Sarah van Walsum Honorary Lecture

Legal change from the Bottom up

The Development of Gender Asylum Jurisprudence in the United States

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As a human being Sarah Van Walsum was extraordinary: kind, both incredibly smart and generous. A major portion of Sarah's scholarship and advocacy focused on the gender-discriminatory nature of migration laws – and as you will see, this has been the major focus of my work and the work of our clinical program. For example, Sarah worked on achieving independent residency rights for foreign women in the Netherlands – this was a major part of our work, because it meant women did not have to stay in abusive relationships to obtain status. We engaged on this issue in the United States early on, and it was a precursor to our work on domestic violence as a basis for asylum protection, which is the subject of my talk. Sarah also focused on affecting change through work with grassroots organizations, not political parties *per se*, which, as you will see, has very much been the orientation of our work.

We have a history of clinical legal education in the United States, of teaching students to be legal practitioners, and to see how the law in practice – including the operation of legal institutions – transforms doctrine, and *vice versa*. Let me begin my formal presentation here: the transformation of gender asylum law in the United States, as a result of change "from the bottom up."

Overview: Legal Change from the Bottom Up and The Case of Isabella

Legal change is often thought of as change from the top down of the legal hierarchy – change brought about by new legislation, regulations, precedent administrative and federal court decisions, or changes resulting from major impact litigation

The development of gender asylum law in the United States, however, tells a different story – of "legal change from the bottom up" – change generated through the representation of women refugees – telling their stories in evidentiary hearings at the first-tier, resulting in the recognition and granting of these claims, and the building up of pressure for change at higher administrative and judicial levels. Thus, the story that women refugees tell themselves, communicated in the course of hearings, can change the culture of decision-making and be an effective vehicle for meaningful legal change.

In presenting these asylum claims lawyers, in partnership or 'alliance' with their clients, develop narratives in which women can portray themselves not as simple victims, or facing persecution only because of their gender but rather, for example, in cases involving violence in the home – what we call domestic violence – as having feminist political opinions that led to their standing up to their abusers.

The story of the development of American gender asylum law is also one of coalition building for social change – lawyers allying with client-based and other community organizations – and a story of change brought about by cross-border alliances of human rights and refugee rights advocates. It is also a story of the engagement of women in government as well as women in the media.

From the enactment of the Refugee Act of 1980 – U.S. legislation that implemented international refugee treaty obligations under the 1951 UN Refugee Convention[1] into U.S. law – until the 1990s, asylum seekers fleeing gender-violence were routinely denied protection.[2]

[1] United Nations Convention relating to the status of refugees ('Refugee Convention'), 28 July 1951, 189 UNTS 137..

[2] See Deborah E. Anker, Law of Asylum in the United States, Chps. 1, 4 and 5 (Thomson Reuters 2016).

From 1980 until the 1990s, the claims of asylum seekers fleeing gender-based violence such as female genital mutilation (FGM), psychological harm, rape, violence in the home – went unrecognized in U.S. law until advocacy organizations, including our clinical program – the Harvard Immigration and Refugee Clinic ("HIRC")[3] – began representing women asylum seekers in increasing numbers and transforming underlying institutions and the law.[4]

Today, the HIRC, other law school clinics and legal services organizations regularly win cases involving gender-based persecution, including domestic violence.

In January 2013, for example, Isabella, a strong and independent woman who fled violent abuse in Honduras, represented by our Clinic, was granted asylum. At age 13, Isabella was first attacked by Jorge, a suitor of her sister's, when he kidnapped her, dragged her to a hotel room, and brutally raped her. Jorge continued to stalk her for years, kidnapping, beating, and raping her – because in his word, he considered her "my woman'" and "my property." She fled to many places, including the capitol Tegucigalpa, but he threatened her constantly; the police, who believed such attacks were private matters, and that men had superior rights in the home, always released him after arrests. Again and again, wherever she went, Jorge was able to find her.

