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**Gender Identity, Refugeehood, and Belonging: Transgender Asylum-Seekers and
International Refugee Status Determination (RSD)**

by

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Declaration

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in Human Rights Law by approved courses and minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations

Signed by candidate

.....
Christina Mihoko Deakin

Abstract

This research deals with transgender asylum-seekers and refugee status determination (RSD). It considers the excessively complex legal developments and discourse surrounding gender-related asylum applications and challenges the strict interpretation of the 1951 Convention Relating to the Status of Refugees and limited understandings of sex, gender, and sexual orientation by decision makers. This research adopts a queer critical analysis of international refugee law and provides a nuanced understanding of transgender identities to explain the shortcomings and misunderstandings that arise from gender-related asylum cases. This article provides recommendations for the advancements of appropriate legal approaches to gender-related asylum claims that will improve the protection of transgender asylum-seekers during the RSD process, provide a foundation for conceptual change to the asylum system, and promote the rule of law and human rights.

Abbreviations

AILA	American Immigration Lawyers Association
BIA	Board of Immigration Appeals (United States)
GLAAD	Gay & Lesbian Alliance Against Defamation
GLBTT	Gay, Lesbian, Bisexual, Transgender, Transsexual
HIRC	Harvard Immigration Lawyers Association
IPV	Intimate Partner Violence
LGBTQI+	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex
MPSG	Membership of a Particular Social Group
PSG	Particular Social Group
RRT	Refugee Review Tribunal (Australia)
RSD	Refugee Status Determination
SOGI	Sexual Orientation and Gender Identity
UDHR	Universal Declaration of Human Rights
UN IE SOGI	United Nations Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity
UN	United Nations
UNHCR	United Nations High Commission for Refugees
VCLT	Vienna Convention of the Law of Treaties

Chapter 1

I INTRODUCTION

Identity is intrinsic to our existence and is sewn tightly into the fibres of our being. Identity cannot be detached nor imposed, transcends our private lives, and influences our demeanour, desires, and relations. However, notions of identity are used to outcast groups and individuals and deprive them of their rights. The LGBTQI+ community, for instance, is discriminated against, harmed, and persecuted for their sexual orientations and gender identities which threaten the power relations within society. The LGBTQI+ community's existence alone threatens the power of the patriarchy, binary norms, heteronormativity, masculinity, and racial supremacy. Persecution and human rights abuses are commonly addressed in the international refugee regime. However, the influence of international law is limited as the international legal order is based on a system of consent where states demonstrate *opinio juris* and state practice. Therefore, where states lack the political will to protect against human rights abuses, adherence to international standards crumbles.

This thesis deals with transgender asylum-seekers and Refugee Status Determination (RSD) and questions not only how queer critique helps identify the foundational shortcomings of international mechanisms protecting transgender asylum-seekers during RSD but also how queer legal theory methods can advance an inclusive and non-discriminatory asylum system. Transgender asylum-seekers are in a precarious position as both their rights as refugees and as transgender individuals are misunderstood. This thesis contends that rigid and non-inclusive interpretations of legal text and doctrines have challenged the protection of refugees' rights as opposed to protecting them. Through the lens of queer legal theory, this paper studies the framework of international refugee law, as codified in the 1951 Convention Relating to the Status of Refugees (hereinafter referred to as the 1951 Convention), to determine whether transgender asylum-seekers are adequately protected through the RSD process. By adopting a gendered approach and interpreting elements of RSD correctly, the rights of transgender asylum-seekers can be adequately protected. The tendency to focus on the conditions of sexual orientation and the country of origin, through a binary and heteronormative lens, rather than on the complexities of gender identity and individual contexts, wrongfully hinders transgender individuals' access to asylum. The RSD process can be an exercise of exclusion when interpretive methods are rigid and

discriminatory, revealing the different power structures such as power in the gender binary, western cultural stereotypes, and the border.¹

Using queer legal theory to critically assess the RSD process of transgender asylum-seekers provides for a deeper study into the commonly accepted categories of identity. Queer studies transcend LGBTQI+ topics and engage in critiquing normative and dominant modes of thought. Queer legal theory engages with topics related to transgender identity and will provide a strong analytical basis for the power relations and shortcomings of the RSD process for transgender asylum-seekers.

