

ONE STEP FORWARD, TWO STEPS BACK? INTERPRETING 'PARTICULAR SOCIAL GROUP' IN THE EUROPEAN UNION

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Abstract The article tests the claim of feminist scholars that concerns about gender have been marginalised in refugee law, by exploring the interpretation given to the concept of a 'Particular Social Group' set out in the 1951 Refugee Convention. It is argued that recent practice at the supranational level in the European Union has contributed to the deterioration of refugee protection standards for women seeking asylum from gender-based violence. However, the article demonstrates that a human rights-based approach to the interpretation of 'Particular Social Group', which is supported by extensive examples of good practice in individual Member States, has the potential to redress this.

Keywords: refugee women, 'Particular Social Group', Refugee Convention, interpretation, comparative law, European law.

I. INTRODUCTION

Since the mid-1980s, feminist scholars and advocates have steadfastly worked to ensure and improve the gender-sensitivity of refugee law, policy and practice. As a result, many advances and successes have been achieved. A case in point is the adoption by the Office for the United Nations High Commissioner for Refugees (UNHCR) and by many States of gender guidelines and the development of gender training to improve asylum decision-making and procedures so that women seeking asylum are appropriately recognised as refugees.¹ A refugee is defined in the United Nations Convention Relating to

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¹ UNHCR, 'Guidelines on International Protection No 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (7 May 2002) UN Doc HCR/GIP/02/01 (Gender Guidelines); see, for example, Immigration and Refugee Board of Canada, 'Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution' (1996); US Department of State, 'Guidelines, Office of International Affairs, Immigration and Naturalization Service, regarding adjudicating asylum cases on the basis of gender' (26 May 1996); UK Visas and Immigration, 'Gender Issues in the Asylum Claim' (2010) (last updated 2018); A Edwards, 'Transitioning Gender: Feminist

the Status of Refugees as a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.²

Many pioneering doctrinal developments in international refugee law have been achieved in appeals concerning the inclusion of women as members of 'Particular Social Groups'.³ However, feminist scholars enquiring into the place of gender in refugee law have argued that, despite these early successes, the protection of refugee women has stalled and once again has been relegated to the margins of refugee law.⁴ This article responds in two ways. First, the article seeks to explore this claim in further depth through an evaluation of an element of the Refugee Convention's definition of a refugee that is of particular relevance to women refugees, namely the fear of being persecuted for reason of membership of a 'Particular Social Group' as interpreted in the European Union (EU). Secondly, the article draws on a human rights-based approach to interpretation and identifies examples of good practice as a basis for further reform.

Although feminist scholars have argued extensively that women who are at risk of gender-based violence⁵ in their countries of origin have a well-founded fear of being persecuted for reasons of political opinion or religion,⁶ existing research demonstrates that asylum decision-makers tend to rely excessively on the Refugee Convention ground of 'Particular Social Group' when making determinations.⁷ As the interpretation of 'Particular Social Group'

Engagement with International Refugee Law and Policy 1950–2010' (2010) 29 Refugee Survey Quarterly 21.

² Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2) (hereinafter the 'refugee definition').

³ See, for example, *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, Ex Parte Shah* [1999] UKHL 20, [1999] 2 AC 629 <<https://www.bailii.org/uk/cases/UKHL/1999/20.html>>.

⁴ C Dauvergne, 'Women in Refugee Jurisprudence' in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 728; E Arbel, C Dauvergne and J Millbank, 'Introduction: Gender in Refugee Law: From the Margins to the Centre' in E Arbel, C Dauvergne and J Millbank (eds), *Gender in Refugee Law: from the Margins to the Centre* (Routledge 2014) 1.

⁵ Gender-based violence against women is defined as 'violence that is directed against a woman because she is a woman or that affects women disproportionately' in Article 3(d) of the Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS 210 (Istanbul Convention).

⁶ For an early exposition of this argument, see H Crawley, 'Gender, Persecution and the Concept of Politics in the Asylum Determination Process' (2000) 9 Forced Migration Review 17; see also New Zealand, Refugee Status Appeals Authority, *Refugee Appeal No 76044* (11 September 2008) para 84; Gender Guidelines (n 1) para 28.

⁷ H Cheikh Ali, C Querton and E Soulard, 'Gender Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice focusing on Women in Nine EU Member States' (European Parliament 2012) 45.

continues to present a challenge to the protection of women at risk of gender-based violence,⁸ the article seeks to address this trend.

The interpretation of 'Particular Social Group' in the case of women seeking asylum is a topic that has been the subject of extensive debate within both academic and policy fields for a long time. It is an essential element of the Refugee Convention definition because failure to demonstrate a nexus to one of the five Convention grounds means persons are refused refugee status even though there might be a real risk of serious harm.⁹ However, successes in developing inclusive jurisprudence and practice resulting in more effective refugee protection are often closely followed by regressive practices and jurisprudence.

Early on, judgments by higher courts in various jurisdictions in the Global North established that women could constitute a 'Particular Social Group' either because they shared the innate characteristic of sex¹⁰ or because they shared a certain characteristic that set them apart from the wider society.¹¹ The two methods of interpretation became known as the protected characteristics approach and the social perception approach, respectively.¹² The UNHCR expressed the view that both approaches ought to be reconciled by incorporating them into a single standard such that 'a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.'¹³

However, although early jurisprudence justified a straightforward and inclusive approach to interpretation based on a single criterion and the UNHCR clearly advocated for the protected characteristics and the social perception approaches to be used in the alternative, more recent practice indicates a departure from this earlier jurisprudence and a shift to a cumulative method of interpretation requiring that such a group must share a

⁸ M Foster, 'Why We Are Not There Yet: The Particular Challenge of "Particular Social Group"' in E Arbel, C Dauvergne and J Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014) 18.

⁹ Such persons might still be granted subsidiary protection, although the rights and entitlements attached to this lesser form of status are not necessarily the same nor safeguarded in international law.

¹⁰ US: *Matter of Acosta* A-24159781, Board of Immigration Appeals (1 March 1985); Canada: *Canada (Attorney General) v Ward* [1993] 2 SCR 689 (using the term 'gender'); UK: *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412, para 15 <<https://www.bailii.org/uk/cases/UKHL/2006/46.html>>.

¹¹ Australia: *Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 190 CLR 225 <<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1997/4.html>>.

¹² Foster (n 8) 20.

¹³ UNHCR, 'Guidelines on International Protection No 2: "Membership of a Particular Social Group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (7 May 2002) UN Doc HCR/GIP/02/02 (PSG Guidelines) paras 10–11 (emphasis added).

protected characteristic and, in addition to that requirement, be perceived to be a distinct group by society.¹⁴ The concept of ‘Particular Social Group’ is thus highly contested and constantly relitigated. Moreover, and as will be discussed below, inclusive legislative and jurisprudential developments in one area of refugee law doctrine, such as that concerning refugees at risk due to their sexual orientation, may have unforeseen effects in other areas, such as refugee women fearing gender-based violence whose claims are not related to their sexual orientation.¹⁵ This article argues that this has contributed to the deterioration of refugee protection standards for women who are seeking asylum on the basis of gender-based violence.

The EU legal framework provides a helpful context in which to frame an exploration of this trend because the Qualification Directive is the only regional legal instrument that attempts to define the term ‘Particular Social Group’.¹⁶ The Qualification Directive is an EU legislative instrument designed to guide EU Member States’ national authorities in the application of the Refugee Convention on the basis of common concepts and criteria, first adopted in 2004 and later recast in 2011. Furthermore, the field of refugee law in the EU is crowded by administrative and judicial decision-makers at both national and supranational levels. The transposition and interpretation of the Qualification Directive by individual Member States, the recasting process and concomitant efforts by the European Asylum Support Agency (EASO) to achieve common standards within the Common European Asylum System (CEAS) illustrate the competing views on the question of whether women who have a well-founded fear of gender-based violence may constitute a ‘Particular Social Group’.

¹⁴ A recent example is the US Attorney General Jeff Sessions’ decision in June 2018 to categorically deny the asylum claims of women at risk of domestic violence in *Matter of A-B-* 27 I&N Dec 316 (AG 2018), overruling an inclusive interpretation of refugee law achieved after 20 years of legal and political efforts, see D Anker, ‘The History and Future of Gender Asylum Law and Recognition of Domestic Violence as a Basis for Protection in the United States’ (2020) 45 Human Rights Magazine 14 <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/the-history-and-future-of-gender-asylum-law/>. Another example is the UK Upper Tribunal’s failure to follow the inclusive jurisprudence of the House of Lords (now the Supreme Court); see C Querton, ‘The Interpretation of the Convention Ground of “Membership of a Particular Social Group” in the Context of Gender-Related Claims for Asylum: A Critical Analysis of the Tribunal’s Approach in the UK’ (2012) Refugee Law Initiative Working Paper No 3 <https://sas-space.sas.ac.uk/4690/5/RLI_Working_Paper_No.3.pdf>.

¹⁵ Dauvergne also notes how the challenges of protecting refugees fearing persecution on the basis of their sexual orientation or gender identity have generated more attention and legal and policy changes in the last decade than any work about refugee women fearing gender-based violence; see ‘Women in Refugee Jurisprudence’ (n 4) 743.

¹⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (Qualification Directive) art 10(1)(d).

