

African Narratives and American Justice: Merging Law and Culture in Past FGC-Based Asylum Claims

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Female genital cutting and US asylum law have a short but meaningful history together—the 13 years since *Kasinga*, the landmark case that set the precedent for asylum claims on the grounds of a fear of FGC—have provided significant case law, and thus, opportunity for the courts to use such cases as a moment to offer clarity and direction on the way FGC should be understood within the narrow confines of US asylum law. Unfortunately, despite the existence of a complete cannon of law dedicated to claims of asylum status, the volume of cases has produced more confusion than it has clarity. As immigration judges sift through past cases and legal instruments which govern the asylum process, they often do so in a way that is inconsistent, and leaves evaluators and practitioners on all sides left to make sense of the complicated legal narrative.

Specifically, I am looking at a subsection of FGC-based asylum cases, involving women who have already undergone FGC. Whereas much of the prior case law and popular thinking about asylum law has generally meant we are in a position to help women avoid undergoing the practice, the cases I'm looking at here are different—they have already endured a FGC procedure. In doing so, I hope to reveal the limitations to the current international human rights and refugee law scheme—

born in a different time with little sense of the current challenges to individual freedom—and from which I can provide clear recommendations based on both an understanding of FGC and its cultural antecedents as well of asylum law. I pose such recommendations noticing a painful void of clarity in the decision making of these cases.

Ultimately, a careful reading of asylum law and recent cases offers an opportunity to recognize the insufficiencies of the enterprise of universal human rights. Upon inspection, it becomes clear that the motives and the original intentions of humanitarian law, of which asylum law is part, do not reflect the nature of modern challenges to human rights. The legal narrative to which all asylum cases must ascribe to demands persecution be defined by religion, social group membership, race, or political opinion; as a result, legitimate acts of violence can fall outside the scope of asylum. The synapse between FGC and the complex legal cannon of asylum law (which remains largely unchanged from its original form) creates confusion—for practitioners and victims of gender violence alike—about how asylum law can effectively aid those in need. As Karen Musalo, lead counsel for Fauziya Kassindja¹ points out, the *Kasinga* decision came out around the same time the US was hearing other FGC cases, mostly of the past exposure to FGC type I am considering here. The positive decision in the *Kasinga* case, contrasted by the decision not to issue

¹ While the case was titled *In re; Kasinga*, the petitioner's name had been incorrectly spelled by INS officials and later, the BIA. I distinguish the case, *Kasinga*, from the actual person, Kassindja where possible throughout this paper.

protection to those whose claims were based on past persecution “may be read as a repudiation of the position that the past persecution of FGM generally may not form the basis for a viable claim to protection” (Musalo 1998, 294). These early decisions crafted a legal thinking that past persecution ought not have a viable place in a successful asylum claim. Yet, even casual observers of human rights doctrine and US asylum law can find legal arguments that directly challenge that claim. We can point to US law and to international treaties and see that past persecution can and has formed the grounds for a successful asylum claim. Indeed, we can even point to case law to see instances where such laws have been appropriately applied. While the rules and law are clear, their application has been anything but consistent.

It is my contention that recognizing the challenges post-FGC-based asylum claims face in US immigration courts demonstrates how international humanitarian doctrine has not kept pace with the changing nature of rights abuses. In particular, gender-based asylum claims are marked by the difficulty of ascribing American legal thinking to a practice that is often imbedded in social and cultural contexts. It has meant that the current approach to asylum law in the US forces victims of gender violence to retrofit their testimonies through the complex legal narrative of immigration and refugee law. I will consider three challenges as manifestations of the cleavage between asylum law and local, culturally based practices such as FGC. Specifically, FGC cases challenge 1) the nature of state responsibility and 2) the construction of a social group affected by the practice. The cases I am primarily concerned with, cases where the FGC has already occurred prior to entering the United States carry the additional challenge of demonstrating fear tied to an event that

has already occurred.

What is FGC?

Before we go too much further, we should be clear that the terms “female genital cutting”², “female genital mutilation”, and “female circumcision” are somewhat misleading—what I am calling FGC is actually more aptly understood as a group of practices and procedures that involve the incision and excision of the female

² Dubbing the group of practices as “female genital mutilation”, while popular among Westerners, is problematic in two regards: the term reflects a negative judgment and yet, does not manage to offer clear information on the process we are examining. As a result, use of the words “mutilation” and “FGM” have become controversial in recent years—and do not serve to educate us about the specifics of the procedure. In order to maintain scholarly objectivity and given the adoption now in the anthropological literature of the term “female genital cutting” as the most neutral term to refer to this group of practices, I will speak of this group of procedures as female genital cutting, or FGC. Other terms are used only when citing or referencing other scholarly work, and the use of the terms “FGM” or “Female Circumcision” is assumed to be a fair proxy for what I am calling FGC. See Bettina Shell-Duncan and Yiva Hernlund, *Female 'Circumcision' in Africa: Culture, Controversy, and Change*, ed. Bettina Shell-Duncan and Yiva Hernlund (Boulder, CO: Lynne Rienner, 2000).

genitalia. It is important to recognize that while “100 million women are circumcised worldwide”, the practice is not monolithic—indeed, among the “26 African countries practicing” FGC today, we find varying degrees of “prevalence from 5 to 99 percent”, with each culture adopting a form of FGC based in its own cultural and religious narratives (Toubia 1994, 712).

