4.1 Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'

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Contents

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I. Introduction

In recent years, the number and variety of refugee claims based on the 'membership of a particular social group' ground set out in the 1951 Convention Relating to the Status of Refugees[1] have increased dramatically. The social group cases have been pushing the boundaries of refugee law, raising issues such as domestic abuse,[2] homosexuality,[3] coercive family planning policies,[4] female genital mutilation (FGM),[5] and discrimination against the disabled.[6]

Invocation of the particular social group ground is not surprising. Its potential breadth makes it a plausible vehicle for refugee claims that do not easily fall under the other grounds set out in Article 1A(2) of the 1951 Convention. This reads:

> . . . [T]he term 'refugee' shall apply to any 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 . . .

Furthermore, since the usual materials consulted in the interpretation of international agreements provide little assistance on the question of membership of a particular social group, adjudicators have adopted a range of (often conflicting)

1 189 UNTS 150.

2 *Islam* v. *Secretary of State for the Home Department* and *R.* v. *Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah*, UK House of Lords, [1999] 2 WLR 1015; [1999] INLR 144, also reprinted in 11 *International Journal of Refugee Law*, 1999, p. 496 (hereinafter '*Islam* and *Shah*').

3 See D. McGhee, 'Persecution and Social Group Status: Homosexual Refugees in the 1990s', 14 *Journal of Refugee Studies*, 2001, p. 20.

4 *Applicant A. and Another* v. *Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, (1997) 190 CLR 225; 142 ALR 331 (hereinafter '*Applicant A.*').

5 *In Re Kasinga*, US Board of Immigration Appeals (BIA), Interim Decision No. 3278, 1996, 21 I. & N. Decisions 357 [1996].

6 A. Kanter and K. Dadey, 'The Right of Asylum for People with Disabilities', 73 *Temple Law Review*, 2000, p. 1117.

constructions of the Convention language.[7] Courts and administrative agencies have at times announced a standard that adequately resolves the case before them only later to conclude that the rule must be modified because of subsequent claims.

This paper provides a detailed analysis of the various legal approaches to the interpretation of the term 'membership of a particular social group' and to specific issues arising under the refugee definition. The analysis is guided by the underlying premise that a sensible interpretation of the term must be responsive to victims of persecution without so expanding the scope of the 1951 Convention as to impose upon States obligations to which they did not consent. In striking that delicate balance, it must be kept in mind that international refugee law bears a close relationship to international human rights law[8] – that refugees are persons whose human rights have been violated and who merit international protection.

This paper has seven sections. After this introduction, Section II briefly surveys the *travaux préparatoires* and UNHCR interpretations of the term 'membership of a particular social group'. Section III undertakes a detailed examination of State jurisprudence in order to provide a basis for discussion of particular issues relating to the definition of membership of a particular social group. In Section IV, interpretive issues that have been of concern to adjudicative bodies are discussed. The analysis of earlier sections paves the way for the discussion in Section V, which proposes an adjudicatory standard for cases invoking membership of a particular social group as a ground for refugee status. Section VI briefly considers an issue that is frequently important in social group cases – the so-called 'nexus' requirement that persecution be 'for reasons of' one of the Convention grounds. The analysis is applied to several social group claims in Section VII. A concluding section summarizes the main points of the paper.

II. International standards

A. The 1951 Convention and the *travaux préparatoires*

As is well known, the term 'membership of a particular social group' was added near the end of the deliberations on the draft Convention. The *travaux* are particularly unhelpful as a guide to interpretation. All that is recorded is

7 See McHugh J in *Applicant A.*, above n. 4, at 259:

> Courts and jurists have taken widely differing views as to what constitutes 'membership of a particular social group' for the purposes of the Convention. This is not surprising. The phrase is indeterminate and lacks a detailed legislative history and debate. Not only is it impossible to define the phrase exhaustively, it is pointless to attempt to do so.

8 Compare with K. Daley and N. Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence', 12 *International Journal of Refugee Law*, 2000, p. 48.

the Swedish delegate's observation: '[E]xperience has shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included.'[9] Accordingly, courts and scholars have generally turned to the term's association with the other Convention grounds – race, religion, nationality, and political opinion – for interpretive guidance. That is, they have sought to identify elements central to the other grounds (such as the 'immutability' or 'fundamentality' of the ground) and then to adopt an interpretation of particular social group consistent with the identified element. While this strategy may provide a limiting principle, it is not compelled by the Convention or other authoritative sources; it is possible that the term was adopted to cover an assortment of groups whose need for protection was based on circumstances distinct from those that provide the justification for inclusion under the other grounds.[10]

B. UNHCR interpretations

1. *The* Handbook

The discussion of the term 'membership of a social group' in UNHCR's *Handbook*[11] is general and rather brief – reflecting, no doubt, the undeveloped nature of such claims at the time of the *Handbook*'s writing. It reads, in its entirety:

> 77. A 'particular social group' normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.
>
> 78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.
>
> 79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.

9 UNGA, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Third Meeting held at the Palais des Nations, Geneva, Tuesday 3 July 1951 at 10.30 a.m.', UN doc. A/CONF.2/SR.3, 19 Nov. 1951, at p. 14.

10 For example, State anti-discrimination principles may condemn classifications based on race, religion, age, disability, sexual orientation, and other characteristics on the grounds these forms of classification are 'unfair' – even if one can identify no single element common to all that accounts for the conclusion of 'unfairness'.

11 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979, re-edited 1992) (hereinafter '*Handbook*').

2. *The position taken in court cases*

In a brief filed in *Islam* v. *Secretary of State for the Home Department* and R. v. *Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah*,[12] UNHCR submitted the following:

> The UNHCR's position is as follows. Individuals who believe in or are perceived to believe in values and standards at odds with the social mores of the society in which they live may, in principle, constitute a 'particular social group' within the meaning of Article 1A(2) of the 1951 Convention. Such persons do not always constitute a 'particular social group'. In order to do so the values at stake must be of such a nature that the person concerned should not be required to renounce them.
>
> . . .
>
> 'Particular social group' means a group of people who share some characteristic which distinguishes them from society at large. That characteristic must be unchangeable, either because it is innate or otherwise impossible to change or because it would be wrong to require the individuals to change it. Thus, where a person holds beliefs or has values such that requiring them to renounce them would contravene their fundamental human rights, they may in principle be part of a particular social group made up of like-minded persons.
>
> . . .
>
> It is important to appreciate that UNHCR's position does not entail defining the particular social group by reference to the persecution suffered. Indeed, the UNHCR agrees with the conclusion of the Court of Appeal in the present cases that persecution alone cannot determine a group where none otherwise exists.
>
> . . .
>
> [I]t is not the *reaction* to the behaviour of such persons which is the touchstone defining the group. However, the reaction may provide evidence in a particular case that a particular group exists.

It should be noted that there is arguably some tension – although not necessarily an inconsistency – between the *Handbook*'s language and the UNHCR brief submitted in the *Islam* and *Shah* appeal. The former is not keyed to the idea of a characteristic that is unchangeable or fundamental.

3. *Other guidance*

In its 1985 Conclusion on refugee women and international protection, UNHCR's Executive Committee noted:

12 *Islam* and *Shah*, above n. 2.

> States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of [the 1951 Convention].[13]

III. State jurisprudence

The most detailed discussions of the 'social group' ground occur in cases in common law jurisdictions. Accordingly, primary attention will be paid here to decisions in Canada, Australia, the United Kingdom, the United States, and New Zealand, although the jurisprudence of other countries is also briefly considered. The cases display a number of approaches – even within the same jurisdiction, jurists frequently adopt conflicting interpretations of the 1951 Convention and domestic law. As will be summarized at the conclusion of the next section, however, it is possible to identify convergence among States on several issues. This section will also discuss 'guidelines' and other interpretive principles proposed or adopted by non-judicial bodies in the relevant States.

To a surprising degree, courts in the common law countries tend to read and analyze cases decided in other common law States. The courts of the United States provide an exception, relying almost exclusively on domestic cases.[14] Recent proposed regulations by the United States Immigration and Naturalization Service, however, take note of 'social group' cases decided by courts of other countries.[15]

A. Canada

The Supreme Court of Canada offered an important discussion of membership of a particular social group in *Canada (Attorney-General)* v. *Ward*.[16] The case involved the claim of a former member of the Irish National Liberation Army (INLA) who was sentenced to death by the INLA for assisting in the escape of hostages. Ward asserted that he would be persecuted if returned to Northern Ireland based on his membership of the INLA.

The Supreme Court rejected an interpretation of the membership of a particular social group ground that would render it a 'safety net to prevent any possible

13 Executive Committee, Conclusion No. 39 (XXXVI), 1985, para. (k).

14 For a rare example of peering beyond US borders, see the BIA's mention of *Islam* and *Shah*, above n. 2, in *Matter of R.A.*, BIA Interim Decision No. 3403, 11 June 1999.

15 See Department of Justice draft regulations on 'particular social group' (65 Fed. Reg. 76588-98), 7 Dec. 2000, below n. 55.

16 [1993] 2 SCR 689; (1993) 103 DLR (4th) 1 (hereinafter '*Ward*').

gap in the other four categories'.[17] As La Forest J explained, such a broad reading would make the other Convention grounds superfluous. Seeking a limiting principle, La Forest J reasoned that the meaning of membership of a particular social group should take into account 'the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative'.[18] Accordingly, he defined membership of a particular social group as encompassing:

> (1) groups defined by an innate or unchangeable characteristic [e.g. by gender, linguistic background, sexual orientation];
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association [e.g. human rights activists]; and
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.[19]

Applying the test, the Court determined that Ward could not meet the Convention definition. His feared persecution was not based on former membership of the INLA, nor did the INLA itself constitute a 'particular social group'. Furthermore, Ward could not establish the requisite nexus between a social group and a well-founded fear of being persecuted. His membership of the INLA 'placed him in the circumstances that led to his fear, but the fear itself was based on his action, not his affiliation'.[20]

The *Ward* standard is frequently referred to as an 'immutability' test, but it plainly would recognize groups beyond those based on characteristics that are unchangeable. The second category includes voluntary associations based on characteristics that are fundamental to human dignity but perhaps changeable. One example used by the Court is human rights activists. It is further important to notice that what is identified as the basis for a social group in this category is not the

17 The Court identified this approach with the scholarship of, among others, I. Foighel, 'The Legal Status of the Boat-People', 48 *Nordisk Tidsskrift for International Relations*, 1993, p. 217; A. C. Helton, 'Persecution on Account of Membership of a Social Group as a Basis for Refugee Status', 15 *Columbia Human Rights Law Review*, 1983, p. 39; G. S. Goodwin-Gill, *The Refugee in International Law* (1st edn, Clarendon, Oxford, 1983), p. 30; M. Graves, 'From Definition to Exploration: Social Groups and Political Asylum Eligibility', 26 *San Diego Law Review*, 1989, p. 739. This seems to be an overly broad reading of Goodwin-Gill's interpretation. The second edition of Goodwin-Gill's *The Refugee in International Law* (Clarendon, Oxford, 1996) examines the *Ward* decision at pp. 360–2.

18 La Forest J here follows the approach of the US case, *Matter of Acosta* (described below, n. 45) and J. C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991).

19 *Ward*, above n. 16, (1993) 103 DLR (4th) at 33–4. The Court notes that the third category is included 'more because of historical intentions', but also comes within an anti-discrimination approach in that 'one's past is an immutable part of the person'.

20 Ibid., p. 38. In another section of the opinion, the Court concluded that Ward might state a claim for refugee status based on his political opinion.

shared possession of a voluntarily assumed characteristic fundamental to human dignity; rather, it is the *voluntary association* of group members that it would be unfair to ask group members to forsake because the *association* – not the *characteristic* – is fundamental to their human dignity. The difference in practice between the two might be slight, because it is likely that adjudicators will conclude that persons have a right to associate with others based on characteristics fundamental to human dignity. For example, if the exercise of freedom of thought is a fundamental human right, then arguably persons should not be compelled to forego associations with like-minded persons. In other words, freedom of thought means more than the right to believe what one wants in the privacy of one's home; it includes the right to join with others who share the same views.

Because 'immutability' does not fully describe groups that would come within the *Ward* standards, the analysis will be labelled the 'protected characteristics' approach. This terminology embraces the groups defined by the *Ward* test and also signals that the analysis primarily looks at 'internal' factors – that is, group definition will be based primarily on innate characteristics shared by a group of persons, not on how the group is perceived in society.

Once it is recognized that the *Ward* test extends beyond immutable characteristics, however, conceptual problems emerge. What, for instance, is the underlying principle that unites the categories identified in *Ward*? It is sometimes asserted that the concept of 'discrimination' is the key. On this basis, it is unjust to discriminate against groups for characteristics which they cannot change or, based on human rights principles, should not be compelled to change, assuming here that compelling a person to forsake a voluntary association based on a characteristic fundamental to human dignity violates human rights. But if this is the justification, it cannot explain why groups must 'voluntarily associate' in order to receive protection. That is, it would seem equally unjust to discriminate against a group of persons who are a group because of a shared protected characteristic whether or not the group members know each other or choose to associate. An apt example would be persons who resist forced sterilization or abortion. From a human rights perspective, persons should not be compelled to be subjected to such procedures whether or not they have formed voluntary groups. La Forest J followed the logic of *Ward* in this manner in concluding that Chinese applicants resisting coercive family practices could constitute a particular social group.[21] But the reason that *Ward* does not go this far – and that other jurists have rejected La Forest J's conclusion – is that such an interpretation risks expanding the social group ground to include all persons whose human rights might be violated.

