The Right to Say I Don’t: Forced Marriage as Persecution in the United Kingdom, Spain, and France

This Note aims to compare the way that forced marriage is, or is not, viewed as persecution under the domestic asylum laws and regulations of the United Kingdom and two other European nations—Spain and France. First, this Note will provide a background on the law of asylum, its international origins, and its domestic implementation in the legal systems of the United Kingdom, Spain, and France. Next, this Note will compare how these three states address the practice of forced marriage. Whether forced marriage is considered persecution under their respective domestic systems of asylum law differs among the states and, in varying degrees, often diverges from, and fails to comply with, international standards. These differences in how forced marriage is substantively treated by these three European countries are especially problematic given the growing procedural harmonization among the countries, leaving victims of forced marriage with fewer options and opportunities for asylum protection. Finally, this Note will argue that there should be domestic, regional, and international solutions implemented to ensure the protection of victims of forced marriage.

INTRODUCTION

My father made the decision to marry me off and I was not given any say at all. In fact, I did not even know about my marriage. It wasn’t until a woman came to my home, giving me money and a dress, and said, “you are now my daughter,” that I realised what
was happening. I was shocked, but my sisters advised me to stay silent.¹

This quote from a Pakistani girl, Sabina, is just one example of the cultural practice of forced marriage.² The United Kingdom has, in recent years, taken several steps to address the prevalence of forced marriage among British citizens. One of its early initiatives was the launch of the Forced Marriage Unit (FMU) in 2005, which strives to distribute information to those at risk of forced marriage and to community members who are in a position to help.³ The FMU provided “advice or support” in almost 1,500 reported cases in 2011, but the total number of forced marriage cases involving British citizens, including those that go unreported, could amount to as many as 8,000 per year.⁴ In addition to the case-by-case assistance provided by the FMU and the civil remedies available to victims of forced marriage, Prime Minister David Cameron recently announced a consultation on the criminalization of forced marriage in British law.⁵ Given this broad acknowledgment of the harm of forced marriage in the United Kingdom domestically, one might assume that forced marriage would also be recognized as a persecutory harm under national asylum law.

This Note aims to compare the way that forced marriage is, or is not, viewed as persecution under the domestic asylum laws and regulations of the United Kingdom and two other European nations—Spain and France. The national refugee protections for victims of forced marriage not only differ among the three nations, but also diverge from international human rights norms regarding forced marriage. In order to provide sufficient context for the comparison,

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². Id.
⁵. Id.; see infra Part II (comparing the civil and criminal code treatment of forced marriage in the United Kingdom, Spain, and France).
Part I will provide a background on the law of asylum, its international origins, and its domestic implementation in the legal systems of the three states studied. Additionally, there is a discussion of the origins of gender claims in refugee law and the gender-neutrality of the law, which is crucial in understanding how forced marriage, a gender-based harm, is viewed in asylum law generally.6 As a point of clarification, this Note focuses on forced marriage as a “gender-based” harm simply because the majority of victims are females.7 However, this does not mean that forced marriage could not equally apply as a persecutory harm for male victims. Instead, forced marriage, as a recognized persecutory harm, would be a qualifying harm for male victims of the practice, just as rape, traditionally addressed as a gender-based harm, also applies to male victims.8

Part II defines and clarifies the legal definitions of forced marriage and explains how domestic laws in the United Kingdom, Spain, and France address the practice. Since persecution is often defined as a serious harm that constitutes a violation of international human rights, Part III examines a number of international and regional human rights treaties and jurisprudence as they relate to the act of forced marriage, in addition to relevant guidelines and reports from the United Nations High Commissioner for Refugees (UNHCR).9 These sources will be used to argue that forced marriage should be recognized as persecution in asylum law, without an additional showing of other attendant harms.

Parts IV, V, and VI of this Note will synthesize the current state of statutory, regulatory, and interpretative case law in the United

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6. This Note uses “refugee law” and “asylum law” interchangeably.
7. In 2010, the U.K.’s Forced Marriage Unit reported that 86% of the forced marriage victims that were reported to the organization were female. Many of the men targeted for forced marriage are those that are, or are suspected of being, gay or transgendered. Charlotte Rachael Proudman, Forced Marriage: What About the Man?, THE INDEP. BLOGS (Dec. 29, 2011, 2:55 PM), http://blogs.independent.co.uk.
8. U.N. High Commissioner for Refugees, Guidelines on International Protection: 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 ¶ 9, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR Gender Guidelines] (The phrase “[t]here is no doubt that rape and other forms of gender-related violence . . . ” characterizes rape as gender-related).
Kingdom, Spain, and France. They will consider whether forced marriage is considered persecution under their respective domestic systems of asylum law and how the current state practice in this regard differs among the states, and in varying degrees, often diverges from, and fails to comply with, international standards. The need to create harmonious and gender-sensitive acknowledgment of forced marriage as a persecutory harm becomes even more important due to the increasing implementation of the Common European Asylum System (CEAS) by way of numerous directives and the “Dublin” Regulations adopted by the European Commission of the European Union.10 The problem that emerges is that forced marriage victims, whose harm deserves to be deemed a persecutory harm under international human rights standards, are facing arbitrary and inconsistent adjudication of their claims, while at the same time confronting increasingly restrictive procedural obstacles.

Part VII will briefly propose three potential solutions—one international, one regional, and one domestic. Internationally, a new convention addressing qualification for refugee status could be drafted that recognizes gender-based persecution, both the harm and the motive, and that explicitly links persecution to international human rights standards, such as the Universal Declaration of Human Rights, leading to an implicit recognition of forced marriage as a persecutory harm. This would modernize international standards of asylum law bringing it out of the Cold War and into the twenty-first century. Granting that drafting a new international convention could prove a difficult and lengthy process, in the alternative, the three states that are the subject of this Note, along with the other member-states of the European Union, should add a substantive regional agreement to the CEAS that tackles gender-based persecution and recognizes forced marriage, in and of itself, as a persecutory harm, applicable throughout the region. Finally, in the short-term, France and Spain, in particular, should strive to adopt national gender guidelines that, like the United Kingdom’s guidelines, directly list forced marriage as a persecutory harm. All three states studied should also consider domestic statutory and regulatory changes that systematically reduce the arbitrariness of asylum decisions that have a forced marriage claim.

I. ASYLUM LAW—ORIGINS AND CURRENT IMPLEMENTATION

Before specifically addressing the role of forced marriage in asylum law in the United Kingdom, France, and Spain, I will quickly outline the origin and basic elements of international asylum law and the domestic asylum law frameworks of those nations. By looking at the current trends in the substantive and procedural requirements of asylum, we can place the country-specific treatment of forced marriage within the larger context of asylum law generally.