Isabella refused to submit to Jorge. She went back to school, worked hard, and became a successful and well-respected manager at a local retail chain. She believed she deserved to be treated with respect, as an equal. When Jorge's violence escalated unbearably, Isabella fled her country. For years she lived in the United States in hiding, too traumatized to come forward. Finally, after confiding in a psychologist friend whom she trusted, she was able to apply for asylum, which was granted on the basis of the violence she had suffered and would suffer if forced to return.

Such a result would have been unheard of 30 years ago.

Most gender asylum victories in the United States are won at lower levels of adjudication, either in non-adversarial proceedings before our Asylum Office, as in Isabella's case, or in quasi-adversarial hearings before administrative immigration judges.

At the time of Isabella's Asylum Office interview, the Board of Immigration Appeals (also called "the Board") – which is the administrative appellate body charged with interpreting immigration and asylum law – had not issued a precedential decision on the key question of whether domestic violence can serve as a basis for asylum; regulations, recognizing the possibility of such claims, were never finalized.

Given this dearth of formal law, our Clinic attorneys and other advocates representing individual clients grounded arguments for recognition of gender asylum claims in non-traditional sources, including non-binding instruments, U.S. and international gender asylum guidelines, agency guidances, training materials for adjudicators, legal briefs drafted by women attorneys in the government, decisions by low-level adjudicators, etc.[5]

Through direct representation of hundreds of women fleeing gender-based violence, the HIRC and other advocates not only laid the foundation for changes at higher administrative and

[3] Harvard Immigration and Refugee Clinical Program: http://hls.harvard.edu/dept/clinical/clinics/harvard-immigration-and-refugee-clinical-program/.
[4] For more specific references, see Deborah Anker, Legal Change from the Bottom Up *in* Arbel, Duvergne and Millbank, Gender in Refugee Law from the Margins to the Centre ,4:25, 5:50–1.(Routledge 2013).
[5] See Anker, Law of Asylum, *supra* note 2.

federal judicial levels, but also changed the culture of the relevant immigration agencies, the perspective of hearing judges, in effect creating a body of jurisprudence at the administrative level that, despite its non-precedential nature, has had enormous impact.

After decades of advocacy, in 2014 the Board finally issued a precedent decision in *Matter of A-R-C-G-*[6] recognizing that domestic violence could form the basis of an asylum claim, when State protection is unavailable. This decision has become vitally important for women and children fleeing Central America – where most of the refugees now fleeing to the United States come from.

In an area of law with a shortage of 'hard' sources, the individual representation model is particularly salient, generating its own jurisprudence and creating an environment in which larger change can happen. Continuing to bring gender asylum claims founded on non-traditional sources of law has made novel legal arguments more familiar, compelling, and legitimate to asylum officers, immigration judges, as well as other higher level administrative (the Board) and judicial decision-makers.

The Refugee Convention and Gender-Based Claims in U.S. Asylum Law

Refugee status is governed by the 1951 United Nations Refugee Convention and the 1967 United Nations Protocol Relating to the Status of Refugees. Article 1A of the Refugee Convention defines a 'refugee' as a person who:

> 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Refugee law provides surrogate protection when a State has failed to protect the basic human rights of its inhabitants for a discriminatory reason, such as the person's race, religion, nationality, membership of a particular social group (PSG), and/or political opinion.[7]

Contemporary international refugee law arose out of the same post-Second World War context that produced the major instruments of international human rights law, most fundamentally the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights. International refugee law is an unusual area of international law and international human rights law in that many states, including the United States, fulfill their obligations through domestic legal systems.

Unlike the human rights regime, no international or specific treaty-based agency is formally responsible for the implementation and interpretation of refugee law. Instead the law is formulated by states parties in the course of adjudication of individual claims to protection (with the United Nations High Commissioner for Refugees (UNHCR) playing a critical supervisory role). While this structure has been subject to a great deal of legitimate criticism, it is in many respects one of the system's strengths. Domestic law enforcement allows States to provide substantive remedies within their own borders to real people facing human rights abuses. This is

[6] Matter of *A-R-C-G-*, 26 I.& N. Dec. 388 (B.I.A. 2014).
[7] See James C. Hathaway, (1991) *The Law of Refugee Status*, Toronto: Butterworths.

not human rights law in the abstract, but human rights in action.

