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Asylum Claims Based on Persecution on Account of Religion: Women Persecuted Under Shari'ah Law

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Under Shari'ah Law*

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Asylum Claims Based on Persecution on Account of Religion:
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I. Introduction

George Washington once wrote, "The bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions".¹ But this was easier said than done. While initially America may have been viewed as a refuge for those escaping persecution, today that refuge has been regulated and codified in such a way that many of those seeking protection are turned away. U.S. law allows asylum only when applicants can show that they have been or will be persecuted "...on account of race, religion, nationality, membership in a particular social group, or political opinion."² Many of those denied protection are women fleeing sexually based persecution such as rape, forced prostitution, torture and discriminatory laws and social mores.

In particular, asylum has been denied to Muslim women fleeing persecution under Shari'ahⁱ law in some countries because they failed to link the persecution to one of the enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion.³ These women often face extreme persecution including strict proscriptions on dress, behavior, work and educational opportunities and ability to marry and divorce.⁴ Trying to fit into the rigid refugee definition, many female asylum seekers have sought to fit their claim within the "membership in a social group" or "political opinion" category. This has been met with limited success. Muslim women fleeing persecution under Shari'ah law, however, may also seek asylum based upon persecution on account of religion.

ⁱ Shari'ah, which means "path to follow", is the general source of ethical, religious and legal rules for Muslims. It was developed to give guidance to Muslims on how to live according to the tenets of the Qur'an. Khaliq, Urfan, *Beyond the Veil? An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 Buff. J. Int'l L. 1, 7 (Spring 1995). For more information, see *infra* Section IV, The Roots of Shari'ah.

This paper will explore how women suffering persecution under Shari'ah law may use the religious persecution category to assert a claim for asylum. Section II will start by looking at modern U.S. refugee law and the legal obstacles that applicants must overcome in order to receive asylum. Section III will focus on religious persecution and previous claims to asylum brought by Muslim women. In section IV I will examine the development of Shari'ah law and explain how a claim of religious persecution can be asserted for actions conducted under certain codified laws. Finally, in section V, I will focus on specific examples of Shari'ah-based persecution in Pakistan, Iran and Afghanistan and discuss how a claim of asylum may be asserted in those circumstances.

II. Introduction to Modern Refugee Law

In the early years of the United States, immigration was virtually unrestricted. In fact, colonies encouraged immigration by giving new immigrants parcels of land to cultivate.⁵ It wasn't until after the Civil War that the government began placing restrictions on immigration, attempting to deter immigration from China and Southern and Eastern Europe.⁶ The Immigration Act of 1917 established the first racially based quota system for admitting immigrants and denied admission to immigrants from a list of Asiatic countries.⁷ This quota system remained in place until after World War II.

During and immediately following World War II millions of people were displaced. Trying to deal with this problem was a priority during the first session of the United Nations General Assembly in 1946.⁸ As a result, the International Refugee Organization (IRO) was established in 1947. The initial objective of the IRO was to help these people return to their home countries.⁹ However, this was sometimes not possible and the IRO needed to resettle a

large number of people in new countries.¹⁰ A few years later the IRO was replaced by the United Nations High Commissioner for Refugees (UNHCR), which remains in place today.¹¹

The UNHCR drafted two major treaties pertaining to refugees: the 1951 United Nations Convention Relating to the Status of Refugees and the United Nations Protocol Relating to the Status of Refugees (Refugee Protocol) in 1967.¹² These two documents provide the framework upon which the majority of the world's nations have developed their asylum laws. Based upon the definitions in these two documents, the United States Congress enacted the Refugee Act in 1980, which defines a refugee as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹³

Thus, in order to establish refugee status, a person fleeing persecution must prove that the persecution is because of one of the five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion.¹⁴

A. What is Persecution?

Even when an applicant can prove that the conduct is on account of one of the enumerated grounds, there are still several other hurdles to overcome. For example, the applicant must show that conduct he or she is fleeing amounts to persecution because "the concept of persecution does not encompass all treatment that our society regards as unfair, unjust or even

unlawful or unconstitutional”.¹⁵ Unless an applicant can demonstrate that the conduct he or she is fleeing is persecution, asylum will not be granted.

There is no universal definition of persecution in refugee law. The United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status infers from Article 33 of the 1951 Convention Relating to the Status of Refugees that persecution is a “threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group”.¹⁶ This Convention was ratified by numerous states, including the United States. It is important to remember, however, that the UNHCR can only make suggestions to states. Each state is free to adopt whatever definitions it chooses.¹⁷

In defining what persecution is, some states have turned to international human rights instruments for guidance. In 1993, the Chair of Canada’s Immigration and Refugee Board issued the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (the Canadian Guidelines).¹⁸ These guidelines suggested that references to international instruments may determine what constitutes permissible conduct by a state towards women.¹⁹ Likewise, the Australian Department of Immigration and Multicultural Affairs published the Guidelines on Gender Issues for Decision makers (the Australian Guidelines).²⁰ The Australian Guidelines listed numerous international instruments including the Universal Declaration of Human Rights²¹, the Convention on the Elimination of All Forms of Discrimination Against Women²² and the 1994 United Nations Declaration on the Elimination of Violence Against Women²³ as sources for determining what persecution is.²⁴ This indicates that violating universal human rights is persecution under refugee law.

In contrast, the United States does not rely directly on international human rights instruments to define persecution. However, the Immigration and Naturalization Service

(“I.N.S.”) did state in an internal memorandum that the evaluation of gender-based claims must be viewed within the framework of international instruments.²⁵ The memorandum then cited to the Convention on the Elimination of All Forms of Discrimination Against Women²⁶, the U.N. Declaration on the Elimination of Violence Against Women²⁷, and the Canadian Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution²⁸ as international instruments that asylum officers should use when dealing with women claimants.²⁹ Furthermore, the I.N.S. did state that “[s]erious violations of basic human rights can constitute acts of persecution”.³⁰ The vagueness of this definition allows decision makers to determine on a case-by-case basis whether the conduct rises to the level of persecution. Thus, each federal circuit may apply slightly different definitions when analyzing asylum claims. When analyzing existing case law, however, it appears that some standards have emerged for what constitutes persecution based upon the form that the persecution takes.

i. Non-physical Persecution

In 1965 Congress amended the Immigration and Nationality Act definition of refugee to eliminate the requirement that the persecution be physical.³¹ Prior to this amendment, the Act required that the persecution be physical before asylum would be granted.³² In *Kovac v. I.N.S.*, the Ninth Circuit held that “a probability of substantial economic disadvantage upon an alien for reasons of race, religion, or political opinion is sufficient to confer upon the Attorney General the discretion to withhold deportation”.³³ Kovac, a Hungarian living in Yugoslavia, sought a stay of deportation claiming that he was a trained chef but the Yugoslavian police had made it impossible for him to get a job as a chef because of his Hungarian background. The court reasoned that the removal of the word “physical” from the definition of refugee meant that the

scope of the definition was broader and could extend to purely non-physical persecution, such as extreme economic deprivation.³⁴

In order to be granted asylum based on economic persecution, the persecution must be severe. For example, the Seventh Circuit denied asylum to a Polish citizen who was terminated from his government job but was able to start up his own business and could afford to come to the United States on a tourist visa.³⁵ The court reasoned that since he was able to maintain his same standard of living by running his own business, this indicated that the persecution was not substantial enough for him to qualify for asylum.³⁶

In a subsequent case, *Borca v. I.N.S.*, the Seventh Circuit held that a well-founded fear of economic persecution could be shown when there is a probability of deliberate imposition of substantial economic disadvantage on account of one of the enumerated grounds.³⁷ In adopting this approach, the court specifically rejected the standard imposed by lower courts that required the applicant show a total deprivation of livelihood.³⁸ The court reasoned that requiring a showing of total economic deprivation was more in keeping with the case law prior to the 1965 Amendment to the Immigration Act.³⁹ That amendment removed the word “physical” from the definition of refugee, making it possible for an applicant to assert a valid claim of asylum based solely on non-physical persecution. Citing to *Kovac*, the Seventh Circuit concluded that an applicant could make a showing of economic persecution even if the deprivation is not total.⁴⁰ The court reversed the BIA denial of asylum and remanded the case for consideration under this standard. This relaxed standard may be significant to women fleeing Shari’ah-based economic persecution because the persecution they face is often severe, but does not always rise to the level of complete economic deprivation.⁴¹

ii. Discrimination

Another form that persecution can take is discrimination. When asserting a claim of persecution based on discrimination, an applicant must show that the discrimination rises to the level of persecution. For example, the Ninth Circuit denied asylum to an Iranian woman who argued that the discrimination she suffered under the government amounted to persecution.⁴² In *Fisher v. I.N.S.*, the woman described three incidents of harassment that she had endured at the hands of government agents. The first incident was when she was detained and questioned by officers, along with several other women, for seeing a man in his bathing suit at a party they had attended. A few months later she was ordered into a car at gunpoint by officers and chastised for allowing a few strands of hair to escape from her chador. The officers admonished her and took her home. The final incident was when officers searched her father's home, where she lived, looking for political dissidents. She was not detained or questioned during the search. Looking at all three of these incidents, the court concluded that they did not rise to the level of persecution. The court stated that "[p]ersecution is an extreme concept, which ordinarily does not include discrimination on the basis of race or religion, as morally reprehensible as it may be".⁴³

After the *Fisher* decision it appeared that getting asylum on the basis of racial or religious discrimination would be almost impossible. However, in *Singh v. I.N.S.*, the Ninth Circuit found that Mr. Singh, an ethnic Indian citizen of Fiji, had been persecuted on account of his race after he and his family were repeatedly threatened.⁴⁴ Because of the threats, Mr. Singh quit his job and the family fled their home. Mr. Singh started a business of his own but the threats continued and Mr. Singh was eventually assaulted in his business. His assailants were Fijian dock workers and gang members. Mr. Singh reported all of the incidents to the police, but they did not respond or take any action.