A. Basic Overview of International Asylum Law

Article 14 of the Universal Declaration of Human Rights (UDHR) declares that everyone has the right to seek and to enjoy asylum from persecution.11 The United Kingdom, France, and Spain are parties to a more specific international treaty, the 1951 Convention Relating to the Status of Refugees, which was drafted after the Second World War to respond to the surge in displaced and resettled people.12 The treaty provides the general definition of a refugee and the international obligations placed on host-countries. In combination with the 1967 Protocol, the 1951 Convention remains the cornerstone of international refugee and asylum law.13

Non-refoulement is one of the most important concepts in the 1951 Convention and international refugee protection overall, and is considered by the UNHCR as part of the body of international customary law.14 The principle of non-refoulement prohibits states from returning a person to any country where they have a risk of being subjected to serious harm.15 The 1951 Convention specifically prohibits refoulement of refugees to the country or countries where they

15. BOELES ET AL., supra note 11, at 253.
face a threat to their lives or freedom. This prohibition has also been acknowledged by the Human Rights Committee as part of the Article 7 obligation of states party to the International Convention on Civil and Political Rights. The core definition of a refugee, as established by the 1951 Convention, is incorporated into the immigration codes of most signatory states. To be defined as a refugee under the Convention, an applicant must be outside of his or her country of origin and be unable to return because of a well-founded fear of persecution on account of his or her race, religion, nationality, political opinion, or membership in a particular social group. The latter part of the definition is referred to as the “nexus” requirement and, along with persecution, is subject to refinement and interpretative gloss by each country using it. However, international bodies and organizations, such as the UNHCR, and various other regional treaties and guidelines are also sources of interpretation for the 1951 Convention. Below is a country-specific explanation of the general history, structure, and substance of the national asylum laws of the countries pertinent to this Note’s analysis.

B. U.K. Asylum Law

The United Kingdom’s asylum procedure is controlled by Part 11 of the most recent Immigration Rules. These rules were promulgated after the passage of the Immigration Act in 1971 and have been revised with subsequent legislation.

16. Id. at 286.


19. BOELES ET AL., supra note 11, at 257.

20. Id. at 257–59.


1993 and 2002, no less than four legislative acts dealing with asylum were passed through the Parliament, where previously no specific, asylum-focused legislation had existed at all.\textsuperscript{23} The Asylum and Immigration Appeals Act of 1993 incorporated the 1951 Convention tenets into domestic law in the United Kingdom.\textsuperscript{24} Even in more recent legislation, the definition of an asylum-seeker continues to closely correspond to the 1951 Convention’s terms. Section 18(3) of the Nationality, Immigration and Asylum Act of 2002 defines a claim of asylum as “a claim by a person that to remove him would be contrary to the United Kingdom’s obligations under—(a) the Convention relating to the Status of Refugees . . . .”\textsuperscript{25} This definition requires an asylum-seeker to conform to the elements incorporated in the definition of a refugee under the Convention, unless they meet other international requirements, such as Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

There are, however, other legislative restrictions and conditions placed on the definition in the Convention, particularly prevalent in legislation passed in the 1990s and 2000s after Britain saw a boon in the number of asylum applications. The 1993 Asylum and Immigration Appeals Act, mentioned above, introduced a fast-track appeals process for claims deemed to be “without foundation” and introduced the safe third country principle into British domestic law.\textsuperscript{26} If a case is placed in the fast-track procedure, the initial decision and appeals process is completed within two weeks.\textsuperscript{27} The 1996 Asylum and Immigration Act expanded the fast-track appeals procedure by adding a list of “safe” countries from which asylum claims would be subject to the fast-track appeals process.\textsuperscript{28} The fast-track procedure in particular has been criticized as “not rigorous enough to meet basic standards of fairness,” particularly with regards to female asylum-seekers.\textsuperscript{29} Gender-based asylum claims are inherently complex, and the structural rigidity of the accelerated procedure under-

\begin{itemize}
\item \textsuperscript{23} Stevens, supra note 22, Introduction.
\item \textsuperscript{24} Keyes, supra note 22, at 405.
\item \textsuperscript{25} Nationality, Immigration and Asylum Act, 2002, c.41, § 18 (U.K.).
\item \textsuperscript{26} Asylum and Immigration Appeals Act, 1993, c. 23, sch. 2 (U.K.).
\item \textsuperscript{27} Gina Clayton, Textbook on Immigration and Asylum Law 420 (2012).
\item \textsuperscript{28} Stevens, supra note 22, at 171–72; Keyes, supra note 22, at 405.
\item \textsuperscript{29} Human Rights Watch, Fast-Track Unfairness: Detention and Denial of Women Asylum Seekers in the U.K. 1–2 (2010)
\end{itemize}
cuts a woman’s ability to effectively make their case.\(^{30}\) The “white list” of “safe” countries was abandoned in 1999, but other similar restrictions on asylum have followed. For example, section 94(A) of the Nationality, Immigration and Asylum Act of 2002 prohibits appeals from asylum-seekers that are nationals of a country included in the European Common List of Safe Countries of Origin drafted by the Secretary of State.\(^{31}\) Asylum-seekers from member-states of the European Union, or who had a right to reside in any member-state of the European Union, were under a rebuttable presumption that their asylum claims were unfounded.\(^{32}\) Some restrictions, particularly those designed to prevent asylum-shopping within the European Union, were derived from European agreements, such as the Dublin Convention, will be discussed in more detail later in this Note.\(^{33}\)

### C. Spanish Asylum Law

The Spanish Constitution, drafted in 1978, twenty-seven years after the 1951 Convention, acknowledges the right to asylum in Article 13.4, stating that “[t]he law shall lay down the terms under which citizens from other countries and stateless persons may enjoy the right to asylum in Spain.”\(^{34}\) This constitutional recognition of an asylum regime was “further developed by the Law 5/1984 Regulating the Right to Asylum and the Status of Refugees,” which was amended in 1994 and implemented in 1995.\(^{35}\) In 2009, the Law 12/2009 Regulating the Right to Asylum and the Status of Refugees replaced the Law 5/1984.\(^{36}\) This law follows the 1951 Convention

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30. *Id.* at 3 (female asylum seekers were given “little opportunity to build trust,” which particularly disadvantages those suffering the trauma of rape and sexual violence).


32. *Id.* § 115(c); *Keyes, supra* note 22, at 409.

33. *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 1997 O.J. (C 254) 1 [hereinafter Dublin Convention].*

34. *Constitución Española, B.O.E. n.311, art. 13, Dec. 29, 1978 (Spain).*


definition of a refugee but goes into much greater detail than Spanish laws had previously done about what constitutes persecution or what meets the nexus requirement.\textsuperscript{37} Law 12/2009 also limited the right to asylum to non-E.U. nationals and stateless persons, with E.U. nationals excluded from any potential asylum relief.\textsuperscript{38}

There is an accelerated process for the asylum proceeding in cases where asylum-seekers are subject to exclusion or rejection under certain procedural grounds, such as being from a safe country of origin.\textsuperscript{39} After filing for asylum, there is a preliminary inadmissibility stage that asylum-seekers must pass before their case is fully considered on the merits.\textsuperscript{40} The inadmissibility procedure is the most important factor deterring refugees from seeking asylum in Spain, because it results in frequent rejection of applicants before they are able to receive full hearings on the merits of their cases.\textsuperscript{41} This threshold procedure is important because it includes a preliminary evaluation of whether a claim is well founded, potentially exacerbating certain gender and other biases, such as the credibility of forced marriage as persecution, in the process.\textsuperscript{42} These gender biases in refugee law are briefly explored in Part I.E of this Note. Other laws and regulations also clarify the procedure and rights given to asylum-seekers.\textsuperscript{43} Due to a combination of economic reasons and the increasingly difficult asylum process, the number of asylum applications submitted and granted reached a low in the late 2000s.\textsuperscript{44}

\textsuperscript{37} Id. arts. 6–7.