Significantly, the introduction and gradual extension of the jurisdiction of the Court of Justice of the European Union (CJEU) into asylum matters¹⁷ has added another, now binding, view concerning the interpretation of 'Particular Social Group'. The recent CJEU judgment in *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* has revived the debate as to whether the protected characteristics and the social perception approaches to the interpretation of 'Particular Social Group' are cumulative or alternative. These questions are likely to impact substantially on women fleeing gender-based violence due to the reliance on this ground of persecution by both asylum decision-makers and legal representatives. Furthermore, in the light of continuing efforts by the EU to achieve greater harmonisation by reducing the discretion of Member States regarding the interpretation of the definition of a refugee and enlarging EASO's mandate by transforming it into a fully-fledged EU Agency for Asylum, this issue requires pressing attention.¹⁸

This article examines whether the protection of refugee women has been relegated to the margins of refugee law by first enquiring into the use of the terms sex and gender in international refugee law and in EU refugee law. The following section examines the law on 'Particular Social Group' and its interpretation by the EU and by individual EU Member States.¹⁹ It is argued that whereas women at risk of gender-based violence remain at the centre of domestic refugee law in a significant number of EU Member States, the picture at EU level is more complex, with relevant protection standards being pushed to the margins by supranational institutions such as the CJEU and EASO. Drawing on examples of good practice in individual Member States, the final section sets out a human rights-based approach to the interpretation of 'Particular Social Group' which highlights the relevance of sex as a distinguishing characteristic, and as a reason for discrimination, violence and ultimately persecution in international refugee law. Finally, it explores the convergence between the protected characteristics and the social perception

¹⁷ M Garlick, 'International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR' (2015) 34 Refugee Survey Quarterly 107, 111–13.

¹⁸ See European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM (2016) 466 final 2, 4, 7 and 9; still supported by the European Commission, 'New Pact on Migration and Asylum' COM (2020) 609 final 10. The EU Agency for Asylum started its operations on 19 January 2022, pursuant to Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 [2021] OJ L468/1.

¹⁹ The analysis includes the UK, a former EU Member State, because although the UK is no longer bound by the Qualification Directive since the end of the transition period on 31 December 2020, the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI No 2525 that were adopted to transpose the Qualification Directive into domestic law now constitute EU-derived domestic legislation, per Section 2 of the European Union (Withdrawal) Act 2018.

approaches if treated as cumulative requirements. It demonstrates how the concept of gender subordination, inherent in the notion of gender-based violence against women as defined in international human rights law, may satisfy the social perception approach.

II. VIOLENCE AGAINST WOMEN AND REFUGEE PROTECTION

The question of whether women at risk of gender-based violence are adequately protected under the Refugee Convention continues to be the subject of debate. This is because the proposition that violence against women is a political issue is not yet widely accepted, restrictive approaches are still taken to the interpretation of ‘Particular Social Group’ and neither sex nor gender are specifically mentioned in the definition of a refugee. However, the position of the UNHCR has always been that refugee women’s experiences and needs may indeed be distinctive.²⁰

The lack of clarity in the use of terms such as sex and gender in international (refugee) law may have contributed to the complexities associated with the interpretation of ‘Particular Social Group’. The term ‘gender’ is often used interchangeably with sex and/or women²¹ and ‘gender-related asylum claims’ are generally equated with women’s asylum claims, leading to the blurring of the distinct concepts of sex and gender.²² This article relies on the Convention on Preventing and Combatting Violence against Women and Domestic Violence’s (Istanbul Convention) definition of gender as ‘the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men’²³ and UNHCR’s definition of sex as ‘a biological determination’.²⁴ It also uses the term ‘gender-based violence’, defined as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’.²⁵ Although the overlap in the terms ‘sex and ‘gender’ is apparent in the notion of gender-based violence, the definition of gender-based violence embodies the

²⁰ UNHCR, ‘Guidelines on the Protection of Refugee Women’ (July 1991) paras 2–3 <<https://www.unhcr.org/publications/legal/3d4f915e4/guidelines-protection-refugee-women.html>>.

²¹ A Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press 2011) 15; A Anderson and M Foster, ‘A Feminist Appraisal of International Refugee Law’ in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 62.

²² C Querton, ‘Gender and the Boundaries of International Refugee Law: Beyond the Category of “Gender-Related Asylum Claims”’ (2019) 37 NQHR 379, 385.

²³ Istanbul Convention (n 5) art 3(c).

²⁴ Gender Guidelines (n 1) para 3.

²⁵ Istanbul Convention (n 5) art 3(d); CEDAW Committee, ‘General Recommendation No 19’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (29 July 1994) UN Doc HRI/GEN/1/Rev.1, para 6; see also CEDAW Committee, ‘General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women’ (14 November 2014) UN Doc CEDAW/C/GC/32, para 15. As noted below, men may also have a well-founded fear of gender-based violence, see for example C Carpenter, ‘Recognizing Gender-Based Violence against Civilian Men and Boys in Conflict Situations’ (2006) 37 Security Dialogue 83.

acknowledgment in international law that women may be the subject of violence because of their sex.

The blurring of the terms sex and gender is also illustrated by the recasting process of the Qualification Directive that saw an unofficial shift in some of the language versions of the Directive away from the terms sex, men and women and towards gender. Although neither the European Commission, European Parliament or European Council proposed amendments to Article 9(2)(f), which gives examples of acts of persecution,²⁶ the provision in French was amended from 'les actes dirigés contre des personnes en raison de leur sexe' to 'les actes dirigés contre des personnes en raison de leur genre'.²⁷ Similar changes occurred in the Portuguese and Romanian versions of the recast Directive. Some language versions, however, continue to describe as a form of persecution acts directed against a person on the basis of their sex.²⁸

Similarly, although the changes made in the recasting process relating to the definition of 'Particular Social Group' were merely intended to remove the reference to a lack of presumption regarding the existence of a 'Particular Social Group' in gender-related cases and to add the example of gender identity, a similar shift in terminology occurred.²⁹ Although the English version retained the existing wording of 'gender related aspects', the terminology 'les aspects liés à l'égalité entre les hommes et les femmes' was changed to 'les aspects liés au genre' in the French version.³⁰ This also occurred in the Bulgarian and Romanian versions of the recast Directive.

It is apparent that the recasting process sought to explicitly recognise that 'gender related aspects' could be understood as more than just inequality based on sex and also included gender identity.³¹ It could be presumed then that the changes in terminology adopted in some of the language versions from sex, men and women to gender were merely intended to streamline the terminology, even though this was not undertaken consistently. This may partly be because 'gender' does not always translate well into other languages.³² This is illustrated by the fact that some language versions retained the use of the term sex, and that some countries use the same word

²⁶ 'Acts of a gender-specific nature' in English.

²⁷ ('Acts directed against a person because of their sex') to ('acts directed against a person because of their gender'). ²⁸ See, for example, Bulgarian, Czech, Italian or Spanish.

²⁹ In English, Article 10(1)(d) Qualification Directive changed from 'Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article' to 'Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'.

³⁰ ('Aspects related to equality between men and women') to ('aspects related to gender').

³¹ ILGA Europe also suggests this should include persecution faced by intersex individuals, EL Tsoordi, 'Guidelines on the Transposition of the Asylum Qualification Directive: Protecting LGBTI Asylum Seekers' (ILGA Europe 2012) 9–10 <https://ilga-europe.org/sites/default/files/Attachments/asylum_directive_transposition_2012.pdf>.

³² Edwards, *Violence against Women under International Human Rights Law* (n 21) 17.

for sex and gender.³³ Moreover, despite the unofficial shift in the terminology of the recast Directive, French-speaking jurisdictions in the EU retained or amended the provisions of their national legislation when transposing the recast Qualification Directive to refer to sex. Belgium, for example, did not amend its domestic provision when transposing Article 9(2)(f) of the recast Qualification Directive into domestic law.³⁴ In France, the domestic provision transposing the recast Article 10(1)(d) was amended from ‘gender related aspects’ to ‘sex related aspects’.³⁵

Ultimately, this trend has no effect on the meaning of the provisions of the Directive as only a formal amendment approved by the relevant EU institutions could do so. Furthermore, understanding persecution as ‘acts of a gender-specific nature’³⁶ reflects the definition of gender-based violence found in international human rights instruments, namely violence directed against a woman because she is a woman or that affects women disproportionately.³⁷ This would imply that although references to sex, men and women have been unofficially removed from some language versions of the recast Qualification Directive, the term ‘gender’, as currently used in the Directive, still includes matters concerning equality between men and women and thus discrimination based on sex.

The amendments to the recast Qualification Directive suggest that it is becoming more widely accepted that gender may be relevant to a variety of asylum claims, as some refugees are at risk of being persecuted for reasons of their sexual orientation or gender identity. Indeed, it has been suggested that gender is in fact relevant in most, if not all, asylum claims across a continuum.³⁸ For example, there is increasing evidence of rape and sexual violence against men and boys, and the forced recruitment of men and boys in situations of armed conflict is highly gendered.

In that sense, reference in the recast Qualification Directive to a wider and more encompassing notion of gender is a positive development within refugee law but it also blurs the concepts of sex and gender and obscures the original intention of seeking to protect those who may be at risk of persecution because of their sex, such as women at risk of gender-based violence. This is problematic because sex discrimination and structural inequality remain relevant for understanding the reasons for human rights

³³ See, for example, in Danish, Maltese or Swedish.