The study of how the international legal framework for RSD adequately protects transgender asylum-seekers will be conducted in four parts. Part one introduces key terms and concepts and lays out the foundation of this research. Part two sets out the historical developments of human rights law and international refugee law concerning transgender asylum-seekers. It also introduces the RSD process and reflects on general legal developments relating to elements of the refugee definition. Part three details the shortcomings and misunderstandings related to gender asylum claims through an analysis of recent legal developments in anglophone jurisdictions, namely Australia and the United States. Part four analyses the RSD process of transgender refugee applicants using queer legal theory and offers recommendations. The final part, building on part four, provides an overall analysis of the legal discourse and jurisprudence, detailing the effects correcting misunderstandings related to gender asylum claims would have on transgender individuals, rule of law, and human rights.

This research is focused predominantly on the legal discourse and jurisprudence of anglophone jurisdictions, namely Australia and the United States. The western-heavy analysis of RSD and transgender asylum-seekers is due to the limited academic resources specifically on RSD elements as it relates to queer asylum-seekers as well as the limited access to case law. Embracing queer legal theory allows for the comparative analysis of Western jurisdictions as well as the critique of Western cultural stereotypes evident in the RSD process.

¹ Irene Manganini *The Refugee Status Determination of Transgender Asylum-Seekers: a Queer Critique* (The Graduate Institute of International Development Studies, 2020) at 51.

II THE RATIONALE FOR THE RESEARCH

Refugee law is intrinsically intertwined with human rights norms, and the transgender asylum-seekers' precarious position within the RSD process reflects the gaps in a presumed universal human rights regime that protects queer individuals' rights. This thesis challenges the discourse surrounding positivist elements of the RSD process that advance a divide between refugee law and human rights and gender awareness. The research on refugee law from a gendered perspective may serve to enhance the experience of transgender asylum-seekers in the refugee determination process and ultimately save and enhance lives.

According to the recent *Summary Conclusions of the 2021 Global Roundtable on Protection and Solutions For LGBTIQ+ People in Forced Displacement* which was co-organized by UNHCR and the United Nations Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity (UN IE SOGI), as of June 2021, sixty-nine States criminalize consensual same-sex relations between adults and six States consider it a capital offence.² A further five additional States consider prescribing the death penalty, although the legal status is uncertain.³ However, the legal status of same-sex relationships does not accurately reflect the full extent of violence and discrimination against the LGBTIQ+ community. The UN IE SOGI have reported in 2019 on the lack of adequate and relevant data collection and management of violence and discrimination based on sexual orientation and gender identity.⁴ The UN IE SOGI report disclosed the following instance:

*Recently, the Independent Expert was shocked to hear from a high-level officer responsible for the formulation of public policy in a country with a population in the tens of millions that, in the officer's opinion, the country's population of lesbian, gay, bisexual, trans and gender-diverse persons "could not exceed 300 or so", and similar misconceptions are common all over the world.*⁵

The UN IE SOGI opined that attaching preconceptions and prejudice to public policy instead of evidence amounts to criminal negligence.⁶ The UN IE SOGI advocates that states should draft

² UN High Commissioner for Refugees (UNHCR) *2021 Global Roundtable on Protection and Solutions for LGBTIQ+ People in Forced Displacement - Summary Conclusions* (2021) available at <https://www.unhcr.org/publications/brochures/611e48144/2021-global-roundtable-protection-solutions-lgbtqi-people-forced-displacement.html> accessed on 1 September 2021 at 9.

³ Ibid.

⁴ Human Rights Council *Data collection and management as a means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity* (2019) A/HRC/41/45 at 5.

⁵ Ibid.

⁶ Ibid.

public policy based on demography, economy, social and cultural characteristics, literacy rates, unemployment rates, voting patterns, crime, and other indicators.⁷ A lack of data on SOGI persons cause the community to be invisible to decision makers and duty bearers.⁸

In legal discourse and jurisprudence concerning transgender asylum applications, characteristics such as sex, gender, and sexual orientation are stereotyped and conflated by decision makers. This conflation and reliance on binary ideology hinders gender variant refugee applicants from being understood and accepted. Legal developments in anglophone jurisdictions reveal a disorderly and unprincipled application of the law which hinders transgender asylum applicants from making successful claims to refugeehood and challenges the adherence to principles such as the rule of law and human rights norms. The analysis of refugee law through a queer legal analysis serves to advance decision makers' adherence to rule of law and human rights which will further enhance the trust in the law, adjudicators, and practitioners.