\textsuperscript{39} Id. arts. 25(1)(d), 25(1)(f).


\textsuperscript{42} Id.


\textsuperscript{44} Id. at 10.
D. French Asylum Law

Asylum in France is recognized in Article 53-1 of the 1958 Constitution, which declares that “[t]he Republic may enter into agreements with European States . . . in matters of asylum” and that “even if the request does not fall within their jurisdiction under the terms of such agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds.”45 More concretely, French rights of asylum are demarcated in Book VII of the Code of the Entry and Residence of Foreigners and the Right to Asylum (CESEDA).46 This statute accords refugee status to those that meet the definition of a refugee in Article 1 of the 1951 Convention.47 It also includes the establishment of a regulatory and administrative body, the Office for the Protection of Refugees and Stateless Persons (OFPRA).48

Like the United Kingdom, France experienced a large influx of asylum claims in the 1990s, leading to the passage of laws reforming the asylum process to make it more restrictive.49 Following the trend discussed above, restrictions on asylum claims from “safe” countries of origin were introduced into the CESEDA in 2003.50 The list of safe countries is not static but is set by the Board of Directors of the OFPRA.51 Though an asylum claim from a country on the safe country list is not a bar to individual examination of the application, it can be the sole reason for the rejection of an application after review.52 A restricted appeals procedure is also used for certain cases that have been rejected, for reasons of safe country of origin and fraud among others.53 However, these fast-track appeals and depor-
tation procedures have faced criticism and were recently condemned in a decision by the European Court of Human Rights. The landscape for asylum in France appears to follow the general European trend towards making it more difficult to receive refugee status successfully.

E. Gender Claims in Asylum Law: Origins and Trends

The 1951 Convention was originally meant to serve and protect political dissidents, particularly those escaping from communism during the Cold War and does not explicitly recognize persecution on the basis of gender as grounds for asylum. This original purpose created a gender bias in the traditional definition of asylum law. The “typical human rights victim” is usually represented in both popular and scholarly works, as a “male dissident, tortured or imprisoned by the State.” Gender-based claims break this traditional portrayal in several respects. For example, gender-based persecution is often not sanctioned by the state, but is instead perpetrated by unaffiliated individuals. Persecution of females could also be seen by some adjudicators as part of a cultural and societal norm, as part of a traditional woman’s role, and thus not subject to state action.

Despite these obstacles, in the past twenty years there has been growing acceptance among countries, including the United States and several European States, of the need for a more gender-sensitive recognition of claims for female asylum-seekers. Some

denied on one of the grounds found in Article L741-4).


57. Schenk, supra note 55, at 306. For more on the gendered dichotomy between public and private spheres, see PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES (Margaret Thornton ed., 1995).


terms in the 1951 Convention definition, such as “persecution” and “particular social group,” are vague enough to leave room for innovative gender-based claims. The “particular social group” category, in particular, has been used successfully to recognize claims for failure to conform to cultural or religious norms, suffering severe domestic violence, and female genital mutilation. However, recognition of these claims can be held hostage by the political will of individual member states, leading some to recommend that gender become a recognized category in the nexus requirement of international refugee law. Without central appellate or agency designation of gender as a recognized category, the broad “particular social group” language may be interpreted in ways that are neither cohesive nor consistent, creating potential unfairness for asylum-seekers that are victim to gender-based persecution.

II. WHAT IS FORCED MARRIAGE?

Forced marriage differs from arranged marriage in one vital element: consent. Consent is an essential element that is lacking in a forced marriage situation. Age, in and of itself, can be a determining factor in whether a marriage is considered forced, under the theory that below a certain age brides or grooms cannot give free and

60. Fitzpatrick, supra note 55, at 239.


62. See generally Schenk, supra note 55.

63. See Pamela Goldberg, Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence, 26 CORNELL INT’L L.J. 565, 591–93 (1993) (noting that in the United States “particular social group” is not defined in statutes and that while some U.S. circuit courts interpret the language broadly, others have a more narrow definition, resulting in a lack of overall clarity in the category).

64. In an arranged marriage, while the families of the bride and groom tend to take the central role in choosing the marriage partner, it is up to the potential partners to freely consent to the marriage. The marriage will not take place without this consent. Arranged marriages are typically not human rights violations. See Kim Thuy Seelinger, Forced Marriage and Asylum: Perceiving the Invisible Harm, 42 COLUM. HUM. RTS. L. REV. 55, 60–61 (2010).

65. Id. at 59.
full consent. In forced marriage there is either no consent or the consent is not free or informed, or is extracted under pressure, whether physical, material, moral, or emotional. Duress and other coercive burdens placed on the victims are important factors in defining forced marriages. Consummation of a forced marriage, unsurprisingly, often involves force and lack of consent as well, amounting to repeated rape. The United Kingdom, France, and Spain all make a marriage entered into without valid consent either void or voidable domestically and have prohibited child marriages.

Despite the general legal consensus of what constitutes a forced marriage, it can be difficult to draft legislation that properly captures the difficulty of ascertaining the validity of the consent given. Many cultural practices are encompassed in this broad definition of forced marriage, such as levirate (requiring a woman to marry her deceased husband’s brother) and the forced marriage of a woman to her rapist, among others. Quieter, subtler methods of coercion


69. Welstead, supra note 3, at 52.

70. See Matrimonial Causes Act, 1973, c. 18, art. 12(c) (U.K.) (making marriage voidable if “either party to the marriage did not validly consent to it”); CODE CIVIL [C. CIV.], art. 180 (Fr.) (stating that marriage contracted without consent of one or both spouses creates a nullity of the marriage); CÓDIGO CIVIL [C.C.], art. 45 (1889) (Spain) (requiring consent as a condition of contracting into marriage).


72. U.N. Dep’t of Econ. & Soc. Affairs, Division for the Advancement of Women, Supplement to the Handbook for Legislation on Violence against Women: “Harmful
include community and familial shaming—a factor not to be underestimated in tribal or communitarian localities around the world. These more subtle types of coercion can be difficult to prove in asylum proceedings.

The domestic response to forced marriage, whether through civil remedies or criminal prosecutions, is an important contextual clue to understanding the domestic response to forced marriage in asylum law. The three countries analyzed have all taken different approaches in their legal response to prevent or punish forced marriage. In the United Kingdom, a civil remedy is available under the Forced Marriage (Civil Protection) Act of 2007. That piece of legislation provides for a Forced Marriage Protection Order. The Forced Marriage Protection Order allows, and in fact mandates, in certain circumstances, the issuing court to attach a power of arrest to the order. A criminal remedy has recently been announced and is set to be introduced in the 2013/2014 parliamentary session. Part of the argument for criminalization is that it would help change public opinion of forced marriage within the communities that practice it.

Spain, on the other hand, did succeed in October 2012 in making forced marriage a criminal offense in Article 172 of the

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73. See Seelinger, supra note 64, at 59.


76. Id. art. 63A.

77. Id. art. 63H.


Spanish Criminal Code. This article sets a punishment of six months to three years in jail (or a fine of up to twenty-four months) for “those that obligate another ‘with violence or severe intimidation,’ to marry.”