³⁴ Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (15 December 1980 as amended) art 48/3(2)(f): ‘Actes dirigés contre des personnes en raison de leur sexe ou contre des enfants’ (‘Acts directed against persons because of their sex or against children’) <http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1980121530&table_name=loi>.

³⁵ The relevant provision (Article L711-2) was amended in September 2018 with effect from 1 January 2019. The provision is now under Article L511-3 of the Code de l'entrée et du séjour des étrangers et du droit d'asile as amended, <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042776185>.

³⁶ Qualification Directive (n 16) art 9(2)(f).

³⁷ See (n 5).

³⁸ Querton, ‘Gender and the Boundaries of International Refugee Law: Beyond the Category of “Gender-Related Asylum Claims”’ (n 22).

violations.³⁹ Hence, using the terms gender and sex interchangeably obscures the relevance of sex as a protected characteristic and as a reason for discrimination, violence and ultimately persecution in international refugee law. It also weakens this legal tool which is designed to address the persistent inequality and discrimination based on sex that leads some women to flee their countries of origin.⁴⁰ Although regard should be had to both sex and gender when interpreting the Refugee Convention definition, these concepts are substantively and analytically distinct. Although the concepts of sex and gender are complementary,⁴¹ retaining sex as a distinct category in international refugee law is valuable.⁴²

III. DEFINING A 'PARTICULAR SOCIAL GROUP' IN LAW AND PRACTICE

A. Definition of 'Particular Social Group' in EU Law

Article 10(1)(d) of the recast Qualification Directive provides that:

Member States shall take the following elements into account when assessing the reasons for persecution: a group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

... Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.

When the European Commission first proposed the Directive, it clearly considered that, as a minimum, a certain 'fundamental characteristic' such as 'gender' could be sufficient to constitute a 'Particular Social Group'.⁴³ Although the term 'gender' is used, it is clear from the Commission's

³⁹ CEDAW Committee, 'General Recommendation No 19' (n 25) para 6; *Opuz v Turkey* App No 33401/02 (ECtHR, 9 September 2009) para 200; *Mudric v the Republic of Moldova* App No 74839/10 (ECtHR, 16 October 2013) para 63; *TM and CM v the Republic of Moldova* App No 26608/11 (ECtHR, 28 April 2014) para 59.

⁴⁰ The argument here draws on Tendayi Achiume's perspective of racial equality; E Tendayi Achiume, 'Putting Racial Equality onto the Global Human Rights Agenda' (2018) 15(28) *Sur IJHR* 141, 145.

⁴¹ H Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 4.

⁴² Querton, 'Gender and the Boundaries of International Refugee Law: Beyond the Category of "Gender-Related Asylum Claims"' (n 22) 385.

⁴³ European Commission, 'Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection' COM (2001) 510 final, proposed art 12(d) (now art 10(1)(d)) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52001PC0510&from=EN>>.

analysis relating to women and gender-based violence that the Commission actually meant ‘sex’.⁴⁴ Furthermore, the Commission said that the term ‘Particular Social Group’ ‘was deliberately drafted in an open way and needs to be interpreted in a broad and inclusive manner’.⁴⁵ The Commission considered that women at risk of gender-based violence because of their ‘gender’ constituted a group of ‘individuals who are treated as “inferior” or as “second class” in the eyes of the law, which thereby condones persecution at the hands of private individuals or other non-state actors, or where the State uses the law in a discriminatory manner and refuses to invoke the law to protect that group’.⁴⁶

The two limbs of the provision reflect the historical interpretation of ‘Particular Social Group’ based on the protected characteristics and the social perception approaches.⁴⁷ A literal interpretation of Article 10(1)(d) indicates that the two limbs of the provision should be read as alternatives. Although the term ‘and’ is used to connect the two approaches, the use of ‘in particular’ suggests that these are illustrative of what might constitute a ‘Particular Social Group’ and they do not have to be read as cumulative requirements.

EU law also requires that the terms of Article 10(1)(d) be interpreted by placing the provision in its context, and in light of the objective of the Qualification Directive as a whole.⁴⁸ It is noteworthy, that Article 9(2)(f) of the Qualification Directive, which concerns acts of persecution, acknowledges that persecution can occur for reasons of sex. As has been seen, although the English version of the Qualification Directive notes that acts of persecution can take the form of ‘acts of a gender-specific ... nature’, the French language version more explicitly implies causation, referring to ‘les actes dirigés contre des personnes en raison de leur genre’.⁴⁹ This view was adopted by the Belgian Council for Alien Law Litigation, which determines asylum appeals against administrative refusals, when it read Article 10(1)(d) in light of Article 9(2)(f). The Belgian Court relied on its national legislation transposing Article 9(2)(f) of the Qualification Directive as an indication that sex, being an innate and immutable characteristic, was a sufficient characteristic for there to be a ‘Particular Social Group’ without anything further.⁵⁰

⁴⁴ Accordingly, references to the term are placed in quotation marks in this article. Blurring of the concepts of gender and sex is not uncommon; see critique in Querton, ‘Gender and the Boundaries of International Refugee Law: Beyond the Category of “Gender-Related Asylum Claims”’ (n 22) 383–7.

⁴⁵ COM (2001) 510 final (n 43) Commentary on art 12(d).

⁴⁶ *ibid.*

⁴⁷ See further discussion in JC Hathaway and M Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 426–36.

⁴⁸ Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR I-03415, para 20.

⁴⁹ (‘Acts directed against a person because of their gender’). See also in Bulgarian, Czech, Italian, Latvian, Portuguese, Romanian and Spanish.

⁵⁰ Belgium: CCE n° 61 832 (19 May 2011) para 4.5.2 (Women in Somalia as PSG – risk of FGM) <<https://www.rvv-cce.be/sites/default/files/arr/A61832.AN.pdf>>; Loi sur l’accès au

The view that sex as a protected characteristic is sufficient to constitute a 'Particular Social Group' is supported by the UNHCR's first two Guidelines on International Protection concerned with gender-related claims for asylum and the definition of 'Particular Social Group'. The UNHCR endorsed both the protected characteristics and the social perception approaches but indicated they should be treated as alternatives.⁵¹ As will be discussed in the last section, where women are at risk of gender-based violence, their sex would satisfy the protected characteristics approach and gender dynamics would satisfy the social perception approach. Thus both Guidelines clearly endorse the view that sex can be within the ambit of 'Particular Social Group' with women being a clear example of a 'social subset' defined by innate characteristics.⁵² The Gender Guidelines also suggest that it is those innate characteristics that identify them as a distinct group in societies where they are treated differently to men: 'their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries'.⁵³

Consequently, the UNHCR notes in its Guidelines on Particular Social Group that women have been recognised as a 'Particular Social Group' under either limb, namely the protected characteristics approach *or* the social perception approach. In addition, UNHCR notes there is often an overlap between the two approaches and women can constitute a 'Particular Social Group' under either. The judiciary in various jurisdictions, including in Belgium, Spain and the UK, have endorsed UNHCR's guidelines and recognised the proposition that women are a clear example of a 'Particular Social Group' defined by innate characteristics and who are often treated differently from men.⁵⁴

1. CJEU interpretation

However, the CJEU decision in the case of *X, Y and Z* has been read to mean that the two limbs of Article 10(1)(d) must be read cumulatively rather than as alternatives.⁵⁵ The central issue in the case concerned the role of laws criminalising same-sex relationships in the recognition of refugee status. The CJEU was asked for a preliminary ruling on the interpretation of 'acts of

territoire, le séjour, l'établissement et l'éloignement des étrangers (15 December 1980 as amended) (n 34) art 48/3(2)(f).⁵¹ Gender Guidelines (n 1) para 29; PSG Guidelines (n 13) para 11.

⁵² PSG Guidelines (n 13) para 12.

⁵³ Gender Guidelines (n 1) para 30.

⁵⁴ Belgium: CCE n° 65 905 (31 August 2011) para 6.8 <<https://www.rvv-ccbe.be/sites/default/files/arr/A65905.AN.pdf>>; Spain: Supreme Court, STS 4013/2011 (15 June 2011) <<https://www.poderjudicial.es/search/AN/openDocument/544cca88913affed/20110705>>; UK: *Fornah* (n 10) paras 15 and 113.

⁵⁵ Joined Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* EU:C:2013:720; European Asylum Support Office, *EASO Guidance on Membership of a Particular Social Group* (March 2020) (Guidance on PSG) 11 <<https://www.easo.europa.eu/sites/default/files/EASO-Guidance-on%20MPSPG-EN.pdf>>.

persecution'⁵⁶ read in conjunction with Article 9(2)(c)⁵⁷ and the definition of 'Particular Social Group' in Article 10(1)(d) of the 2004 Qualification Directive.⁵⁸ The case concerned three asylum seekers who had claimed refugee status in the Netherlands on the basis of a well-founded fear of being persecuted for reason of their sexual orientation. The referring authority enquired whether persons 'with a homosexual orientation' constituted a 'Particular Social Group' under the Directive,⁵⁹ whether and to what extent they might be expected to conceal their sexual orientation or exercise restraint⁶⁰ and whether the criminalisation of homosexuality in their countries of origin constituted an act of persecution as defined in the Directive.⁶¹

The CJEU determined that a 'Particular Social Group' may be constituted by those whose shared characteristic is their sexual orientation⁶² and that the existence of criminal laws specifically targeting homosexuals supports the finding that 'those persons form a separate group which is perceived by the surrounding society as being different'.⁶³ Accordingly, Article 10(1)(d) 'must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group'.⁶⁴ The judgment on this point has been described as being narrow, and based on the particular facts of the case.⁶⁵ Indeed, the principal matter of contention in the national proceedings and subject of the preliminary reference concerned the role that laws criminalising same-sex relationships might play when determining refugee status.⁶⁶ To some extent, the judgment does not seek to give any interpretative guidance beyond cases of this nature.