21 See *Chan* v. *Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at 642–6. The majority in the case does not reach the same conclusion; and courts in other jurisdictions have rejected La Forest J's reasoning. See the discussion under the subheading 'Social groups and human rights violations' below.

In sum, the 'voluntary association' test of *Ward*'s second category appears intended to ensure that the social group definition does not become a safety net. Accepting the limitation makes it difficult, however, to construct a coherent principle that underlies the *Ward* categories.

B. Australia

The leading decision of the High Court of Australia, *Applicant A.* v. *Minister for Immigration and Ethnic Affairs*,[22] involved applicants who asserted fears of forced sterilization because of their non-acceptance of China's 'one-child' policy. The court adopted what might be termed a 'social perception' or 'ordinary meaning' approach, that is, to be a 'particular social group', a group must share a common, uniting characteristic that sets its members apart in the society. As described by McHugh J, what distinguishes the members of a particular social group from other persons in their country 'is a common attribute and a societal perception that they stand apart'.[23] To the same effect, Dawson J viewed a particular social group as 'a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element, the element must unite them, making those who share it a cognizable group within their society.'[24]

The High Court made clear that its standard was not as inclusive as the 'safety net' approach advocated by some scholars. The analysis of *Applicant A.*, for example, would not reach 'statistical' groups that may share a demographic factor but neither recognize themselves as a group nor are perceived as a group in society. An example, drawn from United States jurisprudence, is an asserted class of 'young, urban men subject to forced conscription and harassment in El Salvador'.[25]

Another limiting principle identified by the High Court is that the group not be defined solely by the persecution inflicted; that is, the 'uniting factor' could not be 'a common fear of persecution'.[26] The rule is necessary to avoid tautological definitions of groups. As Dawson J notes: 'There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons

22 See above n. 4. Claims arising out of China's State family planning policies are common in other jurisdictions as well, as is described below in the text accompanying notes 162–4 under the subheading 'Chinese coercive family practices'.

23 *Applicant A.*, (1997) 190 CLR 225 at 265–6. See also ibid., p. 264: '[T]he existence of such a group depends in most, perhaps all, cases on external perceptions of the group . . . [The term particular social group] connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.'

24 Ibid., p. 241 (footnote omitted).

25 *Sanchez-Trujillo* v. *INS*, 801 F 2d 1571 (9th Circuit), 1986.

26 *Applicant A.*, (1997) 190 CLR 225 at 242 per Dawson J.

into a particular social group is their common fear of persecution.'[27] In other jurisdictions, this well-established principle is described as requiring that the social group exist '*dehors* the persecution'.[28]

The analysis in *Applicant A*. stands in rather sharp contrast to the Canadian Supreme Court's reasoning in *Ward*. The Australian High Court's approach is not based on an analogy to anti-discrimination principles; it is more sociological. That is, it looks to external factors – namely, whether the group is perceived as distinct in society – rather than identifying some protected characteristic that defines the group (or a characteristic that group members should not be asked to change).

Frequently these standards will overlap. Both tests, for example, are likely to conclude that homosexuals and prior large landowners in communist States constitute particular social groups. Another example arose in a subsequent High Court case, *Chen Shi Hai* v. *Minister for Immigration and Multicultural Affairs*,[29] where the Australian-born applicant was the third child of a Chinese couple. The High Court found no error in the Refugee Review Tribunal's conclusion that so-called 'black children' – children born outside the family planning policies – constituted a particular social group in China. That conclusion is justified under either the *Applicant A*. or the *Ward* standards because 'black children' are perceived and treated as a distinct group in China and because birth order is immutable.[30] At times, however, the two standards may produce different results in membership of a particular social group cases. Consider, for example, claims asserted by private entrepreneurs in a socialist State, wealthy landowners targeted by guerrilla groups, or members of a labour union. According to the facts of the particular society, either might constitute a social group under the social perception approach; it would be far harder to reach such a conclusion under the protected characteristics approach.

In *Applicant A*., the High Court did not sustain the claim. Arguably, the characteristic that united the claimed social group was the members' assertion of their human right not to be subject to forced sterilization and their right to make fundamental choices about their family.[31] A majority of the Court concluded, however, that the asserted group was too disparate, representing simply a collection of persons located in China who objected to a general social policy.[32] According

27 Ibid., p. 242. 28 *Islam* and *Shah*, above n. 2, p. 503.

29 *Chen Shi Hai* v. *Minister for Immigration and Multicultural Affairs*, (2000) 170 ALR 553.

30 The central issue in *Chen Shi Hai* was not the social group definition, but rather whether the targeting of 'black children' constituted the application of general laws and hence was non-persecutory. The High Court rejected this reasoning, upholding the Refugee Review Tribunal's finding that the harmful treatment accorded 'black children' rose to the level of persecution and is inflicted based on their membership of a particular social group, not based on their parent's failure to obey family planning policies.

31 Alternatively, the group might be described without reference to human rights. See Brennan CJ in *Applicant A*., above n. 4: 'The characteristic of being the parent of a child and not having voluntarily adopted an approved birth-preventing mechanism distinguishes the appellants as members of a social group that shares that characteristic.'

32 *Applicant A*., above n. 4, (1997) 190 CLR 225 at 247 per Dawson J; and at 269–70 per McHugh J.

to Dawson J, there was 'no *social* attribute or characteristic linking the couples, nothing external that would allow them to be perceived as a particular *social* group for Convention purposes'.[33] Furthermore, to recognize a class united solely by the abuse of human rights would permit the persecution to define the class.[34]

C. United Kingdom

The recent joint decision by the House of Lords in *Islam* and *Shah*[35] considered the claims of two married Pakistani women who were subjected to serious physical abuse by their husbands and forced to leave their homes. The applicants further asserted that the State would either be unable or unwilling to prevent further abuse if they were returned to Pakistan.[36] The case is of major significance. It reaches important conclusions about gender-related asylum claims and the issue of non-State actors; and the judgment includes important discussion of the jurisprudence of other States. Furthermore, the careful reasoning of the House of Lords has attracted attention from adjudicators in other common law jurisdictions.[37]

Counsel for the women claimants urged that the relevant social group for the case should be defined as women in Pakistan accused of transgressing social mores who are unprotected by their husbands or other male relatives. UNHCR, as intervener, suggested a definition – consistent with Executive Committee Conclusion No. 39, quoted above – as 'individuals who believe in or are perceived to believe in values and standards at odds with the social mores of the society in which they live'.[38]

33 Ibid., p. 270.

34 See also *Minister for Immigration and Multicultural Affairs* v. *Khawar*, [2000] FCA 1130, 23 Aug. 2000 (applying *Applicant A.*, above n. 4, to a case involving a Pakistani woman beaten by her husband and the failure of the State to prevent or stop the abuse; 'particular social group' to be determined 'according to the perceptions of the society in question'). An appeal against this ruling was later dismissed by the High Court: see *Minister for Immigration and Multicultural Affairs* v. *Khawar*, [2000] FCA 14, 11 April 2002.

35 *Islam* and *Shah*, above n. 2.

36 This paper will leave aside the 'political opinion' claim pressed in the *Islam* case.

37 The case has already received significant attention. See, e.g., G. S. Goodwin-Gill, 'Judicial Reasoning and "Social Group" after *Islam* and *Shah*', 11 *International Journal of Refugee Law*, 1999, p. 537; M. Vidal, '"Membership of a Particular Social Group" and the Effect of *Islam* and *Shah*', 11 *International Journal of Refugee Law*, 1999, p. 528.

38 See the quotation in the text above at n. 13. UNHCR's position appears to ride two horses, perhaps hoping that one will cross the finishing line first. The statement quoted in the text above is placed in bold in the brief, and appears to state the overall approach. (The brief elsewhere notes that '[t]he distinguishing characteristic which defines the group consists in a shared set of values which are not shared by society at large or, conversely, a common decision to opt out of a set of values shared by the rest of society.') Alternatively, the brief favourably cites, and appears to rely upon, the reasoning of the *Acosta* decision of the US BIA (discussed below in the text accompanying n. 45). The brief therefore states: 'It is UNHCR's position that the relevant distinguishing characteristic may consist in any feature which is innate or unchangeable, either because it is impossible to change or because an individual should not be required to do so.' Ibid., p. 16. While these standards may frequently overlap, they represent precisely the difference between *Ward*, above n. 16, and *Acosta*, below n. 45, on the one hand, and *Applicant A.*, above n. 4, on the other.

A majority of their lordships concluded that the social group could appropriately be defined as Pakistani women, although there was also support for the more limited definition urged by the claimants.[39] The House of Lords agreed on certain principles, such as the now widely accepted views that the social group cannot be defined solely by the persecution and that the definition of a group is not defeated simply by showing that some members of the group may not be at risk. The House of Lords also rejected the part of the US Court of Appeals decision in *Sanchez-Trujillo* (discussed below) which held that a social group must display 'cohesiveness' in order to be recognized under the Convention. Furthermore, a majority of the House of Lords identified an anti-discrimination principle as underlying the five grounds mentioned in the Convention.

Yet the House of Lords indicated varying overall approaches to the definition of the term membership of a particular social group. Lords Steyn and Hoffmann largely relied upon the protected characteristics analysis of the Canadian Supreme Court in *Ward*; Lords Hope of Craighead (with the majority) and Millett (in dissent) adopted language closer to the social perception approach of the High Court of Australia in *Applicant A*.[40] There was no need for a choice between these views – under the facts of the case, women in Pakistan met either test – and a majority of the House of Lords accepted the broadest definition of the class (Pakistani women).

In an important decision following *Islam* and *Shah*, the Immigration Appeal Tribunal (IAT) laid out the 'main principles that should govern cases based on membership of a particular social group'.[41] The Tribunal understood the House of Lords to have adopted a protected characteristics standard in *Islam* and *Shah*. It thus reported the 'basic principle' that the unifying characteristic of the group 'must be one that is immutable or, put summarily, is beyond the power of the individual to change except at the cost of renunciation of fundamental human rights'.[42] The IAT referred to the three-part analysis of *Ward* and in *Matter of Acosta* (discussed below) – groups defined by (i) an immutable characteristic, (ii) voluntary association for reasons fundamental to human dignity, or (iii) former voluntary status – and held that the latter two categories should not be understood to expand the

39 Lords Steyn, Hoffmann, and Hope of Craighead adopted the broader class definition. Lord Steyn also signed on to the more restricted definition and was joined by Lord Hutton. *Islam* and *Shah*, above n. 2.

40 Ibid., per Lord Hope of Craighead:

> In general terms, a social group may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society . . . As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person's nationality. The phrase can thus accommodate particular social groups which may be recognisable as such in one country but not in others or which, in any given country, have not previously been recognised.

41 *Montoya*, Appeal No. CC/15806/2000, 27 April 2001. The IAT also cited a number of decisions from other jurisdictions.

42 Ibid., p. 12.

first; to do so would be to depart from 'the underlying need for the Convention to afford protection against discriminatory denial of core human rights entitlements'. Rather, they identify groups that voluntarily associate based on a characteristic that is unchangeable or which persons should not be asked to change.[43]

Islam and *Shah* is also important because of its analysis of the 'nexus' element in the refugee definition in a case involving persecution by a non-State actor. This aspect of the case will be discussed below in Section VI.

D. United States

For a number of years, there have been two distinct lines of analysis for 'social group' cases in the United States, owing to the peculiar administrative structure of the United States system. Asylum cases are heard by Immigration and Naturalization Service (INS) asylum officers; if not granted, they may be raised before immigration judges in a removal proceeding and then appealed to the Board of Immigration Appeals (BIA). Both the judges and the BIA are located within the Department of Justice. BIA decisions may be appealed to a federal circuit Court of Appeals; the applicant files in the circuit in which his or her case originated. The decisions of the Courts of Appeals are, by administrative practice, binding on the BIA only for cases arising in that circuit. The Ninth Circuit Court of Appeals (which covers California and other western US states) hears many more asylum cases than any other circuit; hence its decisions play a crucial role in the development of asylum law in the United States.

The BIA and the Ninth Circuit have constructed different interpretations of 'particular social group'. The other federal circuit courts of appeals have largely adopted the BIA's approach.[44] Accordingly, asylum cases brought in the Ninth Circuit are judged by one standard; cases heard by the BIA and appealed to other circuit courts are judged by a different standard.

The BIA's approach, first announced in the 1985 case of *Matter of Acosta*,[45] has been highly influential. It was cited with approval and largely followed in the Canadian Supreme Court's *Ward* decision, and has been widely cited in cases arising in other jurisdictions as well. The Board stated that a 'particular social group' refers to 'a group of persons all of whom share a common, immutable characteristic'. That

43 Ibid., pp. 13–15. In essence what the IAT appears to have done was to have taken the 'shouldn't have to be changed' element of category (ii) and read it into category (i) (immutability). It is not apparent that this doctrinal move clarifies the categories or the analysis. It does, however, underscore the IAT's commitment to the protected characteristics approach and its concern that the social group ground not be read in an overly broad fashion. This paper critiques the IAT's resolution of the *Montoya* case in Section V below.