Finally, France has taken a different approach altogether. Rather than creating a specific provision for forced marriage, the French Penal Code increases the penalties for other crimes when they were committed for the purpose of forcing a person to marry or against a person who refused to marry. However, forced marriage is not a distinct criminal offense.

III. INTERNATIONAL HUMAN RIGHTS STANDARDS ON FORCED MARRIAGE

As mentioned above, different countries typically have differing national interpretations of whether forced marriage qualifies as persecution. Nevertheless, there are numerous international reports, treaties, and agreements that clarify the minimum international human rights standards, a violation of which would amount to a serious violation of human rights, and thus, persecution under the 1951 Convention.

The UNHCR Gender Guidelines, as briefly discussed above, were intended to provide guidance to a wide range of relevant groups in making refugee status determinations that had a gender-based

80. Código Penal [C.P.], art. 17 (Spain).
82. CODE PENAL [C. PÉN.], art. 221-4(V), (Fr.); see France: Law on Violence Against Women, GLOBAL LEGAL MONITOR, (Sep. 29, 2010), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402253_text (explaining that the Penal Code provision cited was passed as part of a larger bill aimed at addressing violence against women in France).
84. Heaven Crawley & Trine Lester, UNHCR Evaluation and Policy Analysis Unit, Comparative Analysis of Gender-Related Persecution in National Asylum and Practice in Europe, ¶ 17, EPAU/2004/05 (UNHCR, 2004), available at http://unhcr.org/40c071354.html. Some European scholars argue that there are three distinct levels of human rights violations. In their view, non-derogable and first generation ICCPR human rights would almost always amount to persecution, while second-generation economic, social and cultural rights would amount to persecution only once the violation has “surpassed a certain level of severity.” Boeles et al., supra note 11, at 266–67.
component.\textsuperscript{85} UNHCR noted that the refugee definition in the 1951 Convention “should be interpreted with an awareness of possible gender dimensions” and that “historically, the refugee definition has been interpreted through a framework of male experiences.”\textsuperscript{86} Importantly, they note that prohibition of a persecutory practice is not enough to deem that the individual’s claim is not valid, because the state “may nevertheless continue to condone or tolerate the practice.”\textsuperscript{87} This is particularly important when the persecutory practice is customary or traditional within specific communities, such as female genital mutilation or forced marriage. Forced marriage is also listed as a “type of harm” along with rape, sexual abuse, female genital mutilation, and honor killings.\textsuperscript{88}

In addition to the general guidance provided by the UNHCR, international human rights instruments also contain a general prohibition of forced marriage. The Universal Declaration of Human Rights (UDHR), along with its partial codification in the binding International Covenant on Civil and Political Rights (ICCPR), are two of the earliest comprehensive multilateral human rights documents of the twentieth century, and they both expressly recognize the right to enter into marriage only with both parties’ full and free consent.\textsuperscript{89}

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the U.N. General Assembly in 1979.\textsuperscript{90} Its purpose was to bring together a variety of international women’s rights conventions and recommendations into one international document.\textsuperscript{91} CEDAW provides an international bill of rights for women, one that affirms the principles of the Universal Declaration of Human Rights.\textsuperscript{92} CEDAW explicitly provides that both men and women shall have “the same right freely to choose a

\begin{footnotes}
\textsuperscript{85} UNHCR Gender Guidelines, supra note 8, pmbl.
\textsuperscript{86} Id. ¶¶ 2, 5.
\textsuperscript{87} Id. ¶ 11.
\textsuperscript{88} Id. ¶ 36(vi).
\textsuperscript{89} Universal Declaration of Human Rights, supra note 66, art. 16(2); International Covenant on Civil and Political Rights, supra note 66, art. 23(3).
\textsuperscript{91} Id.
\textsuperscript{92} Convention on the Elimination of All Forms of Discrimination Against Women, supra note 66, pmbl.
\end{footnotes}
spouse and to enter into marriage only with free and full consent.”

However, it does not provide a timetable for state parties to comply with the treaty, nor does it impose an obligation on state parties to act urgently to do so.

The European Convention on Human Rights (ECHR) was drafted in 1950 and is regarded by many as the “most effective international instrument for the protection” of individual human rights. The European Convention has been ratified by forty-seven European States and is generally implemented and respected by those states.

Article 3 of the Convention comes closest to addressing a claim of protection for certain classes of persecuted aliens. The article prohibits states from returning anyone to a place where they would be at risk of torture or inhuman or degrading treatment or punishment. The Convention also established the European Court of Human Rights (ECtHR) and granted it jurisdiction over “all matters” with respect to the interpretation of the Convention and the Protocols.

This court has addressed, through its case law, forced marriage and whether it is a violation of human rights. In one such case, A.A. & Others v. Sweden, the court undertook a very fact-specific analysis of five forced marriages. The decision seems to suggest that, if there is no physical or other abuse, a forced marriage in and of itself is not persecution—or at least does not qualify as a violation of Article 3 of the European Convention prohibiting torture and “inhuman or de-

93. Id. art. 16(1)(b).
94. Kathree, supra note 90, at 425.
97. BOELES ET AL., supra note 11, at 291 (citing European Convention, supra note 96, art. 3). This prohibition addresses a narrower type of qualifying persecution than the 1951 Convention, but at the same time encompasses this type of persecution in a broader manner by not calling for a specific nexus requirement.
98. European Convention, supra note 96, arts. 19, 32.
grading treatment or punishment.”\textsuperscript{100}

However, while \textit{A.A. & Others} alleged violations of Article 3, Article 12 of the European Convention guarantees “[m]en and women of marriageable age” a right to marry.\textsuperscript{101} As the freedom of association implies the freedom not to join an association, the right to marry necessarily implies the right not to marry.\textsuperscript{102}

Some have also compared the deprivation of liberty and servile status associated with forced marriage to modern slavery and therefore a violation of \textit{jus cogens}.\textsuperscript{103} A \textit{jus cogens} norm in international law is one from which no derogation is allowed.\textsuperscript{104} Others note that forced marriage should constitute a new crime against humanity in international criminal law.\textsuperscript{105} For example, the Appeals Chamber of the Special Court for Sierra Leone ruled that forced marriage was a crime against humanity under the category of “Other Inhuman Acts” recognized by customary international law.\textsuperscript{106} These ideas support the applicability of a standard of forced marriage as \textit{per se} persecution, without additional substantive requirements that the victim be below a certain age or also have suffered additional abuse.

Having looked at the background through which forced mar-

\textsuperscript{100} \textit{Id.} \textsuperscript{¶} 92 (noting that “[i]n any event, the fifth applicant is now adult and any risk of being ill-treated if forced to marry upon return is hypothetical and unsubstantiated since, in the Court’s view, there is too little information and documentation available in the case for such a conclusion”).

\textsuperscript{101} \textit{European Convention}, \textit{supra} note 96, art. 12.


\textsuperscript{106} Scharf & Mattler, \textit{supra} note 105.
riage is viewed in domestic and international law, we can now properly turn to each country’s treatment of forced marriage and to what degree it is considered persecution for the purposes of asylum law. Under the 1951 Refugee Convention, recognition as a refugee requires, among other elements, that the asylum applicant fear harm that constitutes “persecution.” However, the 1951 Convention does not provide a precise definition of “persecution.” The UNHCR has stated that in addition to threats to life or freedom, other serious human rights violations may also constitute persecution. Additionally, in the European Union, the E.U. Qualification Directive provides a guiding and binding source of interpretation of the 1951 Convention for member states. The Qualification Directive, discussed in further detail in Part VII.B, equates persecution to, among other definitions, a “severe violation of basic human rights,” and specifically lists “acts of a gender-specific nature” as a form of persecution.