The health risks vary greatly—as does the severity of the FGC practiced. While some in the medical community have taken to classifying FGC in to types³, the nature of FGC is that “the operator is usually a layperson with limited knowledge of the anatomy and surgical technique” and thus such specificity of categorization is not often deliberate if existent (Toubia 1994). Outside of a hospital and often in unsanitary conditions, the young woman undergoing the procedure is usually not under any anesthetic—as a result “the girl may move, and the extent of cutting cannot be accurately controlled” (Toubia, *Female Circumcision as a Public Health Issue* 1994). As a result, the physical complications from FGC can range significantly, but are usually made more severe by the lack of a trained medical practitioner performing the time of procedure. Still, there are some common adverse health effects that add to complex narrative surrounding FGC as a human rights issue, namely 1) pain during intercourse and 2) complications in childbirth. While there are any number of possible short-term effects, including bleeding, ulcers, and kidney damage, the pain during intercourse is an almost certainty—and the side effect that garners the most feminist

³ See Nahid Toubia, "Female Circumcision as a Public Health Issue," *The New*

England Journal of Medicine 331, no. 11 (1994): 712-716.

outrage. The cultural value for women to produce children (and thus that pleasure during intercourse is derived from bringing children to their spouse, not in the physical pleasure of the act, or the possibility of an orgasm) is made particularly heinous by the fact that infibulation (a type of FGC involving the removal of the clitoris and the labial wall)⁴ compromises the health of the delivering mother and child. This results in a disturbing cultural narrative that demands FGC for marriage, demands children from that marriage, and then ensures that the ensuing child birth will be complicated by health risks to the woman and the baby.

International Human Rights and Refugee Protection: From Post-War to the Present

As this paper aims to offer guidelines for utilizing US asylum law in cases of past persecution, we need to provide a working definition of asylum law to draw upon. US asylum law is the body of jurisprudence that governs the United States' obligation to recognize valid claims for refugee status as outlined in two major international documents: the 1951 Convention Relating to the Status of Refugees and the subsequent 1967 Protocol Relating to the Status of Refugees. The 1951 Convention offers insight to the requisite vocabulary we will need in order to analyze the processes in the US today. We look to these documents to provide our present-day definition of 'refugee': "...owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or

⁴ Ibid.

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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

(United Nations High Commission on Refugees 1951). Important here is the enumeration of the reasons one can be reasonably fearful of persecution: “race, religion, nationality, [and] membership of a particular social group or political opinion” (United Nations High Commission on Refugees 1951). These are the only four ways to establish oneself as a refugee—in the US and in any country that is a party to the 1951 Convention. It is important to note that the 1951 Refugee Convention frames US asylum law, but does not describe it in totality. Refugee law in the United States begins from the central ideas presented in the Refugee Convention, and has developed through legislative and judicial processes. To that end, the United States maintains no formal prohibition on past persecution as grounds for an asylum claim. The absence of any distinction between past persecution from the threat of persecution contribute to a perception of a more liberal and progressive asylum law in the United States.

I place asylum law within the larger context of universal human rights to discuss its initial intentions and modern limitations. The 1951 Refugee Convention is itself part of a larger series of texts and treaties issued in the post-War years under the banner of the human rights law. The Refugee Convention plays a significant role in tackling a specific human rights concern, and it is buttressed by the work of several other UN documents, notably the Universal Declaration of Human Rights, which

provided the philosophical and moral basis for the Refugee Convention in 1951. Still, the world was different in 1948 when the Universal Declaration of Human Rights was signed and in 1951 when the Refugee Convention was born. Recognizing the environment through which these statements of rights were developed as similar is important; it allows us to recognize that refugee and asylum law were being crafted in a complementary fashion by in many respects the same people who had only a few years earlier crafted the backbone of modern human rights.

While the US follows the spirit of the Refugee Convention, it also makes use of federal law that helps ground the guidance and ideology of the UNCHR within the framework of the United States judiciary. It achieves this largely through one bill, the Immigration and Nationality Act (2000). The definition of ‘refugee’ here is broader than the one found in the Refugee Convention, notably to this discussion is with the addition of a clause that defines forcible sterilization as grounds for asylum at any point: “For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization... shall be deemed to have a well founded fear of persecution on account of political opinion.” (Immigration and Nationality Act 2000). While FGC is not a forcible sterilization by definition, it certainly can produce sterilization and the women who are seeking protection have likely been forced into the procedure. The rationale offered by the BIA for the exclusive protection of forced sterilization is that it can be best “viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might have been eventually born to them.” (BIA 2003). Forced sterilization is

recognized as an ongoing act of persecution—the effects of the initial persecution bear a significant influence on the long-term health and well-being of the person who undergoes the sterilization. Given that rationale, why wouldn't FGC fit this definition? The leap from the letter of the law to the reality women like Ms. Kassindja present in US courts is not a drastic one. Still, one can look at the intention of this protection—that violence of this kind is an ongoing persecution with long term effects and that as such, “the rationale for past persecution [protection] is that the ‘past serves an evidentially proxy of the future’” (*Marquez v. INS* 1997). The idea here is that past persecution, when it causes the kind of long-term suffering as forced sterilization, for example, produces a persecution both at the time of the event and into the future given the extensive and ongoing disfiguration associated with the initial act of persecution. We need to be careful to recognize this does not mean that the “proxy for the future” allows for protection from hypothetical persecutions not directly associated with an initial act that meets the rubric for providing a lifetime of health and emotional challenges. Put more simply, the courts in *Marquez* and the nature of the asylum law as described in the Immigration and Nationality Act do not provide asylum necessarily for someone who, for example, had one arm amputated. The removal of an arm, unlike the sterilization, does not on its own produce the same degree of continuous pain and suffering, or persecution. (The limb example is deliberate. We will spend more time on this analogy when we discuss *Matter of A-T*).