The court held that Mr. Singh and his family had suffered persecution on account of race-based discrimination.⁴⁵ The court justified its holding in light of the *Fisher* case by arguing that *Fisher* did not stand for the argument that discrimination never rises to the level of persecution.⁴⁶ Rather, the record in *Fisher* simply did not show that the discrimination the applicant suffered rose to the level of persecution. In the present case, the court held, there was ample evidence that Mr. Singh had been persecuted and thus asylum was appropriate.⁴⁷ This holding is significant to the issue of persecution under Shari'ah law because it opens the door to the possibility that discrimination can be persecution if severe enough.

iii. Prosecution as Persecution

Discriminatory laws are often the source of persecution for applicants seeking asylum. This can present another hurdle for the applicant because refugee law generally does not provide protection to those fleeing prosecution for a crime. International law recognizes the right of states to establish and enforce their own laws. This is the case even when the law that was violated was one "that our society regards as unfair, unjust, or even unlawful or unconstitutional".⁴⁸

Although the general rule is that prosecution for a crime is not persecution, there are two primary exceptions. Those exceptions are: disproportionately severe punishment because of an enumerated ground and pretextual prosecution.⁴⁹ The applicant in *Fisher* argued that she feared persecution for her religious and political beliefs by the Iranian government because she may be prosecuted under Iranian law for violating the dress and conduct rules of the Shari'ah. The court held that she failed to meet either exception. In denying her claim, the *Fisher* court stated that she had merely shown that she was at risk for prosecution under Iranian laws that apply to all women and not persecution on account of one of the enumerated grounds.⁵⁰ It pointed to the fact

that none of the officers knew her religious and political beliefs when they detained her, so the punishment could not be a pretext to persecute her for her beliefs. In addition, the government has detained and harassed other women for similar infractions, so there was no evidence that she her experiences were disproportionately severe compared to the rest of Iranian women. As such, the prosecution was not on the grounds of her personal beliefs and was not a pretext for singling her out for persecution.

B. Agency and Intent

Recall that in the *Singh* case discussed above, the persecutors were Fijian dock workers, not government agents.⁵¹ Despite this, the Court granted asylum to Mr. Singh based on persecution on account of race.⁵² This demonstrates the principle that the persecution does not have to be perpetrated by the government or agents working for the government. For example, in *In re Kasinga*, the BIA defined persecution as “infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim”.⁵³ Kasinga was a Togolese woman fleeing forced Female Genital Mutilation (FGM), a ritual practiced by the Tchamba-Kunsunto tribe that she belonged to. In her application, Kasinga stated that if she returned to Togo she would be forced to undergo FGM because it was a tribal custom. Although the Togolese government did not actually participate in the FGM, it would provide no protection for her. The court concluded that she had a well-founded fear of persecution because of the tribal customs and granted asylum.⁵⁴

The purpose of FGM is not to punish or hurt women. It is a custom that has long been practiced in Togo and is routinely performed on girls at the age of 15 as a rite of passage.⁵⁵ Most asylum cases involve persecutors that intend to hurt their victims, but this is not required.⁵⁶ The BIA has stated that, “subjective punitive or malignant intent is not required”.⁵⁷ In other words,

persecution may be found even where the conduct is perpetrated by a non-state agent for reasons other than to punish or harm the victim.

C. The Nexus Requirement

This leads to perhaps the most difficult hurdle an asylum applicant must overcome, the nexus requirement. As discussed above, the refugee definition requires "...a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁵⁸ Thus, the applicant must present evidence that the intent of the persecutor was related to one of the enumerated grounds.

The pivotal case describing the nexus requirement is *I.N.S. v. Zacarias*.⁵⁹ This case involved a Guatemalan man seeking asylum on the basis of persecution on account of political opinion.⁶⁰ While living in Guatemala, armed, uniformed guerillas came to Mr. Zacharias' home and asked him to join them in fighting the government. When Mr. Zacharias refused to join them the guerillas told him to think it over and they would return to take him. Fearful that he would be forced to join them, Mr. Zacharias fled Guatemala two months later. The issue before the Supreme Court was whether coercion by the guerillas to get Mr. Zacharias to join them was persecution on account of political opinion.⁶¹ The Court answered in the negative, stating that there were many reasons why Mr. Zacharias might decline to join the guerillas and many of them were not political.⁶² Mr. Zacharias presented no evidence that he gave a reason for his refusal to join or that the guerillas believed his refusal to be politically motivated. Without any evidence, direct or circumstantial, to show that the persecution was motivated by Mr. Zacharias' political opinion, asylum could not be granted.⁶³

The *Zacharias* court hinted that had Mr. Zacharias presented evidence that the guerillas would persecute him because they believed his refusal to join them was politically based he

might have fulfilled the nexus requirement.⁶⁴ It doesn't matter whether an individual actually possesses the opinions they are being persecuted for as long as the persecutors believe they do.⁶⁵ When an individual is persecuted at least in part because of a political belief he or she is believed to hold, that individual is being persecuted on account of imputed political opinion and the nexus requirement is fulfilled.⁶⁶

For example, in *In re S.P.*, the BIA held that harm that has been inflicted on account of one of the protected grounds specified in the refugee definition for imputed reasons could satisfy the definition.⁶⁷ The applicant in *In re S.P.* was fleeing persecution by Sri Lankan forces after he was found in a guerilla camp. He had been kidnapped by the guerillas and was being used for slave labor when the army invaded the camp. He was assumed to be a guerilla and was taken to a prison where he was held for six months. During his detention he was tortured at least eight times, beaten on several occasions and threatened with death at least four times. The immigration judge denied asylum, concluding that the army's motive was an attempt to gain information from the applicant regarding the continuing civil unrest in Sri Lanka. Reversing the judge's decision, the BIA held that although one motive may have been to obtain information, the underlying reason for the abuse was a belief that the applicant held political views opposed to the government.⁶⁸

In re S.P. involved a refugee seeking asylum based upon imputed political opinion. In the BIA's decision, however, it recognized that any of the enumerated grounds may be imputed and thus a basis for asylum.⁶⁹ In cases involving women fleeing persecution under Shari'ah law, the persecution may often be due to imputed beliefs. In particular, these women may be targeted for persecution due to imputed religious beliefs. In order to better understand how women fleeing

persecution under Shari'ah law may fit within the definition of refugee, it is essential that we start with a discussion of persecution on account of religion.

III. Persecution on Account of Religion

Freedom of religion is not a new concept. The importance of freedom of religion was recognized in the first amendment of the U.S. Constitution, which guarantees that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."⁷⁰ It received international recognition in the Universal Declaration of Human Rights (UDHR). The UDHR states in article 18 that:

Every person has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public and private, to manifest his religion or belief in teaching, practice, worship and observance.⁷¹

Refugee law has also recognized the importance of religious freedom by including it in the five enumerated grounds upon which asylum may be granted. Thus, the freedom to practice one's religion without persecution is a universally recognized human right that deserves protection.

A. Forms of Religious Persecution

The United Nations High Commissioner for Refugees Handbook, in describing the various forms religious persecution can take, includes "serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community".⁷² The Third Circuit recently granted asylum to a Chinese man fleeing persecution from the government because of his Catholic religion.⁷³ The applicant was arrested, detained for a week, and beaten by police after he helped raise money for a Catholic church in his village. He

fled the country after the police showed up at his home with a summons for him. The court concluded that the physical harm he endured at the hands of police because of his religious activities was persecution on account of religion and granted him asylum.

In another recent case, *Muhur v. Ashcroft*, the Seventh Circuit reversed a BIA denial of asylum to a Christian woman from Eritrea.⁷⁴ The applicant was a Jehovah's Witness who claimed that she would be persecuted because of her religion if she was deported. The immigration service acknowledged that Eritrea persecutes Jehovah's Witnesses, but the judge denied asylum anyway. He reasoned that she would not come to the attention of authorities because she was not a religious zealot.⁷⁵ In reversing the immigration judge and the BIA, the Seventh Circuit held that an applicant is entitled to claim asylum on the basis of religious persecution even if the applicant could escape notice by concealing her religion.⁷⁶ The applicant need not be a religious fanatic in order to be eligible for asylum. She only needed to demonstrate that she had a well-founded fear of persecution on account of her religion, regardless of whether she could have concealed her religious beliefs or not. The court reasoned that, "one aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population".⁷⁷ The court seemed offended by this notion and urged that the case be assigned to a new judge on remand due to the "mishandling of...[the] claim by the immigration judge...".⁷⁸

B. Persecution Claims of Muslim Women

Claims of persecution by Muslim women are not a new thing. Muslim women have been seeking asylum in the United States for many years. Many of these claims have asserted persecution on the grounds of political opinion or membership in a social group.⁷⁹ Unfortunately,

most of these claims have been denied. The following is a quick summary of a few asylum cases involving Muslim women.

One of the earliest cases frequently cited when addressing the claims of Muslim women is *Fatin v. I.N.S.*⁸⁰ *Fatin* involved an Iranian woman seeking asylum because of persecution based on membership in a particular social group. She asserted that her membership in a group of “upper class...Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals” made her likely to be persecuted if she was forced to return to Iran.⁸¹ In analyzing her claim, the court cited three elements that must be met by an alien seeking asylum based on a claim of membership in a particular social group. The alien must (1) identify a group that constitutes a “particular social group” within the interpretation, (2) establish that he or she is a member of that group, and (3) show that he or she has a well-founded fear of persecution based on that membership.⁸²

In determining what constituted a “particular social group” the *Fatin* court relied upon the Board’s decision in *Matter of Acosta*.⁸³ In *Matter of Acosta* the Board stated that a particular social group refers to “a group of persons all of whom share a common, immutable characteristic”⁸⁴. The characteristic that defines the group must be one that the members cannot change, or should not be required to change because it is fundamental to their individual identities.⁸⁵ The Board specifically included sex as an example of an immutable characteristic.⁸⁶

The petitioner asserted that she faced persecution because of her membership in a group of Iranian women who refused to conform to the government’s restrictive laws regarding women.⁸⁷ In particular, this group included women who found the law requiring women to wear the veil, or chador, so abhorrent, that they would rather risk punishment than conform to it. Punishment for failing to wear the chador may include 74 lashes, one year in prison, and

possibly even rape and death.⁸⁸ The court reasoned that women with this viewpoint could constitute a particular social group because being forced to wear the chador may be “so fundamental to [her] identity or conscience that [they] ought not to be required to be changed”.⁸⁹