III DEFINING 'TRANSGENDER'

In the context of this research which deals with transgender asylum-seekers, it is necessary to define the term 'transgender'. Legal discourse and jurisprudence concerning transgender asylum applications, mistakenly conflate characteristics such as sex, gender, and sexual orientation and base their understanding of such terms on stereotypes and binary and heteronormative attitudes.⁹ Decision makers have shied away from using the term 'transgender' as a particular social group (PSG), one of the Convention grounds an applicant may base their claim for refugee status on, as the term was understood to be too broad.¹⁰ Being transgender is intrinsic to one's identity; however, and detrimentally to transgender asylum-seekers, the significance of being transgender is not appreciated fully by decision makers.

The term 'transgender' was first coined by psychiatrist John Oliven as recently as 1965. Oliven argued that the term 'transsexualism' be replaced with the term 'transgenderism' as

⁷ Ibid.

⁸ Ibid at 7.

⁹ For an instance of sex, gender, and sexual orientation conflation in case law, see *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000); A72-994-275, United States Court of Appeals for the Ninth Circuit, 24 August 2000. For an in-depth study on conflationary stereotypes, see Francisco Valdes 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society' (1995) 83 CLR 1.

¹⁰ For an instance where 'transgender' was rejected as a PSG, see *RRT Case No. 0902671* [2009] RRTA 1053 at 25.

sexuality could not account for transvestism or the all-consuming belief of a gender identity.¹¹ The term ‘transgender’ grew in popularity since and has been used as an inclusive umbrella term. In 1994, gender theorist Stryker defined ‘transgender’ as referring to ‘all identities or practices that cross over, cut across, move between, or otherwise queer socially constructed sex/gender boundaries,’ including, but not limited to, ‘transsexuality, heterosexual transvestism, gay drag, butch lesbianism, and such non-European identities as the Native American berdache or the Indian Hijra.’¹² The widely referenced definition of ‘transgender’ provided by the organization Gay & Lesbian Alliance Against Defamation (GLAAD) reads as follows:

An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms - including transgender.... Use the descriptive term preferred by the person. Many transgender people are prescribed hormones by their doctors to bring their bodies into alignment with their gender identity. Some undergo surgery as well. But not all transgender people can or will take those steps, and a transgender identity is not dependent upon physical appearance or medical procedures.¹³

Being transgender is a personal experience of gender identity and is a multifaceted aspect of someone’s individuality. To understand fully what it means to be transgender, the concept of gender identity must also be understood. According to the Yogyakarta Principles,¹⁴ gender identity refers to:

...each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.¹⁵

The transgender community is diverse and being transgender is an enigmatic feature of someone’s identity. The diversity within the transgender community and the multiplicity of transgender

¹¹ John Oliven ‘Sexual Hygiene and Pathology’ (1965) 2 Am J Med Sci 428 at 514.

¹² Susan Stryker ‘My Words to Victor Frankenstein Above the Village of Chamonix: Performing Transgender Rage’ (1994) 1 GLQ 237 at 251.

¹³ Gay & Lesbian Alliance Against Defamation (GLAAD) *Media Reference Guide - 10th Edition* (2016) available at <https://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf> accessed on 20 May 2021.

¹⁴ International Commission of Jurists (ICJ) *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2007) available at <https://yogyakartaprinciples.org/> accessed on 28 May 2021.

¹⁵ *Ibid.*

individuals' experiences challenges the positivist approach to international refugee law that values pedigree and adherence to legal definitions.

In 2012, UNCHR published *Guidelines on International Protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*.¹⁶ In their guideline, UNHCR made reference to the eighth edition of GLAAD's *Media Reference Guide* and provided a definition for 'transgender' that attempted to encompass the different and currently accepted characteristics of the term. The guidelines provide the following definition and explanation:

*Transgender describes people whose gender identity and/or gender expression differs from the biological sex they were assigned at birth. Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual. Transgender individuals dress or act in ways that are often different from what is generally expected by society on the basis of their sex assigned at birth. Also, they may not appear or act in these ways at all times. For example, individuals may choose to express their chosen gender only at certain times in environments where they feel safe. Not fitting within accepted binary perceptions of being male and female, they may be perceived as threatening social norms and values. This non-conformity exposes them to risk of harm. Transgender individuals are often highly marginalized and their claims may reveal experiences of severe physical, psychological and/or sexual violence. When their self-identification and physical appearance do not match the legal sex on official documentation and identity documents, transgender people are at particular risk. The transition to alter one's birth sex is not a one-step process and may involve a range of personal, legal and medical adjustments. Not all transgender individuals choose medical treatment or other steps to help their outward appearance match their internal identity. It is therefore important for decision makers to avoid overemphasis on sex-reassignment surgery.*¹⁷

Given the challenges transgender asylum-seekers face in the RSD process and asylum system in general, UNHCR's guidelines for asylum claims based on sexual orientation and/or gender identity are commendable; however, the provided definition for 'transgender' requires further discussion. The definition provides that the concept of 'non-conforming' relates to transgender individuals 'not fitting within accepted binary perceptions of being male and female;' however, GLAAD has

¹⁶ UN High Commissioner for Refugees (UNHCR) *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (2012) HCR/GIP/12/01 available at <https://www.refworld.org/docid/50348afc2.html> accessed on 25 May 2021.

¹⁷ Ibid.

provided further clarity to the meaning of ‘transgender’ and ‘gender non-conforming.’ In their tenth and latest issue of *Media Reference Guide*, GLAAD provides the following definition for ‘gender non-conformity’:

*[a] term used to describe some people whose gender expression is different from conventional expectations of masculinity and femininity. Please note that not all gender non-conforming people identify as transgender; nor are all transgender people gender non-conforming. Many people have gender expressions that are not entirely conventional – that fact alone does not make them transgender. Many transgender men and women have gender expressions that are conventionally masculine or feminine. Simply being transgender does not make someone gender non-conforming. The term is not a synonym for transgender or transsexual and should only be used if someone self-identifies as gender non-conforming.*¹⁸

Not all transgender individuals are gender non-conforming, and they may have conventionally masculine or feminine gender expressions. The definition provided by UNHCR can be misleading in the RSD process as it leaves gender conforming transgender individuals at risk of being excluded from protection.

It is not in the scope of this paper to provide a full detailed analysis of the historical emergence of the meaning of the term ‘transgender;’ however, the brief introduction to the definition of ‘transgender’ highlights the very personal features of what it means to be transgender. A basic understanding of terminology is important in legal analysis; however, the diverse experiences and identities of transgender people highlight the impossible practice of adopting a closed definition of what it means to be transgender. It is necessary for the purpose of this thesis not to have a closed meaning of the term transgender, as any attempt to restrict the characteristic to rigid definitions could threaten inclusivity and be a means to wrongfully deny someone a right to refugeehood.

IV METHODOLOGY: QUEER LEGAL THEORY

For the purposes of this thesis, which is to critically analyse the shortcomings of international law in protecting transgender asylum-seekers during the RSD process, the adoption of queer legal theory is necessary. Queer legal theory is a useful tool in explaining the shortcomings of the RSD process of transgender asylum-seekers through identifying foundational issues within jurisprudence.

¹⁸ Supra note 13.

Queer studies have engaged with deconstructing commonly accepted identity categories such as gender and sexuality through revealing and criticizing power structures. Queer theory has dealt with topics of transgender identity and will provide a strong basis for the analysis of the RSD process for transgender asylum-seekers. This thesis focusses on queer legal theory, as it provides the strongest foundation for a legal analysis of the RSD process for transgender applicants. This research does not provide an in-depth analysis of the historical developments of queer legal theory. Instead, it details concepts from the discipline most relevant to the legal analysis of the RSD process.

The ambiguity of the term 'queer' is incorporated into its dictionary definition that reads: 'strange, odd, peculiar, eccentric... also, of questionable character, suspicious, dubious.'¹⁹ Its second definition, which is generally used in modern discourse, reads: 'of a person (usually a man): homosexual. Also ...of things: pertaining to homosexuals or homosexuality.'²⁰ The meaning of the term 'queer' in 'queer theory' differentiates from the meaning of 'queer' in previous research areas. Whittington notes that the term 'queer' is commonly read to have something to do with LGBTQI+ themes; however, 'queer theory' which was formulated in the 1990s uses the term 'queer' as a position against normative or dominant modes of thought.²¹ Queer studies refer to topics outside the range of LGBTQI+ studies. Mills, following feminist scholarship, wrote 'to make a 'queer' reading is to read against the grain of conventional critical practice in order to expose the regulatory hierarchies that define and qualify the heterosexual imperative as normal.'²² Queer theory uses its ambiguity as an advantage to question presumed normativity. Queer studies are therefore undefined and are understood to follow postmodern techniques due to its shared criticism against universalist theory, foundationalism, and stability.²³ It is through its ambiguous