The fact that this rule has both worked in the interest and against women with prior histories of FGC is a telling example of the inconsistency with which otherwise helpful policy is properly utilized.

Challenges to FGC Narratives in US Courts

In order to logically propose solutions, we need to thoughtfully consider the problem. To that end, the problems I will consider demonstrate not merely the inconsistency in the application of law, but more aptly, the conflict that arises between culture and law. As these problems demonstrate, the objectives of asylum law do not always anticipate (or appreciate) the cultural basis of FGC. FGC is a damaging procedure and it involves narratives of subjugation—but that is not enough. Asylum law is clear in its demands—it means that these cultural and tribal narratives need to then be reconsidered and reconfigured within the constraints of the American legal system.

State actor challenges

In asylum law, the responsibility is placed on the petitioner to demonstrate that persecution they are seeking protection from is performed at the hand of the state, or, that the state is unable or otherwise unwilling to protect the refugee from harm. An asylum applicant's "well founded fear of persecution" must be grounded in the knowledge that the state is unwilling or unable to protect the refugee (United Nations High Commission on Refugees 1951). This could be that the state perpetrates the persecution, or because the state is powerless to protect the individual from such persecution. (United Nations High Commission on Refugees 1951). In FGC cases, the role of state actors can be distinctly muddled. The act of FGC is not conventionally sanctioned by the state, but instead complicated by tribal power structures and local governments who often turn a 'blind eye' to the practice. In such cases, FGC is not

channeled through the state apparatus, but “perpetrators of FGM have a quasi-public or de facto authority or are perpetrating FGM with the consent of a quasi-public figure who may exert more influence than de jure authorities” (Dorkenoo and Elworthy 1994, 28).

A major criticism of refugee law, both in the United States and elsewhere, has been its focus on state persecution, because significant acts of gender violence—such as FGC—occur largely in the shadow of the state, “within the private sphere where state protection is not available because domestic criminal law is not enforced or is non-existent.”(Bhabha and Shutter 1994, 251). While a narrow application of asylum law to state-sponsored persecution was initially designed to protect refugees after the Second World War, it often “fails to protect people fleeing human rights violations committed by non-state actors”, which disproportionately effects women (Ankenbrand 2002, 50).

As a result of its initial intentions, the state responsibility argument also functions best when we are looking at refugees coming from ‘strong’ states—that is, in the post-war sense, states who have the organizational bureaucracy to effectively protect its citizens or control their ability to actively harm other citizens. An appreciation for the political nature of the world in the years leading up to the 1951 signing of the Refugee Convention reveals the paradigms and dilemmas the framers set out to remedy. When the idea of international human rights, and soon after, refugee protection was developed, the problems that demanded international cooperation to resolve were atrocities committed by states against their citizens. The Holocaust was fresh in the minds of Eleanor Roosevelt and her colleagues—travesties

of excessive power and excessive force. The United States had inherited the role of global superpower—and it had spent the period following World War II defending democracy. By 1950, the US and its’ allies were preventing the scourge of Communism from spreading in Korea. The image of the enemy—the perception of those who would cause harm were despotic dictators—was the likes of Kim-il Sung and Adolf Hitler, despotic dictators, not community or tribal actors.. No one considered that crimes against humanity could or would occur on a much smaller, more local plane.

The idea of “quasi-public figures who exert more influence than de jure authorities” is a concession that the state is ill-equipped to prevent such private actors from chipping in to the state’s power (Dorkenoo and Elworthy 1994). Power and influence in ‘strong’ states rests with the state’s “monopoly on the legitimate use of force” (Weber 1947). There is no capacity for ‘quasi-public figures’ because the state provides an effective security apparatus both to protect its citizens and to protect itself. Such personalities are inevitably a product of weak states where the influence of the government is not universal. When the government cannot, or will not respond to the needs of its people, alternative mediations arise that are not from the state but individual power wranglers who represent a bureaucratic order where government has failed to offer one⁵. Again, the obsession with the state in refugee law

⁵ In evaluating power structures between the polity and the people, Charles Tilly (1985) offers a comparison of state power and mob power, positing that the Weberian ‘use of force’ concept can be commercialized and bartered via taxes and tributes. In

disproportionately affects those involved in an FGC procedure. Of the 26 million women who are estimated to undergo FGC each year, an overwhelming proportion of these procedures occur within the fractious political terrain of Africa.

Indeed, the state actor argument, designed in a time of world wars, does not effectively serve the interests of women who are fleeing or who have endured a FGC. Built at a time when the protection of humanity meant protection from dictatorships, international human rights (including the Refugee Convention) have not adapted to the modern era. It remains focused on protecting those from harm at the hand of oppressive regimes and has not formally found a way to recognize firstly, that today persecution takes many forms, including often the individual harming another in the name of culture or other inescapable social norms. Secondly, refugee and human

crafting the analogy, Tilly offers room to consider that when government is unwilling or unable to offer the commodity of protection—mobs can bandy together in a similar, but often, less streamlined and developed capacity. Attempting to protect against the state can create a patchwork of alternate ‘strong men’. Similarly, Venkatesh (2008) has offered similar evaluations of the South Side of Chicago’s now defunct Robert Taylor Homes. Outside the sphere of influence, alternate channels of order and bureaucracy establish to protect local—sometimes down to a building or floor—interests. See Charles Tilly, "War Making and State Making as Organized Crime," in *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985) and Sudhir Venkatesh, *Gang Leader for a Day: A Rogue Sociologist Takes to the Streets* (New York: Penguin, 2008).

rights law have not come to appreciate that the state actor principle assumes the state is organized and strong enough to protect its citizens from said persecution. In the case of FGC, this is usually not the case. The assumption of the state actor principle is that all acts of persecution occur at the hand of the state—violence or personal endangerment that occurs otherwise is just mean.