Although the petitioner met the requirements of the first element by demonstrating that Iranian women who refuse to conform to Iran’s repressive laws and social mores may constitute a particular social group, she still failed to get asylum. The court held that she failed to demonstrate that she was a member of this social group (element two), and thus did not have a well-founded fear of persecution on account of it (element three).⁹⁰ In reaching this decision, the court relied on petitioner’s statements that she found wearing the chador objectionable and would seek to avoid it if possible.⁹¹ She never stated that she would refuse to conform to the law or that compliance would be so deeply abhorrent as to be persecution.⁹² Thus, because she never said she would refuse to conform to the law, the court held that she did not belong to the social group that she put forth in her petition: Iranian women who refuse to conform to the government’s gender-specific laws and social norms.⁹³

A few years later in *Fisher v. I.N.S.*, the Ninth Circuit reviewed a similar case of a woman fleeing persecution under Iran’s laws and social mores.⁹⁴ As described above, the primary issue in this case was whether the conduct the petitioner experienced in Iran amounted to persecution and thus allowed her to assert a well-founded fear of persecution. The petitioner based her appeal on three separate incidents that occurred prior to her fleeing the country. Those incidents, described above, included being detained and questioned by government officials after seeing a man in his bathing suit, being stopped on the street and ordered into a car at gunpoint where she was reprimanded and taken home, and third having her father’s home, where she resided, searched by police.⁹⁵ The court held that she did not demonstrate that she had

suffered persecution.⁹⁶ Rather, she only showed that she could be prosecuted for violating Iran's laws if she was deported. Since the punishment she possibly faced was not disproportionately severe or a pretext for targeting her specifically, it did not amount to persecution and she could not receive asylum.⁹⁷

More recently, the BIA reversed an immigration judge's finding of deportability and granted asylum to a Moroccan woman fleeing persecution from her father due to his orthodox Muslim views.⁹⁸ *In re S.A.* involves a young woman who suffered years of physical and emotional abuse by her father because she did not adhere to his rigid views of Islam. In particular, she recounted tales of her father beating her every week with his hands, feet or a belt. On one occasion he burned her thighs with a heated razor after she wore a skirt that he thought was improper. She was not allowed to go to school, participate in activities outside of her home or talk to strangers. If she disobeyed her father in any way, even inadvertently, he would beat her severely. Her mother sought help from the government but without avail. The petitioner attempted suicide twice and ran away from home twice in an attempt to escape the abuse.

The BIA concluded that the abuse she had suffered amounted to persecution and if returned to Morocco, she would likely be subject to more persecution.⁹⁹ In addition, the Board held that the persecution was on account of her religious beliefs, specifically, because they differed from the beliefs held by her father.¹⁰⁰ The case record indicated that she was abused by her father because she refused to submit to his views regarding the proper role of women, which were based on his orthodox Muslim beliefs. As such, her case was distinguishable from other cases where the court held that persecution on account of gender alone does not constitute persecution on account of membership in a particular social group and asylum was warranted.¹⁰¹

In January of 2004, in *Seving v. Ashcroft*, the Ninth Circuit reversed a BIA decision that denied asylum to a woman from Afghanistan.¹⁰² The petitioner feared persecution on account of the fact that she was a woman who had adopted Western customs and because she was of Uzbek ethnicity. The court determined that by adopting Western customs, she was making “a clear anti-Taliban political statement”, which put her at greater risk than the general population.¹⁰³ The court held that she had established a prima facie showing of eligibility for asylum because she presented evidence of the conditions in Afghanistan that supported her assertion of a well-founded fear of persecution.

The court also rejected the BIA’s suggestion that a fear of violence that is “part of the general strife occurring in Afghanistan” is not persecution under the case law.¹⁰⁴ The court stated that just because a country is experiencing unrest does not mean that a petitioner cannot show a fear of persecution in that country.¹⁰⁵ The petitioner demonstrated that although there was a great deal of internal strife in Afghanistan, she was at a greater risk for harm because of her political views and ethnicity. Because of this, the court remanded the case to the BIA with instructions to reopen the proceedings in light of its decision.

The women in these four cases sought asylum because of persecution on account of membership in a particular social group, political opinion, and religious beliefs. They came from Iran, Morocco and Afghanistan. They were persecuted by government officials as well as by family members. The persecution ranged from threats, detention, emotional abuse to physical abuse. Despite all the differences, there is one thing they all had in common. They were all persecuted under Shari’ah law.

As discussed above, asserting a claim of persecution based on prosecution that one may suffer at the hands of the government presents special problems. Refugee law was intended to

protect victims, not criminals. Where the petitioner merely establishes that “he faces a possibility of prosecution for an act deemed criminal in...society, which is made applicable to all people in the country”, that does not amount to persecution.¹⁰⁶ This is often the case for Muslim women fleeing state sanctioned persecution under Shari’ah law. The UNHCR Handbook addressed this problem, however, in paragraph 57 saying, “...penal prosecution for a reason mentioned in the definition...may in itself amount to persecution”.¹⁰⁷ Thus, if a woman fleeing prosecution under Shari’ah law can demonstrate that the prosecution is on account of religion, she may be able to establish a claim for asylum. In order to understand how a claim of religious persecution can be asserted for prosecution of codified laws, it is important to understand the origins of Shari’ah law.

IV. The Roots of the Shari’ah

The most fundamental aspect of Islamic law that Westerners must understand is the relationship between religion and the law in some Muslim countries. Unlike Western states, for example the United States, many Muslim states, such as Iran and Saudi Arabia, do not view the law as a separate entity from religion.¹⁰⁸ They are intertwined and cannot exist without the other. The state is merely an agent, which exists solely to enforce the tenets of the religion through law.¹⁰⁹ Thus, religion precedes the law and the law precedes the state. Religion is the base of Islamic culture upon which everything else is built.¹¹⁰ Using the common base of Islam, Muslim states have combined religion, history, and their own unique cultures to create distinct legal systems that vary widely.¹¹¹

Traditionally, Muslims view the Shari’ah as divine in origin. It is a combination of Qur’anic rules, the Traditions of the Prophet (Sunna), analogical reasoning (qiyas), and the consensus of scholars (ijma).¹¹² The purpose of the Shari’ah was to translate the messages of the

Prophet Muhammad into rules of living for all Muslims. According to the classical theory of the development of Islamic law, the first and most important sources of Shari'ah were the Qur'an and the Sunna, both divine in origin. The Qur'an is believed by Muslims to be the primary and direct source of divine law. The Sunna, which means "custom of the community", when applied to Muhammad in the Traditions of the Prophet, requires that all Muslims live as he lived. As time passed, the Qur'an and Sunna were not enough to handle the new situations that arose as society changed. Thus, qiyas was used to apply the law through analogy to these new situations. No rule arrived at by qiyas could contradict the Qur'an or Sunna. The final source of the Shari'ah was ijma, the consensus of scholars. Ijma was used to agree upon the fundamental rules of the Shari'ah when there was a dispute. From these four sources, the Shari'ah developed into a framework of laws for the Islamic state.

The dominant theory of the development of Islamic law was formulated by Professor Joseph Schacht.¹¹³ This theory, adopted by the "Orientalists", holds that the first source of Shari'ah was pre-Islamic rules and customs called "sunna", which were used throughout Arabia.¹¹⁴ Arabs had lived under these rules and customs for hundreds of years.¹¹⁵ Unlike the classical theory, which holds that the Qur'an came first, Schacht's theory posits that the Qur'an did not influence the law until the Umayyad empire (661-750 A.D.).¹¹⁶ This was when newly formed schools of law began restructuring the rules and customs in accordance with the Qur'an. Following this, the Traditions of the Prophet began to be written. These traditions eventually replaced the pre-Islamic rules and customs, becoming the final sunna. According to Schacht, these were the final additions to the Shari'ah. Consequently, Schacht's theory argues that the Shari'ah's first sources were not divine in origin, but rather were Arabic customs pre-dating Islam by centuries, which only later were changed to reflect the Qur'an and Sunna.

Despite their differences, both theories assert that the Shari'ah was developed to regulate the Muslim community in accordance with the teachings of Muhammad. Additionally, neither theory explains how the Shari'ah should be implemented. Consequently, in the millennium since the Shari'ah was formed, numerous methods have been developed to implement it.¹¹⁷ Some states have completely abolished it and have adopted Western codes of laws. Others have adopted it, updating it to reflect the values of modern legal systems. And still others have applied a stringent application of the law, as interpreted by the state's religious leaders.

Since there is no single Islamic law, but rather, a variety of legal codes that interpret the Shari'ah to reflect the history, culture and politics of that society¹¹⁸, each state must be looked at individually. In assessing the claims of women alleging persecution under Shari'ah law, it is important that decision makers familiarize themselves with the particular circumstances of the state the woman is fleeing. Not all Islamic states persecute women. In addition, there are many Muslim women who live in conservative Islamic states without any fear of persecution. As such, each woman's claims must be assessed on a case-by-case basis. The following is an analysis of three states which implement some form of the Shari'ah. Each analysis will examine particular laws enforced under the Shari'ah and discuss how a woman persecuted under those laws may meet the requirements for asylum.