Finally, individual states, through agency-issued guidelines or interpretative case law, articulate what does or does not constitute “persecution” for applicants seeking asylum in their territory. However, because of the administrative nature of most first instance decisions and lower level appeals in asylum proceedings, many asylum cases remain unpublished or difficult to access. Despite this, through an examination of appellate decisions and agency guidelines, we can arrive at a general view of how forced marriage is treated

107. 1951 Convention, supra note 12, art. 1.
109. BOELES ET AL., supra note 11, at 266.
110. Id. at 267.
111. Id. at 267 (citing Article 9 of the European Qualification Directive).
112. The House of Lords in the United Kingdom, for example, has held that persecution is “the sustained or systemic failure of State protection in relation to one of the core entitlements which has been recognized by the international community.” This particular case focused on a Slovakian man identifying himself as a Roma who was persecuted by skinheads in Slovakia, but the definition has been cited as the general definition of persecution in case law. ANNA KOTZEVÁ, ET AL., ASYLUM AND HUMAN RIGHTS APPEALS HANDBOOK 17–18 (2008).
when offered for the persecution element in asylum claims.

IV. UNITED KINGDOM TREATMENT OF FORCED MARRIAGE AS PERSECUTION

A. Official Guidelines

On paper, the United Kingdom has one of the most gender-sensitive approaches to refugee status determination.113 States were urged to adopt guidelines directly addressing women’s asylum claims by the U.N. Special Rapporteur on Violence Against Women.114 The United Kingdom subsequently adopted specific national gender guidelines to provide guidance to second-instance adjudicators—the Immigration Appellate Authority—in deciding asylum cases that involve gender-related claims.115 These guidelines aim to provide a jurisprudential, procedural, and evidentiary background to asylum adjudicators, which more genuinely reflects the experience of female refugees in the same way that it reflects the experience of male refugees.116 Persecution, as defined through British case law, is often equated with a violation of human rights or harm that amounts to “serious harm.”117 The guidelines provided to the Immigration Appellate Authority include forced marriage as a harm “within family life” that would constitute “serious harm” under the 1951 Convention.118

The U.K. Home Office, which is the governmental department with authority over immigration, also released its own gender guidelines for asylum claims, to provide guidance to the first-instance officers and adjudicators of the U.K. Border Agency when faced with these matters.119 The U.K. Home Office Guidelines specifically recognize forced marriage as an example of gender-specific persecution,

113. Crawley & Lester, supra note 84, ¶ 6.
114. IMMIGRATION APPELLATE AUTHORITY, ASYLUM GENDER GUIDELINES 3 (2000).
115. Id.
116. Id. at 4.
117. Id. at 9.
118. Id. at 20.
and acknowledge that “the fact that violence against women is common . . . does not mean that protection on an individual basis is inappropriate.”

Despite the promulgation of gender guidelines, there continues to be a regular failure by decision-makers to take a gender-sensitive approach to refugee law interpretation.

B. Case Law

In Ex parte Shah, the House of Lords adopted a broader view of persecution that included private harm, such as domestic violence, within the scope of the Refugee Convention. The applicants in the case were women who were victims of domestic violence in Pakistan and the appeal dealt primarily with two issues: whether domestic violence amounted to persecution and whether the applicants could satisfy the nexus requirements as members of a “particular social group.” These two issues are often interconnected in gender-based asylum claims. Lord Hoffman noted in Shah that serious harm, even if private, amounts to persecution when there is a withdrawal or failure of the state’s protection.

Only eleven of the released tribunal and court refugee determinations from 1995 to 2008 have included forced marriage as part of the claim. In NS v. Secretary of State, the asylum-seeker

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120. Id. at 5–6.
123. Bacon & Booth, supra note 122.
124. Id. at 153.
125. Catherine Dauvergne & Jenni Millbank, Forced Marriage as a Harm in Domestic and International Law, 73 Modern L. Rev. 57, 67 (2010). Lower judicial opinions in administrative courts are not released, partially explaining the low number of forced marriage cases available. Even so, the United Kingdom had by far the lowest number of released forced marriage asylum cases compared to the other two countries analyzed, Canada and Australia.
claimed that being obliged to enter into a marriage, without her freely given consent, in order to have a male protector, amounted to persecution.126 The adjudicator agreed that the applicant “should not in conscience be required to change her single or lone status.”127 A case only four years later stated bluntly, and without analysis, that forced marriage would amount to a persecutory threat, if the court were to assess that there was a risk of forced marriage.128 However, while in NS v. Secretary of State forced marriage alone was found to be persecutory, most asylum cases with a forced marriage claim tend to have another component of persecution, such as domestic violence.129 Since forced marriage on its own is a violation of established international human rights, the approach in NS is one which most closely complies with international standards of refugee law, in comparison to decisions that place more emphasis on the component harms of forced marriage.

V. SPANISH TREATMENT OF FORCED MARRIAGE AS PERSECUTION

A. Official Guidelines

Spain has no specific gender guidelines in place, though the government does publish and disseminate a specific brochure on gender-related claims and the UNHCR guidelines are “widely distributed at workshops, seminars and ports of entry for asylum seekers” and cited in appeals decisions.130 Despite the lack of nationally adopted gender guidelines, in 2007, Spanish lawmakers passed the Equality Law, amending the general asylum law in the nation.131

127. Id.
128. FB Sierra Leone v. Sec’y of State for the Home Dep’t, ¶ 62, [2008], UKAIT 00090 (U.K. Asylum & Immigration Tribunal, Nov. 27 2008) (assessing that there was not a risk of forced marriage in the specific case).
129. Dauvergne & Millbank, supra note 125, at 80.
amendment explicitly provides that asylum law is applicable to foreign women who have fled their countries on account of a well-founded fear of suffering gender-based persecution. 132 The amendment was applied to the 1984 asylum law, which is no longer implemented. The gender nexus was written into the new law, with the caveat that whether gender is a qualifying motive of persecution in any particular case would depend on the conditions in the country of origin. 133 However, though the legal recognition of gender as a sufficient motive, under certain circumstances, is a great advancement towards creating a more gender-sensitive nexus requirement, without clear national gender guidelines detailing what can amount to gender-related persecution, there is still a risk of increased arbitrariness to the adjudication process for gender-related claims.

B. Case Law

Forced marriage is closely linked to domestic violence in many Spanish asylum claims, and the jurisprudence can be unclear. 134 For example, Spain first granted asylum for a domestic violence claim in 2005. 135 Despite the fact that the applicant had also been forced to marry, the reasoning for the decision was based on the severity and continuity of the violence against the applicant, not the forced marriage. 136 This demonstrates that there is some hesitation around basing a decision on the persecutory harm of forced marriage alone and a desire to emphasize the attendant harms instead. 137

May 6, 2014.