Social group challenges

Not all acts of harm are legally persecution. As we saw with state actor challenges, asylum petitioners need to be able to fit their experience in to the narrow construction of asylum law. One of the limitations to constructing an asylum claim is the ability to see the persecution through one of the five protected categories: race, religion, nationality, political opinion, and social group membership. Given that FGC is largely considered a gender-based right of passage ritual, it becomes difficult to fit FGC into the definition of persecution on the basis race, religion, or nationality.

The religious underpinnings of FGC are rather tenuous at best. There is good evidence that the practice exists both in Muslim and Christian traditions, but that religion is not a sufficient factor to produce acceptance of FGC as an accepted cultural practice. While “many of the terms used to describe FGC are in fact derived from Arabic, there is no direct mention to FGC at any juncture in the Qu’ran, the holiest scripture of the Islamic faith” (Labove 2007, 4). The only reference to FGC comes in the sunna, a group of “sayings and customs known individually as a hadith” and each hadith remains open to interpretation and analysis by clerics and scholars (Boyle 2002, 32). Still, we find popular support for the practice under a myriad of

religious traditions, and thus find it especially hard to fit the process of FGC in to a *because of faith* definition.

As we saw with the state actor principle, the intention of human rights and refugee law was to protect people from what it saw at the time as the threat of dictatorships. It had little appreciation for how much the threats to humans would evolve from the state to a cultural practice that traverses national, religious, and social class boundaries. In crafting the enumerated characteristics of religion, race, and nationality, the Refugee Convention continues a dialog of speaking about persecution in terms that occur within the state, issues that less reflect ethnic and cultural practices, with an eye more toward protecting people from the whims of despotism.

When we are attempting to define persecution, we look for the reasons why one chooses to persecute another human being (such as this happens *because of x*). In doing so, we are looking for differences between people. In most cases, religion, nationality, and race are shared characteristics between oppressors and oppressed, between the young girl undergoing FGC and her parents or tribal elders forcing her in to the practice. While her race, religion, and nationality have all contributed in bringing a young girl to FGC, they are not the reasons for the FGC directly. What is unique about this individual to warrant this persecution at the hand of her fellow community or tribal members? This again is not the state persecuting sections of its population that human rights and refugee law had been designed to anticipate. This is persecution at the most local of levels—when the reasons for persecution do not clearly segregate and subjugate along the lines as they had during the era when the Refugee Convention was first crafted in Geneva.

Therefore, women who have undergone FGC typically need to explain such persecution through the lens of a “membership in a social group” (United Nations High Commission on Refugees 1951). Gender by itself may contribute to the social group, but it is usually by itself not sufficient to create a viable claim. Harm caused “because the asylum seeker is a women” raises the challenge of fitting gender in to “one of the five grounds” (Musalo, *Empowering Survivors with Legal Status* 2007, 307).

In 1985, the *Acosta* decision set the precedent for how to approach social group membership with specific consideration to gender violence. In *Acosta*, “the BIA held that a social group was to be defined with reference to an immutable or fundamental characteristic that ‘either is beyond the power of the members to change or is so fundamental to their identities or consciences that it ought not be required to be changed.’” (Musalo and Knight 2001, BIA 1985). This definition provided the legal backbone for *Acosta*, then *Kasinga*, and much of the legal advocacy of the early 1990s surrounding gender violence and asylum in the United States.

Yet despite any precedent set in the *Acosta* decision, it was still social group membership that fueled the debates in the *Kasinga* case. Trying to frame gender-based persecution as under the umbrella of a social group prolonged the debates—understandably, there was serious worry about “opening the floodgates”—“the asylum authorities” have an interest in seeing “that groups be defined narrowly because otherwise the category could be used...to let in the hordes they fear so much”, here women fleeing FGC (Bohmer and Shuman 2008, 204). This process of ‘designing’ social groups I posit has been both helpful and damaging to the asylum

process. It is, if nothing else, a required part of the asylum process, but one that has both presented victories for gender-based claims and raised questions about the structural integrity of asylum law. For one, it has allowed interpretations that support some reading of gender in to a social group definition, as in the case of Ms. Kassindja, but these groups are open to interpretation, and as a result can be “sometimes strangely defined”, sometimes encompassing “vast numbers of people or relatively few” (Bohmer and Shuman, 204). Putting aside the final outcomes for a moment, it would seem that the ability to engineer social groups that may or may not be as inclusive depending on the receiving state’s interpretation (grounded itself in politics and national interests) is a major deficiency of the current system. The creation of the groups—and perhaps the flexibility such creation can take is problematic. It means states are largely able to renegotiate the terms upon which they will grant asylum each time. Yet, rather than purport to be an individual, case-by-case review, the social group membership principle asserts a sense of specificity, an exacting science through which asylum cases are to be determined—forcing those working on behalf of refugees to seek legally circuitous routes to provide the strongest possible case.

