section, this divergence is the result of the adoption of either a broad or a restrictive approach to the issue of state responsibility. As outlined by Justice Moore in *Faddoul v Minister for Immigration and Multicultural Affairs*:

> One present source of uncertainty [as to whether the treatment of women might constitute persecution] is precisely what is comprehended by the notion of 'for reasons of' in the Convention as it might relate to women if they are exposed to a risk of domestic violence. One approach to the issue is to view that risk as one deriving not from membership of a particular social group, one characterisation of which is that members are women, but rather from the circumstances personal to the woman and the relationship in which the violence would occur. Another is to take a broader view and approach the issue on the footing that even if the violence might arise in the context of a particular personal relationship, it occurs against a backdrop of the woman concerned being provided only limited or no state protection.[98]

This divergence in approach is demonstrated by two recent decisions of single judges of the Federal Court of Australia, *Ndege*[99] and *Khawar*.[100] Both cases involved women victims of domestic violence, from Tanzania and Pakistan respectively, societies in which women occupy low social status, domestic violence is rife and there are few, if any, support structures in place for women victims of spousal abuse.

In *Ndege*, the applicant endured beatings and threats of violence from her husband. She claimed she did not know how to seek assistance from the police. Some months into a visit to Australia, she left her husband and took her three children to seek shelter and assistance at a women's refuge. Ten days later she obtained a Crimes (Family Violence) intervention order against her husband. During the hearing she claimed that marital violence is considered normal in Tanzania, such that the authorities would have refused to take action if she had made a complaint. Further, as her husband was a professional man and a former senior bureaucrat, he would have been able to bribe the police and judiciary. If returned to Tanzania, she feared her husband's revenge for leaving him, and ostracism by her family and society for failing to comply with Tanzanian custom.

The Refugee Review Tribunal ("the Tribunal") in *Ndege* found that there was a real chance the claimant would suffer serious harm at the hands of her husband if she were returned to her country of origin, and that such harm would constitute persecution for a Convention reason, namely, by reason of her membership of the particular social group of 'married women in Tanzania'.[101]

On appeal to the Federal Court,[102] Justice Weinberg overturned the Tribunal's decision, holding that the Tribunal's conclusion (that the state was the source of the Refugees Convention-related persecution) was not properly open to it. Justice Weinberg conceptualised the harm as a traditional 'private' harm by requiring that the perpetrator of the violence, (the applicant's husband), be motivated by a Convention reason in order to establish a sufficient nexus

98 [1999] FCA 87 (Moore J, 12 February 1999).

99 Note 8 *supra*.

100 Note 10 *supra*.

101 *Ibid.*

102 RRT decisions may be appealed to the Federal Court for judicial review (as distinct from merits review) under Part 8 of the *Migration Act* 1958 (Cth).

between the harm suffered and the Refugees Convention.[103] His Honour held that:

> Tanzania itself was found by the RRT to be the source of the respondent's "well-founded fear of being persecuted". Absent a finding that the respondent's husband was motivated in his violence towards her by one or more of the matters set out in Art 1A(2) of the Refugees Convention, there was no evidence or other material before the RRT capable of giving rise to that conclusion.[104]

His Honour commented further that his finding was:

> in some respects, strengthened by the decision of the House of Lords in *Islam*. In each appeal before their Lordships the husband of the particular appellant was identified as the persecutor. What made their conduct Refugees Convention *related* persecution was the motivation underlying that conduct. That motivation was found to be Convention related, and not private in nature.[105]

With respect, this misconstrues the approach taken by the Law Lords.[106] The majority in *Islam; Ex parte Shah* held that a sufficient nexus between the harm suffered and the Refugees Convention arose where the persecutory conduct also involved the state's failure to protect, a failure motivated by a Convention reason. The husband was not the sole relevant agent of harm; the persecution was the state's act of withholding protection, in combination with the physical abuse.