44 See D. Anker, *Law of Asylum in the United States* (3rd edn, Refugee Law Center, Boston, MA, 1999), pp. 382–3.

45 *Matter of Acosta*, Interim Decision No. 2986, 1985, 19 I. & N. Decisions 211, BIA, 1 March 1985.

characteristic might be 'an innate one such as sex, color, or kinship ties' or 'a shared past experience such as former military leadership or land ownership'. Importantly, the common characteristic must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution of the refugee definition.[46]

In *Acosta*, the BIA proceeded by identifying a common element in the other four Convention grounds and then applying that element to the term 'particular social group'. (This form of reasoning – purportedly an application of the interpretive principle of *ejusdem generis* – has also been adopted in cases arising in other jurisdictions.[47] As discussed below, it is not clear that application of the principle is appropriate in interpreting the 'for reasons of' grounds of the refugee definition.) The Board identified that element as 'immutability', no doubt focusing on the race and national origin aspects of the Convention definition and drawing parallels to US constitutional law and anti-discrimination principles. The focus on 'immutability' has appeal because immutable characteristics (such as gender and ethnic background) have frequently been grounds for invidious treatment and because it provides a sensible way to limit a potentially very broad and ill-defined category. As was apparent to the BIA, however, the 'immutability' standard cannot be a basis for the 'religion' or 'political opinion' Convention grounds; hence, the second aspect of the test was added (applying to characteristics so fundamental that one should not be required to change them).

Under the *Acosta* standard, US cases have recognized that social groups can be based, for example, on gender,[48] tribal and clan membership,[49] sexual orientation,[50] family,[51] and past experiences.[52] Other claims have been rejected, such as those involving Chinese opposed to coercive family planning practices[53] and women subjected to sexual and physical abuse.[54] (The standards for this latter

46 Ibid., pp. 233–4. Note that the formulation is not quite the same as that adopted by the Canadian Supreme Court in *Ward*, above n. 16, because it states that the characteristic – not the voluntary association based on the characteristic – must be so fundamental that an individual should not be compelled to forsake it.

47 See *Islam* and *Shah*, above n. 2, at p. 503; *In Re G.J.*, New Zealand Refugee Status Appeals Authority (RSAA), Refugee Appeal No. 1312/93, 1 NLR 387, 1995.

48 *Fatin* v. *INS*, 12 F 3d 1233 (3rd Circuit), 1993.

49 *In Re Kasinga*, above n. 5, *In Re H.*, Interim Decision 3276, 1996.

50 *Matter of Toboso-Alfonso*, 20 I. & N. Decisions 819 (BIA), 1990.

51 *Lwin* v. *INS*, 144 F 3d 505 at 511–12 (7th Circuit), 1998 (parents of Burmese student dissidents); *Gebremichael* v. *INS*, 10 F 3d 28 at 36 (1st Circuit), 1993; *Iliev* v. *INS*, 127 F 3d 638 at 642 and n. 4 (7th Circuit), 1997.

52 *Matter of Fuentes*, 19 I. & N. Decisions 658 (BIA), 1988, concerning a former member of the national police.

53 *Matter of Chang*, 20 I. & N. Decisions 38 (BIA), 1989.

54 *In Re R.A.* above n. 14; *Gomez* v. *INS*, 947 F 2d 660 (2nd Circuit), 1991 (rejecting a social group claim where the group was defined as 'women who have been previously battered and raped by Salvadorean guerrillas').

category are evolving[55] and require careful consideration beyond the scope of this paper.) *Acosta* itself refused to recognize as a social group members of a taxi driver collective.

The Ninth Circuit Court of Appeals' analysis of social group contrasts rather dramatically with the BIA's *Acosta* standard. In *Sanchez-Trujillo* v. *INS*,[56] a case asserting a social group of young, urban, working-class males of military age in El Salvador, the court stated:

> [t]he term ['social group'] does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase 'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete group.[57]

The group claimed by the applicant did not come within this definition because it was not a 'cohesive, homogeneous group'.

The 'voluntary association' and 'cohesiveness' elements of the *Sanchez-Trujillo* definition were no doubt crafted – like the protected characteristics standard – to prevent a seemingly unlimited social group ground for refugee status. As the court explained:

> Major segments of a population of an embattled nation, even though undoubtedly at some risk for general political violence, will rarely, if ever, constitute a distinct 'social group' for the purposes of establishing refugee status. To hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country.[58]

The *Sanchez-Trujillo* analysis has been widely criticized[59] and explicitly rejected by courts in the United Kingdom[60] and Australia.[61] They are surely in significant tension with the BIA's protected characteristics standard,[62] as can be seen by

55 The Department of Justice has not yet developed a consistent approach to these issues. On her final day in office in Jan. 2001, Attorney-General J. Reno vacated the BIA's decision in *In Re R.A.*, above n. 14, and ordered that the issue be reconsidered once proposed Department of Justice regulations on 'particular social group' became final. It is far from clear whether or when proposed rules issued on 7 Dec. 2000 (65 Fed. Reg. 76588-98) (see also above n. 15) will be promulgated in final form by the Bush Administration. In addition, see *Aguirre-Cervantes* v. *INS*, 2001 US App. Lexis 26170; 242 F 3d 1169 (9th Circuit), 2001, recognizing a claim brought by an abused Mexican daughter based on a family group defined as social group. For a more detailed analysis, see the subheading 'Family-based claims' below.

56 *Sanchez-Trujillo* v. *INS*, above n. 25. 57 Ibid., p. 1576. 58 Ibid., p. 1577.

59 See, for example, Anker, *Law of Asylum in the United States*, above n. 44, p. 382.

60 *Islam* and *Shah*, above n. 2, at pp. 501–2. 61 *Applicant A.*, above n. 4, at p. 241.

62 See *Lwin* v. *INS*, above n. 51.

considering how the approaches apply to claims brought by homosexuals or women. Both these characteristics are either immutable or so fundamental that it would be unjust to demand that they be changed; yet classes of gays and lesbians or women are unlikely to be cohesive or homogenous or to display close affiliation among members. (Interestingly, both approaches have been interpreted to cover claims asserting a family-based group.)[63]

The Ninth Circuit, in a recent case, seems to have recognized the weaknesses of the *Sanchez-Trujillo* standard. The case, *Hernandez-Montiel* v. *INS*,[64] held that Mexican 'gay men with female sexual identities' constituted a particular social group – a group that fits within the *Acosta* standard but is hard to square with the cohesive and associational test of *Sanchez-Trujillo*. The court acknowledged that it was the only circuit to adopt a 'voluntary associational relationship' requirement and that its standard conflicted with the BIA's rule in *Acosta*. It resolved the tension by simply combining the conflicting standards:

> We thus hold that a 'particular social group' is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of it members that members either cannot or should not be required to change it.[65]

No theoretical justification is offered for this rather remarkable move.[66] It appears to be a capitulation to the *Acosta* standard without a willingness to admit defeat.

The confusion that the competing standards and the *Hernandez-Montiel* 'solution' have spawned is only compounded by proposed regulations issued by the INS in December 2000.[67] The INS rule would establish the following:

> (c) Membership of a particular social group
>
> (1) A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it . . .
>
> . . .

63 *Sanchez-Trujillo* itself, above n. 25, notes that 'immediate members of a certain family' would constitute a 'prototypical' social group embraced by the Convention's language: 801 F 2d 1571 at 1576. See also *Aguirre-Cervantes* v. *INS*, above n. 55. For 'immutable characteristics' cases, see, for example, *Lwin* v. *INS*, above n. 51; and *Ananeh-Firempong* v. *INS*, 766 F 2d 621 at 626 (1st Circuit), 1985.

64 *Hernandez-Montiel* v. *INS*, 225 F 3d 1084 (9th Circuit), 2000.

65 Ibid., p. 1093.

66 And, as is suggested below, it still fails to develop an appropriate standard.

67 See above n. 55.

> (3) Factors that may be considered in addition to the required factors . . . but not necessarily determinative, in deciding whether a particular social group exists include whether:
>
> (i) the members of the group are closely affiliated with each other;
> (ii) the members are driven by a common motive or interest;
> (iii) a voluntary associational relationship exists among the members;
> (iv) the group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
> (v) members view themselves as members of the group; and
> (vi) the society in which the group exists distinguishes members of the group for different treatment of status than is accorded to other members of the society.

In explanatory notes to the proposed rule, the INS states that the identified factors are drawn from administrative and judicial decisions that have been 'subject to conflicting interpretations'. The proposed provision, it is argued, 'resolves those ambiguities by providing that, while these factors may be relevant in some cases, they are not requirements for the existence of a particular social group'.[68] The thoughtful reader of the proposed rule might well think that the rule has produced more ambiguities than it has resolved. For instance, the opening paragraph states that group members must share a 'common, immutable characteristic' that either cannot be changed or that is so fundamental that he or she should not be required to change it. Yet if the characteristic must be immutable, then what sense does it make to add that a person should not be required to change it? And what purpose is served, for instance, by listing other factors that may be consulted if the 'immutability' elements are required? The INS formulation seeks to be inclusive and responsive, but in the end may provide rather little guidance to adjudicators.

The discussion so far has considered two alternative approaches expressly adopted in the United States jurisprudence. There is a third approach, however, that is hinted at in some of the sources, usually without the recognition that it is providing a different analysis.[69] For example, in *Gomez* v. *INS*, the Second Circuit Court of Appeals, after quoting the familiar language from *Sanchez-Trujillo*, goes on to state: 'A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor – or in the eyes of the outside world in general.'[70] The proposed

68 65 Fed. Reg. at 76594.

69 See M. Fullerton, 'A Comparative Look at Refugee Status Based on Persecution Due to Membership of a Particular Social Group', 26 *Cornell International Law Journal*, 1993, pp. 505 and 560.

70 *Gomez* v. *INS*, above n. 54, 947 F 2d 660 at 664. This 'externalist' approach is mentioned, but not given much weight, in a footnote in *Sanchez-Trujillo*, above n. 25: 'We do not mean to suggest that a persecutor's perception of a segment of a society as a "social group" will invariably be irrelevant to [the] analysis. But neither would such an outside characterization be conclusive.' 801 F 2d 1571 at 1576 n. 7.

INS rules, quoted above, likewise state that external factors may play a role in the definition of a social group.[71] This third approach charts a route between the voluntary association and protected characteristics standards that have dominated the United States cases. It looks in the direction of the 'sociological' approach of *Applicant A*.

E. New Zealand

The concept of membership of a particular social group has been developed in the New Zealand case law largely through the careful and exhaustive analysis of Rodger Haines, Chairman of the Refugee Status Appeals Authority (RSAA). The New Zealand cases generally follow the *Ward/Acosta* protected characteristics approach, placing significant weight on anti-discrimination principles in the Convention.[72] Under this test, the RSAA has recognized groups based on sexual orientation[73] and gender.[74] The RSAA has suggested that a test that looks to external social perceptions would be too encompassing. In *Re G.J.*, it stated:

> The difficulty with the 'objective observer' approach is that it enlarges the social group category to an almost meaningless degree. That is, by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group.[75]

F. France

The French jurisprudence does not include detailed analyses of membership of a particular social group. A number of decisions by French authorities have, however, approved social group claims, and the results are broadly similar to the decisions of the common law countries. Thus, cases decided in the mid-1980s

71 See subpara. (iv): 'The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question'; and subpara. (vi): 'The society in which the group exists distinguishes members of the group for different treatment of status than is accorded to other members of the society.' These elements are said to follow from the BIA's decision in *In Re R.A.*, above n. 14, in which the Board had found it significant that the applicant had not shown that the asserted group 'is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population', ibid., p. 15. See 65 Fed. Reg. at 76594.

72 See *Re G.J.*, above n. 47. 73 Ibid.

74 *Re M.N.*, Refugee Appeal No. 2039/93, 1996; Refugee Appeal No. 71427/99, 2000, the latter available on http://www.refugeecaselaw.org/Refugee/guidelines2001.htm.

75 *Re G.J.*, above n. 47, p. 24.

recognized as refugees Cambodian asylum seekers fearing persecution by the Khmers Rouges on the basis of their membership of the '*bourgeoisie commerçante*' and their social origins.[76]

More recently, the *Commission des recours des réfugiés* (CRR) has affirmed that women, under certain circumstances, may constitute a particular social group. Thus, in 1991 it held that women who refuse to submit to FGM may state a valid claim to refugee status, although in the case under consideration refugee status was denied because the applicant did not show that she was personally threatened with FGM.[77] In a case brought by an Algerian woman, who returned to Algeria after having lived abroad for a number of years, the CRR stated that women who object to generally applicable discriminatory legislation do not, by that fact alone, constitute a particular social group. Nonetheless, in the particular case, the applicant had shown that the authorities had tolerated threats against her by Islamic militants who sought to compel her to adopt a traditional lifestyle; thus, the claim was recognized.[78]

French adjudicators have also considered claims brought by Chinese applicants based on a claim of threatened forced abortion and sterilization. The results in the cases follow decisions in other jurisdictions that have held that persons who oppose generally applied population policies do not constitute a particular social group.[79]

A turning point was reached in the case of *Ourbih*, which found that transsexuals may constitute a particular social group. Although the decision does not analyze the issue in detail, the *Conseil d'Etat* has used language that suggests an underlying approach. In 1997, it rejected the decision of the CRR to deny the claim of *Ourbih*, an Algerian transsexual, finding that the Commission had not properly examined the evidence to determine whether transsexuals were regarded as a social group in Algeria 'en raison des caracteéristiques communes qui les définissent aux yeux des autorités et de la société'.[80] Upon reconsideration, the CRR held that transsexuals in Algeria could constitute a particular social group because of a common characteristic that set them apart and exposed them to persecution that was tolerated by the authorities in Algeria.[81] The result here parallels the *Hernandez-Montiel* decision in the United States,[82] although arguably *Ourbih* goes further if it purports to allow

76 International Association of Refugee Law Judges, 'Interim Report on Membership of a Particular Social Group', Appendix I ('French Jurisprudence'), Oct. 1998, available at http://www.refugee.org.nz/Iarljfrench.htm.