Gender-based asylum claims may implicate any of the five grounds in the refugee definition – race, religion, nationality, membership of a particular social group (PSG), and/or political opinion. While some contend that gender should be an explicit ground in the refugee definition, we believe, in the words of UK feminist and refugee scholar, Heaven Crawley, "the obstacles to women's eligibility for refugee status lie not in legal categories per se, but in the incomplete and gendered interpretation of refugee law – the failure of decision-makers to acknowledge and respond to the gendering of politics and of women's relationship to the state."[8]

Of course, it almost goes without saying, that there would be no willingness at this time, on the part of States, to expand the formal grounds for asylum/refugee protection, adding gender as a ground, for example. Indeed the opposite is the case: States are looking for opportunities to cut back any such obligations. But more fundamentally, adding gender or sex to the enumerated grounds of persecution would not solve the failure to address gender-based harm and State inability/unwillingness to provide protection more generally in the assessment of gender-based asylum claims. Gender, properly understood, should pervade the interpretation of every element of the refugee definition.

Thirty years ago, U.S. asylum law, like international law, was so trapped within the public/private distinction – with harms disproportionately affecting women relegated to the 'private sphere' – that rape, for example, was generally understood as an act driven by personal motivations, such as lust or hate, not as a cognizable harm amounting to persecution (and providing a basis for protection).

In one infamous case decided during the period of 1990s civil wars in Central America, a Salvadoran woman who was gruesomely raped and forced to watch her uncle, the chairman of the local agrarian cooperative, hacked to death (while the attackers shouted political slogans), was denied asylum, with the court finding that the rape and trauma imposed on her was of a personal nature.[9] In another case, a woman who was subjected to sexual violence by a colonel in the Polish secret police was denied protection because 'it is clear that he was not "persecuting her". . . . [H]e simply was reacting to her repeated refusals to become intimate with him').[10]

Today, in contrast, rape, assaults that occur in the so-called "domestic shere, and other gender-based acts of violence are frequently recognized as persecutory harms encompassed within the refugee definition. Over the past two decades, advocates, including lawyers at the HIRC, have successfully represented female asylum seekers fleeing such violence and, as I will describe further, this direct client representation model has changed institutional culture and norms, with adjudicators increasingly recognizing gender-based asylum claims.

Advocacy from below: the Context and History of Women's Asylum Claims

Formal changes in the law are slow to emerge. Gender asylum serves as an important reminder that formal law – typically set forth in statutes, in precedent-setting high court or administrative decisions, and in regulations – is not the sole source of legal authority. By

[8] Heaven Crawley, Refugees and Gender: Law and Process (Jordan 2001).
[9] *Campos-Guardado v I.N.S.*, 809 F.2d 285, 288 (5th Cir. 1987).
[10] *Klawitter v. INS*, 970 F.2d 149 (6th Cir. 1992).

bringing individual cases and presenting arguments grounded in informal, non-binding but persuasive sources, our clinic, along with other organizations, has helped shape the thinking of decision-makers, changed the culture of legal institutions, and in effect created a body of American gender asylum law, developed in large part at the ground level.

Most successful gender asylum claims are won before the U.S. Citizenship and Immigration Service's Asylum Office or in the immigration courts, and do not generally result in publicly available written opinions. Thus, these decisions only determine the claim at issue, and the reasoning or principles articulated are not formally binding on any other asylum applications or court cases. The Board of Immigration Appeals has issued precedential decisions in only a few gender-based asylum cases.

Federal courts of appeals issue publicly available precedent-setting decisions, but claims appealed to the federal courts have often been denied because they are based on poorly developed facts, or an incomplete record. Federal courts are required to defer to administrative decision-makers where the decisions reached are supported by what is called the 'substantial evidence' standard. As a result, the visible legal precedents set at the federal level are often based on weak and under-developed claims.

Given this problematic formal legal context, the HIRC and other organizations have, through their advocacy efforts and especially through representation of individual women in asylum proceedings, worked to generate legal authority from sources that are not traditionally considered authoritative. These include non-precedential Board opinions, decisions of individual immigration judges, government briefs, national gender guidelines U.S. Citizenship and Immigration Service training materials that analyze the law and often take progressive positions, in particular on gender asylum.