The CJEU did not, in fact, expressly determine whether Article 10(1)(d) could be read as an alternative. The CJEU noted that a 'Particular Social Group' exists where, *inter alia*, two conditions are met,⁶⁷ as the Qualification Directive provides that a 'Particular Social Group' exists where, *in particular*, the two criteria exist. As the CJEU found that the existence of

⁵⁶ Qualification Directive (n 16) art 9(1)(a).

⁵⁷ 'Prosecution or punishment, which is disproportionate or discriminatory'.

⁵⁸ *X, Y and Z* (n 55) para 1. ⁵⁹ *ibid* para 37(1). ⁶⁰ *ibid* para 37(2).

⁶¹ *ibid* para 37(3). ⁶² *ibid* para 45. ⁶³ *ibid* para 48. ⁶⁴ *ibid* para 79(1).

⁶⁵ M Fraser, 'The Court of Justice of the European Union Delivers Judgment in the Joined Cases of C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie en Asiel*' (*European Database of Asylum Law*, 11 December 2013) <<https://www.asylumlawdatabase.eu/en/journal/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y>>.

⁶⁶ *X, Y and Z* (n 55) paras 26–36.

⁶⁷ *ibid* para 45. The only authentic version of the judgment handed down by the CJEU is that which appears in the language of the case (Rules of Procedure of the Court of Justice [2012] OJ L265/1, art 41). The language of this case is Dutch (art 37(3) Rules of Procedure) and the paragraph states that 'Volgens deze omschrijving wordt een groep geacht een "specifieke sociale groep" te vormen als met name aan twee cumulatieve voorwaarden is voldaan' ('according to that definition, a group is considered to constitute a "particular social group" if, in particular, two cumulative conditions are met'). The word cumulative is not used in the French or English version.

laws criminalising same-sex relationships were sufficient to fulfil the social perception limb, it did not have to consider whether a 'Particular Social Group' could exist solely on the basis of the protected characteristics limb. Thus, the judgment does not necessarily require that the cumulative approach is adopted.⁶⁸

This view is substantiated by the Court observing that the existence of laws criminalising same-sex relationships 'supports the finding that those persons must be regarded as forming a particular social group'.⁶⁹ The CJEU's cautious approach could be said to arise from its reluctance to test the boundaries of CEAS harmonisation.⁷⁰ Indeed, research published shortly before the judgment was issued concluded that there were significant disparities in Member States' interpretation of Article 10(1)(d)⁷¹ and its short judgment on the first question is entirely limited to the facts of the case.⁷²

2. EASO Guidance

EASO supports the EU in achieving the aim of harmonisation in the field of asylum. One of its more recent activities is the provision of guidance documents to EU Member States on the interpretation of refugee law concepts. However, EASO's Guidance to Member States on Membership of a Particular Social Group is built entirely on the assumption that the CJEU endorsed an exclusively cumulative interpretation of Article 10(1)(d).⁷³ This is inconsistent with its earlier analysis of the Directive, which accurately noted that the CJEU decision did not turn on that specific question.⁷⁴ Furthermore, the Guidance fails to apply its legal analysis⁷⁵ uniformly to 'Particular Social Groups' of women compared to other groups considered in the Guidance.⁷⁶ More specifically, the Guidance indicates that additional and stricter criteria are required for the determination of 'Particular Social Groups' on the basis of sex. For example, although the Guidance says that biological sex and gender are examples of innate characteristics, it adds that 'in practice the criterion of "distinct identity" will, in most countries of origin, only be substantiated if it is combined with more characteristics relevant for the surrounding society to perceive a particular group as different'.⁷⁷

⁶⁸ M den Heijer, 'Persecution for Reason of Sexual Orientation: X, Y and Z' (2014) 51(4) CMLRev 1217, 1223.

⁶⁹ *X, Y and Z* (n 55) para 49 (emphasis added).

⁷⁰ E Drywood, 'Who's in and Who's out? The Court's Emerging Case Law on the Definition of a Refugee' (2014) 51(4) CMLRev 1093, 1094.

⁷¹ Cheikh Ali, Querton and Soulard (n 7) 50.

⁷² Nine paragraphs in total, *X, Y and Z* (n 55) paras 41–49.

⁷³ EASO Guidance on PSG (n 55).

⁷⁴ EASO, *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis* (December 2016) 49 <<https://www.easo.europa.eu/sites/default/files/QIP%20-%20JA.pdf>>.

⁷⁵ EASO Guidance on PSG (n 55) 'Legal Analysis' section, 11–18.

⁷⁶ *ibid* 'Application of the Analysis on Membership of a Particular Social Group' section, 19–27.

⁷⁷ *ibid* 12 (emphasis added).

In contrast, decision-makers determining ‘Particular Social Groups’ based on the protected characteristics of sexual orientation or gender identity are directed to consider ‘whether the group has a distinct identity based on this common characteristic, i.e. is this group perceived as being different by the surrounding society because of their sexual orientation and/or gender identity?’.⁷⁸ No reasoning is provided for this difference of approach.

The Guidance also suggests that more anxious scrutiny is needed where women are at risk of gender-based violence. Where potential groups are defined by sexual orientation, gender identity, age, illness, disability or a common past experience of having been trafficked, decision-makers are guided to consider how the group’s distinct identity may be demonstrated by the existence of criminal or discriminatory laws,⁷⁹ being ‘stigmatised’⁸⁰ or ‘alienated’,⁸¹ subjected to a ‘culture of intolerance’⁸² or discriminated against due to ‘customs, traditions or myths’ in any area of social life, ‘including access to education, employment or health, and more generally to the exercise of a wide range of civic, political, economic, social and cultural rights’.⁸³

On the other hand, decision-makers are unjustifiably directed to make further enquiries in the case of groups defined by sex. The existence of discriminatory laws or practice is no longer sufficient in itself to indicate that a ‘Particular Social Group’ comprised of women has a distinct identity. At most, ‘it forms an indication which needs to be further assessed in the context of the country of origin; how essential is the law for the perception of the surrounding society on different identity, how is it being applied and how does it affect women differently. Often other characteristics will be needed to establish the criterion of “distinct identity” such as a region of origin, ethnicity and/or social situation’.⁸⁴ Thus, not only does the Guidance adopt an overly restrictive reading of *X, Y and Z*, it also inexplicably further restricts the interpretation of Article 10(1)(d) in the cases of women fearing gender-based violence.

The Guidance propounded by EASO reflects a regression with significant implications for the protection of women at risk of gender-based violence, particularly as EASO Guidance aims to promote greater convergence within the EU. The recent transformation of EASO into a fully-fledged EU Agency for Asylum with increased powers on asylum in the EU further emphasises the importance of this finding.⁸⁵ Although the Guidance is said to reflect ‘commonly agreed standards’,⁸⁶ the analysis conducted below exploring legislative provisions and the interpretation of ‘Particular Social Group’ in the context of women at risk of gender-based violence in a variety of EU Member States indicates that different standards and practices exist at the national level.

⁷⁸ *ibid* 20.

⁷⁹ *ibid* 20, 25–6.

⁸⁰ *ibid* 20, 24.

⁸¹ *ibid* 24.

⁸² *ibid* 20–1.

⁸³ *ibid* 25.

⁸⁴ *ibid* 21.

⁸⁵ EUAA Regulation (n 18).

⁸⁶ EASO Guidance on PSG (n 55) 3.

B. Definition of 'Particular Social Group' in EU Member States

1. National legislation

The notion that women may be at risk of persecution because of their sex and therefore in need of refugee protection is reflected in the domestic legislation of several EU Member States that expressly includes references to gender or sex. Whereas some Member States include persecution based on sex as an additional ground for persecution,⁸⁷ in others this is recognised as a specific example of a 'Particular Social Group'.

In the Czech Republic, domestic legislation specifically mentions gender as an additional ground for persecution.⁸⁸ Italy has a specific *non-refoulement* provision that prevents *refoulement* to a country where a person may be persecuted for, among other reasons, their sex.⁸⁹ The definitions of a refugee set out in domestic legislation in Germany,⁹⁰ Ireland,⁹¹ Spain⁹² and Sweden⁹³ explicitly include sex or gender as specific examples of 'Particular Social Groups'.

⁸⁷ Additional to the five Refugee Convention grounds of 'race, religion, nationality, membership of a particular social group or political opinion', art 1A(2) Refugee Convention.

⁸⁸ Act No 325/1999 Coll on Asylum (11 November 1999) Section 12 <<https://www.refworld.org/docid/4a7a97bfc33.html>>. Foster (n 8) 25.

⁸⁹ Legislative Decree No 286 of 1998 (25 July 1998) art 19 <<https://www.camera.it/parlam/leggi/deleghe/98286dl.htm>> (as amended by art 1 of Decree Law No 113/2018, implemented by Law No 132/2018 <<https://www.gazzettaufficiale.it/eli/id/2018/12/03/18A07702/sg>>).