133. Law 12/2009 art. 7 (B.O.E. 2009, 17242) (Spain); EUROPEAN MIGRATION NETWORK, ANNUAL POLICY REPORT ON MIGRATION AND ASYLUM—SPAIN, 17 (2009).

134. This is not surprising given the fact that forced marriage itself is often accompanied by rape, domestic violence, and other forms of physical or verbal abuse. See Seelinger, supra note 64, at 63. What is more telling is the amount to which those subsequent abuses are elevated in a claim in comparison to the original abuse, the forced marriage itself.


136. Id.

137. Spain is not alone in this respect. In the United States, for example, officials tend to also focus on “component harms” to a forced marriage and grant asylum on the basis of
Spanish courts do classify forced marriage as a claim that is not necessarily excluded from recognition in asylum law.138 Many of the appellate cases that revolve around forced marriage have applicants from Nigeria and are often also linked to female genital mutilation (FGM), wherein the applicants are fleeing after the FGM that was done in preparation for a forced marriage.139 An Asylum Aid report found that of twenty judicial decisions examined with a forced marriage claim, only four applicants were granted asylum or subsidiary protection.140 These cases noted that forced marriage was a form of gender-based persecution that fit the framework of social persecution in the convention grounds of asylum.141

There are limits to Spanish courts’ acceptance of forced marriage as a persecutory harm. When forced marriage is directly and centrally addressed, Spanish case law is inconsistent and places arbitrary restrictions on when forced marriage can amount to gender-related persecution for asylum. One decision from the Audiencia Nacional, the national appellate court of ordinary jurisdiction, has held that a twenty-five year old could not have been at risk of a forced marriage because she was too old for her mother to have credibly forced her to marry, especially considering the fact that her father was not involved in supporting the forced marriage.142 Though there may be some cultural and gender-based misconceptions in the reasoning of the decision, at least one report and other cases include age as an extremely important factor weighing negatively against the adjudicator’s granting of asylum status for applicants alleging forced marriage.143 Spanish courts have also rejected claims where country
reports suggest that forced marriages do not take place in the area of origin. However, recent case law finds that forced marriage can amount to persecution, even if the practice is banned, if the state is unable to provide protection.

Overall, the most recent jurisprudence surrounding forced marriage as persecution in Spain acknowledges that forced marriage, when the applicant is under a certain age, is a form of gender-based persecution, but is reluctant to recognize that a marriage was truly a forced marriage. They base this reluctance on doubts about the applicant’s age, the area where the marriage took place, or generalizations about the potential influence of the applicant’s family members—when in fact, according to international human rights law, the only relevant factor should be the individual’s consent.

VI. FRENCH TREATMENT OF FORCED MARRIAGE AS PERSECUTION

A. Official Guidelines

France, like Spain, has no specific national gender guidelines for administrative agents or adjudicators. French first-instance and second-instance determination authorities maintain that the UNHCR gender guidelines are used in decision-making, but in practice they are not used or referred to in written decisions. A lack of gender-specific national guidelines has contributed to leading decision-makers adopting a less gender-sensitive interpretation of the 1951 Convention. There is generally less analysis available concerning

asylum to “. . . not an adolescent, but a young woman of 27 years of age, who knew the customs . . . ”).

144. S.A.N., Mar. 31, 2005 (J.T.S., No. 1796) (Spain) (denying asylum where the practice of forced marriage did not correspond to the specific area of the country from where the applicant originated, nor to the age of the applicant).


146. See supra Part VI. Note that while age is a relevant factor in the legal determination of whether a marriage was forced, it is only on the theory that minors do not have the capacity of giving full and free consent—consent is still the underlying factor.

147. Id.

148. ASYLUM AID, supra note 130, at 34.

149. Id. at 32.

150. Id. at 44 (discussing how the lack of a gender-sensitive interpretation of

Though France has not adopted gender guidelines, the Office for the Protection of Refugees and the Stateless (OFPRA) has explicitly acknowledged that considering gender-related claims is important.\footnote{152. Id. at 6.} Despite this acknowledgment by OFPRA, there is a view among some government and administrative officials that official guidelines are not necessary and that the use of common sense by adjudicators and decision-makers is enough to safeguard gender equality.\footnote{153. Id. at 12.} However, as examined briefly in Part II, asylum law is not gender neutral, so without specific directives, officials may be arbitrarily, instead of systematically, taking into account the unique context of gender-related claims.\footnote{154. Id. at 12, 16.} This especially prejudices forced marriage claims, which typically require a certain amount of cultural and gender sensitivity to be seen as credible or persecutory.\footnote{155. UNHCR Gender Guidelines, supra note 8, ¶ 37 (recommending that country of origin information be collected where it is relevant, including the position of women before the law, the political rights of women, and the prevalence of harmful traditional practices); see United Nations High Commissioner for Refugees supra note 151, at 25 (giving an example of a Mauritanian asylum claimant in France who was told by an officer that she was not credible because of a detail concerning the dowry system in her country of origin, which could have been corroborated with research about the customs of Mauritania).}

\section*{B. Case Law}

In France, adjudicators and decision-makers at both the first and second instance may, in practice, arbitrarily grant refugee status or subsidiary protection for claims of persecution based on forced marriage.\footnote{156. ASYLUM AID, supra note 130, at 45.} However, written and published decisions are not favorable to the idea of forced marriage as harm amounting to persecution.\footnote{157. However, forced marriage can be used to create a judicially acceptable “particular social group.” United Nations High Commissioner for Refugees, supra note 151, at 31.} Of the three countries analyzed in this Note, France has the
most restrictive interpretation of persecution as it relates to forced marriage. Only a behavior of opposition to the marriage and the consequences of that opposition, such as abuse, are considered persecution or serious harm—not the forced marriage alone. Successful cases of asylum are typically accompanied by physical or sexual abuse, or the risk or threat of such abuse, and occur in societies where forced marriage is common and accepted by the public, if not necessarily by national law. Even in cases that have attendant harms, where society does not appear to be in full support of forced marriage and forced marriage is illegal in the country of origin, refugee status is not granted.

158. Id. at 45 (citing Mlle T., Commission des recours des réfugiés [CRR] [Refugee Appeals Commission] decision No. 519803, July 29, 2005 (Fr.), see also Conseil d’État [CE] [highest administrative court] decision No. 294266, July 3, 2009, Rec. Lebanon 336 (Fr.) available at http://www.unhcr.org/refworld/docid/4a72ef662.html.

159. See, e.g., Mme. KDB, Commission des recours des réfugiés [CRR] [Refugee Appeals Commission] decision No. 531526, Apr. 27, 2006 (Fr.) (granting asylum where objecting to a forced marriage went against the norms of the society and led to inhumane and degrading treatment); Mme. RNT, Commission des recours des réfugiés [CRR] [Refugee Appeals Commission] decision No. 557964, Apr. 6, 2006 (Fr.) (granting asylum where applicant entered into a forced marriage, suffered physical and sexual abuse, later fleeing in objection to the norms of the society). See generally United Nations High Commissioner for Human Rights, Résumé de la jurisprudence de la Commission des Recours des Réfugiés (CRR) sur les persécutions féminines, Mise à jour N°4, 1er avril—30 juin 2006 (2006), http://www.unhcr.org/refworld/pdfid/45d9995b2.pdf.