77 *Aminata Diop*, CRR, Decision No. 164078, 18 Sept. 1991.

78 *Elkebir*, CRR, sections réunis (SR), Decision No. 237939, 22 July 1994.

79 *Zhang*, CRR, SR, Decision No. 228044, 8 June 1993; *Wu*, CRR, SR, Decision No. 218361, 19 April 1994.

80 'By reason of the common characteristics which define them in the eyes of the authorities and of society' (author's translation), *Ourbih*, Conseil d'Etat, SSR, Decision No. 171858, 23 June 1997.

81 *Ourbih*, CRR, SR, Decision No. 269875, 15 May 1998. 82 See above n. 64.

the fact of persecution to assist in the definition of the social group. Indeed, in most of these cases (with the exception of the Chinese coercive family planning cases), the fact that an applicant can show a specific risk of persecution seems to be a more important factor than definition of a particular social group.[83]

Since *Ourbih*, homosexuals have also been recognized as refugees in a series of cases, including some concerning asylum seekers from countries where homosexuality has been decriminalized.[84] In all these cases, membership of a social group is only rarely specified as the ground for recognition, although it is the only possible ground for doing so. Looking beyond cases concerning sexual orientation, the CRR has also recognized an Afghan woman on the grounds that, as a woman, she was exposed to serious discrimination by the Taliban due to her way of life, her desire to study, and her decision not to practise religion.[85]

The first asylum case concerning FGM was recognized in France in March 2001, although the social group ground was not specifically mentioned.[86] Most recently, in late 2001, the CRR recognized as refugees a Somali woman and a Malian couple, who did not wish their daughters to be subjected to FGM. In the first case, the CRR found that women in Somalia who refused to submit their daughters to FGM risked their daughters' forced infibulation, as well as persecution with the consent of the general population and of the factions which ruled the country without it being possible for them to claim the protection of a legally constituted public authority. The CRR also found a specific risk of persecution in that the woman was a widow and her elder daughter had already died shortly after being forcibly infibulated.[87] As for the Malian couple, they were both found to be members of a particular social group under the 1951 Convention and to have a well-founded fear of persecution which was voluntarily tolerated by the authorities of their country of origin.[88]

83 Cf. T. A. Aleinikoff, 'The Meaning of "Persecution" in US Asylum Law', 3 *International Journal of Refugee Law*, 1991, p. 5, suggesting that, once risk of harm is demonstrated, adjudicators should be lenient in considering the Convention grounds.

84 *Djellal*, CRR, SR, Decision No. 328310, 12 May 1999 (Algerian asylum seeker); *Elnov* and *Tsypouchkine*, both CRR, Decisions Nos. 318610 and 318611, 23 July 1999 (two asylum seekers from Kazakhstan); *Aourai*, CRR, Decision No. 343157, 22 Feb. 2000 (Algerian asylum seeker); *Albu*, CRR, Decision No. 347330, 3 April 2000 (Romanian asylum seeker); *Mahmoudi Gharehjeh Daghi*, CRR, Decision No. 330627, 4 Oct. 2000 (Iranian asylum seeker); *Kulik*, CRR, Decision No. 367645, 29 June 2001 (Ukrainian asylum seeker).

85 *Berang*, CRR, Decision No. 334606, 6 May 1999. Similar examples concern Algerian women granted refugee status based on their Western way of life (*Mme Benedir*, CRR, Decision No. 364663, 18 April 2001; *Mme Krour*, CRR, Decision No. 364839, 2 May 2001; *Mlle Benarbia*, CRR, Decision No. 364301, 1 June 2001).

86 *Mlle Kinda*, CRR, Decision No. 366892, 19 March 2001.

87 CRR, Decision No. 369776, 7 Dec. 2001 (no case name as applicant asked hearing to be held in camera).

88 *M. et Mme Sissoko*, CRR (SR), Decisions Nos. 361050 and 373077, 7 Dec. 2001.

G. Germany

Fullerton describes a number of German decisions in lower level courts. She identifies two different analyses in her 1990 review of German jurisprudence.[89] Some courts have looked for homogeneity among group members and some sort of internal group structure; other courts have asked whether the alleged group is perceived by the general population as a group and, if so, whether it is perceived in strongly negative terms.

More recently, Judge Tiedemann of the Administrative Court in Frankfurt am Main has reported that the German jurisprudence continues to be 'very sparse'.[90] The majority of the lower administrative courts follow the ruling of the Federal Administrative Court (*Bundesverwaltungsgericht*) that 'political persecution' is required for recognition as a refugee under either Article 16a of the Basic Law (the German Constitution) or section 51 of the Aliens' Act (which incorporates the phraseology of the 1951 Convention refugee definition into German law).[91] Similarly, in an earlier Federal Administrative Court ruling concerning an Iranian homosexual, the Court noted that the appeals court had determined that the applicant's homosexuality was fundamental to his emotional and sexual life and could not expect to be relinquished as a personal act of will. This analysis is similar to the 'protected characteristics' approach of some common law jurisdictions in cases concerning membership of a particular social group. Nonetheless, the Court concluded that the applicant was eligible for asylum based on the likelihood of political persecution.[92]

As a result of the need to prove political persecution, there is a tendency to subsume claims under another Convention ground. Where a particular social group has been relied upon by the courts, this has tended to be without close analysis. Particular social groups recognized by the courts have nevertheless included women from Iran not willing to observe the Islamic dress code[93] and single women in

89 See above n. 69.

90 P. Tiedemann, 'Protection Against Persecution Because of "Membership of a Particular Social Group" in German Law', in *The Changing Nature of Persecution* (International Association of Refugee Law Judges, 4th Conference, Berne, Switzerland, Oct. 2000), pp. 340–50, available on http://www.iarlj.nl/swiss/en/nature.pdf/tiedemann.pdf.

91 German Federal Administrative Court, judgment of 18 Jan. 1994, 9 C 48.92, 95 BVerwGE 42.

92 German Federal Administrative Court, judgment of 15 March 1988, 9 C 278.86, 79 BverwGE 143. A judgment more similar to other cases involving homosexuality was rendered by the Administrative Court in Wiesbaden in 1983, Case No. IV/1 E 06244/81, 26 April 1983. In that case, the court held that homosexuals in Iran constituted a social group based on a conclusion that an objective observer in Iran would recognize that homosexuals are perceived as, and treated as belonging to, a particular social group.

93 Hessen Higher Administrative Court, Decision of 14 Nov. 1988, 13 TH 1094/87, InfAuslR 1998, 17.

Afghanistan.[94] Administrative courts have also recognized refugee status in cases involving FGM, but this has either been on political persecution grounds or the specific Convention ground has not been specified.[95]

H. The Netherlands

Cases in the Netherlands have considered many of the kinds of social group claims that have been adjudicated in other States, including those based on gender, homosexuality, and Chinese coercive family planning policies.[96] As stated by Thomas Spijkerboer in a leading study of Netherlands refugee law:

> In Dutch legal practice, just which of the five persecution grounds is related to the (feared) persecution is virtually considered immaterial. Whether the persecution is clearly discriminatory and not just random, however, is critical. Once the discriminatory nature of the persecution has been established, the particular rubric under which it falls is 'of less importance'. Without much ado, persecution on account of sexual orientation, on account of the nationality or religion of the spouse, on account of descent, and on account of transgression of the Chinese one-child policy have been brought under the refugee concept. Only in the decision on sexual orientation was the persecution ground actually specified ('a reasonable interpretation of persecution for reasons of membership of a particular social group can include persecution for reason of sexual nature').[97]

As to claims based on gender, Netherlands cases have recognized claims brought by women persecuted due to the actions of male relatives, but the Convention ground has not been specified.[98] Spijkerboer reports that cases involving sexual abuse of

94 Frankfurt Administrative Court, Decision of 23 Oct. 1996, 5 E 33532/94.A(3), NVwZ-Beilage 6/1997, p. 46.

95 See Tiedemann, above n. 90, pp. 342–3; T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Aldershot, UK, 2000), pp. 118–19.

96 In the coercive family planning case, the Netherlands Council of State accepted the UNHCR position that family policies are not per se persecutory but may be implemented in a persecutory manner. In the particular case, the Council rejected the asylum claim because of lack of evidence that the applicant (a male) would be targeted upon return to China. Afdeling Bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State), 7 Nov. 1996, RV 1996, 6 GV 18d–21 (China).

97 Spijkerboer, *Gender and Refugee Status*, n. 95 above, p. 115 (footnotes omitted). Spijkerboer further notes, regarding claims brought by women who have objected to prevailing social mores of their society, that '[a]n early Dutch decision concerning an Iranian woman who had been removed from the university on account of improper behavior held that, in the absence of authoritative Council of State case law, women may be considered "a relevant persecution category"'. More recently, however, social group appears to have given way to political opinion or religion as the persecution ground in Netherlands social mores cases: ibid., p. 117 (footnotes omitted).

98 Ibid., p. 121.

women which argue membership of a particular social group are rare.[99] A 'Work Instruction' on 'Women in the Asylum Process' issued by the Netherlands Immigration and Naturalization Service states that in cases raising gender claims 'consideration should be given primarily to persecution for reasons of political opinion' (including imputed political opinion). Moreover, the Instruction specifically declares:

> Sex cannot be the sole ground to determine membership of a 'particular social group'. *Women in general* are too diverse a group to constitute a particular social group. In order to establish membership of a particular social group one should be put in an exceptional position compared to those whose situation is similar. In addition, the persons should be targeted individually.[100]

In sum, while the *results* in Netherlands cases are consistent with results in social group cases elsewhere, theoretical and doctrinal analysis of the Convention ground remains underdeveloped in the country's jurisprudence.

IV. Interpretive issues

A. General considerations

Despite the variety of approaches discussed above, there is some degree of convergence among adjudicative bodies on several interpretive principles. The overriding concern expressed in the legal sources is that some limiting principle be identified to ensure that the 'social group' ground not be all-encompassing. An overly broad interpretation is resisted for several reasons. First, it is stated that the Convention was not intended to provide protection to all victims of persecution – only to those who come within one of the five Convention grounds. Thus, to read the social group ground to include all other groups of persons who flee across borders or suffer human rights abuses would conflict with the structure of the Convention. Secondly, as a matter of legal logic, the social group cannot be read so broadly that it renders the other Convention grounds superfluous. Thirdly, it is argued that an overly broad definition of 'particular social group' would undermine the balance between protection and limited State obligations implicit in the Convention.[101]

99 Ibid., p. 123.

100 Netherlands Immigration and Naturalization Service, Work Instruction No. 148, reprinted in Spijkerboer, *Gender and Refugee Status*, n. 95 above, p. 231 (UNHCR translation).

101 Perhaps the broadest definition of 'social group' has been suggested by A. C. Helton. He would include within the Convention's purview 'statistical groups' that are victims of discrimination (such as persons with sickle cell anaemia), societal groups (people who share basic innate

At a more particular level, adjudicative bodies have largely rejected the 'cohesiveness' standard of *Sanchez-Trujillo*.[102] Indeed, with its recent decision in *Hernandez-Montiel*, the Ninth Circuit itself has moved away from 'cohesiveness' as the central test for the existence of a 'particular social group'.

At a substantive level, various 'social groups' have received widespread recognition. Of particular significance are cases in a number of States recognizing homosexuals[103] and women[104] as groups eligible for protection. As is noted below in Section VI, the gender category has generated some of the most difficult interpretive issues for State adjudicators, particularly as to the establishment of 'nexus' between the persecution feared and the social group membership.

B. The role of 'persecution' in the definition of a particular social group

The case law frequently asserts that a social group must exist independently of the persecution imposed on members of the group. As explained by Dawson J in *Applicant A.*:

> [T]he characteristic or element which unites the group cannot be a common fear of persecution. There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution.[105]

This view seems eminently sensible, but it can also be misapplied. An example is provided by cases arising from the enforcement of generally applicable criminal and regulatory statutes. Consider the common claim that enforcement of China's family planning policies persecutes on the basis of social group. It is sometimes said that such claims cannot be allowed because it would be permitting the persecution to define the social group.[106] Again, here is the reasoning of Dawson J:

characteristics, such as race and gender), social groups (voluntary groups that interact socially, such as friends, neighbours, audiences), and associational groups (groups of persons that self-consciously pursue a shared goal or interest, such as trade unions and universities). Recognizing the breadth of the definition, Helton argues that it is the 'only reasonable interpretation' because 'it is profoundly irrational to differentiate between the types of arbitrary and capricious persecution that an oppressive regime may impose'. Helton, 'Persecution on Account of Membership of a Social Group', above n. 17, pp. 39 and 59.

102 See Lord Hoffmann in *Islam* and *Shah*, above n. 2, pp. 502–3; *Ward*, above n. 16; *Applicant A.*, above n. 4, p. 241.

103 The jurisprudence is summarized in *Re G.J.*, above n. 47.

104 See, for example, *Islam* and *Shah*, above n. 2.

105 See *Applicant A.*, above n. 4, p. 341.

106 Another frequent ground for rejecting such claims is that implementation of such policies is not inherently persecutory. See *Matter of Chang*, above n. 53.