V. An Analysis of Specific Country Conditions

The three states focused on in this paper, Pakistan, Iran and Afghanistan, each implement the Shari'ah in different ways. Thus, the forms of persecution that women endure under the Shari'ah can vary widely. In some instances the persecution may be physical abuse and torture, while in other cases it may be widespread and systemic discrimination. Regardless of what form

the persecution takes however, it is persecution on account of religion and thus, a basis for asylum under the Refugee Act of 1980.¹¹⁹

A. Pakistan

In 1979, the government of Pakistan adopted five new laws derived from Shari'ah law called the Hudood Ordinances with the intention of conforming Pakistani law with the injunctions of Islam.¹²⁰ The purpose of these laws was to "criminalize non-marital rape, extramarital sex (including adultery and fornication), and various gambling, alcohol, and property offenses."¹²¹ Although these laws applied equally to all Pakistanis, male and female, Muslims and non-Muslims alike, in practice they have been interpreted in a manner that persecutes women and provides them with little protection under the law.¹²² In particular, the Zina Ordinance, which prohibits extramarital sex and non-marital rape, illegal sex acts collectively referred to as "zina", has been used to persecute women who claim that they have been raped.¹²³ It has also been attributed to the rising incidence of rape in Pakistan and makes it possible for women to be imprisoned solely on the basis of their gender.¹²⁴

Since it is illegal to have extra-marital sex in Pakistan under the Zina Ordinance, when a woman reports that she has been raped, the report is viewed as an admission that she violated the law unless she can prove that the sex was non-consensual. In order to prove that the sex was non-consensual, she must provide four credible Muslim adult males who can testify that they witnessed the act of penetration.¹²⁵ If she fails to meet this burden, she can be imprisoned for zina while the male perpetrator often goes free. The maximum punishment for zina is either stoning to death or 100 lashes in public.¹²⁶ Typically, however, a woman will be imprisoned for several years while the man accused of rape will be acquitted for lack of evidence.¹²⁷

Human rights advocates in Pakistan report that 90% of reported rape victims end up in prison¹²⁸. Once in prison, women face even more persecution at the hands of the police, prison guards and the military. According to a U.S. State Department Report, approximately 62% of women were raped by jail officials and 85% were subjected to torture.¹²⁹ In addition, it has been reported that police officers have threatened women with false charges of violating the Zina Ordinance and have threatened them with violence to prevent reports of rape in prison.¹³⁰ To make matters worse, women charged with zina face great shame and are often viewed as having dishonored their families. The stigma attached to the charges, along with the fact that so many reported rape victims end up in prison, is a large reason why rape is grossly under-reported in Pakistan.¹³¹

The way the Zina Ordinance has been interpreted, along with the statistics cited above, demonstrates that the Pakistani government is either unwilling or unable to protect women from non-marital rape. The government is also unwilling or unable to protect women inside of their own prisons, leading to very high incidences of sexual assault and torture. U.S. courts have recognized rape as a form of persecution.¹³² Furthermore, the BIA has recognized that persecution can be inflicted by persons whom the government is unwilling or unable to control.¹³³ And given that the Zina Ordinance is based upon and intended to enforce Shari'ah law, a woman found guilty of violating it is deemed to have violated the Islamic faith.¹³⁴ Any punishment she receives for this violation is on account of her religious beliefs, imputed or actual.¹³⁵ Thus, a woman raped in Pakistan and facing the consequences of the Zina Ordinance can assert a valid claim of asylum from persecution on account of religion.

A woman who can show that she faces prosecution under the Zina Ordinance has demonstrated a well-founded fear of persecution. If a woman is accused of zina, there is a very

real chance that she will be persecuted. Even if she is the victim of rape, chances are that she will end up in prison where she will be subjected to more rape, sexual assault, and torture.¹³⁶ This clearly constitutes a “well-founded fear” as required by the refugee definition.¹³⁷ In analyzing the term “well-founded fear”, the United States Supreme Court noted that, “[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place”.¹³⁸ In addition, INS regulations state that an applicant need not show that she would be singled out for persecution if there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of religion.¹³⁹ An applicant seeking asylum under these circumstances can clearly show a pattern of persecution when 90% of reported rape victims are imprisoned.¹⁴⁰

While prosecution for violating a law is typically not protected under refugee law, there are two exceptions that make prosecution persecution. The first exception is when the punishment is disproportionately severe because of an enumerated ground.¹⁴¹ The second exception is when the punishment is pretextual.¹⁴² The Zina Ordinance falls within both exceptions.

The Zina Ordinance disproportionately punishes women for committing zina while men often go free.¹⁴³ This is because of the evidentiary standards enforced under the law that make it almost impossible for a man to be convicted of zina. The reasons for the different treatment under the law are the ways in which women are treated under Pakistan’s interpretation of the Shari’ah. The Shari’ah requires the testimony of four male witnesses to testify that they all saw the illegal sexual intercourse in order to convict the man because the victim’s testimony is not as reliable as a man’s. This is derived out of the Qur’an 1:282, which states:

“And get two witnesses out of your own men. And if there are not two men available, then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her.”¹⁴⁴

The different weight afforded to testimony based on sex is justified as necessary due to the perception that women are emotional and sensitive by nature. Because women are designed for the natural task of childbirth and rearing, they are deemed to have been created to be more loving and emotional than men. As a result, they may “swerve from reality” when confronted with any serious crimes or offenses.¹⁴⁵ The assumption is that this could affect a woman’s testimony if called as a witness to a crime.

However, Islamic law allows conviction for a crime based on admission of the guilty party. For example, when a woman reports being raped, that report is deemed an admission of zina.¹⁴⁶ Once the woman confesses to zina, she then has the burden of proving that the intercourse was rape by the presentation of four male witnesses.¹⁴⁷ If she is unable to do so, then she may be convicted of zina based upon her confession.¹⁴⁸ The end result is that the victim of the crime is often prosecuted while the perpetrator goes free.

The Zina Ordinance is also used as a pretext for persecuting women in Pakistan. Police and other government officials have threatened to charge women with zina in order to force them into sexual intercourse or have used the threat as a means to keep women from reporting the assaults.¹⁴⁹ Charges of zina are also brought by family members to prevent women from marrying against the family’s wishes.¹⁵⁰ And other reports have indicated that women who remarry after a divorce are sometimes charged with zina by their ex-husbands.¹⁵¹ Thus, there are

ample examples of the Zina Ordinance being used as a pretext to inflict harm, shame and imprisonment on women in Pakistan.

Once an applicant has met the requirements of one of the exceptions, she must still link the conduct to an enumerated ground.¹⁵² This can easily be accomplished in regards to the Zina Ordinance because the law has its roots in religion. The Qur'an lists five crimes, called hadd offenses, of which zina is one.¹⁵³ Hadd offenses are considered the most serious crimes under Islamic law because they are regarded as offenses directly against Allah.¹⁵⁴ Thus, a punishment for violating the Zina Ordinance is a punishment for committing an offense against God. Persecution that is committed under the Zina Ordinance is clearly linked to religious beliefs and consequently, the nexus requirement is fulfilled.¹⁵⁵

Women fleeing persecution under the Zina Ordinance can assert a valid claim for asylum due to the severe punishments that they suffer under the law, the disproportionate way in which the laws are enforced and the fact that the laws are often used as a pretext to persecute them even further.¹⁵⁶ The method with which the Pakistani government has chosen to enforce the law has left women virtually unprotected from rape. As a result, the occurrence of rape has increased, women have been falsely imprisoned for committing zina, and human rights violations are rampant against women imprisoned in Pakistan. Thus, women who are threatened with persecution on account of the Zina Ordinance, or have been subjected to persecution in the past, should be granted asylum in accordance with U.S. law.

B. Iran

The Islamic Republic of Iran is a theocratic state run by Shi'a Muslim clerics and dominated by Ayatollah Ali Khamene'i.¹⁵⁷ Khamene'i directly controls the armed forces and indirectly controls internal security forces and the judiciary. Khamene'i became the chief of state

in 1989, succeeding Ayatollah Khomeini, who led the overthrow of the monarchy in 1979. After the overthrow of the monarchy, the current government was formed, vesting authority in a learned religious scholar. Those legal scholars, Khomeini and then Khamene'i, implemented a wide range of laws based on the Shari'ah that regulate almost every aspect of Iranian culture. In particular, women have been subjected to harsh discriminatory laws and regulations in marriage, divorce, child custody, dress, and their ability to travel freely.

In 1997 Ali Mohammad Khatami-Ardakani was elected President of Iran. Since his election, there has been some progress made in recognizing women's rights. Women now make up approximately 60% of applicants accepted to universities, advocates for women's rights were elected to the parliament, and women were elected to provincial councils.¹⁵⁸ Despite this progress though, there are still numerous laws that discriminate against women and enforcement of them sometimes rises to the level of persecution.

Hejab, the veiling of women, is believed to be fundamental to Islam and a divinely proscribed duty of women.¹⁵⁹ Women are considered vulnerable to un-Islamic forces, so they are required to cover everything except for their hands and faces to protect themselves and society from any temptations. A woman who refuses to wear the veil is viewed to be disloyal to the regime and Islam. Using the Qur'an as justification, Khamene'i has authorized severe punishments for women seen in public without a veil.¹⁶⁰ This includes fines and lashings, which are administered without access to judicial proceedings. In addition, the Hezbollah, a group of citizens claiming to be the guardians of public morality, have been accused of harassing, detaining and attacking women who fail to wear a veil.¹⁶¹ The attacks have included knifings and acid throwing, intended to maim the victims. The government has done nothing to stop these attacks.

Another way that Iranian law discriminates against women is in the home. After the revolution the government repealed the Family Protection Law, a bill that had given women increased rights in the home and employment and replaced it with laws based on the Shari'ah.¹⁶² According to Khamene'i, the purpose of these laws is to protect the family, the fundamental unit of society.¹⁶³ In reality, however, they took away almost all rights women had in marriage, divorce, and child custody. Polygamy became legal again, with men being allowed to have up to four wives and as many temporary wives, or concubines, as they wish.¹⁶⁴ Men also can divorce a woman for any reason, while a woman can only seek a divorce under very specific circumstances.¹⁶⁵ After a divorce, women rarely retain custody of their children.¹⁶⁶ If she does have custody but remarries, the father automatically gets custody of the children unless she can prove he is an unfit parent. In addition, women can only have custody of their children until they are seven years old.¹⁶⁷

The discrimination does not stop at the front door to the home; it also pervades everyday life for women as well. The government has enforced gender segregation in most places, including schools, hospitals, and public buildings, airports, on buses and in the work place.¹⁶⁸ In addition, over 40,000 female teachers were fired due to their "physical and mental weakness", which caused many schools for girls to be closed down due to the segregation laws.¹⁶⁹ As a result, many girls in rural areas were denied an education. Segregation has also made it difficult for women to work outside the home. When granted permission by their husband, women are allowed to obtain a job, but segregation limits their options.