Additionally, there is an unclear jurisprudential division between full-fledged Convention refugee status and subsidiary protection. In some cases, claims with “almost identical” facts have led some claimants to be granted subsidiary protection and some to be granted asylum. Domestic violence, for example, is almost never recognized as qualifying for asylum status, unless it is linked to a forced marriage. At the same time, as seen above, forced marriage by itself is usually not enough for asylum status, and sometimes only leads to subsidiary protection. Without clear direction through guidelines or directives addressing forced marriage, there is a risk of continuing obfuscation and arbitrariness in the jurisprudence concerning the claim.

VII. INTERNATIONAL, REGIONAL, AND DOMESTIC SOLUTIONS: RECOGNIZING FORCED MARRIAGE, IN AND OF ITSELF, AS PERSECUTION WITHOUT ADDITIONAL LIMITATIONS.

As seen above, human rights instruments addressing the topic generally hold that forced marriage is a violation of human rights and human dignity. It is especially important for women to have their claim of forced marriage adjudicated in a consistent manner within Europe because of the increasingly interconnected system of state responsibility for asylum claims in the European Union.

The Dublin Regulation establishes a hierarchy of criteria for identifying the member state responsible for the examination of an asylum claim in Europe. The state responsible for the asylum claim is typically the state that the asylum-seeker first entered, or the

162. Id. at 32.
163. Id.
state responsible for their entry into the territory of the E.U. member states, Norway, Iceland, and Switzerland.\textsuperscript{166} The problem is that there are not standard protections for refugees in the different E.U. countries with regard to internationally accepted violations of human rights, such as forced marriage.\textsuperscript{167} This problem creates an especially weak protection against gender-specific acts of persecution, like forced marriage, that are not traditionally defined as torture, and thus, do not qualify for additional Article 3 protection under the European Convention.\textsuperscript{168} By constructing a solution that harmonizes international asylum standards with regards to forced marriage, whether international, regional, or domestic, we can prevent women from being unduly burdened by inconsistent interpretations of asylum law among states that do not conform to UNHCR or international human rights law in refusing to recognize forced marriage alone as a persecutory harm.

A. An International Solution: Drafting a New Convention or New Protocol to the 1951 Convention

The 1951 Convention is now sixty-three years old, and many scholars argue that the Convention has become “badly outdated.”\textsuperscript{169} The central norm of non-refoulement continues to be relevant but the international community is dealing with different types of migration problems, and recognizes more international human rights for women than it did at the time of the drafting of the original Convention.\textsuperscript{170}

\begin{itemize}
\item \textsuperscript{168} Boeles et al., supra note 11, at 326–27 (citing a European Court of Human Rights case holding that transfer from the United Kingdom to Germany could be an indirect breach of Article 3 where Sri Lankan national sought asylum in the United Kingdom after Germany denied asylum because of state policy of not granting protection where persecution was attributed to non-state actors).
\item \textsuperscript{169} See, e.g., Fitzpatrick, supra note 55, at 229; Michael J. Parrish, Note, \textit{Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection}, 22 CARDOZO L. REV. 223 (2001) (arguing that the legal definition of a refugee must change to encompass the post-Cold War evolution of the motivations for fleeing persecution).
\item \textsuperscript{170} Fitzpatrick, supra note 55, at 235.
\end{itemize}
The 1951 Convention, and even the 1967 Protocol, were drafted with the purpose of dealing with the specific refugee problems relating to the Cold War and “is no longer adequate” to address the types of refugees that are now fleeing persecution. UNHCR policy has expanded the scope of non-refoulement through, for example, the proliferation of the Gender Guidelines. These policies are persuasive guidance, but non-binding and proper recognition of gender-based harm (including forced marriage) as persecution is unevenly applied in national systems, as we have seen in this Note.

Though acknowledging that, as with all international treaties, drafting a new Convention or an additional Protocol would be a lengthy and possibly contentious process, it would be the most comprehensive long-term solution to the problem. Scholars have suggested several approaches as to how the 1951 Convention should be revised. Some focus on the persecution element in the refugee definition, arguing that it should be expanded to converge with international human rights law, particularly the Universal Declaration of Human Rights. This expansion would in turn include the freedom to marry only with full and free consent of both parties, as noted in Article 16(2) of the Universal Declaration of Human Rights. Others focus on expanding the “nexus” requirement, or the acceptable motives behind persecution, to more accurately reflect today’s refugee realities. There are, of course, some risks to drafting a new Convention that is more inclusive or specific. The advantage to broad language, such as leaving “persecution” undefined, is that it can be interpreted to include a great variety of worthy, creative, and


174. Universal Declaration of Human Rights, supra note 66, art. 16(2).

novel cases. However, linking the Convention to evolving international rights standards, through the Universal Declaration of Human Rights, rather than a static, exclusive enumerated list of persecutory harms, can mitigate these risks.

This approach would solve many problems associated with trying to frame gender-motivated claims under the amorphous “particular social group” structure, but given the skepticism by some national courts of acknowledging forced marriage as a persecutory harm, it would not wholly solve the problem. Indeed, a unified approach linking both the persecution and the “nexus” requirements to international human rights norms would properly help to resolve the problem of inconsistency in the recognition of forced marriage as persecution. Drafting a new international convention to modernize asylum qualification would be the most enduring solution to the problems addressed in this Note. However, international solutions require lengthy negotiations and procuring international consensus could be difficult, particularly given the traditional role of state sovereignty and plenary power over immigration.

B. Regional Solution: Substantive Regional Agreements

Since the drafting of a new international convention or protocol is likely to take a considerable amount of time to be completed and adopted, a more near-term solution is for the European Union to explicitly include forced marriage, and other gender-based harms, as persecution in a regional agreement on asylum.

The 1992 Treaty on European Union formally acknowledged that asylum is a “matter of common interest.” In response, the European Union is already attempting to harmonize the asylum process across the member states by adopting European regional directives on procedural issues. The Dublin Regulation, discussed above, was part of the first phase of regional asylum harmonization

176. See supra Part I.E (noting that several terms in the 1951 Convention can be, and are, broadly interpreted in innovative ways by some national courts).
177. See supra Part VI (discussing France’s asylum adjudicators’ refusal to recognize forced marriage in and of itself as persecution).
179. BOELES ET AL., supra note 11, at 317.
dubbed the Common European Asylum System (CEAS), but even it notes that successive phases should lead to a uniform status of asylum, not only a uniform procedure.\footnote{Dublin Regulation, supra note 165, art. 5. Other directives adopted by the Council of Europe address reception conditions for asylum-seekers and rules of procedure for the examination of asylum claims. See Boeles et al., supra note 11, at 321.} Intuitively, this is the right direction—harmonized procedure without harmonized substantive rules risks inequity in adjudication. The Dublin II Regulation also creates an additional layer of inequity in the recognition, or lack thereof, of properly granted refugee status among European Union member states.\footnote{Maria-Teresea Gil-Bazo, The Future of International Cooperation on Refugee Protection, Refugee Studies Centre’s Public Seminar Series (May 9, 2012), http://www.forcedmigration.org/podcasts/audio/rsc-public-seminars-2012-trinity-term.mp3.} While rejections of asylum are universally recognized, when a rejected asylum-seeker cannot seek asylum in any other E.U. state, the same is not true of refugee acceptances.\footnote{Id.} A refugee with status in one member state may not have that status be mutually recognized in other member states.\footnote{Id.}