Gender asylum: The Early Years – 1980s to 1990s

The Board of Immigration Appeals' 1985 decision in *Matter of Acosta*[11] laid the formal foundation for gender asylum claims in the United States and internationally. In that decision, the Board explored the Refugee Convention's ground of membership of a particular social group (PSG), and reasoned that (based on principles that united the other grounds), a PSG is defined by a 'common, immutable characteristic' that 'members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.' The Board explained that a "shared characteristic might be an innate one such as sex, color, or kinship ties." That same year, the UNHCR Executive Committee adopted Conclusion No. 39, recognizing that women asylum seekers who fear harsh or inhumane treatment for gender-based reasons may be considered a PSG under the Convention.

In the late 1980s and early 1990s, collaboration across borders among women's human rights activists, immigration rights advocates, and scholars led to positive changes. During this period, the Women's Refugee Project was formed, growing out of a partnership among the HIRC, Greater Boston Legal Services and the Harvard Law School's Human Rights Program, to advocate in various ways and before different adjudicatory bodies for a gender sensitive interpretation of refugee law. The HIRC started participating actively in the training of asylum officers and indirectly in the development of training materials.

[11] *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

The international women's rights movement had shown gender asylum advocates the importance of challenging the public/private distinction, of recognizing that harms committed against women in the so-called private sphere were of public concern and should be considered serious human rights violations embraced within the meaning of persecution under the Refugee Convention.[12] During this period, asylum and refugee lawyers campaigned for U.S. and international tribunals and courts to recognize gender violence as persecution and feminism as a political opinion meriting protection.

In 1993, Canada issued its historic Gender Guidelines[13] – guidances to administrators – that served as a model for the United States and other countries around the world. That same year, 1993, a United States federal court in *Fatin v I.N.S.*[14] denied asylum to an Iranian woman who refused to wear the chador, a traditional Islamic veil she considered a sign of support for the Khomeini government that she opposed. The HIRC filed an amicus or friend of the court brief to support her claim and, when her claim was denied, seized upon language in the court's decision that U.S. law calls "dicta," that is commentary of the court that is instructive but not determinative of the decision. Such dicta in the *Fatin* decision reasoned that feminism could constitute a political opinion, that gender could define a PSG, and generally that women who were being subjected to serious abuse because of their gender are eligible for protection. Attorneys at the HIRC highlighted this analysis and used it to support gender asylum claims, as did other attorneys advocating in other cases.

This reasoning in the *Fatin* decision was applied to other gender claims, laying the groundwork for asylum for thousands of women based on PSG, political opinion, (feminist beliefs), as well as on other grounds. Other parts of the court's reasoning in *Fatin* (for example. that it can be persecution for a person – in the court's reasoning, a feminist – to be forced to violate her fundamental beliefs), set the stage for recognition of emotional and psychological harm as a dimension of persecution, which is critical to the recognition of the claims of women, as well as of children and other asylum seekers.

During this same period, following the first coup against Haitian President Aristide in 1991, the HIRC, among other organizations, began representing Haitians who had fled their country and were seeking asylum in the United States. Among our clients were a large number of women who told stories that clearly revealed the gendered nature of the harm they had suffered in Haiti.

The Board addressed the issue of gender-based violence in Haiti in its1993 decision in *Matter of D-V-*,[15] granting asylum to a Haitian woman who had been raped and beaten in her home by members of the security forces because of her support for the deposed President Aristide. The decision, however, was initially not precedential – unpublished and unavailable – and as such was effectively "hidden." It was only through the stalwart efforts of immigration

[12] See Deborah Anker, (2002) 'Refugee law, gender, and the human rights paradigm', Harvard Human Rights Journal, 15: 133–54.
[13] Canadian Immigration and Refugee Board Chairperson (1993) *Guideline 4: women refugee claimants fearing gender-related persecution: Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act*, 9 March 1993. Updated 13 November 1996. Online: www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/GuideDir4.aspx (accessed 7 June 2013).
[14] *Fatin v I.N.S* 12 F.3d 1233, 1241 (3d Cir. 1993).
[15] *Matter of D-V-*, 21 I&N Dec. 77 (B.I.A.1993).

professors and law clinics around the country that the Board in 1995 agreed to establish the *D-V-* decision as precedent.