Despite the numerous burdens women in Iran must live with, U.S. courts have been reluctant to grant asylum to them. The two main cases dealing with the asylum claims of Iranian women are *Fatin v. I.N.S.* and *Fisher v. I.N.S.*¹⁷⁰ In both of those cases, the court denied asylum

to the applicants because they did not think those particular women would suffer persecution if returned to Iran. The denial of asylum in both cases, however, was related to the specific merits of the individual cases. Neither case stood for the proposition that women in Iran cannot be persecuted.¹⁷¹ Thus, using existing case law, it is possible to assert a valid claim of asylum for persecution under Iranian law.

Recall that in *Fatin*, the court recognized that if a woman's opposition to wearing the veil was so strong that she would rather face physical punishment than wear the veil, those beliefs may be so fundamental that she shouldn't be required to change them. The court acknowledged that women could be persecuted under Iran's social laws if they decided that the laws were "so deeply abhorrent...that it would be tantamount to persecution".¹⁷² However, the court's decision indicated that it would only grant asylum to women who refused to conform to Iranian laws and thus, were at risk of persecution for their refusal.¹⁷³

The *Fatin* court failed to recognize that the law requiring that women wear hejab could amount to persecution even if the applicant chose to conform to the law rather than face the consequences of violating it. Forcing a woman to wear hejab is analogous to forcing a particular religion on someone. Hejab is considered a divinely proscribed duty mandated by Shari'ah in accordance with the Qur'an.¹⁷⁴ It is a reflection of a woman's adherence to the Islam faith and of her moral fitness. A woman seen without hejab is considered disloyal to the faith and un-Islamic.¹⁷⁵ When she is punished for violating the law, she is being punished for violating the tenets of Iran's version of Islam.

Even if a woman can avoid punishment under Iranian law by wearing hejab, she shouldn't be forced to. In 2004, the Seventh Circuit in *Muhur v. Ashcroft*, described above, held that an applicant fleeing religious persecution should be eligible for asylum even if she could

avoid persecution by concealing her faith.¹⁷⁶ The court recognized that “[o]ne aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population”.¹⁷⁷ That is precisely what the Iranian government is doing when it persecutes women who fail to observe hejab. Women that object to hejab do not adhere to the same version of Islam that is supported by the Iranian government. Even if their only point of contention with Iran’s interpretation of Islam is the requirement of hejab, it is still a difference in religious opinion. The government uses threats, violence, arrest, and shame as a way to keep these differing opinions out of society.¹⁷⁸ The only way women can avoid persecution is by concealing their beliefs, precisely what the *Muhur* court rejected.¹⁷⁹

The *Fisher* court also refused to recognize that the applicant had suffered persecution under Iranian laws when it denied her claim for asylum.¹⁸⁰ The court stated that the applicant had failed to demonstrate that she had ever spoken out against the policies while in Iran or that being forced to follow them amounted to persecution.¹⁸¹ It relied heavily on the assumption that Fisher had not been targeted, but was merely prosecuted for violating generally enforced laws. When an applicant is fleeing persecution for violating a criminal law that is disproportionately and severely applied or a pretext for persecution, the applicant may be eligible for asylum.¹⁸² Since these laws are enforced against all women who violated their edicts, the court held that Fisher was not eligible for asylum.¹⁸³

The court made one fatal mistake when analyzing Fisher’s claim; it held that the laws are not disproportionately applied.¹⁸⁴ The court relied on *Abedini v. I.N.S.*, which considered Iranian laws that were “made applicable to *all people* in that country”.¹⁸⁵ However, the *Fisher* court replaced the term “all people” used in the *Abedini* decision with the term “all women”, implying that there is no difference.¹⁸⁶ The laws that Fisher was fleeing from only prosecuted women, but

not men for the same behavior. Thus, they were disproportionately applied against women and not men. This indicates that the laws are being used as a pretext to persecute women “for [their] beliefs or characteristics”.¹⁸⁷ For example, Fisher described an incident where she and several other women were detained and questioned by government officials because they attended a party where the male host was wearing a bathing suit.¹⁸⁸ She was told that being in the presence of a man in his bathing suit was “incorrect”.¹⁸⁹ The man who hosted the party and appeared in the bathing suit was not subject to any punishment.

Laws that proscribe conduct and limit the rights of women are often justified as protecting the morals of society and the public welfare. Women are seen as the weaker half of society, more vulnerable to the corruption of outside, un-Islamic forces.¹⁹⁰ If they are not controlled, women will lead men “off the path”, creating social unrest and immorality.¹⁹¹ Thus, more laws regulating their behavior are required to ensure the safety of the community. However, this reasoning does not adequately justify the discriminatory treatment women suffer and may in fact be further evidence of the discrimination women face.

The asserted purpose of Iran’s family laws is to return the family to its place as the fundamental unit of society and to return women to their natural role of child bearer and mother.¹⁹² However, the laws have had the opposite effect, giving men almost exclusive control over the decisions of marriage, divorce and child custody. Women cannot marry without the permission of their father or a male relative.¹⁹³ Men can have up to four wives at a time and as many temporary wives as they wish.¹⁹⁴ Temporary marriages occur after a short ceremony and can last any amount of time.¹⁹⁵ Temporary wives are not granted the rights afforded to traditional wives, such as alimony.¹⁹⁶ Divorce is almost the exclusive right of men.¹⁹⁷ Only under very specific circumstances can women seek a divorce.¹⁹⁸ After a divorce women may only retain

custody of children up to the age of seven.¹⁹⁹ However, if she remarries, the father is granted custody.²⁰⁰

When analyzing these laws, it is important to maintain respect for cultural differences, but even while maintaining respect for these differences, it is difficult to ignore some of the effects these laws can have. For example, the law requiring hejab is often used as a basis for prostitution charges.²⁰¹ Prostitution can carry a sentence of death.²⁰² However, Islamic law forbids a woman or girl from being executed if she is a virgin.²⁰³ To solve this problem, a woman or girl who is sentenced to death is married off to a jail official for a night and thus, capable of being executed the next day.²⁰⁴ Another law that is difficult to reconcile with its purported justification is the child custody law. The government asserts that these laws are intended to allow women to assume their natural role of mother, but women are granted very few rights when it comes to child custody.²⁰⁵ If the purpose of this law was really to protect the mother-child relationship, it would encourage maternal custody rights, not eliminate them.

The same disproportionate effect occurs when the segregation laws are applied. Women bear the burden for ensuring that unmarried men and women do not mingle.²⁰⁶ They must ride in reserved sections of public buses, must enter public buildings through separate doors, and are often discriminated against in hiring decisions because businesses must be segregated.²⁰⁷ Schools must also be segregated and due to the shortage of female teachers, many girls have been unable to obtain an education.²⁰⁸

Iranian laws place a disproportionately severe burden on women to protect the morality and public welfare of the community. The laws are intended to ensure that the community lives according to the will of Allah but have the result of persecuting women on account of religious beliefs. Since the Qur'an views women as weak and more vulnerable to corruption, the laws

have been designed to punish women more than men for infractions that both are guilty of. This clearly fits within the first exception enunciated in *Abedini*.²⁰⁹ Thus, a woman fleeing persecution under Iranian law can assert a valid claim of persecution on account of religion.

C. Afghanistan

Women's rights have been a hotly debated topic in Afghanistan for almost a hundred years.²¹⁰ Throughout the twentieth century various Afghan leaders attempted to introduce social reform that allowed more opportunity to women and girls. After the Soviets invaded the country in 1979 some women in urban areas enjoyed more freedom than they had ever had before. Women were allowed to hold jobs and attend school and university. While these new freedoms were limited to women in cities belonging to the upper class, it created greater expectations for many Afghan women for more freedom in the future. When the Soviet-backed government fell in 1992 and was replaced with the ultra-conservative Taliban in 1996, most of the freedoms women had enjoyed were quickly eliminated.²¹¹ Then in late 2001 the Taliban was driven from power by U.S. forces and many women hoped that this meant the end of their oppression. Despite assurances of more freedom from international actors, very little has changed for many women in Afghanistan.²¹² This is especially true for women living under the authority of Ismail Khan in the western province of Herat.²¹³

Ismail Khan first appeared in Herat in the late 1970's when he organized an uprising against the Soviet government. He continued fighting the communists in the Herat province until the Soviets were driven from power. Khan took power of Herat after the fall of the communist government and almost immediately implemented a more conservative social order, eliminating the social reforms the communist government had established and supporting hejab.²¹⁴ He only remained in power for three years however, before the Taliban gained control of the area. For the

next several years he was in a Taliban prison or in hiding in Iran. During the U.S. invasion in 2001 he worked with U.S. forces to help fight the Taliban. In November of 2001 he returned to Herat and resumed power.²¹⁵

Since resuming power in Herat, Khan has established himself as the sole and independent leader of Herat, refusing to work with the central government of Afghanistan or to allow officials appointed by Afghan President Karzai from taking posts in Herat.²¹⁶ “The Emir”, as he is referred to, has used his forces to stop political rallies and protests, arrested dissidents, intimidated and beaten opponents and stifled independent media.²¹⁷ Most disturbing perhaps, is his use of the police force to monitor the public, especially women and girls, to ensure that they are behaving according to Islamic values. He has even instructed adolescent boys to monitor people and told them, “You have the right to do whatever you feel is appropriate to have Islamic rules met in society”.²¹⁸

After the fall of the Taliban many women thought that they would be able to shed their burqas in favor of a headscarf.²¹⁹ The burqa is a floor length garment that covers the entire body and has only a small screen through which the wearer can see. It is described as very uncomfortable and difficult to wear and impedes movement.²²⁰ Ismail Khan has used the government controlled television, radio and newspaper to issue orders on how women should dress.²²¹ They must wear a burqa or chadori, a floor length garment that covers the head but leaves the face exposed, whenever they leave the house. Many Afghan women have expressed the desire to be able to go out in Islamic hejab, which means a head scarf and long sleeved clothing, but fear retaliation from the government, employers, school officials and even strangers if they do so.²²² There have been numerous accounts from women and girls who were harassed,

threatened and beaten for failing to wear the burqa or chadori.²²³ In all of these accounts the women were wearing Islamic hejab, but not the burqa or chadori.