⁹⁰ Section 3b Asylum Procedures Act, in the version promulgated on 2 September 2008 (Federal Law Gazette I, at 1798), last amended by Article 2 of the Act of 11 March 2016 (Federal Law Gazette I, at 394), provides that 'if a person is persecuted solely on account of their sex or sexual identity, this may also constitute persecution due to membership of a certain social group' <https://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html#p0029>. Prior to this provision coming into force in 2013, Section 60(1) Residence Act stated that 'when a person's life, freedom from bodily harm or liberty is threatened solely on account of his/her sex, this may also constitute persecution due to membership of a particular social group' (since repealed).

⁹¹ Section 1 Refugee Act 1996 states that 'membership of a particular social group includes membership of a trade union and also includes membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation' <<http://www.irishstatutebook.ie/eli/1996/act/17/enacted/en/index.html>>.

⁹² Art 3 Asylum Law 12/2009 provides 'La condición de refugiado se reconoce a toda persona que, debido a fundados temores de ser perseguida por motivos de raza, religión, nacionalidad, opiniones políticas, pertenencia a determinado grupo social, de género u orientación sexual, se encuentra fuera del país de su nacionalidad y no puede o, a causa de dichos temores, no quiere acogerse a la protección de tal país' (emphasis added) ('Refugee status is recognised for any person who, due to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, membership of a particular social group, based on gender or sexual orientation, is outside the country of their nationality and is unable or, because of such fear, is unwilling to avail himself of the protection of such a country') <<https://www.boe.es/eli/es/l/2009/10/30/12/con>>.

⁹³ Art 1, Chapter 4 Aliens Act 2005:716, as amended by Lag om ändring i utlänningslagen (2005:716) SFS 2021:223 (24 March 2021) defines a refugee as a person who 'befinner sig utanför det land som utlänningen är medborgare i, därför att han eller hon känner välgrundad fruktan för förföljelse på grund av ras, nationalitet, religiös eller politisk uppfattning eller på grund av kön, sexuell läggning eller annan tillhörighet till en viss samhällsgrupp, och inte kan, eller på grund av sin fruktan inte vill, begagna sig av detta lands skydd' (emphasis added) ('is

The application of these domestic provisions has led to inclusive judicial decisions resulting in refugee protection for women at risk of gender-based violence. For example, the German Administrative Court in Stuttgart recognised the refugee status of an unmarried woman with a 'Western' lifestyle as she would be at risk of gender-based persecution if she were to return to Iraq.⁹⁴ In addition, the German Administrative Court in Aachen concluded that a risk of female genital mutilation (FGM) amounts to a threat to a woman's life, freedom from bodily harm or liberty solely on account of her sex, and therefore constituted persecution due to membership of a 'Particular Social Group'.⁹⁵ The Administrative Court of Oldenburg allowed the appeal of an Algerian woman who was at risk of forced marriage on account of her sex and thus due to her membership of a 'Particular Social Group'.⁹⁶ A Chinese woman was recognised as a refugee because of the risk of forced sterilisation, which was considered to be a form of gender-based persecution of members of a 'Particular Social Group', this being women.⁹⁷

In Spain, the Supreme Court has previously recognised as refugees women who were at risk of persecution because of their 'female gender'. There is an express legislative recognition that sex or gender is a sufficient characteristic for there to be a 'Particular Social Group' and so there is no need for extensive discussions concerning its definition. As a result, several women have been granted protection from gender-based violence and discrimination: a woman victim of domestic violence from Algeria,⁹⁸ where the Spanish Supreme Court also endorsed the 1991 UNHCR Guidelines on

outside the country of which the alien is a national, because he or she has a well-founded fear of persecution for reasons of race, nationality, religious or political opinion or because of *sex/gender*, sexual orientation or other membership in a particular social group, and is unable, or because of his fear is unwilling to avail himself of the protection of such a country') <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag-2005716_sfs-2005-716>. The Migration Court of Appeal has confirmed that the term 'kön' means both biological sex and social gender, which refers to socially or culturally determined, stereotypical, notions of how men and women should behave, MIG 2008:39 (21 November 2008) <<https://lagen.nu/dom/mig/2008:39>>.

⁹⁴ Administrative Court Stuttgart (18 January 2011) A 6 K 615/10 <<https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-stuttgart-18-january-2011-6-k-61510#content>>.

⁹⁵ Administrative Court Aachen (10 May 2010) 2 K 562/07.A <<https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-aachen-10-may-2010-2-k-56207a#content>>.

⁹⁶ Administrative Court of Oldenburg (13 April 2011) 3 A 2966/09 <<https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-oldenburg-13-april-2011-3-296609#content>>; see also women at risk of forced marriage in Iran, Administrative Court Stuttgart (14 March 2011) A 11 K 553/10 <<https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-stuttgart-14-march-2011-11-k-55310#content>>; and women at risk of forced marriage in Afghanistan, Administrative Court Gelsenkirchen (18 July 2013) 5a K 4418/11.A <<https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-gelsenkirchen-18-july-2013-5a-k-441811a#content>>.

⁹⁷ Administrative Court Trier (23 March 2011) 5 K 1181/10.TR <<https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-trier-23-march-2011-5-k-118110tr#content>>.

⁹⁸ Supreme Court, STS 4013/2011 (15 June 2011) <<https://www.poderjudicial.es/search/AN/openDocument/544cca88913affed/20110705>>.

Women;⁹⁹ a Ukrainian single parent struggling to survive due to potential social and employment discrimination;¹⁰⁰ a woman at potential risk of FGM in Nigeria;¹⁰¹ and a woman at risk of FGM and forced marriage in Nigeria.¹⁰² In Sweden, the Migration Court of Appeal has recognised women as comprising a 'Particular Social Group' on the basis of their sex or gender.¹⁰³ Examples of such cases include an Albanian woman and her two children who were at risk of gender-based violence from her ex-husband and his relatives in the absence of State protection¹⁰⁴ and a Somali woman who had given birth to a child outside marriage.¹⁰⁵ Thus, there is judicial recognition that sex alone provides a sufficient basis for being a member of a 'Particular Social Group'.¹⁰⁶

The express recognition that women may have a well-founded fear of being persecuted for reasons of sex in national legislation and judicial decisions means that women at risk of gender-based violence in their home countries are more likely to be awarded refugee protection in a straightforward manner.¹⁰⁷ Furthermore, reliance on domestic law means that refugee women are insulated from the regressive interpretative trends found in EU law, such as the narrow approach adopted by the CJEU in *X, Y and Z* and EASO's restrictive guidance to Member States based on its reading of that decision and its contrasting approach to other groups as discussed above.

2. National jurisprudence

Even where States have not adopted specific legislative provisions providing for persecution on the basis of sex or gender, there is nonetheless widespread recognition that women can constitute a 'Particular Social Group'. Whilst some States transposed the two limbs of Article 10(1)(d) on the basis that they were alternatives¹⁰⁸ and others did not, some of those States which did not do so nevertheless interpret the provision as if they were alternatives, meaning that sex is in fact a sufficient characteristic for the existence of a

⁹⁹ UNHCR, 'Guidelines on the Protection of Refugee Women' (n 20).

¹⁰⁰ Supreme Court, STS 1303/2007 (15 February 2007) (admissibility decision) <<https://www.poderjudicial.es/search/AN/openDocument/1df95224bb248663/20070322>>.

¹⁰¹ Supreme Court, STS 5931/2006 (10 October 2006) (admissibility decision) <<https://www.poderjudicial.es/search/AN/openDocument/b5c237dd5109f1eb/20061026>>.

¹⁰² Supreme Court, STS 2781/2009 (11 May 2009) <<https://www.poderjudicial.es/search/AN/openDocument/ea8c38ee614d0910/20090528>>.

¹⁰³ Migration Court of Appeal, MIG 2008:39 (21 November 2008) <<https://lagen.nu/dom/mig/2008:39>>.

¹⁰⁴ *ibid.* ¹⁰⁵ Migration Court of Appeal, MIG 2011:8 (21 April 2011) <<https://lagen.nu/dom/mig/2011:8>>.

¹⁰⁶ *ibid.*

¹⁰⁷ An approach also supported by Dauvergne in 'Women in Refugee Jurisprudence' (n 4) 742–3. For example, Italy ('ovvero' ('or'), Art 8 Qualification Decree 251/07), Sweden ('eller' ('or'), law proposal to transpose Qualification Directive, Regeringens proposition 2005/06:6, 24–5) and formerly Hungary (Section 64(1)(d) Act LXXX of 2007 on Asylum); see also Cheikh Ali, Querton and Soulard (n 7) 49–50.

‘Particular Social Group’.¹⁰⁹ As a result, women from various countries of origin have been found to constitute ‘Particular Social Groups’, including women in Afghanistan, by the Austrian Asylum Court,¹¹⁰ as have women in Burkina Faso¹¹¹ and Guinea by the Belgium Council for Alien Law Litigation,¹¹² and women in Sierra Leone¹¹³ and Pakistan by the UK House of Lords.¹¹⁴ Judicial interpretation in Belgium, the UK and France will be explored in further detail below to illustrate how national authorities have interpreted Article 10(1)(d) Qualification Directive in cases of women who fear gender-based violence. Such national practice stands in stark contrast to the restrictive interpretation of the CJEU judgment in *X, Y and Z*.