In *Kasinga*, the court focused its energies to ask two questions: Was Kassinja’s well-founded fear of persecution based on a “membership in a particular social group” and if this social group ought to be applicable to other women, should the BIA “establish guidelines or a framework for future cases”? (Coffman 2005, 66). In attempting to answer those two questions, the BIA derived a social group that was designed to accept that premise that Kassindja’s persecution was within the

construction of a social group, but yet her social group membership was narrowly constructed to prevent future asylum claims on the grounds of FGC. The resulting group—“young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice”—is one so specific that anthropologist Charles Piot calls it an “invented social category...a group that might only consist of a single person, Kasinga herself.” (BIA 1996, Piot 2006, 228).

Certainly this accomplished the goal of granting Kassindja asylum and keeping the door (mostly) closed to future claims, but it still exposed bigger cracks in the asylum law veneer: the process to find a way for gender in to a social group definition and yet to frame the individual in terms of a narrow group suggests that FGC will inevitably have a difficult time continuing to place the square peg of individual gender violence in to the round hole of social group membership persecution. While human rights law is “based on the rights of the individual”, the struggle of the *Kasinga* case, and indeed many others since, is the need to find a way to make personal, individual, gender violence an issue based on membership a larger social group (Piot, 228). It is this line of thinking, that persecution need to be conceptualized in terms of a larger group that is seemingly antithetical to the venture of human rights. Upon closer evaluation however, we see that Piot has merely found the difficulty of asylum law in gender-based cases—while the source of human rights violations has changed, humanitarian law has not realigned its thinking to appreciate the largely interpersonal nature of FGC claims, for example, today. Such provides a theoretical and structural problem with asylum law and its antecedents—an emphasis on group membership ignores the reality of how people are actually persecuted and instead demands a legally obtuse

reconstruction of the persecution as part of some larger group.

The *Kasinga* decision, while narrow, provided legal scholars and activists an insight in to how the BIA was thought to consider gender-based persecution for the purposes of asylum adjudication. Ultimately, *Kasinga* did set precedent: for all the structural challenges it revealed within the complicated area of social group membership, it also served as a reminder (far beyond FGC cases) that “the category of social group membership is a place where the law can be expanded to take in ‘new’ forms of persecution, or more accurately, old forms that we are now willing to recognize as an appropriate basis for asylum” (Bohmer and Shuman, 2003). Notably, and most relevantly, it opened the door for a wide array of gender-based claims via the social group membership argument. Substantively, this is good; but it is work done with little attention to the theoretical structure of social groups and an humanitarian law. Pragmatically, the social group membership argument has been of significant resource to those championing the fight for gender based asylum claims. Yet, it does so at the expense of providing a clear framework for all asylum adjudication—victories for some have not meant victories for all, and the path to absolute victory for gender claims is one that reappropriates the social group to supporting role, not one that mangles and manipulates social group definitions for the case at hand.

‘Fear’ in Past FGC cases

As the Refugee Convention states, asylum is granted when an individual can demonstrate a “well founded fear of being persecuted” on the basis of a select set of

grounds we have already begun to discuss: race, religion, social group, nationality, and political opinion. While all FGC asylum cases face hurdles of demonstrating fear of a cultural practice as prescribed by asylum law, women who have fled post facto face yet another hurdle: how to demonstrate a persisting fear of *being* persecuted once FGC has already occurred? I stress the active voice of ‘being persecuted’ because it suggests that typically refugees are actively fleeing, thus, escaping harm. Their leave to remain in the US is seen as a means of protecting them from the specific persecution they fear. That model has been advanced even by FGC cases (such as *Kasinga*) where the threat of FGC could be mediated by the refugee’s permanent settlement outside of their home country.

As I’ve already alluded to, asylum law in the United States is perceived as more progressive not so much for what it does say, but for what it does not: US asylum law makes no distinction between past persecution and the threat of persecution. Is there room for a gray area? Yes—one that presents opportunities and challenges to women who have already endured persecution prior to arriving in the United States.

Cases such as *Matter of A-T* demonstrate the difficulty of expressing the ongoing suffering endured by women who have been subjected to FGC. A.T., “a 28-year-old citizen of Mali entered the US” as a visitor in 2000, and applied for asylum in 2004 (BIA 2007, 296). The young woman had undergone FGC “as a young girl but has no memory of the procedure” (BIA 2007, 296). In addition, she made claims to oppose the practice for her children, despite not having children or any planned children in the near future. Ms. A-T unquestionably made some faux pas—applying for asylum four years after arriving in the US, taking about hypothetical children, for

example—but her lack of a quality legal team does not change the fact that by the BIA’s own definition of past persecution, (by a definition of past persecution offered in *Hassan*, for example) Ms. A.T. presents a strong case of past persecution, fitting the guidelines established. Likely so prejudiced by her desire to protect unborn children and her incredibly untimely request for asylum status, the Board of Immigration Appeals, which heard her case in 2007, issued a decision that was a sucker-punch for those working on behalf of women with FGC. Whether or not Ms. AT should be granted asylum is actually not even the most valuable question here. Rather, the immigration judges who decided *A-T* revealed a chronic misunderstanding of the nature of FGC and of its place within asylum law. What the decision says for a larger group of women like Ms. A.T. has wider ramifications than the direct decision upon A.T. herself. In dismissing her appeal, the BIA crafts a narrative about FGC as a “harm that is generally inflicted once”, thus more comparable to amputation than sterilization (BIA 2007, 296). Given that one cannot undergo multiple FGC procedures, anyone already subjected to FGC “no longer has a well founded fear of persecution based on the fear she will again be subjected to” FGC (BIA 2007, 300). The BIA adopted a narrow reading of the US refugee definition discussed earlier—that, unlike other refugee definitions, included provisions for involuntary sterilization and abortion, noting that despite the similarities and the “ongoing physical and emotional effects” as a result of both, “Congress has not seen fit to recognize FGM in a similar fashion (BIA 2007, 300). Had they desired to accord FGC the same protection, the judges argue, they would explicitly mentioned FGC in their definition of a ‘refugee’. Such a narrow reading

does not serve the spirit of the law or the persecuted women who seek refugee protection. As *Hassan* showed, past FGC can be an appropriate basis for asylum under US law. There, the courts recognized that FGC, much like involuntary sterilization or abortion, is a practice that presents long-term significant health consequences to the woman and that each are similar in their severity, and each come with a similar social premise legitimizing (and often mandating) the practice.