> [T]he reason the appellants fear persecution is not that they belong to any group, since there is no evidence that being the parents of one child and not accepting the limitations imposed by government policy is a characteristic which, because it is shared with others, unites a collection of persons and sets them apart from society at large. It is not an accurate response to say that the government itself perceives such persons to be a group and persecutes individuals because they belong to it. Rather, the persecution is carried out in the enforcement of a policy which applies generally. The persecution feared by the appellants is a result of the fact that, by their actions, they have brought themselves within its terms.[107]

It may well be that the claim in *Applicant A*. properly failed because of a lack of proof that those who violated the family planning policies were a group 'set apart' from society. Yet the careful words of Dawson J should not be taken to mean that those who oppose a generally applicable State policy will always be seeking to define a social group simply on the basis of the persecution they might suffer.

Another example is provided by cases involving abused spouses, in which the definition of social group has been particularly difficult. Advocates have suggested a number of approaches to defining the social group concerned, including 'women', 'battered women', and 'battered women for whom the State will not provide protection'. Cross-cutting concerns place the applicant on the horns of a dilemma. If the group is defined too broadly, adjudicators might conclude that few members of the group are likely to be subject to persecution and hence the group does not, in fact, stand apart from society. If, however, the group is defined too narrowly, it is likely to be seen as drawn simply for the purposes of the claim and not because it reflects a group cognizable in the society at large. Lord Millett, in his dissent in *Islam* and *Shah*, relied upon the latter ground in rejecting the asserted class ('women in Pakistan who have been or who are liable to be accused of adultery or other conduct transgressing social norms and who are unprotected by their husbands or other male relatives'). He found:

> Whether the social group is taken to be that contended for by the appellants . . . or the wider one of Pakistani women who are perceived to have transgressed social norms, the result is the same. No cognisable social group exists independently of the social conditions on which the persecution is founded. The social group which the appellants identify is defined by the persecution, or more accurately (but just as fatally) by the discrimination which founds the persecution. It is an artificial construct called into being to meet the exigencies of the case.[108]

107 *Applicant A*., above n. 4, p. 243.

108 *Islam* and *Shah*, above n. 2, p. 525. See also *Matter of R.A*., above n. 14, finding that asserted class was constructed for the purposes of the litigation.

It is possible to agree with Lord Millett but still not reject the claim, if the appropriate social group is defined as 'Pakistani women', although Lord Millett rejected this definition as well because he concluded that there is insufficient evidence to demonstrate that the claimants are being persecuted on this ground. With all respect, it is difficult to see how the class of 'Pakistani women who have transgressed social norms' is defined by the persecution suffered. Such a group might well be seen in Pakistan as a pariah group, identified not by the persecution they suffer but rather persecuted because of their conduct.

Furthermore, to say that the group must exist *dehors* the persecution is not to say that persecution may not help define a group, both by giving the persons subject to maltreatment a sense of 'groupness' and by creating societal perceptions that the group stands apart. McHugh J put it this way:

> [W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.[109]

Under this reasoning, it would appear that an applicant would have a valid claim if he or she could establish that persons asserting the human rights at issue were, in fact, perceived by society at large as a distinct group.[110]

Importantly, there should be no requirement that an applicant prove that every member of a particular social group has a well-founded fear of persecution in order to establish a 'social group' within the meaning of the 1951 Convention. Indeed, if this were the test, the analysis would come perilously close to mandating that persecution define the class. Thus, homosexuals have been found to be a social group in a number of States; yet not all members of the class may be at risk of persecution, depending, for instance, on how openly they express their sexual orientation or whether they have allies in the government. Again, the well-founded fear element of the definition will have to be brought to bear in each case. An applicant will not be able to establish refugee status simply because he or she belongs to a group recognized as such by the society from which he or she seeks protection.

109 *Applicant A.*, above n. 4, (1997) 190 CLR 225 at 264.

110 See McHugh J: 'There is no reason why persons "who, having only one child . . . do not accept the limitations placed on them" and who communicate that view to Chinese society could not be a "particular social group" in some situations. If, for example, a large number of persons with one child who wished to have another had publicly demonstrated against the government's policy, they may have gained sufficient notoriety in China to be perceived as a particular social group.' Ibid., p. 269.

The BIA's *Kasinga* decision illustrates these points. The case involved a claim brought by a young woman who feared being subjected to FGM by her tribal group. The BIA, which sustained the claim, defined the social group as being 'young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice'.[111] It is far from clear, however, why such an elaborate definition was necessary. Perhaps the Board was concerned that some female members of the tribe consent to FGM, with the result that the narrower definition was viewed as preferable in order to make more congruent the social group and victimhood. This concern seems misplaced. The persecutory conduct is visited solely on *women of the tribe*; it is for that reason that the applicant, as a female member of the tribe, is at risk. That other women of the tribe may not seek to flee FGM is irrelevant both to the definition of the class and to the establishment of 'nexus'. In sum, the definition of the class must describe a group that stands apart in society where the shared characteristic of the group reflects the *reason* for the persecution. This is importantly different from saying that a defined class must only include persons likely to be persecuted.

C. *Ejusdem generis*

It has sometimes been suggested that the principle of *ejusdem generis* provides a useful interpretive limit on membership of a particular social group. The principle holds that a general term following in a list of particular terms should be interpreted in a manner consistent with the general nature of the enumerated items.[112] So, for example, if a city ordinance prohibits 'loud noise, motorized vehicles, unleashed animals, and other conduct likely to disturb peaceful enjoyment of public parks', it would be appropriate to seek in the specific examples an underlying concept that might be applied in interpreting the broader final phrase.

The five Convention grounds are not, however, written in a manner that makes application of *ejusdem generis* appear appropriate. The Convention does not list four grounds and then add a fifth such as 'and all other grounds that are frequently a basis for persecution'.[113] The term 'particular social group' appears to define a free-standing Convention ground of equal kind and status to the other identified grounds. (To return to the city ordinance example, it would be analogous to an ordinance that prohibited 'motorized vehicles, unleashed animals, and all conduct

111 Above n. 5.

112 See *Black's Law Dictionary* (6th edn, West Publishing, St Paul, MN, 1990), p. 517: '[W]here general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to those persons or things of the same general kind or class as those specifically mentioned.'

113 This is also a ground for rejecting the 'safety net' interpretation of particular social group.

that is excessively noisy'.) As stated by Kirby J in *Applicant A.*, 'it is difficult to find a genus which links the categories of persecution unless it be persecution itself'.[114] Indeed, an *ejusdem generis* reading of the five grounds, as Kirby J goes on to note, would appear to violate the rule that the group must exist outside the persecution. It would be a sensible interpretive guide only if the term 'particular social group' were intended to be a 'safety net' category – an interpretation widely rejected for the reasons described above.[115]

The suggestion that *ejusdem generis* can play a useful interpretive role may be based on a slightly different kind of argument that looks to the underlying motivation for the designation of particular categories. For example, one might attempt to identify a norm of non-discrimination as crucial to the structure of the Convention, and thereby see the five Convention grounds as categories of persons likely to be victims of persecution. This might then provide an argument that 'particular social group' should be read, in the main, to cover groups that are discriminated against. Whatever the merits of such an approach, it should be clear that it does not rely on the principle of *ejusdem generis*, but rather on the underlying purposes of the Convention.[116]

D. Anti-discrimination and the definition of 'particular social group'

The search for a limiting principle has led adjudicators in a number of States to identify anti-discrimination as an underlying norm of the 1951 Convention that can provide interpretive guidance. It is thus regularly noted[117] that the opening paragraph of the Convention declares:

114 *Applicant A.*, above n. 4, (1997) 190 CLR 225 at 295. One possibility is that the list includes personal characteristics that are either immutable or so fundamental that it would be unjust to compel persons to forsake them. As noted in the discussion in *Ward*, above n. 16, it is not, however, clear what unifying concept underlies these separate considerations.

115 See Goodwin-Gill, 'Judicial Reasoning', above n. 37, pp. 537 and 541.

116 In a comment on the earlier version of this paper discussed at the expert roundtable, the INS suggested that the *noscitur a sociis* rule of construction (the meaning of a word may be known by words accompanying it) supports the protected characteristic approach. It is argued that a common element to the other grounds is a protected or fundamental characteristic and thus this should be read into the social group ground as well. This is not an implausible argument, but it runs into difficulty because other common elements can be identified in the given grounds. One, for example, might be 'social cognizability'; another could be 'traditional grounds for disfavoured treatment'. Furthermore, the protected characteristics element itself is a bit artificial – it needs to reach beyond immutable characteristics in order to cover political opinion and religion. (Note also that not all immutable characteristics are necessarily fundamental – for example, height.) Once that conceptual move is made, it is not clear why an additional element could not be added to extend to social group; so the common element could logically be described as 'immutable characteristic, fundamental characteristic or shared characteristic of a group'.

117 *Re G.J.*, above n. 47; *Islam* and *Shah*, above n. 2, pp. 510–11.

> Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings *shall enjoy fundamental rights and freedoms without discrimination* . . . (emphasis added)

The anti-discrimination approach is said to supply a common basis for the enumerated Convention grounds. That is, persons who are persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion are persons whose human rights are being violated for discriminatory reasons. Lord Hoffmann, in *Islam* and *Shah*, states:

> In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect . . . [T]he inclusion of 'particular social group' recognised that there might be different criteria for discrimination, in *pari materiae* with discrimination on other grounds, which would be equally offensive to principles of human rights . . . In choosing to use the general term 'particular social group' rather than an enumeration of specific groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.[118]

The invocation of an anti-discrimination principle appears to accomplish four goals. First, by defining a limiting principle, it resists a 'safety net' approach to social group. Secondly, by stressing lack of State protection and marginalization, it explains why persons fleeing natural disasters and civil war might not be Convention refugees.[119] Thirdly, it rejects the 'cohesiveness' and 'voluntary association' analysis of *Sanchez-Trujillo*. Fourthly, it makes easier the recognition of women as a social group, since women are frequently the victims of serious societal discrimination.

Despite these benefits of an anti-discrimination approach, there are significant problems with identifying it as the sole underlying principle of the five Convention grounds.[120] The anti-discrimination principle is invoked primarily to drive home the point that the Convention does not provide protection to all persons who are victims of persecution. Yet one does not need an anti-discrimination approach to

118 *Islam* and *Shah*, above n. 2, p. 511.

119 See Hathaway, *Law of Refugee Status*, above n. 18, p. 137.

120 As Goodwin-Gill has noted, 'it remains a gloss on the original words, of which advocates need to be aware'. Goodwin-Gill, 'Judicial Reasoning', n. 37 above, p. 539.

reach this result; it seems plain on the face of the Convention itself. That is, one *could* say that a political dissident is being discriminated against because of the views she holds, while other persons with views favoured by the regime are not being persecuted. This would be true, however, of any person whose human rights were being violated, as compared to all those in the particular society whose rights are not being violated.[121]

Furthermore, an anti-discrimination analysis may suggest additional norms that unduly restrict the scope of the Convention. It may lead adjudicators, for example, inappropriately to import into refugee law concepts from domestic anti-discrimination law, such as those relating to causation. More significantly, an anti-discrimination understanding of the Convention may lean towards an 'immutability' approach for defining particular social group.[122] This is so because domestic anti-discrimination law in many States typically defines protected groups as those who share characteristics that ought to be irrelevant to State decision making; and frequently, immutable characteristics are so identified. For instance, it is seen as unjust to distinguish people based on characteristics that they cannot alter, such as race, gender, ethnicity, or caste. Finally, it appears that even those adjudicative bodies that purport to adopt an anti-discrimination approach define it in a manner that actually goes beyond it. For example, the New Zealand Refugee Status Appeals Authority, which is firmly committed to an anti-discrimination/protected characteristics analysis, states that under its approach 'recognition is given to the principle that refugee law ought to concern itself with actions which deny human dignity in any key way'.[123] While the conclusion may well be sensible, it is far from clear what function the anti-discrimination norm ultimately has in the analysis.

E. Social groups and human rights violations

The requirement that a particular social group exist outside of the alleged persecution casts doubt on groups defined solely on the basis that their members' human rights have been violated. For example, it is unlikely that an adjudicator would recognize the claim of a victim of torture if the asserted social group is all persons in the country who have been or might become victims of torture.

It is this reasoning that has generally defeated the claims of Chinese applicants alleging fear of forced sterilization and abortion. Although such acts would surely violate fundamental human rights, adjudicators have been hesitant to recognize

121 Goodwin-Gill has suggested that 'while it may be, and often is, possible to interpret persecution as some form of discriminatory denial of human rights, to think exclusively in these terms may fail to reflect the social reality of oppression'. Ibid., p. 539.

122 See e.g., *Re G.J.*, above n. 47.

123 Ibid., p. 26, citing Hathaway, *Law of Refugee Status*, above n. 18, p. 108.

such claims because they conclude that the only characteristic shared by the purported group is the alleged persecution.