The Belgian Aliens Act provides that the two limbs of Article 10(1)(d) are cumulative¹¹⁵ but in practice the judiciary interpret it more flexibly, sometimes referring to one limb only and sometimes to both.¹¹⁶ Sex has been recognised as an innate characteristic and thus as a basis for the existence of a ‘Particular Social Group’ as far back as 2002.¹¹⁷ The Belgian Council for Alien Law Litigation regularly draws on jurisprudence from other jurisdictions. It endorsed the Canadian decision of *Ward v Canada*,¹¹⁸ stressing the jurisprudential evolution of the scope to be given to this Convention ground and found that ‘the social group can be defined from the existence of innate or immutable features, such as sex’.¹¹⁹ The Belgian Council for Alien Law Litigation also regularly cites the UK House of Lords decision in *Shah and Islam*, the first decision from the UK higher courts establishing that women constituted a ‘Particular Social Group’.¹²⁰

Although the word ‘and’ is placed between the two limbs in the Belgian Aliens Act, they are both prefaced by the words ‘amongst others’. In jurisprudence post-dating *X, Y and Z*, the Belgian Council for Alien Law Litigation has interpreted the national provision transposing Article 10(1)(d) as being not exhaustive. It also took into account the fact that the Qualification Directive merely sets out minimum standards and these have to be interpreted in the light of the Refugee Convention and the EU Charter.¹²¹

¹⁰⁹ For example, Austria, Belgium, Italy, Romania and the UK; see also Cheikh Ali, Querton and Soulard (n 7) 49–50. ¹¹⁰ Asylum Court, C16 427465-1/2012 (6 December 2012) <<https://www.asylumlawdatabase.eu/en/case-law/austria-asylum-court-6-december-2012-c16-427465-12012#content>>.

¹¹¹ CCE n° 65 905 (31 August 2011) para 6.8 <<https://www.rvv-ccc.be/sites/default/files/arr/A65905.AN.pdf>>.

¹¹² CCE n° 176 119 (11 October 2016) para 5.14 <<https://www.rvv-ccc.be/sites/default/files/arr/A176119.AN.pdf>>.

¹¹³ *Fornah* (n 10).

¹¹⁴ *Islam* (n 3). For further examples, see Cheikh Ali, Querton and Soulard (n 7) 52–5.

¹¹⁵ Art 48/3(4)(d) Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (15 December 1980 as amended) (n 34).

¹¹⁶ Cheikh Ali, Querton and Soulard (n 7) 49.

¹¹⁷ Commission Permanente de Recours des Réfugiés (predecessor to the CCE), no 01-0668/F1356 (8 March 2002).

¹¹⁸ *Ward* (n 10). ¹¹⁹ For a recent example, see CCE n° 176 119 (11 October 2016) para 5.14 (Women from Guinea as PSG / risk of forced marriage) <<https://www.rvv-ccc.be/sites/default/files/arr/A176119.AN.pdf>>.

¹²⁰ In Pakistan in this case, *Islam* (n 3).

¹²¹ CCE n° 176 119 (11 October 2016) para 5.14.3.

The Court has on several occasions pointed out that the characteristic of sex is sufficient to distinguish the group from the rest of society. It thus considers that sex is an immutable characteristic and provides a sufficient basis for the existence of a 'Particular Social Group' but that, in addition, this very fact means that women are perceived as being different from the rest of society.¹²²

In the UK, Article 10(1)(d) Qualification Directive is transposed almost word by word, although the words 'in particular' were replaced with 'for example'.¹²³ In the case of *Fornah*, the House of Lords¹²⁴ expressly indicated that applying the two limbs cumulatively would impose a stricter test than that provided for in international law¹²⁵ and the UNHCR's PSG Guidelines reflecting the alternative approach were strongly endorsed.¹²⁶ However, the response to this judgment has been inconsistent. In some cases, the Upper Tribunal followed *Fornah* and has found, for example, that women in Bangladesh are a 'Particular Social Group' because the lack of State protection against domestic violence was 'on account of the fact she is a woman'.¹²⁷ In other cases, the Tribunal has departed from *Fornah* and adopted a cumulative approach by requiring 'discrimination in the wider sense' where the group 'is the broad one of gender or a group with gender-based identifying features'.¹²⁸ The need for such an additional requirement has been criticised for being discriminatory and contrary to international refugee law.¹²⁹

More recently, the Upper Tribunal has expressly rejected the cumulative approach after reviewing the relevant authorities in its latest decision providing guidance on the interpretation of 'Particular Social Group'.¹³⁰ It noted that the CJEU decision in *X, Y and Z* did not consider whether a literal interpretation of the provision was compatible with the Refugee Convention.¹³¹ It emphasised that the Refugee Convention imposes a higher standard of protection than is provided by a literal reading of Article 10(1)(d) Qualification Directive and the provision should therefore be read as if the word 'or' linked the two limbs of Article 10(1)(d) and the related national Regulations.¹³² Thus, despite some past inconsistent practice, the Upper Tribunal has now confirmed its adherence to the approach set out by the

¹²² See, for example, CCE n° 979 (25 July 2007) para 5.7 <<https://www.rvv-ccc.be/sites/default/files/arr/A979.AN.pdf>>; CCE n° 176 119 (11 October 2016) para 5.14 <<https://www.rvv-ccc.be/sites/default/files/arr/A176119.AN.pdf>>.

¹²³ Regulation 6(1)(d) The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI No 2525) <<https://www.legislation.gov.uk/uksi/2006/2525/contents/made>>.

¹²⁴ Now the Supreme Court.

¹²⁶ *ibid*, Lady Hale, para 103.

¹²⁷ *SA (Divorced woman – illegitimate child) Bangladesh* CG [2011] UKUT 00254(IAC), paras 73–74.

¹²⁸ *SB (PSG – Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 00002, para 112(b).

¹²⁹ Querton, 'The Interpretation of the Convention Ground of "Membership of a Particular Social Group" in the Context of Gender-Related Claims for Asylum: A Critical Analysis of the Tribunal's Approach in the UK' (n 14).

¹³⁰ *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 00223 (IAC).

¹³¹ *ibid* paras 66–67.

¹³² *ibid* para 72.

House of Lords. Overall, there is extensive jurisprudence in the UK in which women have been recognised as members of widely defined ‘Particular Social Groups’ based on the protected characteristics approach.¹³³

In France, Article 10(1)(d) Qualification Directive has been transposed mainly by cross-reference to it, and the French National Asylum Court has traditionally interpreted the two limbs of Article 10(1)(d) as cumulative.¹³⁴ The main difficulty has been that in order to be considered members of a ‘Particular Social Group’ it was necessary for women and girls to demonstrate, in their country of origin, their opposition to the practices which they claimed put them at risk of persecution in order to be perceived as having transgressed cultural norms.¹³⁵ In addition, in the case of a Syrian Kurdish woman fleeing forced marriage and domestic violence in 2004, the Court refused to recognise ‘people of the female sex’ as comprising a group because they did not constitute ‘a circumscribed and sufficiently identifiable group of persons’.¹³⁶ Since the French National Asylum Court required women and girls to have actively manifested their opposition to the acts which would constitute persecution, mothers of girls born in France but who would be at risk of FGM in their home countries should they return were not

¹³³ See, for example, Women in Pakistan (*Islam* (n 3)); (Intact) Women in Sierra Leone (*Fornah* (n 10)); Women in the Ivory Coast (*MD (Women) Ivory Coast* CG [2010] UKUT 215 (IAC)); Women in Somalia (*HM (Somali Women, Particular Social Group) Somalia* [2005] UKIAT 00040); Women in Afghanistan (*NS (Social Group – Women – Forced Marriage) Afghanistan* CG [2004] UKIAT 00328); Women in Bangladesh (*SA (Divorced woman – illegitimate child) Bangladesh* CG [2011] UKUT 00254 (IAC)); Women charged with committing adultery in Pakistan (*KA and Others (domestic violence – risk on return) Pakistan* CG [2010] UKUT 216 (IAC)); Women who have committed adultery from Punjab, India (*BK (Risk – Adultery – PSG) India* CG [2002] UKIAT 03387); Women in Kenya (and particularly Kikuyu women under the age of 65) (*P & Anor v Secretary of State for Home Department* [2004] EWCA Civ 1640); Women in Liberia belonging to those ethnic groups where FGM is practised (*SK (FGM – ethnic groups) Liberia* CG [2007] UKAIT 00001); Women at risk of FGM in Sudan (*FM (FGM) Sudan* CG [2007] UKAIT 00060); Young Iranian women who refuse to enter into arranged marriages (*TB (PSG – women) Iran* [2005] UKIAT 00065); Lesbian women in Albania (*MK (Lesbians) Albania* CG [2009] UKAIT 00036); Women who do not conform to the heterosexual narrative and are perceived as lesbians in Jamaica (*SW (lesbians – HJ and HT applied) Jamaica* CG [2011] UKUT 00251(IAC)); Former victims of trafficking in Moldova (*SB (PSG – Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 00002), Nigeria (*PO (Trafficked Women) Nigeria* CG [2009] UKAIT 00046. Note that this case has partly been overturned by the Court of Appeal in *PO (Nigeria) v Secretary of State for the Home Department* [2011] EWCA Civ 132 but on other issues not concerned with PSG), Thailand (*AZ (Trafficked women) Thailand* CG [2010] UKUT 118 (IAC)), Albania (*AM and BM (Trafficked women) Albania* CG [2010] UKUT 80 (IAC)), China (*HC & RC (Trafficked women) China* CG [2009] UKAIT 00027), all decisions available at <https://www.bailii.org/form/search_cases.html>. Clause 32(2)–(4) of the Nationality and Borders Bill 2021, however, proposes an express cumulative approach contrary to the case law.