¹⁹ Oxford University Press 1989 s.v. "queer" adj. 1.a. Oxford English Dictionary 2nd Edition (1989) available at <https://www.oed.com/oed2/00194686;jsessionid=29800D0408C3B2E9D6BF3ACB049B00E7> accessed on 25 May 2021.

²⁰ Oxford University Press 1989 s.v. "queer," adj. 2.a. Oxford English Dictionary 2nd Edition (1989) available at <https://www.oed.com/oed2/00194686;jsessionid=29800D0408C3B2E9D6BF3ACB049B00E7> accessed on 25 May 2021.

²¹ Karl Whittington 'Queer' (2012) 33 Stud. Iconogr. 157, 157.

²² Robert Mills 'Whatever You Do is a Delight to Me: Masculinity, Masochism, and Queer Representations of Male Martyrdom' (2001) 13 Exemplaria 1 at 2.

²³ Laurie Rose Kepros 'Queer Theory: Weed or Seed in the Garden of Legal Theory' (2000) 9 Tul. J. L. & Sex. 279 at 282.

characteristics that queer theory seeks to foster social change.²⁴ Queer theory advances sex/gender dignity and freedom for every individual.

As queer studies gained more recognition, queer legal theory, a jurisprudential movement, was championed for during the mid-1990s.²⁵ Queer legal theory finds itself in the domain of critical legal studies and follows the philosophy of queer studies. Thomas advances that queer legal theory is not only contained in an intellectual domain but a political domain as it provides an account of the ‘economy of power relations.’²⁶ In the context of refugee law, queer legal theory provides for the critical analysis of power structures such as in the form of gender binary, western cultural stereotypes, and borders.²⁷

Valdes argues the goal of queer legal theory is of ‘sex/gender dignity and freedom for every individual.’²⁸ Valdes further proposes eight strategies for queer legal theory which include: fighting ‘conflationary’ stereotypes; bridging social science knowledge and legal knowledge; using narratives; developing constructionist sensibilities; conceptualizing “sexual orientation”; defending desire as such; transcending “privacy”; and promoting positionality, relationality, and (inter)connectivity.²⁹ Following Valdes’ eight strategies of queer legal theory, this research provides a queer critique of the RSD process.

In general, queer legal theory resists classification and embraces indeterminacy and is understood to be inclusive across the definitions of gender and sexuality. It therefore includes individuals that do not conform with tidy labels.³⁰ Following this logic and according to Kepros, one of the most controversial aspects of queer theory is its threat against identity politics.³¹ Kepros affirms that queer theory ‘does not assume identity politics is never useful’ and that it ‘challenges GLBTT,³² feminist, and critical race theorists to go further in their critique and to examine the origins and confines of the identities with which they attempt to assert themselves.’³³ Queer theory

²⁴ Ibid at 284.

²⁵ Ibid at 293.

²⁶ Kendall Thomas ‘Practicing Queer Legal Theory Critically’ (2019) 6 CAL 8 at 14.

²⁷ Manganini op cit note 1 at 51.

²⁸ Valdes op cit note 9 at 362.

²⁹ Ibid at 364-72.

³⁰ Kepros op cit note 23 at 283.

³¹ Ibid 291.

³² GLBTT is a common abbreviation for the combined terms ‘Gay, Lesbian, Bisexual, Transgendered, Transsexual’.

³³ Kepros op cit note 23 at 291.

therefore does not undermine identity politics nor calls for its dismissal, and instead challenges the oversimplification of aspects of identity that are commonly misunderstood.