Mediations between law and culture: Suggestions to Adjudicators

Sadly, no one suggestion for future adjudicators is particularly revolutionary. My research reveals that while there are in fact laws to protect persecuted women, the law is drawn upon far too infrequently. In fact, we have already discussed a definition of ‘refugee’ within US asylum law that should protect women who have undergone FGC (Immigration and Nationality Act 2000). The fact that the law has not been so used reveals a major problem with asylum law, for certain, but more specifically, the way FGC is understood within asylum law. Secondly, while Eleanor Roosevelt and those drafting the UNHCR likely had Nazi Germany and not one’s parents in Togo in mind when drafting the beginnings of what would become modern refugee law, we need to remain mindful of that the prevention of violence and the protection of human rights ought to be the principle objective of the asylum process today. Such a goal may require a retooling of our current human rights norms. Now more than ever, violence and atrocities occur not simply by the sponsorship of a government but in the absence of a government willing or able to prevent such injustices.

Amputations and FGC are Different: Why Drawing Distinctions Between Limbs and Genital Surgeries Matters

While I may have instinctively assumed that all are at least agreed that FGC carries significant developmental and emotional risks for the women who undergo it, the reasoning presented in *A-T* reveals that there is not a universal appreciation for the pain or health consequences that can occur as a result of a genital cutting. Indeed, the comparison of FGC to the amputation of a limb reveals that there is a cultural synapse between American judges and the African women who appear before them. Two things, I would suggest, are happening here—firstly, a narrow reading of the term “refugee” to include forced sterilization *but not* FGC is applied. The *A-T* decision reflects an instance of judicial restraint: the BIA looks to the definition of ‘refugee’ in the Immigration and Nationality Act and does not see FGC explicitly listed as an exception for asylum status. Rather than extrapolate that forced sterilization and FGC may in fact carry similar cultural and health consequences, the BIA determines that “Congress has not seen fit to recognize FGM...with special statutory provisions” by its absence from the Immigration and Nationality Act definition of ‘refugee’ (BIA 2007).

Secondly, the specifics of the practice are not fully conceptualized and understood by immigration judges and the BIA. Even when good public policy exists, it is not always being utilized because of a fundamental misunderstanding of the nature and severity of FGC. As the BIA states in *A-T*-, “persons who have experienced past persecution”, with or without a “well-founded fear, may obtain refugee status” if their unwillingness to return home arises from “the severity of the

past persecution or they face a reasonable possibility of other serious harm in the future”. This is a different interpretation of the “reasonable proxy of future persecution” thesis posited in *Marquez*, where the past persecution was reasonably assumed to be continuing in a way that would provide for an ongoing persecution. The idea that the severity of past persecution offers clues to future treatment does not rule out FGC, but it is a change in thinking. Rather than assume the act, here FGC, is drastic enough to cause daily persecution, the BIA in *A-T-* was looking to see if the act would serve as a signal that future, albeit different, persecution would occur. This switch—from appreciating the severity of a past persecution as sufficient to construct the assumption of an ongoing persecution to, the need to see if the past persecution demonstrates a future possibility of persecution—produces differences in definition of persecution and means women with legitimate claims to asylum fall through the cracks of legal interpretation.

Through a misreading of the legal basis informing a “past persecution” claim, the BIA reveals “a gross misunderstanding and misrepresentation of the significant and lasting physical and mental harm suffered by women who are subjected to FGC” (Physicians for Human Rights 2008). More alarming though, the legal construction in *A-T-* represents a departure in understanding FGC—and leaves otherwise valuable public policy at the whim of immigration judges and the Board of Immigration Appeals.

In a demonstration of both judicial restraint and of a misunderstanding of the “substantial continuing harm” associated with FGC, the BIA deemed that as “FGM is performed only once... the risk of any identical future persecution” is eliminated

(Physicians for Human Rights 2008, BIA 2007). This again reveals a limited knowledge of the practice and represents a departure in thinking from that offered a decade earlier in *Kasinga*⁶. There the court was clear that the practice “results in permanent disfiguration” and seemed to have no difficulty appreciating the long-term effects of a genital cutting procedure can have (BIA 1996). Representing a flaw in legal thinking and an incomplete understanding of the nature of FGC the Board in *A-T-T* “erroneously fixed the inquiry on whether the particular abuse suffered by A.T.—genital mutilation—was capable of repetition” rather than on, as discussed earlier, the possibility that persecution could be ongoing and repeat by virtue of continuing symptoms (Richey 2008, 16). This reading problematically assumes that protection on the basis of past persecution “only protects applicants in the future from re-exposure to the same harms suffered in the past”, not recognizing that the harm already occurred can cause a persecution to never fully end. (Richey, 16). Whether or not the exact act—be it amputation or genital cutting can occur again is not and has not been the litmus test for asylum. With FGC the persecution is ongoing, manifested through physical pain, and can often have “dangerous, serious, and irreversible effects” (Toubia 1994, 714). Recent bodies of research have exposed “psychopathologic disorders directly attributable to genital mutilation”, continuing the suffering and validating the ongoing persecution contention (Toubia 1994, 715). With a decision