In 1995, the HIRC joined with the Center for Constitutional Rights, one of the country's most prominent civil rights legal organizations, New York University Law School's immigration clinic, the international women's human rights organization MADRE and a coalition of women's groups within Haiti to gather affidavits from Haitian women who were being systematically raped and beaten in retaliation for their actual and imputed political beliefs. The coalition submitted a lengthy report on the human rights abuses to the Inter-American Commission on Human Rights, which then reviewed the facts and recognized that rape constitutes torture, even outside the detention context. This was the first recognition of rape as torture by an international human rights body and it provided a basis from which to argue, in the asylum context, that rape is persecution, (if rape is torture, it meets the lower threshold of harm in the term persecution).[16]

Mid to late 1990s: gender guidelines, *Kasinga*, Decisions from Other Countries

Through collaboration across the border with advocates in Canada, as well as U.S. government officials, the United States issued its own gender asylum guidelines in 1995. The U.S. gender guidelines,[17] which were initially drafted by the HIRC, incorporated human rights standards and addressed both procedural issues and substantive standards in the adjudication of women's asylum claims. In order to build momentum for these guidelines before they were issued, the HIRC attorneys worked with female journalists to highlight the fairness and equity issues at stake; the New York Times and other major newspapers ran front-page articles spotlighting the individual stories of women represented by the HIRC who were seeking asylum because of gender-based persecution.

Although these guidelines were sub-regulatory pronouncements by the United States government, they were cited and relied upon by the Board of Immigration Appeals and federal courts in precedential decisions. As a result, the guidelines became normative and influential. Following the example of Canada and the United States, several other State parties to the Refugee Convention, including Australia and the United Kingdom, subsequently developed similar guidelines.

In 1996, The Board issued its second precedential, ground-breaking gender asylum decision, *Matter of Kasinga*,[18] which recognized female genital mutilation (FGM) as a basis for an asylum claim. Around the same time, high courts and tribunals in other countries, including New Zealand, the United Kingdom, and Australia, issued positive and ground-breaking gender asylum decisions.[19] These decisions largely focused on the failure of countries to protect

[16] Inter-American Commission on Human Rights (1995) *Report on the Situation of Human Rights in Haiti*. Online: www.cidh.org/countryrep/EnHa95/EngHaiti.htm (accessed 30 September 2013).

[17] Coven, Phyllis. INS Office of International Affairs. *Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Asylum Gender Guidelines)*, Memorandum to INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p.

[18] *Matter of Kasinga* 21 I&N Dec. 357 (BIA 1996).

[19] See e.g., *Regina v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] 2 All ER 545

women from gender-based violence and highlighted the bifurcated nature of persecution, i.e. that persecution involves two prongs – serious harm and failure of state protection – recognizing claims in which States either cause the harm or fail to protect from harms caused by non-state actors.

Late 1990s to 2000s: *Rodi-Alvarado* and the Changing Landscape of Gender Asylum

Then in 1999, a lightning rod Board decision, *Matter of Rodi Alvarado*[20], complicated the landscape. In a highly controversial precedential decision, the Board reversed the lower court immigration judge decision and denied asylum to Rodi Alvarado, a Guatemalan woman fleeing a violently abusive relationship. The Board's decision called into question whether domestic violence could serve as the basis for an asylum claim; the issue of whether gender could define a particular social group was also left in limbo.

As a result, advocates increasingly began relying on alternative legal theories, winning claims brought under other grounds, including political opinion and religion. Shortly after denying Rodi Alvarado's claim, the Board, in a precedent decision, *Matter of S-A-*[21] , granted asylum to a young Moroccan woman who was severely physically abused by her father. (The Board decided that case based on the religion ground: the daughter flouted the conservative Muslim rules her father imposed).