¹³⁴ See, for example, CNDA Mlle JE F n°10012810 (24 March 2015) 8 <<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CNDA%2C%2024%20march%202015%2C%20no.10012810%20.pdf>>.

¹³⁵ Cheikh Ali, Querton and Soulard (n 7) 49. CNDA Sections Réuniones Mme D n° 638891 and Mlle K n° 639908 (12 mars 2009) 11 <<http://www.cnda.fr/content/download/5151/15583/version/1/file/lesgrandesdecisionssurlasile.pdf>>.

¹³⁶ CNDA Mlle H n° 433 535 (20 December 2004), cited in Cheikh Ali, Querton and Soulard (n 7) 51, fn 208.

able to obtain refugee status as the mother had not been perceived as transgressing cultural norms in the country concerned and the children were too young to demonstrate opposition. Therefore, neither were considered members of a 'Particular Social Group' and they were merely entitled to subsidiary protection.¹³⁷

However, this has now changed. Both limbs must still be met, but applicants are no longer required to have expressly and publicly opposed the persecutory practice and as a result membership of a 'Particular Social Group' is to be understood as an objective fact and not dependent on the actions of the person in question.¹³⁸ The abandonment of the requirement for women to have publicly opposed the persecutory practice in their country of origin is a positive development and aligns more closely with practice across Europe. Nonetheless, there is still an emphasis on demonstrating that the group has a distinct identity on the basis that society generally perceives the members of the group as different (the social perception approach). The Court has now established that in cases of gender-based violence, this can be demonstrated where persecutory harm, such as FGM or forced marriage, is so commonly practised that it amounts to a social norm in the country in question and the second limb is met by the mere fact of not wanting to be subjected to that prevailing social norm. EASO's Guidance appears to endorse this approach when it gives the example of 'countries or regions where the prevalence rate of FGM is high' in its guidance on whether the concerned group is perceived as being different by the surrounding society.¹³⁹

The French 'social norm' approach raises questions concerning how prevalent violations of women's rights must be before the social perception test is met. The concerns with the French approach are twofold. First, this may become the central focus of asylum determination rather than being used solely to determine whether the applicant has a well-founded fear of persecution. Secondly, the question of prevalence is relevant to whether there is a well-founded fear of persecution, rather than whether a person is a member of a 'Particular Social Group'. Other Refugee Convention grounds do not depend on how many people may be at risk of persecution. For example, family members have been recognised as comprising a 'Particular Social

¹³⁷ Cheikh Ali, Querton and Soulard (n 7) 53–4. CNDA Mme D and Mlle K (n 135) 11.

¹³⁸ CNDA Mlle E n° 16029780 C (23 October 2017) 78–80, para 3 <<http://www.cnda.fr/content/download/125021/1265091/version/3/file/Recueil%202017.pdf>>; CNDA Mme E n° 15031912 R (23 July 2018) 58–61, para 3; CNDA Mme D n° 17042624 R (23 July 2018) 62–4, para 3; CNDA Mlle A n° 17034030 C (2 February 2018) 87–9 <<http://www.cnda.fr/content/download/154762/1566623/version/1/file/Recueil%202018.pdf>>. See also CNDA, 'La CNDA redéfinit le cadre d'analyse des demandes de protection fondées sur le refus d'un mariage forcé' (26 July 2018) <<http://www.cnda.fr/Ressources-juridiques-et-geopolitiques/Actualite-jurisprudentielle/Selection-de-decisions-de-la-CNDA/La-CNDA-redefinit-le-cadre-d-analyse-des-demandes-de-protection-fondees-sur-le-refus-d-un-mariage-force>>.

¹³⁹ EASO Guidance on PSG (n 55) 15.

Group’,¹⁴⁰ and this is a much smaller group than that of ‘women’ generally. Equally, it is well established that not all members of the group need to be at risk. Such an approach blurs the boundaries between the assessment of risk and the grounds of persecution in a manner which is unwarranted by international refugee law.

However, the concern that the determination of a ‘Particular Social Group’ would become focussed on quantitative evaluations of persecutory practice¹⁴¹ has proven to be unfounded. The French National Asylum Court has subsequently confirmed that because the existence of a ‘Particular Social Group’ does not depend on the size of the group, the existence of the group is not to be determined solely on the basis of the extent of the persecutory practice in the country concerned.¹⁴² Overall, and despite French practice requiring the use of the social perception approach, recent developments have rendered that approach more inclusive and it still allows for the recognition of women as ‘Particular Social Groups’. However, the convergence between the protected characteristics and the social perception approaches, discussed below, would mean that there was an inclusive interpretation, which would better ensure the effective protection of women at risk of gender-based violence.

IV. AN INCLUSIVE AND INTEGRATED APPROACH

The above discussion demonstrates that in a significant number of EU Member States there is legal recognition, either on the basis of an express legislative provision or on the basis of the interpretation given to ‘Particular Social Group’, that women may have a well-founded fear of being persecuted because they are women. It is widely accepted that sex can properly be the sole reason for persecution and, accordingly, that sex as a protected characteristic is sufficient to establish a ‘Particular Social Group’, either on its own or because it means that the group has a distinct identity in the relevant country, justifying the granting of refugee status where there is a well-founded fear of persecution. Even in States where the jurisprudence has fluctuated on this, it has ultimately been resolved in a way which places women at risk of gender-based violence at the centre of refugee law.

However, in countries such as France (and the UK if the legislative amendments to the definition of ‘Particular Social Group’ in the Nationality

¹⁴⁰ See, for example, Ireland: *AVB & Ors v Refugee Appeals Tribunal & Ors; XGB & Ors v Refugee Appeals Tribunal & Ors* [2015] IEHC 13 <https://www.courts.ie/acc/alfresco/932620b4-4d8d-48f7-b750-49ccbfe63ddf/2015_IEHC_13_1.pdf/pdf#view=fitH>.

¹⁴¹ See, for example, CNDA Mlle E n° 16029780 C (23 October 2017) 78–80, para 5 <<http://www.cnda.fr/content/download/125021/1265091/version/3/file/Recueil%202017.pdf>>; CNDA Mme S n° 17038232 R (26 November 2018) 54–8, para 9, <<http://www.cnda.fr/content/download/154762/1566623/version/1/file/Recueil%202018.pdf>>.

¹⁴² CNDA (Grande Formation), Mmes N, S et S n°s 19008524, 19008522 and 19008521 R (5 December 2019) 17–20 <http://www.cnda.fr/content/download/169967/1697343/version/2/file/CEREDOC_REC_2019_Recueil%202019.pdf>.

and Borders Bill 2021 come into force), some concerns remain regarding the interpretation and application of the second limb of Article 10(1)(d) Qualification Directive, this being that the 'group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society'. Moreover, the narrow approach of the CJEU in *X, Y and Z* and EASO's restrictive interpretation of it in its Guidance on Membership of a Particular Social Group, mean that there is a pressing need for a principled approach to the interpretation of this Refugee Convention reason for persecution. It is for this reason that it is suggested that the protected characteristic of sex should be seen as being a sufficient basis, in itself, for the existence of a 'Particular Social Group'.

If the cumulative approach is being applied, it is suggested that the same outcome might be achieved by adopting a convergence approach, by which a group may be perceived as 'being different by the surrounding society' in a given country by virtue of the innate characteristic of sex itself. As discussed above, the UNHCR guidance,¹⁴³ the practice of certain States such as Belgium¹⁴⁴ and the European Commission's original approach¹⁴⁵ support this view. It draws on the recognition by international human rights law that violence against women is justified and condoned by both States and non-State actors on the basis of the belief that women are inferior. In some countries, legal systems and social norms differentiate between persons on the grounds of sex, with significant consequences.¹⁴⁶

Following the principled approach to interpretation of the Refugee Convention proposed by Hathaway and Foster, which emphasises the humanitarian purpose of the treaty grounded in the protection of human rights, interpreting the term 'Particular Social Group' in accordance with the general rule of treaty interpretation, indicates that it should be interpreted in a dynamic way in light of developing norms of international law.¹⁴⁷ Hathaway has proposed, in relation to the interpretation of persecution, that a human rights-based approach to interpretation is consistent with the general rule of treaty interpretation, which relies on widely accepted common standards and has potential for dynamic evolution.¹⁴⁸ A similar approach can be taken here, and international human rights law can give guidance on both the interpretation

¹⁴³ The UNHCR had indicated in its Guidelines on PSG that the protected characteristics and the social perception approaches may converge. The Guidelines also note that women as a group had been recognised as such under either approach.

¹⁴⁴ As the Belgian Court put it, it is the immutable characteristics that differentiate the group from the rest of society, and which are perceived as such by the rest of the population or the authorities.

¹⁴⁵ As noted, the subordination of women because of their inferiority was in the mind of the European Commission when the Qualification Directive was first proposed in 2001.

¹⁴⁶ K Celis *et al.*, 'Gender and Politics: A Gendered World, a Gendered Discipline' in G Waylen *et al.* (eds), *The Oxford Handbook of Gender and Politics* (Oxford University Press 2013) 2.