Justice Weinberg's approach can be contrasted with that taken by Justice Branson in *Khawar* and with that of the House of Lords in *Islam; Ex parte Shah*, (an approach subsequently approved by a majority of the Full Federal Court in *Minister for Immigration and Multicultural Affairs v Khawar*[107]). The applicant in *Khawar* was a Pakistani woman who claimed to have been the victim of domestic violence at the hands of her husband and (to a lesser extent) her husband's family. There was evidence that domestic violence was officially tolerated in Pakistan in the sense that no state assistance was forthcoming, despite the victim's repeated requests for help. The applicant claimed that she sought the assistance of the police on four occasions, when she went to lodge reports about her husband's violence. On each occasion, the applicant was not taken seriously, met with refusal to document her complaint, or had her complaints recorded inaccurately. Finally, after an incident in which her husband and his brother poured petrol on her clothing and threatened to set her alight, she was told by a police officer that women were the cause of the problem, and that she should 'go and do her own work'. The applicant claimed that, following this experience, she knew that she would never get any help from the police.[108]

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103 Relying on *Ndege*, the RRT later found that for a state to be complicit in private persecution that persecution must be for a Convention reason. Since this was not the case, the applicant did not have a well-founded fear of persecution for a Refugees Convention reason. The Federal Court dismissed an appeal arising from the case on unrelated grounds: *Khan v Minister for Immigration & Multicultural Affairs* [2000] FCA 105 (Sundberg J, 15 February 2000).

104 *Minister for Immigration & Multicultural Affairs v Ndege*, note 8 *supra* at [50].

105 *Ibid*, at [76]. (Original emphasis).

106 See also the comments of Hill J in *Minister for Immigration & Multicultural Affairs v Khawar*, note 10 *supra*, at [71].

107 *Ibid*.

108 *Khawar v Minister for Immigration & Multicultural Affairs*, note 9 *supra* at 192.

The Refugee Review Tribunal accepted that the applicant was a victim of violence, but found that the reason or motivation behind the violence arose out of the personal relationship between the applicant and her husband. The Tribunal did not accept that the applicant's husband was targeting her for reasons of her membership of a particular social group, such as 'women', or 'married women in Pakistan'. The Tribunal noted:

> She was being harmed and harassed *because of the particular dynamics of the family into which she was married and the circumstances of her marriage.* Her husband treated her well during the first five years of marriage. There is no evidence that he ever tried to harm her in any way during that period. It was only when he re-established contact with his family that he started to resent the applicant for causing him to sever his relationship with his family over the previous five years.[109]

In the initial appeal to the Federal Court of Australia, the applicant argued that persecutory conduct could qualify as Convention-based persecution even though the persecutor as an individual had no discriminatory motive, provided that the state withheld effective protection for a Refugees Convention reason.[110] The applicant also argued that a group defined in terms of gender, for instance, 'married women in Pakistan', can qualify as a particular social group within the meaning of the Refugees Convention.[111]

In *Islam; Ex parte Shah* it was said that:

> [t]he fact that those who take advantage of the situation to use violence against members of the group do so for their private purposes does not matter; the members should be regarded as the victims of persecution by the state. To qualify for refugee status, however, [the members] must still prove that the state authorities have withdrawn their protection for a Convention reason.[112]

Similarly, in *Khawar*, Justice Branson indicated that the refusal or failure of state law enforcement officers to take steps to protect members of a particular social group from violence is itself capable of amounting to persecution under the Refugees Convention.[113] Her Honour found that the motivation of the claimant's husband to harm her would be irrelevant in such a case. Justice Branson concluded that it therefore would have been open to the Tribunal, if it had accepted the evidence of the applicant and if it had found that 'women', or 'married women' constituted a particular social group in Pakistani society, to decide that the applicant had a well-founded fear of persecution by the Pakistani police by reason of her membership of a particular social group.

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109 *Ibid* at 192-3. (Emphasis added).

110 *Ibid* at 194.

111 *Ibid*. This submission was not contested by the respondent.

112 *Islam; Ex parte Shah*, note 7 *supra*, at 1045, per Lord Millett. Lord Steyn, in the majority, made similar remarks in obiter. All three Law Lords were in agreement as to the possibility that the state may persecute members of a group by openly withdrawing protection. However Lord Millett went on to find that gender was not a sufficient ground of discrimination.