Our clinic's advocacy efforts included a major amicus – friend of the court – briefing signed by 187 organizations and law professors – that resulted in the then-Attorney General vacating the Rodi Alvarado decision, with orders for the Board to issue a new decision in light of proposed regulations, which had not been and indeed never were formally adopted. Importantly, women within the relevant government agency, the Department of Homeland Security, advocated for the Department to take a more favorable position. The Rodi Alvadrado case has a long procedural history and was undecided until 2009, when the case was sent back to the immigration judge, who granted asylum. However, the immigration judge only formally granted the claim, with no reasoning or explanation, and therefor the decision only applied to Rodi-Alvarado, not to any of the other hundreds of women whose cases were still pending. For ten years, while the Rodi Alvarado case was left undecided, HIRC lawyers as well as others continued winning many individual gender asylum cases based on gender as a PSG, race, religion, and especially on feminism as a political opinion.

As we won case after case at lower levels, we put pressure on the Board. Once the Chair of the Board was invited to speak to our refugee law class and I asked bluntly: could the Board issue another decision, rejecting the notion that violence in the domestic sphere could be persecution, given the build-up of contrary decisions in the lower immigration courts? He answered no. We knew we were on our way to a major, favorable decision: *Matter of A-R-C-G.*

(HL) (UK).

[20] *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999); *Matter of R-A-, 22* I&N Dec. 906 (AG 2001); *Matter of R-A-, 23* I&N Dec. 694 (AG 2005); *Matter of R-A-*, 24 I&N Dec. 629 (AG 2008) (IJ 2009).

[21] *Matter of S-A-* [*S-A-*], 22 I&N Dec. 1328 (BIA 2000).

2009 to the present: The precedential decision of *Matter of A-R-C-G-*

In 2012, the Board officially opened the way for formal change – asking for *amicus* – again, friend of the court – briefing on the question of whether domestic violence can serve as the basis of an asylum claim, We wrote the lead brief for the national organization of immigration lawyers, the American Immigration Lawyers Association.

And finally, two years later – in 2014 – the Board issued a precedent decision in the *Matter of A-R-C-G-* case, recognizing that serious physical harms committed in the context of a domestic relationship can constitute persecution where State protection is unavailable, and that the PSG ground can apply in such cases. The Board's formulation is convoluted: "married women in intimate relationships who cannot leave." We did not succeed in establishing one of our major principles, that gender itself could define a PSG –a principle the Board had accepted back in 1985 with *Acosta* and then backed away from – but we won a key point: that violence based on gender in its private though most ubiquitous setting – domestic relationships – could be the basis for protection.

Conclusion: The Representation Model and 'Strategic Optimism'

The development of U S gender asylum law tells an unusual story of progressive legal change. The traditional story of legal change is one of litigation or major legislation first, that then opens the door for change at the ground level. But the history of gender asylum demonstrates a legal transformation from the ground up, achieved through persistent work representing individuals at the first tier of the determination process. There is now a deep tradition of adjudicators recognizing gender-based asylum claims, including domestic violence claims. Indeed there is now a ground-level gender asylum jurisprudence that is having significant impact on other aspects of refugee law and decision-making institutions, including at higher levels.

This transformation of the law was brought about in part by large-scale representation of individual clients, advocacy on the ground with NGOs, people in government, and women in the media, who highlighted the issues of fairness and equality central to the treatment of gender-based asylum claims.

And based on this work, colleagues at our clinic, working along with others, have forayed into new areas, for example, developing a new case law that comprehends the long-term and persecutory effects of the Guatemalan genocide targeted at indigenous people, as well as the special requirements and the need for a refocused asylum jurisprudence for children asylum claimants.

I hope this talk provides an example – in the words of the founder of our law school's clinical programs, the late Professor Gary Bellow[22] – of how 'strategic optimism' and direct representation and work with clients – extraordinary, inspiring survivors – can be a powerful means of legal and social change, even as we learn to tolerate all the ambiguities associated with our sometimes limited formal and 'suspended' victories.

[22] Gary Bellow, (1996) 'Response essay: Steady work – a practitioner's reflections on political lawyering', *Harvard Civil Rights-Civil Liberties Law Review*, 31(2): 297.