Identity politics has been challenged for oversimplifying characteristics of identity and furthering the divide between groups of people. Alcoff and Mohanty justify the use of identity as they note that the ‘legitimacy of some subjective experiences... is based on the objective location of people in society... “experiences” are not unfathomable inner phenomena but rather disguised explanations of social relations, and they can be evaluated as such.’³⁴ Knowledge of identity can assist in understanding objectivity, not through passive observation but through the hard work of embracing the world’s complexities. In refugee law, the ability to gain an objective understanding of an individual experience through understandings of identity can be serviceable only when the understandings of identity are complete and challenged. Unfortunately, there are challenges in embracing identity complexities.

Butler, expressed the dangers of constraining ‘subjects’ to their colour, sexuality, ethnicity, class, and ablebodiedness as follows:

*The theories of feminist identity that elaborate predicates of color, sexuality, ethnicity, class, and ablebodiedness invariably close with an embarrassed “etc.” at the end of the list. Through this horizontal trajectory of adjectives, these positions strive to encompass a situated subject, but invariably fail to be complete The internal paradox of this foundationalism is that it presumes, fixes, and constrains the very “subjects” that it hopes to represent and liberate.*³⁵

Butler’s analysis provides a foundation on which critique of the 1951 Convention is built upon. The 1951 Convention is an international agreement which attempts to represent and liberate refugees. In practice, incorrect and rigid interpretations of the Convention doctrines may regrettably exclude deserving asylum-seekers from refugeehood.

It is not to say that identity should be completely erased from RSD processes as an understanding of identity can provide for an objective understanding of certain individual experiences. It is important for the complexities of identity to be embraced and attempted to be better understood and for power-relations to be examined. Advocating for RSD officers, lawyers, and judges to put in the hard work of embracing complex identities is a challenge. An overly

³⁴ Linda Martin Alcoff and Satya P Mohanty ‘Reconsidering Identity Politics: An Introduction’ in Paula M. L. Moya and others (eds) *Identity Politics Reconsidered* (Palgrave Macmillan, 2006) 5.

³⁵ Judith Butler *Gender Trouble: Feminism and the Subversion of Identity* (1990) 143.

exaggerated focus on a limited understanding of identity excludes individuals from being recognized as a protected group. Therefore, although identity knowledge can potentially provide for an understanding of objectivity, it can also provide for the incorrect exclusion of individuals from protected human rights.

Queer legal theory has rarely entered jurisprudence and law classrooms. Queer legal theory provides a practical analysis of power relations, and it provides for an inclusive method of critical analysis against the normative or dominant modes of thought. Queer legal theory is utilized to critique the restrictive nature of the RSD process for transgender asylum-seekers; however, queer theory goes beyond LGBTQI+ topics, and the analysis and findings of this study serves to advance inclusivity within the RSD process generally.

V THE REFUGEE STATUS DETERMINATION PROCESS (RSD)

For the purposes of analysing the treatment of transgender asylum-seekers in the RSD process, the elements of the refugee definition examined are the interpretations of the Convention ground of membership of a particular social group (MPSG), ‘well-founded fear of persecution’, and the ‘causal link’. According to UNHCR, RSD is the following:

[T]he legal or administrative process by which governments or UNHCR determine whether a person seeking international protection is considered a refugee under international, regional or national law. RSD is often a vital process in helping refugees realize their rights under international law.³⁶

The most accepted international legal authority for RSD is the 1951 Convention which sets out the definition of ‘refugee’ with the following criteria:

- they must be outside their country of origin;
- they must be unable or unwilling to avail themselves of the protection of that country, or to return there;
- their inability or unwillingness must be attributable to a well-founded fear of being persecuted;

³⁶ UN High Commissioner for Refugees (UNHCR) *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate* (2020) available at <https://www.refworld.org/docid/5e870b254.html> accessed on 9 September 2021 at 14.

- and the persecution fear should be based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.³⁷

Although the Convention's definition of a refugee reflects its own Eurocentric and heteronormative origins, the Convention's fluidity allows for interpretive flexibility and for decision makers to use discretion. In accordance with the rule of law, it is necessary, however, to develop guidance on interpretive means to ensure predictability, consistency, and equality. This section introduces the three elements of the refugee definition reviewed in this research: MPSG; well-founded fear; and the causal link.

a) *RSD: Membership of a Particular Social Group*

The 1951 Convention establishes that the fear of persecution must be based on reasons of 'race, religion, nationality, membership of a particular social group, or political opinion.'³⁸ A literal interpretation of the list of grounds lacks gender sensitivity and inclusivity. To achieve the non-discrimination principles of the 1951 Convention, the refugee definition must be interpreted in a human rights context where discrimination is a minimum base.³⁹ Although applicants may rely on several grounds in their claim, this research primarily focuses on the MPSG ground which would include sexual orientation and gender. The MPSG ground is undefined in the Convention; however, jurisprudence has shaped different approaches and interpretations as to what this ground signifies.