Women are also severely restricted in their abilities to work outside the home.²²⁴ Although Khan has not officially forbidden women from working, he has placed numerous restrictions on them.²²⁵ He appealed to men to not allow their daughters and wives to work, and has accused women who work of moral impropriety. Women who do hold jobs must follow strict dress codes, work separately from men, should avoid all contact with foreign men, cannot ride in cars with foreign men at all, and cannot ever be alone with a man that is not a close relative.²²⁶ There are very few women in governmental positions, and those that do hold government jobs are friends and relatives of Khan and his commanders. Women are not allowed to work in television or as journalists and are pressured not to work for international NGO's and the United Nations. Women are permitted to work only in positions where it is necessary to maintain segregation of the sexes.²²⁷

Even if a woman can find a job, further restrictions make it even more difficult for her to keep it. Women are forbidden from driving and cannot be alone with a man that is not a close relative, even a taxi driver.²²⁸ There is very little public transportation in Herat, so in order to work a woman must be able to walk to work or have a male relative drive her. Women are forbidden from being in Herat's public parks at night and many women are afraid to go out at all at night without a male relative.²²⁹

If a woman is seen walking, talking, or riding in a car with a man that is not a close relative she is arrested and can be forced to undergo an abusive gynecological exam to look for evidence of recent sexual activity.²³⁰ The Herati police watch for men and women alone together and confront them. If they cannot provide adequate proof that they are related, both are arrested

and the woman is taken to Herat hospital. Once at the hospital the woman is examined by a doctor for evidence that she has engaged in sexual intercourse recently. Although this law is supposed to target only unrelated men and women, there have been reports of women forced to undergo examinations even when they were with male cousins.²³¹ The physical violation these women endure is only made worse by the severe shame and humiliation that accompanies the examination.

Women are also severely limited from participating in civil and political organizations or from speaking freely.²³² Khan has taken almost total control of public speech in the media, schools, the university and civic organizations.²³³ Women have been particularly limited because Khan has forbidden almost any organization that addresses women's rights.²³⁴ Women who speak out against the government and its policies are publicly and privately chastised.²³⁵ Women have been forbidden from speaking to journalists about women's rights and those that did were fired from their jobs or threatened.²³⁶ The only women's organization in Herat with any involvement in the government is the Women's Shura.²³⁷ Khan allowed the formation of the shura after intense international pressure, but has maintained rigid control over it. He picked the leadership of the shura, defined its mission and limited the subjects the shura could address.²³⁸ Initially many Herati women were excited about the prospects of the shura, but most quickly became disappointed and stopped participating.²³⁹

The result of Khan's rule over Herat has been the almost complete and total control of every aspect of women's lives. Women are instructed on what they can wear, whom they can associate with, what they can say, where they can go and when, and the jobs they may take. These rules have violated the human rights of women and denied them any dignity.²⁴⁰ All of these restrictions have been required in the name of Islamic morals. Thus, where these

restrictions amount to persecution, an Afghan woman can assert a valid claim of asylum on account of religious persecution.²⁴¹

In order to support a claim for asylum, an Afghan woman must first demonstrate that she has a well-founded fear of persecution.²⁴² Depending on her personal circumstances, this may be done in several ways. I will analyze the current restrictions placed on women in the Herat region of Afghanistan and explain how they can amount to persecution. However, this analysis should not be taken as a statement that all women in Herat suffer under these same circumstances. Conditions vary widely for women in Afghanistan based on education, social class, marital status and numerous other factors. The following discussion is intended only to illustrate how potential claims could be brought.

The proscriptions Afghan women face under Ismail Khan's regime in regards to access to employment may constitute economic persecution. An applicant can show a well-founded fear of economic persecution when there is a probability of deliberate imposition of substantial economic disadvantage on account of one of the enumerated grounds.²⁴³ The restrictions placed on women under Khan's regime amount to a deliberate imposition of substantial economic disadvantage on account of religion. Because they are Islamic women, they are forbidden to ride in cars with foreign men or be alone with men they are not related to. This can make it very difficult for women to work for international organizations. During the summer of 2002 Khan held two meetings with Afghan women working for international organizations. At those meetings he told the women, "It is not good that you are working with foreigners. You are Islamic girls and you shouldn't work with foreigners."²⁴⁴ He has also accused women who work with international organizations of moral impropriety.²⁴⁵ The Herat police have also harassed

women who work with these groups. Police target women seen shaking hands with or speaking with foreign men.²⁴⁶

The persecution is not limited to women who work for international organizations. There are many reports of women in Afghanistan unable to obtain jobs that they are qualified for simply because they are women.²⁴⁷ For example, women are not allowed to work as journalists or in most government positions. Women who are trained as lawyers or engineers are not allowed to practice their trade, although they may use the degree to obtain a teaching position. Khan uses the Qur'an to justify the limitations on the jobs available to women. The Qur'an states that although a woman is permitted to work outside of the home, the job must be a lawful job that suits the nature of the woman.²⁴⁸ For example, women should not work in physically demanding jobs such as industry, combat, maintenance, or construction. Women are considered weaker in comparison to men and events such as menses, pregnancy, childbirth, and nursing all make a woman less qualified than a man to take care of household finances.²⁴⁹ Thus, men are given the responsibility for running the household. As the Qur'an stated at 4:34:

“Men are protectors and maintainers of women, because Allah has made the one of them to excel the other, and because they spend (to support them) from their means.”²⁵⁰

Based on these and similar statements, some fundamental Islamic states have severely limited the opportunities women have outside of the home. Khan uses Islam as a justification for his persecution of women.

In order to show persecution, the applicant will have to demonstrate that the restrictions she faces on employment are so severe that they prevent her from obtaining any other position commensurate with her education and experience.²⁵¹ For many women this will be impossible. Under the Taliban women were not allowed to go to school or work, so most women have little

or no education that qualifies them for a job. However, there are a limited number of women who were able to obtain an education outside of Afghanistan or prior to the Taliban regime. These women may be able to demonstrate that the current restrictions on them are so severe that it amounts to persecution.

In order to make a showing of persecution under the employment restriction, the petitioner will still need to demonstrate that the restrictions are on account of an enumerated ground.²⁵² For example, a petitioner may attempt to show that she belongs to a particular social group that includes Afghan women who feel so strongly about working outside the home that being forbidden from doing so is persecution.²⁵³ Following the decision in *Fatin*, however, the petitioner may have to show that her feelings are so strong that she is willing to violate the law and risk persecution.²⁵⁴

Afghan women can also assert a claim of persecution based on the practice of forced gynecological examinations. The practice of forced gynecological examinations on women and girls seen talking to or in the company of strange men is perhaps the most compelling evidence of state sponsored persecution in Herat. The forced examinations are a form of sexual assault and are persecution just as much as a beating or arbitrary confinement would be. They are cruel, inhuman and degrading and can lead to great humiliation for the woman subjected to it and her family. The examinations are being used to threaten women into submission and as a tool to enforce Khan's directives. A woman seen talking to a man that she is not related to, even in a working environment, is subject to this treatment. Because of the serious nature of this threat, many women have been intimidated into avoiding the public sphere, including work.

The restrictions imposed on women are enforced according to an extreme version of Shari'ah practiced in Afghanistan. Ismail Khan uses religious justifications to support his edicts

and tyranny over women. He accuses women who work outside the home of moral impropriety. He encourages private citizens to stop unmarried men and women who are together and beat them because, “[a]ccording to Islam, you are obliged to beat them”.²⁵⁵ He has also established a vice squad of police that monitors Herat for moral violations and beats people who are acting immorally.

An applicant seeking to advance a claim based on religious persecution can argue that the rules enforced by Khan force a particular brand of Islam inconsistent with the applicant’s beliefs. The Seventh Circuit recently held that an applicant is entitled to claim asylum on the basis of religious persecution even if the applicant could escape notice by concealing her religion.²⁵⁶ Here, a woman could avoid persecution if she followed all of the rules and essentially adopted Khan’s fundamentalist version of Islam. There are probably women in Afghanistan that would happily do so. The purpose of the persecution and all of the restrictions is to force a particular version of Islam on the population and to stifle any speech or actions that might create dissent. This is precisely the threat that the Seventh Circuit acknowledged when it supported an applicant’s right to practice her religion free from the threat of persecution.²⁵⁷

VI. Conclusion

Women fleeing persecution under Shari’ah law have had little success getting asylum up until now due to the misunderstanding of the relationship between Islam and the law in many Muslim countries. Shari’ah law was developed through Islam as a means to enforce the tenets of the religion and ensure that the society lived according to Allah’s will. As such, persecution that occurs through and under these laws is persecution on account of religion. Women who deviate from the laws and social norms of Islam are viewed as corrupt and un-Islamic.²⁵⁸ Their punishment is not only often proscribed by the Qur’an and Shari’ah, but is often demanded by

the government to stifle dissent and alternative interpretations of Islam. Persecution under these circumstances is clearly persecution on account of religion and fits within the refugee definition.²⁵⁹

The courts must recognize that Islamic societies vary significantly from the west in regards to the doctrine of separation of church and state. What appears to be secular law on its face often is derived from long held religious beliefs. In analyzing the claims of Muslim women, decision makers should be sensitive to these differences and consider the history, religion and culture of the region in rendering their decisions. Muslim women should not be denied asylum that they are legally entitled to due to a lack of cultural understanding on the part of immigration officers and judges.

¹ David A. Martion, *Asylum Case Law Sourcebook* xvii (1994 ed., Federal Publications, Inc.)

² See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(1988) (adopting definition of refugee from 1951 Convention Relating to the Status of Refugees).

³ *Id.*

⁴ Macklin, Audrey. *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 Geo. Immigr. L.J. 25, 42 (Fall, 1998).

⁵ Peters, Teresa L., *International Refugee Law The Treatment of Gender-Based Persecution: International Initiatives as a Model and Mandate for National Reform*, 6 Transnat'l L. & Contemp. Probs. 225, 227 (Spring, 1996).

⁶ *Id.*

⁷ *Id.* at 229 (discussing the Immigration Act of 1917).

⁸ Karen Musalo, Jennifer Moore, Richard A. Boswell, *Refugee Law and Policy, A Comparative and International Approach* 20 (Carolina Academic Press, 1st ed. 2002) (citing United Nations High Commissioner for Refugees, *An Introduction to the International Protection of Refugees* (1992)).