113 *Khawar v Minister for Immigration and Multicultural Affairs*, note 9 *supra* at 198.

On appeal to the Full Federal Court, the majority agreed with and expanded upon the reasoning of Justice Branson.[114] Justice Lindgren, with whose reasons Justice Mathews agreed, said:

> With respect, I agree with her Honour that the RRT erred in thinking that a failure of the state to protect any particular social group of which Ms Khawar was a member was necessarily rendered irrelevant by the RRT's finding that she feared violence from her husband whose motivation resided in private, family considerations.[115]

The Tribunal's approach was found to be narrower than that required by the definition of 'refugee' in the Refugees Convention. In reaching this conclusion, the majority of the Full Court drew extensively upon the reasoning of the House of Lords in *Islam; Ex parte Shah*. In particular, Justice Lindgren expressly endorsed the approach of the majority to the question of causation; the majority of the House of Lords had held that it may be "satisfied by a pattern of violence for which the immediate motivation was personal, combined with denial of state protection".[116] The majority in the *Khawar* appeal accepted that "persecution may consist of the effect of the conduct of two or more persons, only one of whom may be moved by a Convention reason".[117]

The majority in the *Khawar* appeal went even further than the House of Lords by specifically identifying both the persecution and the persecutor. In exploring the nature of the persecution feared by Mrs Khawar, Lindgren J identified two approaches to the question of persecution: persecution consisting of the conduct of the state alone and persecution consisting of a combination of the serious harm committed by her husband and the state's failure to protect her from that harm. His Honour found that, taking either approach, the Tribunal had erred when it decided that the state's lack of protection was irrelevant. According to the first approach, Mrs Khawar feared violence from her family in the context of a lack of state protection. Alternatively, Mrs Khawar feared violence from her husband and his brother for 'personal' reasons combined with "the husband's and brother's knowledge that the state would not protect her from them for reason of her membership of a particular social group".[118]

Interestingly, Lindgren J preferred the first approach, characterising the relevant persecutor as the state and the relevant persecutory conduct as the state's failure to protect. His Honour stated that the relevant persecutory conduct should be defined as:

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114 In *Bariah v Minister for Immigration and Multicultural Affairs* [2000] FCA 1253 (Unreported, Moore J, 6 September 2000), the court referred to both *Khawar* cases as providing a possible avenue of argument before the RRT, but the application in the case was dismissed as incompetent. The initial case was heard by the RRT prior to the *Khawar* judgments.

115 *Minister for Immigration and Multicultural Affairs v Khawar*, note 10 *supra* at [112], per Lindgren J.

116 *Ibid* at [135], per Lindgren J.

117 *Ibid* at [136], per Lindgren J.

118 *Ibid* at [137] and [150].

> the state's systemic failure to protect the members of the particular social group in certain classes of situation. It would be irrelevant that the state was not motivated by feelings of enmity or malignity. The husband's motivation would be irrelevant: his violence would not be the persecutory conduct and would be relevant only as providing the occasion of an instance of persecution by the state.[119]

Whereas the House of Lords in *Islam; Ex parte Shah* did not precisely identify the persecution and the persecutor in that case, the majority in the *Khawar* appeal identified both. While some may argue that Lindgren J's judgment stretches the conceptual boundaries of the Refugees Convention beyond what was originally intended by the framers, the majority's analysis sits comfortably with existing principles of Australian refugee law. In particular, the decision in the *Khawar* appeal reinforces the principle that the term 'persecution' is a broad one, as outlined by Justice McHugh in *Applicant A v Minister for Immigration and Ethnic Affairs*.[120] In relation to motivation, the majority drew on the High Court's judgment in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*,[121] and that of the Federal Court in *Ram v Minister for Immigration and Ethnic Affairs*,[122] in agreeing first, that neither enmity, malignity nor antipathy are essential elements of the motivation of the persecutor, and secondly, that persecutory conduct must be motivated by the perception of some particular characteristic or trait belonging to a group and all its members. According to Lindgren J:

> [A] state perception of a particular social group as 'inferior', 'less deserving' or 'second class' by reference to the rest of society, and, in particular, a view of members of the group as not possessing the same human rights as the rest of society or, if possessing them, as not entitled to have them enforced and protected to the same extent as the rest of society, would constitute a motivation that would be entirely consonant with the Convention's definition and preamble.[123]

Applying existing principles of refugee law to the group 'women' could at first glance be seen to have far-reaching consequences, given that women constitute approximately half of the world's population and experience discrimination (at least to some degree) in most societies. However, the Full Federal Court's decision in the *Khawar* appeal does not open the 'floodgates' to gender-based claims. This is highlighted by Justice Lindgren's concluding comments:

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119 *Ibid* at [124].

120 Note 13 *supra*, at 258, per McHugh J. Justice McHugh stated that "[p]ersecution for a Refugees Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Refugees Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group".

121 Note 15 *supra*.

122 Note 52 *supra*.

123 *Minister for Immigration & Multicultural Affairs v Khawar*, note 10 *supra* at [141], per Lindgren J.

> [T]he fact that the police have failed to protect a woman from her husband's violence will not necessarily provide the bridge between the state and privately motivated harassment. Firstly, the failure may be atypical. Secondly, it may be due to the attitude or ineptitude of a particular police officer. Thirdly, it may be due to systemic inefficiency. Fourthly, the police may be reluctant, for good or bad reason, to become involved in a particular domestic dispute. Unfortunate as the woman's position would be, these various explanations (and perhaps others) would serve to displace any suggestion that she was a refugee as defined. Something more is required. In my view, that "something more" would be satisfied at least by a sustained or systemic absence of state protection for members of a particular social group attributable to a perception of them by the state as not deserving equal protection under the law with other members of the society, whatever the origin or explanation of that discriminatory perception might be.[124]

However, Justice Hill in a dissenting judgment concluded that there was not a sufficient nexus between the physical harm feared by Mrs Khawar from her abusive husband and a Convention reason for persecution. His Honour said:

> I think there is a difficulty in the present case in characterising the persecution suffered by the appellant as caused by anything other than the personal characteristics of the relationship in which the appellant found herself. I do not think that a common sense approach would lead to the conclusion that the situation the applicant found herself in, and the situation in which she might find herself were she repatriated to Pakistan, would warrant a finding that she was persecuted just because she was a woman. No doubt the fact that she was a woman had a part to play in the alleged persecution, both because it was the foundation of her marriage to an alcoholic and abusive husband and because of the fact that she was a married woman meant that the police offered her no assistance. But I do not think that it is correct to say in all the circumstances that her persecution was by reason of her membership of any particular social group, however defined.[125]

His Honour also expressed doubt over whether 'women in Pakistan' were capable of constituting a particular social group within the meaning of the Refugees Convention, such that the harm feared by Mrs Khawar could be said to be because of her membership of the group. According to Justice Hill: "[a]ll women in Pakistan are not potentially subject to the violence which can constitute persecution. This has only to be stated to be accepted."[126] This comment resonates with Lord Millett's observation in *Islam; Ex parte Shah*, that "it is difficult to imagine a society in which women are actually subjected to serious harm simply because they are women".[127] Arguably, both approaches display an overly narrow conception of 'persecution'. While not all women in Pakistan may be married to violent husbands, all are potentially at risk of numerous other forms of gender-based harm commonly found in patriarchal societies. This risk is obviously exacerbated in a society where the state deliberately withholds protection from women who experience harm in the 'private' sphere.

It is interesting to attempt to identify the precise point at which the approach taken by Justice Hill diverges from that of the majority of the Full Court in *Khawar*. The fact that Hill J upheld the Tribunal's decision suggests that his

124 *Ibid* at [160].
125 *Ibid* at [53].
126 *Ibid* at [56].
127 *Islam; Ex parte Shah*, note 7 *supra* at 1042, per Lord Millett.