Currently, two key methods of interpreting MPSG have emerged between and within jurisdictions: the *ejusdem generis* or protected characteristic approach and the social perception or sociological approach. The *ejusdem generis* approach was accepted as an international standard following the *Matter of Acosta*⁴⁰ with many jurisdictions adopting the protected characteristic approach. In the *Matter of Acosta*, the United States Court of Appeal used the doctrine of *ejusdem generis* to construe MPSG by reading the *general* in light of the *specific*. The general in this instance would be the MPSG in question and the specific would be the other four grounds: race; religion; nationality; and political opinion. In *Acosta*, the court held that by using the doctrine of *ejusdem generis*, MPSG must be defined consistently with the other four grounds so that it leads

³⁷ United Nations General Assembly *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, 189, p. 137 at art 1(a)(2).

³⁸ *Ibid* at art 1(a)(2).

³⁹ Fatima Khan and Tal Schreier (eds) *Refugee Law in South Africa* (2014) 45.

⁴⁰ *Matter of Acosta*, 19 I&N Dec. 211 (U.S.B.I.A., Mar. 1, 1985).

to it necessitating a ‘common, immutable characteristic . . . that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to change.’⁴¹ The *ejusdem generis* approach is therefore an internal focused method that assesses the applicants’ immutable and internal characteristics.

Building on the *ejusdem generis* doctrine set out in the *Matter of Acosta*, Justice Gerard La Forest of the Supreme Court of Canada, in the case of *Canada (AG) v Ward*,⁴² provided that the following three groups be considered for the purposes of PSG:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.⁴³

The court determined that claims on bases such as ‘gender, linguistic background and sexual orientation’ are included in the first category of protected groups.⁴⁴

The *ejusdem generis* doctrine focuses on the innate and/or unchangeable characteristics of the asylum-seeker and is based on an understanding of protected characteristics. Other jurisdictions, such as Australia, have developed the social perception test which focusses on external characteristics and the ordinary meaning of MPSG. The social perception test lacks the ability to provide an in-depth analysis of the asylum-seekers’ predicament and characteristics as its analysis is restricted to how applicants are ‘objectively’ viewed.

Within the discourse of MPSG and in addition to the interpretive issues, there is also the issue of credibility. UNHCR provides guidance on establishing an applicants’ gender identity and provides the following:

Exploring elements around the applicant’s personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker

⁴¹ Ibid at 212.

⁴² *Canada (AG) v Ward* [1993] 2 S.C.R. 689

⁴³ Ibid at 7.

⁴⁴ Ibid at 79.

*ascertain the applicant's sexual orientation or gender identity, rather than a focus on sexual practices.*⁴⁵

The focus for the asylum decision maker is whether the refusal to grant refugeehood to an applicant would amount to a potential breach of the 1951 Convention.⁴⁶ The asylum decision maker must then balance the risks of refusing refugee status to a genuine claimant and returning them back to face persecution and, on the other hand, granting refugee status to a non-genuine claimant, undermining the public interest in enforcing legitimate immigration control.⁴⁷ With SOGI asylum claims, credibility is focused generally on proving whether there is a credible fear of persecution on the grounds of member of SOGI minority.⁴⁸ Adjudicators therefore require guidance and training so that the assessment is completed in an open-minded, dignified, and respectful manner with a focus on the applicants' identity and personal narrative instead behavioural aspects such as dress or sexual history.

b) RSD: Well-founded Fear of Persecution

A Convention refugee is characterized as someone who is unable or unwilling to return to their home country due to a 'well-founded fear of being persecuted.' The inclusion of 'well-founded' alludes to the understanding that the fear must involve a level of subjectivity and objectivity. The UNHCR's procedural handbook gives guidance on who carries the burden of proof within refugee law and details the four procedural steps for assessing asylum claims. Firstly, the handbook confirms the claimant has the burden of proof which is then shared between the examiner and the claimant to ascertain and evaluate the relevant facts. The burden is then shifted from the claimant to the examiner who conducts their own research. Lastly, if the findings are not sufficient and there is nothing to contradict the claim, the claimant should be given the benefit of doubt.⁴⁹ Despite UNHCR's guidance, the subjective and objective elements of the well-founded fear assessment are disputed amongst academics and adjudicators. The unsettled nature of the well-founded fear assessment puts transgender asylum-seekers at risk of being silenced should their fear of

⁴⁵ Supra note 16.