⁹ *Id.*

¹⁰ *Id.* at 19.

¹¹ Resolution 319(IV)A.3 December 1949.

¹² *Convention on the Status of Refugees*, opened for signature July 28, 1951, G.A. Res. 429[V], 189 U.N.T.S. 137, entered into force Apr. 22, 1954; *United Nations Protocol relating to the Status of Refugees*, opened for signature Jan. 31, 1967, G.A. Res. 2198[XXI], 19 U.S.T. 6223, 606 U.N.T.S. 267, entered into force Oct. 4, 1967.

¹³ INA § 101(a)(42)(A), *supra* note 2 (based on the definition of refugee stated in the *Convention Relating to the Status of Refugees*, *supra* note 12 at art. 1).

¹⁴ *I.N.S. v. Zacharias*, 502 U.S. 478, 481 (1992).

¹⁵ *Fatin v. INS*, 12 F.3d 1233, 1242 (3rd Cir. 1993)

¹⁶ Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 51 (1979).

¹⁷ See Goodwin-Gill, Guy, *The Refugee in International Law* 67 (Oxford University Press, 2nd ed. 1998).

¹⁸ Immigration and Refugee Board of Canada, *Guidelines Issued By the Chairperson Pursuant to Section 65(3) of the Immigration Act*, Guideline 4, Women Refugee Claimants Fearing Gender-Related Persecution (issued Mar. 9, 1993).

¹⁹ See Macklin, *supra* note 4 at 41.

²⁰ *Id.* at 26.

- ²¹ *Universal Declaration of Human Rights*, G.A. Res. 217(A) (III), U.N. Doc. A/Res217 (1948).
- ²² *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature Mar. 1 1980, 19 I.L.M. 33, entered into force Sept. 3, 1981 (the U.S. has not ratified).
- ²³ *Declaration on the Elimination of Violence Against Women*, G.A. [R]es. 48/104, 48 U.N. GAOR Supp. (No. 49), U.N. Doc. A/48/49 (1993).
- ²⁴ See Macklin, *supra* note 4 at 41.
- ²⁵ Phyllis Coven, Memorandum, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women* (Office of International Affairs, May 26, 1995).
- ²⁶ *Convention on the Elimination of All Forms of Discrimination Against Women*, *supra* note 22.
- ²⁷ *Declaration on the Elimination of Violence Against Women*, *supra* note 23.
- ²⁸ Immigration and Refugee Board, *Guidelines Issued By the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa, Canada: Immigration and Refugee Board, Mar. 9, 1993).
- ²⁹ Coven, *supra* note 25.
- ³⁰ Asylum Branch, Office of General Counsel, Immigration & Naturalization Serv., *Basic Law Manual: Asylum, Summary and Overview Concerning Asylum Law* 20 (1991).
- ³¹ *Immigration and Nationality Act*, Pub. L. No. 89-236, §11(f), 79 Stat. 918 (1965) (amending 8 U.S.C. §1253(h)).
- ³² See *Kovac v. I.N.S.*, 407 F.2d 102, 103 (9th Cir. 1969) (analyzing the 1965 amendment to § 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h), that removed "physical" from definition of persecution).
- ³³ *Id.* at 103.
- ³⁴ *Id.* at 106.
- ³⁵ *Zalega v. I.N.S.*, 916 F.2d 1257, 1260 (7th Cir. 1990).
- ³⁶ *Id.*
- ³⁷ *Borca v. I.N.S.*, 77 F.3d 210, 216 (7th Cir. 1996) (reversing the BIA because it has used the wrong standard when assessing applicant's claim of economic persecution).
- ³⁸ *Id.* at 215.
- ³⁹ *Id.* at 216.
- ⁴⁰ *Id.* at 217-18.
- ⁴¹ See *infra* Section V. An Analysis of Specific Country Conditions, Part C. Afghanistan, p. 33, for a discussion of economic persecution under Shari'ah law.
- ⁴² *Fisher v. I.N.S.*, 79 F.3d 955, 964 (9th Cir. 1996).
- ⁴³ *Id.* at 961 (citing *Ghaly v. I.N.S.*, 58 F.3d 1425, 1428 (9th Cir. 1995)).
- ⁴⁴ *Singh v. I.N.S.*, 94 F.3d 1353, 1359 (9th Cir. 1996).
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*
- ⁴⁸ See *Fatin*, *supra* note 15 at 1240 (interpreting language from *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985)).
- ⁴⁹ See *Abedini v. I.N.S.*, 971 F.2d 188, 191 (9th Cir. 1992) (applicant denied asylum after showing that prosecution involved maximum sentence of 2 years imprisonment and 19 lashes and that the prosecution was not a pretext to punish him for his beliefs); see also *United Nations High Commissioner for Refugees Handbook*, *supra* note 16 at ¶ 57.
- ⁵⁰ *Fisher*, *supra* note 42 at 962 (citing *Abedini*, *supra* note 47 at 191).
- ⁵¹ *Singh*, *supra* note 44.
- ⁵² *Id.*
- ⁵³ *In re Kasinga*, 21 I. & N. Dec. 357, 365 (emphasis added).
- ⁵⁴ *Id.* at 366.
- ⁵⁵ *Id.* at 358.
- ⁵⁶ *Id.*
- ⁵⁷ *Id.* at 10.
- ⁵⁸ *INA*, *supra* note 2.
- ⁵⁹ *Zacharias*, *supra* note 14.
- ⁶⁰ *Id.*
- ⁶¹ *Id.* at 480.
- ⁶² See *id.* at 482.
- ⁶³ *Id.* at 483.

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- ⁶⁴ *Id.* at 482.
- ⁶⁵ *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509, 517 (9th Cir. 1985).
- ⁶⁶ *In re S.P.*, 21 I. & N. Dec. 486, 492 (BIA 1996).
- ⁶⁷ *Id.* at 489.
- ⁶⁸ *Id.* at 496.
- ⁶⁹ *Id.* at 486.
- ⁷⁰ U.S. Const. amend. I (enacted 1791).
- ⁷¹ *Universal Declaration of Human Rights* art. 18 (adopted by the General Assembly on Dec. 10, 1948) Res. 217(A).
- ⁷² *United Nations High Commissioner for Refugees Handbook*, supra note 21 at ¶ 72.
- ⁷³ *Chen v. I.N.S.*, 359 F.3d 121 (2nd Cir. 2004).
- ⁷⁴ *Muhur v. Ashcroft*, 355 F.3d 958 (7th Cir. 2004).
- ⁷⁵ *See id.* at 960.
- ⁷⁶ *Id.*
- ⁷⁷ *Id.* at 961.
- ⁷⁸ *Id.*
- ⁷⁹ *See Fisher*, supra note 42, *Safaie v. I.N.S.*, 25 F.3d 636 (8th Cir. 1994), *Fatin*, supra note 15, *Sharif v. I.N.S.*, 87 F.3d 932 (7th Cir. 1996).
- ⁸⁰ *Fatin*, supra note 15.
- ⁸¹ *Id.* at 1237.
- ⁸² *Id.* at 1240.
- ⁸³ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).
- ⁸⁴ *Id.*
- ⁸⁵ *Id.*
- ⁸⁶ *Id.*
- ⁸⁷ *Fatin*, supra note 15 at 1241 (citing Petitioner's Brief at 12).
- ⁸⁸ *Id.* (citing Petitioner's Brief at 14).
- ⁸⁹ *Id.* (citing *Acosta*, supra note 83 at 234).
- ⁹⁰ *Id.*
- ⁹¹ *Id.* at 1236.
- ⁹² *Id.* at 1241.
- ⁹³ *Id.* (citing Petitioner's Brief at 12).
- ⁹⁴ *See Fisher*, supra note 42 (en banc decision reversing a three-judge panel that vacated the BIA's decision to deport).
- ⁹⁵ *Id.* at 959.
- ⁹⁶ *Id.* at 963.
- ⁹⁷ *Id.*
- ⁹⁸ *See In re S.A.*, 22 I. & N. Dec. 1328 (BIA 2000).
- ⁹⁹ *Id.* at 1335.
- ¹⁰⁰ *Id.* at 1336.
- ¹⁰¹ *See Fatin*, supra note 15; *Fisher*, supra note 40.
- ¹⁰² *Seving v. Ashcroft*, 85 Fed.Appx. 620 (9th Cir. 2004).
- ¹⁰³ *Id.* at 623.
- ¹⁰⁴ *Id.*
- ¹⁰⁵ *Id.*
- ¹⁰⁶ *Abedini*, supra note 49 at 191 (applying *Estrada-Posadas v. I.N.S.*, 924 F.2d 916, 920 (9th Cir. 1991)).
- ¹⁰⁷ *See United Nations High Commissioner for Refugees Handbook*, supra note 16 at ¶ 57.
- ¹⁰⁸ David F. Forte, *Studies in Islamic Law: Classical and Contemporary Application* 12 (1st ed., Austin & Winfield 1999); Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 Buff. J. Int'l L. 1, 7 (Spring, 1995).
- ¹⁰⁹ *See id.*
- ¹¹⁰ *See Farooq Hassan, The Concept of State and Law in Islam* 50 (1st ed., University Press of America 1981).
- ¹¹¹ *Khaliq*, supra note 108 at 7.
- ¹¹² *Forte*, supra note 108 at 43.
- ¹¹³ *Id.* at 18-19.
- ¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 30.

¹¹⁸ See *Khalig*, supra note 108 at 7.

¹¹⁹ INA § 101(a)(42)(A), supra note 2 (stating the definition of a refugee).

¹²⁰ Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan From A Woman-Sensitive Perspective*, 18 Mich. J. Int'l L. 287 (Winter 1997).

¹²¹ See Michael F. Polk, *Women Persecuted Under Islamic Law: The Zina Ordinance in Pakistan as a basis for Asylum Claims in the United States*, 12 Geo. Immigr. L.J. 379, 380 (Winter 1998) (citing United States Department of State, Pakistan Country Report on Human Rights Practices for 1996, released by the Bureau of Democracy, Human Rights and Labor, Jan. 30, 1997.)

¹²² *Id.* at 383.