Honour was of the opinion that the facts of the case did not suggest that the state of Pakistan was tolerant of, let alone complicit in, domestic violence towards women. It seems that while his Honour generally agreed with the majority on questions of legal principle, he differed in his application of those principles to the facts. Justice Hill emphasised that mere inertia on the part of the state is not enough to constitute 'persecution' by it. In his Honour's view, without a positive government policy requiring police to 'ignore calls for help' the requisite motivation to persecute has not been shown.

But, employing the majority's analysis, the material point is not whether all the members of the group 'women' face a real chance of persecution, but how the state responds when an individual member experiences harm, and whether the harm is condoned because it is inflicted on a woman. It is this question that should have been addressed by the Refugee Review Tribunal.[128]

It is clear from the majority judgments in *Islam; Ex parte Shah* and the *Khawar* appeal that the relevant persecution is the failure of the state to protect, and that the persecutor is the state. In this way, the approach taken by the majority in both cases demonstrates a willingness to look beyond the acts of the perpetrator of the physical violence, and to take a broader, more contextualised approach when assessing an applicant's claim. In conceptualising 'persecution' as incorporating the withholding of state protection, the judgments place the harm feared by women squarely in the public realm instead of restricting it to a domestic setting as a purely 'private' harm.

VIII. CONCLUSION

The increasing recognition of gender issues in refugee jurisprudence creates new challenges for decision-makers operating within a traditional legal framework. This is particularly so in matters where decision-makers are confronted with claims of serious harm committed against women in the home, rather than by state actors. Clearly, the purpose of the Refugees Convention is to protect those in fear of serious harm who cannot access protection in their own state. Despite this, claims involving private violence against women have been rejected on the basis that the harm feared does not amount to persecution within the meaning of the Refugees Convention. This failure can be attributed in part to the pervasiveness of a gendered division between public and private forms of harm.

In the fifty years since the Refugees Convention was framed, there have been significant developments in our understanding of the role of gender in society. However, a general recognition of the types of issues which arise when gender and refugee law intersect has not yet resulted in a clear or consistent approach to dealing with them when they arise in practice. This is particularly so in cases

128 The Full Court's decision in *Minister for Immigration & Multicultural Affairs v Khawar*, note 10 *supra*, is currently the subject of a special leave application to the High Court.

involving the requirement of Convention-related persecution found in Article 1A(2).

The recurring question in such cases (where female applicants fear private harm) is whether the harm is personal to the relationship, or whether it occurs for a Convention reason. Case law often focuses on how the state is *unable* to provide protection, whether due to the ubiquity or omnipotence of a non-state agent, a lack of an effective state police service, or the existence of civil unrest and a lack of formal governance within the territory in question. It is the other limb of the test in Article 1A(2), an *unwillingness* to protect, that may nevertheless be invoked to establish a connection to the Refugees Convention. The claim is increasingly made that the unwillingness to protect in cases of domestic violence arises from discrimination against women, and their vulnerable social and economic status. In the *Khawar* appeal and *Islam; Ex parte Shah*, the claimants were deprived of protection from serious harm because their state of origin was unwilling, rather than necessarily unable, to protect them, and that unwillingness stemmed from the fact that the claimants were members of the particular social group 'women'. To accept that such conduct constitutes persecution within the meaning of the Refugees Convention is to recognise the reality of women's lives in societies where oppression of, and violence against, women is commonplace and condoned by the state.

While *Islam; Ex parte Shah* does not bind Australian courts, the approach it offers seems to have been accepted by the Full Federal Court. The judgements in *Islam; Ex parte Shah* offer a way to approach cases involving gender-based persecution, not only domestic violence but also practices such as forced marriage, female genital mutilation, and serious punishment for transgressing social mores. The practical implications arising from the decision are yet to be fully realised. Hopefully the recognition that states can be held responsible for private harm will better enable decision-makers to negotiate the difficult issues arising at the intersection of refugee law and gender in relation to persecution, in a way which fulfils the broad humanitarian purpose of the Refugees Convention.