Though the European Union did adopt a Minimum Qualifications Directive, it tracks closely to the 1951 Convention, except that nationals of E.U. member states are not included in the definition.\footnote{Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted, COM (2009) 551 final (Oct. 21, 2009) [hereinafter Proposal for Minimum Qualifications Directive]; Allard, supra note 167, at 307 (stating “[t]he definition of a refugee in the Minimum Qualifications Directive is essentially the same as that contained in the Refugee Convention”); Boeles et al., supra note 11, at 338. The Qualification Directive does address subsidiary protection, but that is outside the scope of this Note.} The interpretative gloss it does provide is not especially favorable to the recognition of forced marriage as persecution because it links persecution to a violation of human rights as stated in the European Convention of Human Rights and Fundamental Freedoms, which does not explicitly address forced marriage.\footnote{Allard, supra note 167, at 310–11.} The persecutory harm in a future regional agreement should be more closely aligned to United Nations human rights treaties, which are more specific, com-
prehensive, and indicative of international custom.\textsuperscript{187} The Minimum Qualifications Directive generally shows a cautious approach to gender issues and is not sufficiently gender-sensitive.\textsuperscript{188} Negotiations began in 2009 to modify the Minimum Qualifications Directive and a revised Directive was adopted in December 2011.\textsuperscript{189} This revised Directive incorporates slightly stronger language on gender as a basis of persecution, but does not substantially change the minimum standards presented in the original Directive or provide further guidance on what qualifies as an act of a “gender-specific” nature for persecution.\textsuperscript{190} This is not enough to assure that victims of forced marriage are protected in the European asylum system, especially given the regionally implemented procedural obstacles. However, the fact that a new Directive was adopted does signal that the CEAS process is “moving forward.”\textsuperscript{191} The region should seize on this momentum to create a more comprehensive regional agreement that would serve to alleviate the problem of inconsistent adjudication of forced marriage and other gender-based claims.

Agreements have been used in other regions to properly incorporate the types of refugee flows that are prevalent in that region, so as to make the definition of a refugee more relevant to the problems facing the region.\textsuperscript{192} The Organization of African Unity adopted the Convention on the Specific Aspects of Refugee Problems in Africa to expand the definition of refugee to include people fleeing from “external aggression, occupation, foreign domination or seriously disturbing the foreign order,” because these were the types of

\begin{footnotes}
\item[188] \textit{Id.} at 561.
\item[190] Proposal for Minimum Qualifications Directive, \textit{supra} note 185, at 29 (changing “[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article” to “[g]ender related aspects should be given due consideration for the purposes of determining members of a particular social group or identifying a characteristic of a such a group”).
\item[191] Email from Maryellen Fullerton, Professor of Law, Brooklyn Law School, to author (Mar. 5, 2013, 10:19 EST).
\end{footnotes}
refugees that the member nations were receiving in large numbers.\textsuperscript{193} Mexico has also adopted this expanded definition, though they are not a party to the OAU Convention.\textsuperscript{194} Forced migration was also the topic of a regional treaty in Central and South America, the Cartagena Declaration, which gives refugee protection to those fleeing generalized violence and oppression.\textsuperscript{195} Though neither treaty specifically addresses gender-based violence, they are significant in that they prove that regional agreements can work to harmonize asylum qualification within a region in response to current political and social realities.\textsuperscript{196}

In that same vein, the European Union could frame a regional convention to harmonize aspects of interpretative asylum law that are particularly conducive to producing inequities given the political reality of the first phase of the Common European Asylum System. This regional agreement, like the potential international Convention solution discussed above, could explicitly link its definition of persecution to the modern conception of human rights violations under international standards, such as the Universal Declaration of Human Rights.\textsuperscript{197}

Increased regional consistency can also potentially be attained through national judges paying closer attention to, and integrating, the jurisprudence of other member states.\textsuperscript{198} However, this ad hoc

\begin{itemize}
\item \textsuperscript{194} Id. at 111.
\item \textsuperscript{196} Monica Saxena, More than Mere Semantics: A Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims, 12 MICH. J. GENDER & L. 331, 340 (2006).
\item \textsuperscript{197} See supra Part VII.A (discussing the viability of a more explicit linkage between international human rights and asylum law in a new international Refugee Convention).
\end{itemize}
method of regional integration would not provide as many guarantees as a formal regional agreement because there are no safeguards to assure that the case law is converging to a higher state of protection, rather than the lowest common denominator. ¹⁹⁹

C. Domestic Solution: Gender Guidelines Specifically Addressing Forced Marriage

Given that the European Council and Commission seem hesitant to dictate any meaningful European standards for asylum qualification, in the short-term, the individual nations of the United Kingdom, France, and Spain, along with other European States party to the Dublin Regulation, should be strongly encouraged to follow the recommendations in the UNHCR Gender Guidelines. ²⁰⁰ There are various ways in which national governments can promote gender-sensitive asylum adjudication that would help women at risk of forced marriage. First, by adopting national guidelines directed at first and second-instance adjudicators that specifically list forced marriage in a non-exclusive list of acts of persecution, governments can foster greater consistency in the adjudication of asylum claims with a forced marriage component. ²⁰¹ France, especially, should heed calls to implement gender guidelines and recognize forced marriage, in and of itself, as a form of qualifying persecution. These guidelines must not just be adopted, but must be actively promulgated, publicized, and supported. Those working in the asylum adjudication system must be properly trained for guidelines to have optimal impact. ²⁰² Additionally, national legislative measures should address the problems described in this Note. The United Kingdom and France should follow in Spain’s footsteps in modifying their asylum laws to allow gender as a ground of persecution. ²⁰³

Furthermore, all three countries should strive to adopt legisla-

¹⁹⁹. In addition to this lack of safeguards, access to foreign case law and time constraints, particularly in courts of first instance, provide significant obstacles to judicial integration of foreign asylum case law in Europe. Id.
²⁰⁰. UNHCR Gender Guidelines, supra note 8; Allard, supra note 167, at 330.
²⁰¹. Crawley & Lester, supra note 84, ¶¶ 78–132 (detailing the incorporation, or lack thereof, of gender guidelines throughout the E.U.).
²⁰³. Id. at 543–44.
tion that reduces the substantive and procedural mechanisms that unfairly disadvantage women. Fair procedures are a necessary step in ensuring the effective implementation of gender guidelines and legislative advancements. Asylum procedures need to be gender neutral, not gender blind, so that females have equal access to the substantive protections of asylum law. Though procedural protections are outside the focus of this Note, they are crucial to the success of any solution addressing forced marriage as a persecutory harm.

CONCLUSION

Until international and regional instruments are drafted, only institutionalized domestic change, whether through implementation of guidelines or through statutory changes to the asylum code, will assure that the harm of forced marriage is correctly recognized as a form of harm that amounts to persecution. Forced marriage is an internationally recognized violation of human rights, and the inconsistent application of the substantive asylum law surrounding forced marriage as persecution, in a world of increasingly convergent asylum procedural standards, creates a problem of inequity that must be resolved through either international, regional, or domestic mechanisms.

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204. HUMAN RIGHTS WATCH, supra note 29, at 7–9.
206. Id. at 561–62.

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