⁶ This line of thinking is not unique to *Kasinga*, and the court has in other instances “never held that a petitioner must fear the repetition of the exact harm that she has suffered in the past” *Hassan v. Gonzales*, 484 F.3d (2007).

that largely undermines the trauma women endure during and for a lifetime following an FGC, the BIA has redefined FGC in a way that is “analogous to the loss of a limb”, not to the kind of medical complications and thus, ongoing persecution that is a more apt descriptor for the practice (New York City Bar 2008). Unlike a limb, an FGC produces a persecution that is continuous *and* leaves open the clear possibility of future persecution. While the BIA was keen to stress the ‘once and done’ construction of an amputation, such a line of reasoning fails to recognize the distinctly horrendous health and social complications that one may have to endure only after the FGC has taken place. Given the Congress’ ability to recognize reproductive health as a vital asset worth protecting through the ‘forced sterilization’ exception, it serves to reason that the same protection ought to be accorded to women surviving FGC and inevitably dealing with reproductive and sexual health consequences as a direct result of FGC.

Is the answer merely the inclusion of past-FGC in current legislation that defines ‘refugee’? While this would ameliorate the issue for victims of FGC seeking asylum, it doesn’t avoid the reality that potentially other acts of gender violence could still fall through the gaps under strict interpretation of the law. Such quick fixes still do not address the situation—that acts of persecution can be mischaracterized, and that law while clear, is not uniformly applied. The aim of the Immigration and Nationality Act was clearly to provide clarity within the structure of US law for the asylum adjudication process. In providing a broad definition for ‘refugee’, US lawmakers sought to leave available the possibility to offer asylum to those who had already suffered persecution and whose resettlement in the United States could be

seen as a logical end to further challenges to their safety and well being. The provision made for forced sterilization offers one example of the kind of ongoing persecution that the United States legislature directs its agencies to accept as a part of a viable asylum claim. More importantly, the reasons offered for distinguishing forced sterilization are not mutually exclusive; for the reasons specified in *Matter of Y-T-L-* and later in *Matter of A-T-*, namely that forced sterilization “deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might have been eventually born to them” FGC similarly imbues childbirth with physical pain and emotional challenges, and thus warrants the same provisional status (BIA 2003). While some in the BIA and appeals judges recognize that the inherent nature of both practices as gender violence, as a disfiguring procedure that subjugates the victim, and as risk to reproductive health, still many more dismiss FGC as an unworthy comparison strictly because it is not explicitly mentioned in the text of the law like sterilization, despite sharing significant physical consequences. Clearly, the legal definition of refugee, with the forced sterilization clause for an appropriate example of past persecution needs to be read for the spirit of the law, as its intentions are not served by a narrow reading that ignores similarities between sterilization and FGC or the similar complications to wellness, emotional well-being, and reproductive health they require.

Today’s human rights paradigms occur in the absence of the state

As we have already discussed, “for a claim to succeed, the applicant must show that the government was involved in the persecution, either directly or

indirectly” (Bohmer and Shuman 2008, 191). This is an easy enough demand when the applicant comes from a stable country, with a firmly established rule of law. But, what if, as we hinted earlier, the asylum seeker comes to the United States from a “country undergoing ‘civil unrest’”(Bohmer and Shuman 2008, 192)? The lines between the state and non-state actors in less than stable political climates can quickly become quite blurry. Women seeking asylum protection for gender-based violence often have a difficult case to prove—they have to show that personal violence, from a husband, for example—could not be mitigated by the internal safety apparatus within their home state. In weak states in particular, where “it can be hard to define ‘the government’” in the first place, it can become incredibly difficult to discern “who exactly is doing the persecuting and on who’s behalf” (Bohmer and Shuman 2008, 192). Cisse (1997) argues, “adjudicators should” be cognizant of these cultural differences and work beyond viewing “all perpetrators of FGM as private citizens in the Western sense” (Cisse 1997, 445). Her point is well taken, but the history of the last decade has proven more is needed to be done—case law shows a reticence by BIA officials and immigration judges to appreciate the instability of ‘government’ and the prevalence of alternative power structures, the “quasi-public figures” who take the place of the state (Dorkenoo and Elworthy 1994, 28). While we have been clear that FGC is not universally a religiously based practice, it can exist more prominently because of and with the help of already existing religious civil society structures. In many of the parts of the world where FGC is prominent, religion and the state are in a tenuous power struggle. In such places, it is altogether possible that a state’s power can be undermined (or simply ignored) by a more powerful religious

bloc. A State Department study within Egypt found that “among certain individuals, the decrees of Islamic leaders trump the authority of government imposed penalties” (U.S. Department of State 1995, 1075). As Cisse notes, “adjudicators should be particularly attentive when religion is invoked as a basis for perpetrating FGM”, as it is possible for spiritual leaders and religious authorities to have a stronger leadership foothold in a community than any formally recognized government entity.

Taking heed, however, is not sufficient. The nature of rights claims today has changed from a need to protect people from the state to the present situation where the state is too weak or too divided to protect its citizens from one another. Framers of refugee and asylum law were clear that appropriate demonstrations of persecution would not be interpersonal quarrels but the kind of political action that warrants a global intervention. Gender violence claims are not unique in this respect, but they do have a tougher time demonstrating the way “the government is unable or unwilling to control individual” perpetration of FGC (Cisse 1997, 445). Receiving states need to be aware of the cultural differences that may allow individuals to impose more power than the government itself—and they need to develop policy that specifically recognizes the difficulties female victims of FGC face in attempting to reproduce their accounts in US courts.