La Forest J, who authored the *Ward* decision for the Canadian Supreme Court, has argued, however, that social group claims might be made out by a class of persons whose fundamental human rights have been violated. In his dissenting opinion in *Chan* v. *Canada (Minister of Employment and Immigration)*,[124] he stated that he would amend the second *Ward* category ('groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake their association') by deleting the 'voluntary association' requirement. The relevant question, according to La Forest J, is whether the persecutor treats people with a shared attribute as comprising a group – not whether the members of the group voluntarily associate with each other.[125] Thus, if an individual is associated voluntarily with a status for reasons fundamental to human dignity, then a group could be cognizable; it would exist 'by virtue of a common attempt to exercise a fundamental human right'. Under the facts of the case, La Forest J would have held that persons who are persecuted for having more than one child can allege membership in a particular social group.[126]

Dawson J in *Applicant A*. takes issue with La Forest J's conclusion, reasoning that the group cannot simply be a random collection of persons across China whose human rights have been violated by coercive family planning practices. Dawson J adds, however, that it would be appropriate to recognize a social group if the violation of human rights gives rise to a self-perception or societal perception of a group:

> A fundamental human right could only constitute a unifying characteristic if persons associated with each other on the basis of the right or, it may be added, if society regarded those persons as a group because of their common wish to exercise the right. And in that situation, it would be the unifying aspect of that element, and not its character as a fundamental human right, which allowed it to delineate a particular social group.[127]

Following Dawson J's logic, if persons across China united in 'support' groups for families with more than one child, or if State policy coercing abortions produced a societal perception that persons resisting forced abortions were social pariahs, then a social group claim might be sustainable. This appears to be a sensible approach that neither recognizes all human rights victims as members of a social group nor denies the possibility that victims of 'generally applicable' policies might be a cognizable social group. In sum, the fact that a group of persons has suffered human rights abuses may be a significant element in determining that a 'particular

124 See above n. 21.

125 Ibid., p. 645. See also, A. Macklin, '*Canada (Attorney-General)* v. *Ward*: A Review Essay', 6 *International Journal of Refugee Law*, 1994, pp. 362–81.

126 See also Daley and Kelley, 'Particular Social Group', above n. 8.

127 *Applicant A*., above n. 4, (1997) 190 CLR 225 at 246.

social group' exists to the extent such abuse is visited on persons who share an independent identifiable characteristic. This is so because such abuses may support a finding that the group is perceived as a group in society in which it is located – that is, it is identified as 'persecutable', or in fact attracts persecution, because of its shared characteristic.

V. The core inquiry: protected characteristics and social cognizability

As the examination of State jurisprudence in Section III showed, the development of the social group ground for refugee status in common law countries has occurred primarily – although not exclusively – through adoption and application of the protected characteristics approach. The results have been important in extending protection to victims of serious human rights abuses and the cases have been influential in other States. The *Islam* and *Shah* case is a particularly noteworthy example. The protected characteristics approach has also received strong support from noted scholars.[128]

The reasons for the success of the protected characteristics approach are apparent. It provides a limiting principle for interpretation of 'particular social group' that resonates with a human rights perspective. That is, it might plausibly be argued – as the protected characteristics approach purports to do – that each of the first four Convention grounds are predicated on human rights conceptions, and thus the 'particular social group' ground ought also to be limited to groups defined in human rights terms. A protected characteristics approach identifies groups that we might generally believe merit protection: those who would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to give up an 'immutable' characteristic or because the basis of affiliation is the exercise of a fundamental human right. The approach also provided an important innovation as adjudicative bodies found the 'voluntary association' analysis of *Sanchez-Trujillo* lacking. It has permitted recognition of groups fully warranting protection – such as women and homosexuals – that do not generally comprise members who are closely affiliated with one another.

Balanced against these advantages, however, are disadvantages that need to be assessed. Significantly, the protected characteristics test is arguably in tension with a common sense meaning of the term 'social group'. Nothing in the refugee definition – and nothing in the *travaux préparatoires* – suggests that the immutability or fundamentality of characteristics is the key to understanding the Convention grounds. Furthermore, although the States Parties' jurisprudence displays a

128 Hathaway, in particular, has forcefully and thoughtfully advocated the *Acosta* approach to the social group definition. See Hathaway, *Law of Refugee Status*, above n. 18, pp. 157–69.

deep concern that the particular social group ground not be so broadly defined as to swallow up the other Convention grounds or to make all victims of persecution automatically refugees – a concern that is plainly consistent with the language, and purposes of the Convention – this consideration alone cannot support limitations that are not otherwise consistent with and reasonably inferable from the Convention.[129]

The protected characteristics approach also appears to deny refugee protection to members of groups who may well be targets of persecution based on their associations that are widely recognized in society.[130] Examples could include such groups as students, union members, professionals, refugee camp workers, or street children. (To list these groups is not to assert that each is always entitled to recognition; it is, however, to help the reader imagine cases in which recognizing such groups might be justifiable.)

A notable example is the *Montoya* case decided by the Immigration Appeal Tribunal (IAT) in the United Kingdom in 2001.[131] The applicant, a manager at his father's coffee plantation in Colombia, alleged that he faced threats and extortion from a revolutionary group that the government was either unable or unwilling to control. He asserted that his family was targeted because they were wealthy landowners; he further stated that his uncle, who had run a coffee plantation in the same village, had been similarly threatened and ultimately murdered. The IAT took note that in Colombia 'the status of being an owner of land that is worked for profit is an ostensible and significant social identifier with historical overtones'; it also accepted that 'another characteristic which private landowners share is the fact that they are ineffectively protected'. Nonetheless, it concluded that the applicant was not a member of a particular social group within the meaning of the Convention because the alleged group was not based on a characteristic that members of the group 'cannot change, or should not be required to change'.[132] The IAT stated that the applicant could change his status as landowner and could do so 'without that having a fundamental impact on his identity or conscience'.[133]

While the Tribunal's conclusion that landownership is not immutable or fundamental to their self-identity is plausible, it is not obvious why this conclusion should exhaust the analysis. Assuming the claimant could establish what he had alleged, the case demonstrates a clear risk of serious human rights violations based

129 As stated by Brennan J in *Applicant A.*: 'An attempt to confine the denotation of the term "a particular social group" in order to restrict the protection accorded by the Convention' is inappropriate where the 'object and purpose of the Convention is the protection so far as possible of the equal enjoyment by every person of fundamental rights and freedoms', above n. 4, (1997) 190 CLR 225 at 236.

130 Goodwin-Gill, *Refugee in International Law* (2nd edn, 1996), above n. 17, p. 365: 'Clearly, there are social groups other than those that share immutable characteristics, or which combine for reasons fundamental to their human dignity.'

131 *Montoya*, above n. 41. 132 Ibid., p. 21. 133 Ibid., p. 22.

solely on the applicant's status – a risk he shared with other persons in a similar situation. Following the ordinary meaning of the words, there is no reason why landowners cannot constitute a social group; in many societies, they are clearly so perceived, both by themselves and by others. Indeed, the IAT seemed to accept that prosperous landowners in Colombia would be perceived as a social group. Yet the protected characteristics approach – at least as applied by the IAT – ruled out recognition of the claim. Why a Convention protecting human rights should be read in such a fashion is far from clear.

The protected characteristics test might be stretched to include Montoya's group, as well as other groups referred to above. Landowning, it could be argued, is a fundamental aspect of one's identity (although the IAT was not persuaded by such a claim). James Hathaway is willing to give a most generous reading to the protected characteristics approach. Thus, he suggests that '[s]tudents are logically within the social group category, since the pursuit of education is a basic international human right' that a person should not be compelled to forego.[134] This seems to strain the category for the sake of reaching an appropriate result in a manner that would not undermine the protected characteristics approach. It is interesting, then, that the proposed INS regulations, by recognizing other factors relevant to a social group determination, appear to be pushing the US jurisprudence beyond the *Acosta* formulation.[135]

An alternative reading of the Convention language is suggested by the majority opinions in the Australian High Court case of *Applicant A*. What constitutes a particular social group is 'a common attribute and a societal perception that they stand apart'.[136] The attribute must not only be shared, it must unite the group as a matter of self-perception or societal perception. That is to say, the shared characteristic must make 'those who share it a cognisable group within their society'.[137] To similar effect is language in the French *Conseil d'Etat*'s *Ourbih* judgment – that membership of a particular social group must be examined from the perspective of whether members of the group will risk persecution 'en raison des caractéristiques communes qui les définissent aux yeux des autorités et de la société'.[138] This approach might best be labelled 'common characteristic/social perception', but the term 'social perception' will be used for shorthand.

134 Hathaway, *Law of Refugee Status*, above n. 18, p. 168.

135 From the foregoing discussion, it ought to be clear that an acceptable alternative is not the 'cohesiveness' and 'voluntary association' standards of *Sanchez-Trujillo*, above n. 25. As noted, the Ninth Circuit itself has backed away from this test in *Hernandez-Montiel*, above n. 64.

136 *Applicant A.*, above n. 4, (1997) 190 CLR 225 at 265–6. See also ibid., p. 264:

> [T]he existence of such a group depends in most, perhaps all, cases on external perceptions of the group . . . [The term 'particular social group'] connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.

137 Ibid., p. 241 (footnote omitted).

138 *Ourbih*, quoted above n. 80.

This social perception interpretation is present – if unrecognized – in some of the US sources, as described above, and is expressly mentioned in *Islam* and *Shah*. Thus, Lord Hope of Craighead stated:

> In general terms, a social group may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society . . . As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person's nationality. The phrase can thus accommodate particular social groups which may be recognisable as such in one country but not in others or which, in any given country, have not previously been recognised.[139]

Importantly, the social perception analysis would appear to encompass the groups currently recognized under the protected characteristics approach. This is primarily due to the fact that groups recognized under the protected characteristics analysis are likely to be perceived as social groups. Why is this the case? It is so because persons in groups that are the subject of persecutory, discriminatory treatment will avoid the shared characteristic that defines the group if they are able to; but groups defined by immutable characteristics cannot do so, and groups defined by characteristics fundamental to human dignity often choose not to do so, nor should they be required to do so.[140] Thus, such groups are likely to maintain their membership despite unfavourable treatment, and generally will be perceived as social groups – defined by the characteristic for which the abuse is imposed. For example, persons are likely to preserve deeply held religious and political convictions even if they face harm in doing so because they may view such convictions as core to their identities. Persons who maintain these kinds of affiliations despite social pressure to change are likely to be perceived as social groups.

While most 'protected characteristics' groups are likely to be perceived as social groups, there may also be social groups perceived as such that are not based on protected characteristics. A social perception approach, therefore, moves beyond protected characteristics by recognizing that external factors can be important to a proper social group definition. Asking whether a group has been 'marked as other'[141] is not to collapse the social group and persecution issues, but rather to examine whether the group is a cognizable group in a particular cultural

139 *Islam* and *Shah*, above n. 2, p. 1038.

140 Note that this also explains why not all immutable characteristics define social groups – consider height in this regard. Persons are generally not persecuted on this ground, and generally not perceived as a social group. If they were perceived as a social group and so persecuted, however, they ought to receive Convention recognition. By contrast, the immutable characteristics approach cannot provide an explanation as to why some immutable characteristics establish groups and others do not.

141 T. D. Parish, 'Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee', 92 *Columbia Law Review*, 1992, pp. 923 and 946.

context.[142] Consider, again, the *Montoya* case, involving the Colombian landowner targeted by guerrilla forces. Even if the applicant could not come within the protected characteristics analysis, it seems quite plausible to consider him part of a group that the guerrillas have perceived as distinct and marked for persecution.

The social perception approach could also reach claims advanced by persons who believe in values at odds with the social mores of the societies in which they live.[143] For example, women who object to FGM or who refuse to wear traditional dress are likely to be perceived as constituting a social group because they have set themselves against the cultural, religious, or political practices of the society. By contrast, it may be more difficult to recognize some of these claims – for instance, one based on attire – under the protected characteristics approach.

As with the protected characteristics approach, the social perception test finds support in the scholarly literature. Goodwin-Gill suggests that '[f]or the purposes of the Convention definition, internal linking factors cannot be considered in isolation, but only in conjunction with external defining factors, such as perceptions, policies, practices and laws'.[144] He would eschew a single principle (such as 'immutability'), examining instead a range of variables:

> These would include, for example, (1) the fact of voluntary association, where such association is equivalent to a certain *value* and not merely the result of accident or incident, unless that in turn is affected by [social perceptions]; (2) involuntary linkages, such as family, shared past experience, or innate, unalterable characteristics; and (3) the perception of others.[145]

Goodwin-Gill recognizes that this interpretation might well embrace groups of 'apparently unconnected and unallied individuals', such as mothers, women at risk of domestic violence, capitalists, and homosexuals.[146]

In recognizing these arguments in favour of a social perception analysis, one must not underestimate the difficulties. Exactly how, it might be asked, is an adjudicator to determine the 'social perceptions' of other societies? Furthermore, *whose* perceptions count? Should an adjudicator examine the views of the alleged persecutors, a majority of the society, the views of ruling elites? A major benefit of the protected characteristics approach is that it avoids some of these evidentiary problems: an adjudicator can make reasonable judgments about the immutability of a

142 See Goodwin-Gill, *Refugee in International Law*, above n. 17 (2nd edn, 1996), p. 362: while 'victimization' alone is not enough to demonstrate a social group, persecutory laws and practices may be 'one facet of broader policies and perspectives, all of which contribute to the identification of the group'.

143 Such claims are also frequently analyzed as political opinion or imputed political opinion claims.

144 See Goodwin-Gill, *Refugee in International Law*, above n. 17 (2nd edn, 1996), p. 362.

145 Ibid., p. 366.

146 Ibid. See also the 'sociological' approach as suggested in Graves, 'From Definition to Exploration', above n. 17.

particular characteristic and can evaluate the testimony of the applicant as to the fundamentality of a particular aspect of his or her identity. (Of course, under the protected characteristics approach, an applicant must still show that the group to which he or she belongs is at risk of persecution in the country to which he or she would be returned.)