¹²³ *Id.*

¹²⁴ *Id.* at 383-384.

¹²⁵ *Quraishi*, supra note 120 at 305-06.

¹²⁶ *Polk*, supra note 121 at 382.

¹²⁷ *Id.*

¹²⁸ *Id.* at 385 (citing United States Department of State, Pakistan Country Report on Human Rights Practices for 1996, citing figures from Pakistani human rights advocate Hina Jilani).

¹²⁹ See United States Department of State, *Pakistan Country Report on Human Rights Practices for 1996*, released by the Bureau of Democracy, Human Rights and Labor, Jan. 30, 1997 (visited Feb. 13, 2005) <http://www.state.gov/www/global/human_rights/1996_hrp_report/pakistan.html>.

¹³⁰ *Polk*, supra note 121 at 383-385.

¹³¹ *Id.* at 384.

¹³² See *Lazo-Majano v. I.N.S.*, 813 F.2d 1432, 1434 (9th Cir. 1987).

¹³³ *In re Kasinga*, supra note 53 at 365; *Matter of Acosta*, supra note 83 at 222-223.

¹³⁴ See David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 Colum. Hum. Rts. L. Rev. 203, 217-20 (Fall 1988).

¹³⁵ See *Zacharias*, supra note 14.

¹³⁶ See *Polk*, supra note 121 at 384.

¹³⁷ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

¹³⁸ *Id.* at 431.

¹³⁹ 8 C.F.R. § 208.13(b)(2)(i)(1997).

¹⁴⁰ See *Polk*, supra note 121 at 384.

¹⁴¹ See *Abedini*, supra note 49 at 191.

¹⁴² *Id.*

¹⁴³ See *Polk*, supra note 121 at 384.

¹⁴⁴ Al-Shea, Abdul Rahman, *Woman In The Shade Of Islam* 81 (Dr. Mohammed Said Dabas trans., 3rd ed. 2000).

¹⁴⁵ *Id.* at 82.

¹⁴⁶ *Polk*, supra note 121 at 384; see also *Forte*, supra note 104 at 82.

¹⁴⁷ *Quraishi*, supra note 120 at 290.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 291; *Polk*, supra note 121 at 384.

¹⁵⁰ *Polk*, supra note 121 at 385.

¹⁵¹ Amnesty International, *Women in Pakistan Disadvantaged and Denied Their Rights*, Country Reports ASA 33/023/1995 (Nov. 11, 1995) (visited Feb. 13, 2005) <<http://www.amnesty.se/women/23e6.htm>> (cited to in *Polk*, supra note 121 at 385).

¹⁵² *Zacharias*, supra note 14.

¹⁵³ *Forte*, supra note 108 at 80.

¹⁵⁴ See *id.*

¹⁵⁵ See *Zacharias*, supra note 14.

¹⁵⁶ See *Abedini*, supra note 49.

¹⁵⁷ U.S. Department of State, *Country Reports on Human Rights Practice, Iran- 2003* § 5, released by the Bureau of Democracy, Human Rights, and Labor, Feb. 25, 2004 (visited Feb. 12, 2005) <<http://www.state.gov/g/drl/rls/hrrpt/2003/27927.htm>>.

¹⁵⁸ Janet Afary, *The Human Rights of Middle Eastern & Muslim Women: A project for the 21st Century*, 26 Human Rights Q. 106, 118 (2004).

¹⁵⁹ Neal, supra note 134 at 217.

¹⁶⁰ *Id.* at 219.

¹⁶¹ *Id.* at 220.

¹⁶² U.S. Department of State Country Reports on Human Rights Practices: Iran, supra note 157 at § 5.

¹⁶³ See Neal, supra note 134 at 211.

¹⁶⁴ Gregory A. Kelson, *Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins*, 6 Tex. J. Women & L. 181, 187 (Spring 1997).

¹⁶⁵ See U.S. Dept. of State Country Reports on Human Rights Practices: Iran, supra note 157 at § 5.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See Kelson, supra note 164, at 187 (quoting Khomeini).

¹⁷⁰ See Fisher, supra note 42, Fatin, supra note 15.

¹⁷¹ Fatin, supra note 15 at 1241; Fisher, supra note 42 at 964.

¹⁷² Fatin, supra note 15 at 1242.

¹⁷³ *Id.* at 1241.

¹⁷⁴ Neal, supra note 134 at 217.

¹⁷⁵ *Id.* at 219.

¹⁷⁶ See Muhur, supra note 74 at 961.

¹⁷⁷ *Id.*

¹⁷⁸ Neal, supra note 134 at 217-20.

¹⁷⁹ Muhur, supra note 74 at 960-61.

¹⁸⁰ Fisher, supra note 42 at 964.

¹⁸¹ *Id.* at 963.

¹⁸² Abedini, supra note 49 at 191.

¹⁸³ Fisher, supra note 42 at 962 (relying on Abedini, supra note 49 at 191).

¹⁸⁴ *Id.*

¹⁸⁵ Abedini, supra note 49 at 191(emphasis added) (used in Fisher, supra note 42 at 962).

¹⁸⁶ Fisher, supra note 42 at 962, 966 (concurring opinion of Canby J.).

¹⁸⁷ Abedini, supra note 49 at 191 (citing *Alonzo v. I.N.S.*, 915 F.2d 546, 548 (9th Cir. 1990)).

¹⁸⁸ *Id.* at 959.

¹⁸⁹ *Id.*

¹⁹⁰ See Neal, supra note 134 at 219.

¹⁹¹ Khaliq, supra note 108 at 14.

¹⁹² *Id.* at 211.

¹⁹³ U.S. Department of State Country Reports on Human Rights Practices: Iran, supra note 157 at § 5.

¹⁹⁴ Kelson, supra note 164 at 187.

¹⁹⁵ U.S. Department of State Country Reports on Human Rights Practices: Iran, supra note 157 at § 5.

¹⁹⁶ *Id.*

¹⁹⁷ Kelson, supra note 164 at 187.

¹⁹⁸ U.S. Department of State Country Reports on Human Rights Practices: Iran, supra note 157 at § 5.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Neal, supra note 134 at 220.

²⁰² *Id.*

²⁰³ *Id.* at 221.

²⁰⁴ *Id.*

²⁰⁵ See Kelson, supra note 164 at 187 (describing Iranian laws that limit women's rights to custody of their children); see also U.S. Department of State Country Reports on Human Rights Practices :Iran, supra note 157 at § 5 (describing Iranian laws that give the father custody if the mother remarries and limits custody for mothers only until the children reach eight years of age).

²⁰⁶ See Neal, supra note 134 at 214.

²⁰⁷ U.S. Department of State Country Reports on Human Rights Practices: Iran, supra note 157 at § 5.

²⁰⁸ See Kelson, supra note 164.

²⁰⁹ Abedini, supra note 49 at 191.

²¹⁰ See Human Rights Watch, *"We Want to Live as Humans": Repression of Women and Girls in Western Afghanistan* 12 Vol. 14, No. 11(c) (Dec. 1990).

²¹¹ See *id.*

²¹² *Id.* at 4.

²¹³ *Id.*

²¹⁴ *Id.* at 14.

²¹⁵ *Id.*

²¹⁶ *Id.* at 15.

²¹⁷ *Id.*

²¹⁸ *Id.* at 17 (citing to a Human Rights Watch telephone interview with G.Z.K., Heart, Oct. 10, 2002).

²¹⁹ See *id.* at 34.

²²⁰ *Id.* at 34 (citing interviews with Afghan women in Sept. 2002).

²²¹ *Id.* at 35-36.

²²² *Id.* at 34 (citing interviews with Afghan women conducted in Sept. 2002).

²²³ *Id.*

²²⁴ *Id.* at 39.

²²⁵ *Id.* (describing how women are limited in their dress, must remain segregated from men, avoid all contact with foreigners, and cannot criticize the government).

²²⁶ *Id.*

²²⁷ Khaliq, supra note 108 at 25.

²²⁸ Human Rights Watch, *"We Want to Live as Humans": Repression of Women and Girls in Western Afghanistan*, supra note 210 at 24.

²²⁹ *Id.* at 19.

²³⁰ *Id.* at 19.

²³¹ *Id.* at 21 (citing report from eyewitness to Human Rights Watch on Oct. 27, 2002).

²³² *Id.* at 26.

²³³ Human Rights Watch: *All Our Hopes Are Crushed*, (visited Feb. 12, 2005) <http://hrw.org/reports/2002/afghan3/herat1002-05.htm#P542_84552> (cited in Human Rights Watch, supra note 210 at 26).

²³⁴ Human Rights Watch: *We Want to Live as Humans: Repression of Women and Girls in Western Afghanistan*, supra note 210 at 27.

²³⁵ See *id.* at 28 (describing interviews with Afghan women who were chastised after speaking out against the government).

²³⁶ *Id.*

²³⁷ *Id.* at 27.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See Convention on the Elimination of All Forms of Discrimination Against Women, supra note 22.

²⁴¹ See *In re S.A.*, supra note 98 at 1335.

²⁴² See INA § 101(a)(42)(A), supra note 2.

²⁴³ Kovac, supra note 32 at 107.

²⁴⁴ Human Rights Watch, *"We Want to Live as Humans": Repression of Women and Girls in Western Afghanistan*, supra note 210 at 40.

²⁴⁵ *Id.* at 41.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 39.

²⁴⁸ See Al-Shea, supra note 144.

²⁴⁹ See *id.* at 86.

²⁵⁰ *Id.*

²⁵¹ Kovac, supra note 32.

²⁵² *Id.*

²⁵³ See Fatin, supra note 15; Fisher, supra note 42.

²⁵⁴ Fatin, supra note 15 at 1241.

²⁵⁵ Human Rights Watch, *"We Want to Live as Humans": Repression of Women and Girls in Western Afghanistan*, supra note 210 at 23.

²⁵⁶ *Muhur*, supra note 74 at 960.

²⁵⁷ *Id.* at 961.

²⁵⁸ See *Neal*, supra note 134 at 218.

²⁵⁹ See *Muhur*, supra note 74, *In re S.A.*, supra note 98; see also INA § 101(a)(42)(A), supra note 2.