...and they Traverse Religions, Nationalities, Political Ideologies

The concept of social group membership is a puzzling one—particularly when one considers the inherently personal act of gender-based violence against another human being. It is incredibly awkward, if not counterintuitive, to attempt to make

groups out of crimes against the individual. How the group will be defined is almost inevitably a hotly contested issue, and often very tautological, with the group being defined by those who have already been subjected to the persecution the asylum is seeking to often times, prevent (Bohmer and Shuman 2008). It bears the theoretical inconsistencies Piot describes of mediating human rights (based on the individual) through group membership (Piot 2006). Still, we are reminded that the legal vagaries of social group membership have been the driving force behind FGC-based asylum claims in the first place.

While social group membership offers a unique opportunity within US asylum law to widen the definitions of ‘persecution’ and of ‘refugee’, I have also been clear to caution against such apparent flexibilities. Such is the nature of the social group membership provisions, positioning states “free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to having transgressed the social mores of the society in which they live may be considered a ‘particular social group’ within the meaning of the 1951 U.N. Refugee Convention” (UNHCR 1991). It is this freedom for individual states, as the UNHCR, puts it, “in the exercise of their sovereignty”, that I find most problematic (UNHCR 1991). While courts have “recognized that FGM can be a form a persecution and young women...who feared such a practice constitute a particular social group”, they have challenged practitioners to find a compelling group narrative to the individual practice—in essence, the social group membership criteria has demanded lawyers and those working on behalf of asylum seekers take the incredibly personal trauma of their client and artfully transpose it to a larger group (BIA 2007). This process is

awkward, cumbersome, and almost always contentious. As Bohmer and Shuman (2008) point out, the interests of immigration authorities to limit the ‘opening of the floodgates’ with their creation of a social group definition can yield often quite contrived social groups. Clear guidance on how social groups ought to be defined in gender-based cases has largely not been utilized within the United States, although some countries have managed better in adapting the standards of the Refugee Convention to their own asylum process. Progress made for gender based claims in the US then, appears largely piecemeal. Given the flexibility and latitude BIA officials and immigration judges have taken in constructing social groups—sometimes, as Piot opined, crafting “social groups of one”, it can be difficult to see precedent in their decisions (Piot 2006). As I have already suggested, the inconsistencies in crafting social groups has produced a mixed bag of outcomes— from success for Ms. Kassindja, and failure for Ms. A.T. for example—and absolute victory for gender based claims will come when the role of social group memberships can be responsibly and uniformly utilized by both sides.

Challenges and possibilities for the future

Indeed, this paper raises more problems than it solves, but I do wish conclude by at least hinting at possibilities for the future, and making note of the example of Canada as a leader in advancing its gender-based asylum legislation. I offer this last perspective through Canada to suggest to future practitioners and scholars in the area of asylum and rights law that neoliberal democracies are confronting the difficult questions that the US has been unable to answer. While we remain bound by our legal

traditions, there are examples to take note of—as they represent a valuable step forward, at least for gender-based asylum adjudication.

In 1993, Canada became the first country to establish “its own guidelines on gender related persecution for Convention refugee status determination” (Ankenbrand 2002, 47, Canada 1993). We should be clear—the Canadian guidelines do not create a sixth ground for acceptable asylum claims—it does not “add ‘gender to the Convention grounds” (Ankenbrand 2002, 47). What the Canadian *Guidelines* do is provide legal reasoning to gender-based claims, helping judges understand the ways in which complicated gender violence can be understood within the Convention’s existing grounds. While it does not break down the state actor principle, or the concept of social group membership, the *Guidelines* offer clarity—and offer a clear “method of interpreting and applying the international refugee definition in a gender sensitive manner” (Mackin 1999, 273). The Canadian approach is meaningful in its simplicity: the *Guidelines* is a short document, and utilizes examples for each of the Convention grounds—where gender can confuse or blur the apparent acceptability of a claim. In doing so, it is incredibly effective at spelling out gender-based narratives within the preexisting Convention rubric.

I mention Canada because their 1993 legislation largely ended much of the confusion I’ve highlighted throughout this research. It represents a mediation to the conflict between the cultural narrative of gender-based violence and asylum law as defined via the Refugee Convention. The United States, as we have seen, provides significantly less clarity on ways gender can be part of a viable claim—and this serves neither a national or humanitarian interest. Where the Canadian *Guidelines* have been

lauded for providing clear directives, US asylum law has fallen victim to legal interpretations and changing political interests.

The work is, I would suggest, just beginning for the United States—as the current scheme of asylum law continues to buckle under pressure from contradicting legal analyses. The current approach to asylum law demands those seeking protection find ways to structure their claim within the narrow definition of ‘refugee’. Particularly challenging for women with gender-based persecution claims, US asylum law has demanded these women carefully strategize and retool their rhetoric to fit their individual persecutions in to an American legal understanding. I contend that such an approach has served no one—the women who demand the safe shelter of the US find a confusing asylum adjudication process and immigration decision makers, the BIA and others, are still without a clear series of operating principles for gender-based claims. The United States ought to recognize that its national interests, as well as the humanitarian objectives of refugee law can be best met through an adjudication process that it is clear in its expectations and consistent in its approach to the law.

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