The evidentiary problems that accompany a social perception test are not insurmountable. There will be many cases where there is ample objective evidence that particular groups are viewed as pariah groups or recognized as standing apart in the claimant's home country. Discriminatory laws and policies, historical animosities, press accounts and the like may frequently establish, to a fair degree of certainty, that a particular group is perceived as 'other' in a particular society. Adjudicators should have little difficulty, for example, concluding that women, homosexuals or family members of targeted groups constitute social groups in many countries.

Another objection to the social perception test might be that it would appear to recognize groups no matter how trivial the shared characteristic is. Philatelists or roller-bladers, for example, might be understood as constituting 'social groups' in particular countries. In contrast, the protected characteristics approach adopts a conceptual filter, ensuring that recognized groups be united by a truly important trait. In so doing, it preserves the powerful palliative of international protection for persons for whom it would be unfair to demand that they avoid or give up their unifying characteristic. As Hathaway has stated in a comment on a draft of this paper, '[s]urely it would be more reasonable to expect the roller-bladers to take off their skates than to insist that they be granted a "trump card" on migration control to enable them to continue to roll'.[147]

A response to this objection begins by noting that most trivial associations are not likely to attract persecutory acts; thus roller-bladers are quite unlikely to be recognized as refugees whether or not they constitute a 'social group'. If such groups *were* seen as groups in a society, however, and persons *were* subject to persecution on the basis of membership in the group, why should international protection be denied? Whatever we may think of philatelists or roller-bladers, clearly the persecutor sees them as a group that constitutes a threat and should be suppressed, and he or she is willing to inflict unjustifiable harm to accomplish the goal of suppression. The Convention is aimed at preventing the infliction of serious abuses based on group membership, not at preserving membership in groups that are deemed important or worthy. The triviality, or not, of the shared group characteristic therefore ought not to be relevant for Convention purposes. Indeed, as noted above, in most civil law States, the likelihood of persecution is a far more significant element in refugee status determinations than a particular Convention ground. It is thus not surprising that the Convention does not use the language 'fundamental' or 'immutable'

147 J. C. Hathaway, 'Professor Aleinikoff's Paper on "Membership of a Particular Social Group"', p. 2 (on file with the author).

to qualify 'social group'. As human history makes clear, persecutors choose groups and victims for a variety of reasons, not simply based on the *fundamentality* of the trait that defines the group.

Indeed, to adopt a 'non-triviality' requirement would be to give the persecutor *carte blanche* for groups that associate for 'non-fundamental' reasons, that is, to permit the persecutor to accomplish precisely what he or she wants – suppression of the characteristic upon which the group is based. (It is conceivable that sadistic persecutors actually seek to inflict harm, but it is more generally the case that persecutors seek to get rid of the offending characteristic.) Such an approach puts things backwards – imposing a burden on members of a group to change in order to avoid persecution rather than providing protection to those at risk of serious unjustifiable harm.

A final concern with the social perception test might be that it creates too broad an interpretation of social group, opening the floodgates to any number of groups and claimants. Why might not the disabled, the poor, students, shopkeepers, athletes, or entertainers qualify under the test? Yet, as long as adjudicators observe the rule that the group must exist outside the persecution (properly understood), the social group category will be significantly limited. Furthermore, other elements of the refugee definition – for example, the requirements that 'nexus' be shown and that the applicant's fear be well-founded – supply additional limits.

Given the advantages and disadvantages of both the protected characteristics and social perception tests, which should the conscientious adjudicator adopt? In my view, the social perception test is closer to the meaning and purpose of the Convention. It is also more inclusive; the protected characteristics analysis seems to cut off plausible claims for the sole reason of identifying a limiting principle of analysis. It must also be recognized, however, that the protected characteristics approach is well entrenched in the jurisprudence of a number of States and, on the whole, has produced results consistent with the Convention that manifestly further the protection of groups at risk of persecution.

My proposal is that, rather than viewing the two approaches as inconsistent and competing analyses, one should conceptualize the protected characteristics approach as the core of the social perception analysis. That is, groups that qualify under the protected characteristics approach are virtually assured recognition under the social perception test as well. This is so, as noted above, because immutable characteristics generally produce social perceptions, particularly when those characteristics have been used as reasons for the imposition of harms. Similarly, groups based on non-immutable but nevertheless fundamental characteristics that have been subject to serious harm are also likely to be socially cognizable – otherwise, the group members would have foregone the conduct to avoid the harm. Conceptualized in this fashion, one can maintain the analysis and results of the protected characteristics approach but also understand 'membership of a particular social group' as including other groups that meet the social perception test.

The idea that protection can be afforded under differing analyses is not foreign to human rights law. For example, norms prohibiting race discrimination may condemn intentional discrimination as well as practices that unjustifiably impose disproportionate harms, whether or not the imposition of harms is intentional. Intent tests and effects tests ask different questions and require different kinds of evidence, but adjudicators seem to have little difficulty in applying the tests to the same claims. Nor is the application of two separate tests seen as contradictory; each condemns practices that fit within the broader category of discrimination. In a similar fashion, adjudicators in States that currently use the protected characteristics approach might consider adoption of the social perception test in addition, testing social group claims under both standards. That is, identification of a group under the protected characteristics approach would be *sufficient*, but not *necessary*, for Convention purposes.

VI. The 'nexus' requirement and non-State actors

In many social group cases, the difficult issue for the adjudicator may not be the definition of the group so much as the 'nexus' requirement, that is, the persecution be *for reasons of* membership in the group. A full analysis of the 'nexus' issue is beyond the scope of this paper,[148] but several discrete issues need to be considered concomitant with a study of 'particular social group'. These relate to the situation where the agent of persecution is not the State.

Examples may be drawn from the cases: (i) a woman is abused by her spouse in a State that takes no action against such abuse; (ii) a woman is threatened with FGM by her tribal group in a State that prohibits, but cannot stop, the practice; (iii) a criminal enterprise threatens the family of someone who owes it money. Difficulties arise in such cases in deciding whether the conduct of the persecutor and/or the failure of State protection is 'for reasons of' the victim's membership of a social group. For instance, in *Matter of R.A.*, the BIA concluded that the applicant – who had suffered very severe abuse – could not satisfy the nexus requirement because she could not show that group membership was the motivation behind the abuse by her husband.[149] This was so, according to the majority, because there was no evidence that the husband had or would target other members of the group.[150] They found: 'On the basis of this record, we perceive that the husband's focus was on the

148 For an in-depth analysis, see J. C. Hathaway, 'The Michigan Guidelines on Nexus to a Convention Ground (2001)', available at http://www.refugeecaselaw.org/Refugee/guidelines2001.htm.

149 *In Re R.A.*, above n. 14, pp. 21–2. The Board of Immigration Appeals (BIA) also held that the applicant had not shown that the government encouraged spouse abuse or failed to protect women with the expectation that abuse would occur.

150 Ibid., p. 20: 'If group membership were the motivation behind his abuse, one would expect to see some evidence of it manifested in actions towards other members of the same group.'

respondent because she was *his* wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm.'[151]

The specific reasoning in *R.A.* is open to serious question.[152] Indeed, the proposed INS rules – formulated to provide 'clarification' of the Board's reasoning – in fact implicitly disapprove of the Board's 'nexus' analysis.[153] Whether or not the persecutor has acted against others in a similar situation may be probative, but it surely cannot be a required element of the case, any more than a person who claims race discrimination must show that the perpetrator has also discriminated against others on the basis of race. The Convention requires a showing that *her* fear of persecution is for reasons of a characteristic *she* possesses.

Even where it cannot be shown that the persecutor has acted 'for reasons of' one of the Convention grounds, there are circumstances in which a refugee claim might be recognized. Haines of the New Zealand Refugee Status Appeals Authority provides a persuasive account in Refugee Appeal No. 71427/99:

> [T]he nexus between the Convention reason and the persecution can be provided *either* by the serious harm limb *or* by the failure of the state protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state actor (e.g., husband, partner or other non-state agent) for reasons unrelated to any Convention grounds, but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. This is because 'persecution' is a construct of two separate but essential elements, namely the risk of serious harm and failure of protection.[154]

151 Ibid., p. 21.

152 See also the thoughtful dissenting BIA opinion authored by Board Chairman P. Schmidt, concluding that it was reasonable to believe that the harm inflicted on the applicant was motivated on account of R.A.'s membership of a particular social group that is defined by her gender, her relationship to her husband, and her opposition to domestic violence. The dissent further argues that *R.A.* is indistinguishable from *Kasinga*, above n. 5, an FGM case where membership of a particular social group was established, because '[t]he gender-based characteristics shared by the members of each group are immutable, the form of the abuse resisted in both cases was considered culturally normative and was broadly sanctioned by the community, and the persecution imposed occurred without possibility of state protection', *In Re R.A.*, above n. 14, p. 37.

153 The explanatory material to the proposed rules states that an applicant is not required to show that a persecutor would be prone to harm other members of the defined social group. It reads: 'Thus, it may be possible in some cases for a victim of domestic violence to satisfy the "on account of" requirement, even though social limitations and other factors result in the abuser having the opportunity, and indeed the motivation, to harm only one of the women who share the characteristic, because only one of these women is in a domestic relationship with the abuser.' 65 Fed. Reg. at 76593.

154 See above n. 7, at para. 112.

In other words, the claimant must show that the feared persecution is 'for reasons of' one of the Convention grounds and that the State does not afford protection. The Convention ground may be supplied either by the non-State persecutor (coupled with a State that is unable or unwilling to afford protection) or by the State (when it is unwilling to afford protection for one of the Convention reasons).[155]

This bifurcated analysis means that a social group claim may require separate analyses of both the conduct of the non-State actor and the State to see if either is acting for reasons of the claimant's membership of a particular social group. Consider again the example of an abusive husband. A social group claim may be established either by showing (i) that the man's actions are predicated on his spouse's gender and the State is unable (or unwilling) to provide protection against such conduct; or (ii) that, whatever the reasons for the husband's actions, the State is unwilling to protect the spouse because of her gender.[156]

Importantly, this analysis does not suggest that every case of domestic abuse establishes a refugee claim. First, the State may have an adequate legal process for sanctioning abusers; thus the applicant would be unable to establish a lack of State protection. Secondly, even where a particular applicant had been unable to secure police protection, it might be – as explained by the Federal Court of Australia in *Khawar* – that the failure was atypical, due to the attitude or ineptitude of a particular police officer, based on police inefficiency, or based on police reluctance to become involved in domestic disputes. The claimant would have to show 'something more' – a requirement that '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'.[157]

155 The Federal Court of Australia has suggested that the 'State's systemic failure to protect the members of the particular social group' from an abusive husband might itself constitute 'persecutory conduct'. See *Minister for Immigration and Multicultural Affairs* v. *Khawar*, above n. 34, para. 124, which reads: '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.' See also P. Goldberg, 'Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence', 26 *Cornell International Law Journal*, 1993, pp. 565 and 584–8.

156 Compare *Islam* and *Shah*, above n. 2.

157 *Minister for Immigration and Multicultural Affairs* v. *Khawar*, above n. 34, judgment of 23 Aug. 2000, para. 160. See also Lord Hoffmann in *Islam* and *Shah*, above n. 2, [1999] 2 WLR 1015 at 1035:

> [S]uppose 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? . . . [I]n my opinion, he is. An essential element in the persecution,

VII. Applications

In this section, I apply the previous analysis to several kinds of claims with which adjudicators are faced today. The analysis cannot be definitive, since cases inevitably turn on the particular circumstances of the applicant and the country of origin. Nevertheless, the discussion above should help to guide the examination of such claims.

A. Sexual orientation

Mr A. is an openly homosexual male. He has been seriously beaten and harassed by persons in his home town. His complaints to local police have been unavailing. He alleges that homosexuality is criminalized in his country and that local and State police either tolerate or encourage violence against homosexuals.

In a number of States, homosexuality has been recognized as a particular social group within the meaning of the Convention.[158] This result is likely to be reached whether an adjudicator applies the protected characteristics test or the social perception test. Sexual orientation is now generally understood as unchangeable or so fundamental to human dignity that change should not be compelled. Furthermore, in many societies homosexuals are viewed as pariah groups. The lack of 'cohesiveness' among members of the class should not defeat the claim. To meet the 'nexus' requirement a claimant would have to establish either that the persecutor abused the claimant because of the claimant's homosexuality (and the State refused to act) or that the State failed to provide protection because of the claimant's homosexuality.

B. Family-based claims

1. Persecution by family member based on victim's membership in a family

Ms R. is an 18-year-old young woman whose father has physically and sexually abused her and her three sisters for many years. Her father has threatened her

> 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'.

158 See *Re G.J.*, above n. 47, and cases cited therein. Importantly, the reasoning of the House of Lords in *Islam* and *Shah*, above n. 2, also appears to cover sexual orientation. The case may therefore by read as clearing up an ambiguity that had existed in lower court cases in the UK. See Vidal, 'Membership of a Particular Social Group', above n. 37, pp. 535–6. See also, Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), 'Replies to the Questionnaire on Gay and Lesbian Asylum Seekers', 14 March 2001.

mother with death if she seeks to intervene. Complaints to the police have not prevented the abuse.