¹⁴⁷ Hathaway and Foster (n 47) 5–12. Vienna Convention on the Law of Treaties (adopted on 22 May 1969, entered into force on 27 January 1980) 1155 UNTS 331, arts 31–32.

¹⁴⁸ JC Hathaway, *The Law of Refugee Status* (Butterworths 1991).

of ‘Particular Social Group’ and the nexus between the risk of being persecuted and the Convention ground in situations where women fear gender-based violence.

International law, and international human rights law in particular, have long endorsed the view that violence against women is exercised precisely because they are women or, in other words, because of their sex. The Committee monitoring compliance with the Convention for the Elimination of Discrimination against Women (CEDAW) defined gender-based violence in 1994 as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’.¹⁴⁹ The definition was endorsed by the more recent Istanbul Convention.¹⁵⁰ In the context of refugee women, the CEDAW Committee issued a General Recommendation noting that ‘gender-related forms of persecution are forms of persecution that are directed against a woman because she is a woman or that affect women disproportionately’.¹⁵¹ The Special Rapporteur on Torture has set out that ‘the purpose and intent elements of the definition of torture¹⁵² are always fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex’.¹⁵³ This proposition has since been endorsed by the CEDAW Committee.¹⁵⁴ International human rights law thus acknowledges that violence may be exercised for reason of a person’s sex.

Gender subordination on the other hand, is a system of belief that serves to maintain women’s inferiority in a given social context. International human rights standards have long identified the relationship between the dynamics of gender norms and violence. More specifically, a number of human rights instruments and their interpretation establish that gender norms and the subordination of women have been used as means by which violence is justified, accepted or condoned. The CEDAW Committee points to the

¹⁴⁹ CEDAW Committee General Recommendation No 19 (n 25) para 6.

¹⁵⁰ Istanbul Convention (n 5) art 3(d).

¹⁵¹ CEDAW Committee General Recommendation No 32 (n 25) para 15.

¹⁵² ‘For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT) art 1.

¹⁵³ Reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (5 January 2016) UN Doc A/HRC/31/57, para 8, and (15 January 2008) UN Doc A/HRC/7/3.

¹⁵⁴ CEDAW Committee, ‘General Recommendation No 35 on Gender-Based Violence against Women, updating General Recommendation No 19’ (2017) UN Doc CEDAW/C/GC/35; see also Committee against Torture, Communication No 262/2005, *VL v Switzerland*, views adopted on 20 November 2006 (22 January 2007) UN Doc CAT/C/37/D262/2005, para 8.10.

relationship between gender subordination and violence against women in the following terms: 'traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women.'¹⁵⁵ The CEDAW Committee locates the roots of gender-based violence against women in 'gender-related factors', including the belief in the unequal relationship between men and women.¹⁵⁶ It is those gender dynamics that render gender-based violence expressly and implicitly accepted and condoned.¹⁵⁷

Both the Istanbul Convention and the views of the UN Special Rapporteur on Torture recognise that the purpose or objective of violence and human rights violations can be the preservation of the unequal balance of power between men and women. The Istanbul Convention expressly enshrines the proposition that violence against women is a 'manifestation of historically unequal power relations between women and men'.¹⁵⁸ The Special Rapporteur on Torture in his report examining how the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment could be interpreted in a gender-inclusive manner suggests that an act may be defined as 'gender-specific violence' where the nature or purpose of the act is 'aimed at "correcting" behaviour perceived as non-consonant with gender roles and stereotypes or at asserting or perpetuating male domination over women'.¹⁵⁹

More recently, the CEDAW Committee has said that gender-based violence against women is the means by which women's inferiority in relation to men is maintained.¹⁶⁰ Accordingly, the Committee highlights the importance of understanding violence against women 'as a social rather than an individual problem'.¹⁶¹ The European Court of Human Rights also acknowledges that the contracting States' failure to respond to risk of violence against women can be due to discriminatory attitudes against applicants as women.¹⁶² On that basis the Court has found violations of the non-discrimination provision of the European Convention on Human Rights¹⁶³ in conjunction with the

¹⁵⁵ CEDAW Committee General Recommendation No 19 (n 25) para 11.

¹⁵⁶ 'The ideology of men's entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour' CEDAW Committee General Recommendation No 35 (n 154) para 19. ¹⁵⁷ *ibid.*

¹⁵⁸ Istanbul Convention (n 5) Preamble and art 3(a).

¹⁵⁹ Special Rapporteur on torture (15 January 2008) (n 153) para 30, fn 7; see also Special Rapporteur on torture (5 January 2016) (n 153) para 6.

¹⁶⁰ CEDAW General Recommendation No 35 (n 154) para 10.

¹⁶¹ *ibid* para 9.

¹⁶² *Mudric* (n 39) para 63; *TM and CM* (n 39) para 62.

¹⁶³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 14.

prohibition of torture, inhuman and degrading treatment or punishment.¹⁶⁴ The concept of gender-based violence against women is understood in international human rights law as violence exercised to perpetuate systems of inequality and women's inferiority, which depends on the belief that men and women have distinct identities arising from different characteristics and roles.

As a result, international human rights law defines gender-based violence against women as violence that is exercised and condoned for reasons of sex on the basis that women are considered to be unequal to men. UNHCR acknowledges that gender refers to 'the relationship between women and men based on socially or culturally constructed and *defined identities*, status, roles and responsibilities that are assigned to one sex or another'.¹⁶⁵ Gender subordination or, in other words, the unequal relationship between men and women, is based on the perception that men and women have distinct identities.

Overall, a human rights-based approach to the interpretation of the Refugee Convention ground of 'Particular Social Group' indicates that women may have a well-founded fear of being persecuted for reasons of their sex but equally that violence against women is enabled by socially constructed gender dynamics built on the distinct identity of men and women. An interpretation of Article 10(1)(d) Qualification Directive in light of international human rights law therefore supports the proposition that gender-based violence against women satisfies, if insisted upon, both the protected characteristics and the distinct identity/social perception limb of the provision.

V. CONCLUSION

It is clear that the Refugee Convention does not protect everyone at risk of persecution or serious harm in their country of origin. Demonstrating that there is a nexus to one of the five Convention grounds is an essential prerequisite for refugee protection and persons with a well-founded fear of being persecuted on the basis of one of those grounds are eligible for refugee status. However, the restrictive approaches taken by the CJEU, the CEAS and the EASO to the interpretation of 'Particular Social Group' have contributed to a regressive trend. Although recent scholarship suggests progress on the protection of refugee women has stalled due in part to the failure of first instance decision-makers to implement jurisprudential and policy developments,¹⁶⁶ this article identifies examples of good practices at the domestic level and a simultaneous backsliding at the supranational level. EASO encourages Member States to adopt a differentiated approach in the cases concerning women fearing gender-based violence. Moreover, there has been an unofficial erasure of sex in the language of the Qualification

¹⁶⁴ European Convention on Human Rights art 3.

¹⁶⁵ Gender Guidelines (n 1) para 3 (emphasis added).

¹⁶⁶ Dauvergne, 'Women in Refugee Jurisprudence' (n 4) 742; Anderson and Foster (n 21) 66.

Directive, although this has not been followed in the domestic legislation or in judicial practice in some Member States. The picture which emerges is one of conflict between the inclusive legislative and interpretative practices in individual Member States and the regressive practice of EU institutions and agencies that seeks to push refugee women back into the margins of refugee law.

It is necessary to understand the purpose of the Refugee Convention as a whole in order to interpret its terms, and in particular to interpret the meaning of 'Particular Social Group'.¹⁶⁷ Discrimination, understood as the exercise of differential treatment on the basis of real or perceived characteristics, lies at the heart of the Refugee Convention.¹⁶⁸ The fact that women are at risk of being persecuted through the operation of the law or because of societal norms is precisely the type of discriminatory ill-treatment which the Refugee Convention seeks to address. As Foster noted, the continued reliance on, or recent adoption of, the social perception approach which lacks clarity has undermined the straightforward approach of defining a 'Particular Social Group' by reference to sex, as an immutable characteristic equally worthy of protection under the Refugee Convention.¹⁶⁹ Either limb of Article 10(1)(d) should be sufficient to define a 'Particular Social Group' if the Refugee Convention is interpreted in light of its object and purpose, as suggested by the UNHCR and endorsed by a number of EU Member States.

As has been seen, the consistent approach across the CEDAW Committee, the Council of Europe, the UN Rapporteur on Torture and the European Court of Human Rights is to recognise that the human rights violations that women suffer may take place precisely because they are women. There are, however, wider gender norms and dynamics, which have the objective of enforcing and maintaining gender subordination, which enable such violations to take place and which may result in a lack of State protection. Gender norms are not causative factors in such persecution but rather the mechanism that enables it. The convergence between the protected characteristics and the social perception approaches is epitomised by the phenomenon of gender-based violence against women perpetuated by systems of belief that distinguish between the distinct identities of men and women.

¹⁶⁷ Hathaway and Foster (n 47) 10–11.

¹⁶⁸ UNHCR, Intervention before the Court of Appeal of England and Wales in the case of *Islam (AP) v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) (25 March 1999) <<https://www.refworld.org/docid/3eb11c2f4.html>>.

¹⁶⁹ Foster (n 8) 38.