Under all the approaches discussed above (including the *Sanchez-Trujillo* standard), the family has been identified as a plausible particular social group, although the fact that the persecutor himself is a member of the family makes this perhaps a novel use of the Convention ground in this instance. In an important decision (*Aguirre-Cervantes* v. *INS*), a Court of Appeals in the United States has nevertheless recognized the family as a social group in such circumstances.[159] The definition of the particular social group as 'family' avoids a number of difficult issues that are raised when abuse claims are stated as persecution for reason of gender – for example, because 'nexus' can be established by showing that the father has assaulted members of his family, there is no need to show that the State acted 'for reasons of' the applicant's membership of a social group. Furthermore, the class definition avoids the difficulty noted by the BIA in *R.A.* that the husband showed no inclination to abuse women other than his wife (thereby, according to the Board, undermining the definition of social group as 'women'). In *Aguirre-Cervantes* there was a close fit between the group and the victims of persecution – the abuser's immediate family.

Other courts and other jurisdictions may resist following the *Aguirre-Cervantes* approach because it appears to transmute any domestic violence case that is not prevented by the State into a refugee claim – irrespective of the reasons for the failure of State protection. In abuse cases alleging a particular social group based on gender, the applicant normally identifies social values and norms that tolerate abuse of women that underlie both the actions of the abuser and the lack of protection by the State. That is, women as a class are devalued, deemed not entitled to equal protection by the State from violence. In *Aguirre-Cervantes*, however, it would be hard to conceive of proof that a society devalues family life. Perhaps it is the social construction of family – with a male head who is free to treat members of the family as he chooses without intervention from the State – that is the key to the case. Thus, the court cited evidence that domestic violence is widely condoned in Mexico, that the State is either unwilling or unable to stop it, and that the State apparently gives 'tacit approval of a certain measure of abuse'.

2. *Persecution by non-State actor who victimizes members of applicant's family*

Mrs S. and her children have received death threats from criminals to whom her husband owes money. The family lives in an area where the government cannot exercise effective control over criminal syndicates.

159 Compare *Aguirre-Cervantes* v. *INS*, above n. 55.

As in the previous hypothetical example, the family may constitute a particular social group. The interesting issue in this case is whether the family may assert a valid claim even if the criminal group's relationship with the husband is not related to one of the Convention grounds. Compare, for example, the classic case of a State threatening a dissident's family in order to deter the dissident's activities.[160] The Federal Court of Australia has found the family cognizable as a social group in such circumstances, rejecting a lower court's conclusion that the dispute was personal because 'the main target of the persecution falls outside the scope of the Convention'.[161] This seems a sensible result. It is the family as such that is being targeted; it is a status that cannot be escaped, and the State is unable to provide protection from the persecution.

C. Chinese coercive family practices

Mr and Mrs C. fled China after the birth of their second child. They assert that they have been threatened with involuntary sterilization by local Chinese authorities.

Applicants claiming refugee status based on a fear of coercive family practices have generally been unsuccessful.[162] The cases express a number of concerns. First, while not condoning forced abortion or sterilization, courts and administrative agencies have tended to view population control measures as permissible social policies – that is, they are not inherently persecutory. Secondly, reports of actions taken by local officials may be deemed to be isolated incidents. Thus, claims may fail for not establishing a *well-founded* fear of persecution.[163] No doubt adjudicators have also been influenced by the fact that the majority of applicants are males from regions in China that have traditionally sent migrants abroad.

Most important for present purposes, adjudicators are hesitant to conclude that persons who object to a general social policy constitute a particular social group. Such persons are not affiliated as a group, nor – it is found – are they identified as

160 For a review of German cases on this point, see M. Fullerton, 'Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany', 4 *Georgetown Immigration Law Journal*, 1990, pp. 381, 428–37.

161 *Minister for Immigration and Multicultural Affairs* v. *Sarrazola*, [1999] FCA 1134, 1999 Aust Fedct Lexis 667. Compare the Netherlands decisions that grant refugee status in situations in which harm is visited on family members to get at another family member. Spijkerboer, *Gender and Refugee Status*, above n. 95, p. 120.

162 See *Chang*, above n. 53 (USA), *Applicant A.*, above n. 4 (Australia). Compare *Chan* (Canada), above n. 21. Importantly, however, the children of two-child families have been deemed to constitute a particular social group. See *Chen Shi Hai* v. *Minister for Immigration and Multicultural Affairs*, above n. 29 (so-called 'black children'). Moreover, applicants may be able to establish claims based on persecution for reasons of religion or political opinion.

163 Compare *Chan*, above n. 21, finding that a fear of forced sterilization was not objectively well-founded.

a group by society at large. The clear underlying concern here is that a rule not be affirmed that would recognize ordinary criminals as a social group, who allegedly might be deemed to be affiliated by their violation of general State policies.

Applicants have sought to distinguish ordinary criminals by noting that the coercive family planning cases assert punishment for the exercise of fundamental human rights, such as the right to be free from egregious bodily intrusions and the right to determine one's family. This links up with the second *Ward/Acosta* category encompassing characteristics fundamental to human dignity, that is, a social group might be asserted as constituted by persons united in their assertion of fundamental human rights.[164] The problem with this analysis, however, is that it would appear to replace the individual Convention grounds with a single ground protecting all persons whose human rights have been violated, designating a social group for each right violated – or perhaps for all persons whose human rights are violated in a particular society. This kind of general *non-refoulement* principle might well be an admirable advance for human rights protection, but it clearly goes beyond the intent and scope of the Convention.

Adjudicators should pause, however, before leaping to the conclusion that opponents of China's family planning practices may never constitute a social group. Adoption of the approach suggested above would require examination of whether persons who have had two children or who have asserted a human right to do so have been perceived to be a social group in China. In this inquiry, the fact of persecution might support the recognition of a social group – without running foul of the rule that the persecution cannot define the group. That is, coercive State action may be perceived by the society at large as affirming the idea that those who oppose the policy are enemies of the State. Indeed, the severity of the human rights abuse underscores the statement being made by the State. It is as if the State were saying: 'These people's conduct transgresses social norms to such an extent that it is justifiable that we violate their fundamental human rights.' (Even if the punishment inflicted did not include forced abortion or sterilization, it might still help to identify violators as a pariah group in Chinese society.)

In sum, the relevant question in the Chinese coercive family planning cases ought to be whether those who oppose the policy are perceived to be a group apart in China. This would be so whether or not the group is 'cohesive' or whether or not the members of the group voluntarily affiliate with each other. It is sufficient that the group is recognized as a group in society so that any person with the characteristic that defines the group is seen as a member of the group. If so, then action taken against them that violates fundamental human rights ought to be understood to be persecution inflicted for reasons of their membership of a particular social group.

This example demonstrates the way in which the proposed approach charts a middle course – neither concluding that all persons who suffer human rights

164 See La Forest J, dissenting in *Chan*, above n. 21, [1995] 3 SCR 593 at 642–6.

abuses receive Convention protection on social group grounds nor automatically ruling out claims brought by those who oppose general social policies. It avoids the untoward consequences of a *Sanchez-Trujillo* approach, and also does not require a stretched application of the protected characteristics test in order to provide protection appropriate under the Convention.

D. Spouse abuse

Mrs T., who had been beaten many times by her husband, told him that she wants a divorce. He has thrown her out of the house and told her that he will not consent to a divorce. Although they no longer live together, the husband continues to harass the wife. Her appeals to the local authorities have brought no assistance; under the social norms of the State, the husband is free to discipline a wife who has abandoned the home.

No set of cases has tested the social group ground as much as claims involving spouse abuse. Although domestic violence claims were virtually non-existent two decades ago, they are now brought with increasing frequency in many jurisdictions. These claims raise difficult issues of the interpretation of both the term 'membership of a particular social group' and the nexus requirement. Adjudicators – aided by officially promulgated guidelines relating to gender-based refugee claims[165] – have shown a general willingness to entertain such claims, but the reasoning of the cases differs substantially across jurisdictions.

The precise definition of the social group has been a particular difficulty.[166] Cases have considered groups defined as women, married women, women who express opposition to abuse, and women married to abusive husbands. The protected characteristics and social perception approaches both might recognize *women* as the appropriate group. This was the conclusion of a majority of the Lords in the important *Islam* and *Shah* decision. It might be objected that this definition fails because not all members of the group are at risk.[167] However, as noted by Lord Steyn in *Islam* and *Shah*, this would be an inappropriate limitation on the class; the relevant question is not whether all members are subject to risk but whether the membership of the applicant in the group is the basis for *her* fear of persecution. Another objection to definition of the class as *women* could be based on the idea that an abuser might well have targeted his wife for abuse not because she is a woman but rather because she is married to him, or because he is simply an abusive person. But this reasoning seems open to question, once the analysis is expanded to take into account social

165 See e.g., Australia, Canada, the Netherlands, the UK, and the USA. Guidelines on the treatment of particularly vulnerable asylum seekers (including those facing gender-related persecution) are also being drafted by the Austrian Federal Asylum Office.

166 See Goldberg, 'Anyplace but Home', above n. 155.

167 This was the argument of counsel for the Secretary of State in *Islam* and *Shah*, above n. 2. See the judgment of Lord Steyn at 504.

norms. It may well be that broader norms in society, in essence, license abuse of women by neither stigmatizing the persecutor nor insisting that the State take action to prevent it. In such a case, the abuse suffered by the applicant seems plainly to befall her because she is a woman.

Some adjudicators have been more comfortable with the category of *married women*, perhaps because it more narrowly identifies the group of persons likely to suffer abuse. That is, an abusive husband may not persecute women on the street, but might well abuse any woman to whom he is married.

Under the proposed approach, it could be appropriate for adjudicators to identify either *women* or *married women* as a particular social group – it is hard to imagine a society in which these groups are not widely recognized as sharing a distinct and socially relevant characteristic. Both groups would also likely be recognized under the protected characteristics approach. The question would then be whether the applicant could demonstrate that the persecution was suffered for reasons of belonging to this group. As the 'nexus' discussion above noted, this could be established in two ways. Either the applicant could show that the abuser persecuted her because of her membership of the particular social group, and that the State was either unable or unwilling to prevent the abuse, or she could show that, whatever the motives of the abuser, the State was *unwilling* to prevent the abuse because of her membership in the defined group.

Admittedly, this analysis is at odds with the BIA's decision in *Matter of R.A.*, but that judgment seems open to serious question – as indicated by the proposed INS rules and the ruling of the US Attorney-General vacating the Board's decision and remanding the case to the Board for reconsideration once the INS promulgates a final rule. There is no justification for a requirement that an applicant prove that her abuser would abuse all women (or all married women). Again, the issue for investigation is whether the applicant is at risk because of circumstances she is in and whether it is her membership in a group that puts her at risk.

VIII. Conclusion

It would be wise to keep in mind the words of Sedley J, writing for the Court of Appeal in the *Islam* and *Shah* case (and quoted by Lord Steyn in *Islam* and *Shah*):

> [A]djudication [of a particular social group claim] 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.[168]

168 *R.* v. *IAT and Secretary of State for the Home Department, ex parte Shah*, English Court of Appeal, [1997] Imm AR 145 at 153.

Additionally, it is crucial to stress that social group determinations are fact- and country-specific. That is, there is no *a priori* reason to assume that a group identified for Convention purposes as a social group in one country will qualify as a social group in other countries. With these chastening considerations in mind, I offer the following summary of the preceding discussion.

While the term 'particular social group' should not be artificially limited in its application, so too it cannot be given a meaning that renders the other categories superfluous. Importantly, a group cannot be defined simply based on the persecution that has been visited upon it. Two general analyses have been identified – the protected characteristics approach and the social perception approach. I have argued that the social perception test, while occasioning some difficulties, is probably the better reading of the Convention. The central issue for analysis in a social group case, then, should be whether the alleged group is united by a common characteristic by which members identify themselves or are identified by the government or society. Nonetheless, the two approaches can be seen as consistent if the protected characteristics analysis is understood to define a core set of groups that are virtually ensured recognition under the social perception test. Understood in that fashion, the protected characteristics test can be applied by adjudicators who find that approach more suitable; such adjudicators can be safe in the knowledge that the approach will identify the vast bulk of groups that should be afforded protection under the Convention. I have argued, however, that they should be willing to assess claims that fail the protected characteristics test under the social perception test as well.

Under either test, there is no requirement that a group be 'cohesive' in order to be recognized as a 'particular social group' within the meaning of the Convention, that is, there need be no showing that all members of a group know each other or voluntarily associate together. The relevant issue is whether or not group members share a common characteristic that defines a group. So too an applicant need not demonstrate that every member of a group is at risk of persecution in order to establish that a particular social group exists. He or she need only demonstrate that a fear of persecution is based on his or her membership of the group.

While a 'particular social group' cannot be defined solely by the fact that all members of the group suffer persecution nor by a common fear of persecution, persecutory action towards a group may be a relevant factor in determining whether a group is cognizable as such in a particular society. The fact that abuse is visited on persons who share an independent identifiable characteristic may demonstrate that the group is perceived as a group in the society in which it is located, that is, it is identified as 'persecutable', or in fact attracts persecution, because of its shared characteristic.

I have suggested that invocation of *ejusdem generis* or understanding the Convention primarily in 'non-discrimination' terms has only limited relevance for interpreting the term 'particular social group'.

As to the requirement of a nexus between membership of a social group and a well-founded fear of persecution, where an applicant is harmed by a non-State actor, such harm may constitute persecution for reasons of membership of a particular social group if (i) the harm is inflicted for reasons of such membership and the State is unable or unwilling to prevent the harm; or (ii) the harm is inflicted and the State, for reasons of the applicant's membership of a particular social group, is unwilling to prevent the harm.

It is worth recalling one final point. A conclusion that a particular social group exists in an individual case does not, of course, establish that all members of the group are entitled to recognition as refugees. An applicant would need to demonstrate a well-founded fear of being persecuted for reasons of membership of that group.