⁴⁶ Robert Thomas 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) 8 Eur. J. Migr. Law. 79 at 80.

⁴⁷ Ibid.

⁴⁸ Moria Dustin and Nuno Ferreira 'Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity' (2021) 40 Refug. Surv. Q. 315 at 316.

⁴⁹ UN High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* HCR/IP/4/Eng/REV.1 (1979) available at <https://www.unhcr.org/4d93528a9.pdf> accessed 25 May 2021 at para 196.

persecution not be understood objectively. Comparably to the issue of credibility where UNHCR alludes to the idea that the applicants' narratives should be valued,⁵⁰ an assessment of well-founded fear must also embrace the applicants' subjective fear.

c) *RSD: The Nexus Clause*

Under international refugee law, it is necessary to establish a nexus or causal link between the well-founded fear of persecution and the Convention group. The nexus clause is required because a claim to refugeehood must be based on the applicant's predicament and not on avoidable or trivial activity. Further, the nexus should also be applicable to a group as to the individual.⁵¹

According to Powell, many in the LGBT community rely on "born that way" arguments that reflect the idea that sexual orientation and gender identity are innate, immutable, or unassociated with choice.⁵² Authors such as Whisman have previously addressed issues with the "born that way" arguments in relation to sexual orientation.⁵³ Building on previous discourse, Powell extends the critique to arguments for transgender rights explaining how the "born that way" logic is founded on 'shaky science' and 'imperfect logic' failing to provide a solid basis for transgender rights.⁵⁴ Powell argues that logic based on human rights would provide a stronger basis for transgender rights.⁵⁵

Transgender individuals do not refer to their gender identity as a matter of choice and may experience distress from social pressures to conform to genders that do not match their authentic gender identity.⁵⁶ Gender identity is not subject to conscious choice; however, expressions of gender identity include choices such as the choice of dress, hair, or naming.⁵⁷ Choice should not be removed from transgender identities and rights, but instead embraced and protected. Transgender rights must be understood to stem from human rights as transgender people, as everyone, deserves to live and flourish within communities.

⁵⁰ Supra note 16.

⁵¹ Khan and Schreier op cit note 39 at 58.

⁵² Tia Powell 'Transgender Rights as Human Rights' (2016) 18 AMA J. Ethics 1126 at 1127.

⁵³ Vera Whisman *Queer By Choice: Lesbians, Gay Men, and the Politics of Identity* (1996) 6.

⁵⁴ Powell op cit note 52 at 1127.

⁵⁵ Ibid.

⁵⁶ Ibid at 1128.

⁵⁷ Ibid.

The refugee system cannot protect all human rights abuses; however, a trivialization of transgender rights is discriminatory, and asylum claim decisions divorced from human rights fail to protect deserving transgender asylum-seekers.

VI LITERATURE REVIEW

There is unfortunately a gap in academic literature on the specific study of transgender asylum-seekers and their treatment and experience within the RSD process; however, there is a plethora of academic discourse that attempts to provide interpretations for the three elements of the refugee definition most relevant to this study. In this section, the academic discourse on the elements of the refugee definition is outlined and responded to in light of transgender asylum-seekers' circumstances.

a) *Memberships of a Particular Social Group*

Hathaway and Foster highlight that the list of protected grounds in the 1951 Convention is not static but evolve in line with the principles of non-discrimination.⁵⁸ Hathaway and Foster neatly summarize the advantages and disadvantages of adopting the *ejusdem generis* doctrine. The *ejusdem generis* approach forms a principled framework, promotes consistency, and allows for the evolution of the MPSG category which is adjusted through human rights. In practice, the *ejusdem generis* approach has extended the MPSG category and allowed for the protection of groups such as women and other sex or gender minority individuals. It has also refused refugee status to persons of groups associated with less fundamental values.⁵⁹ The *ejusdem generis* approach, however, can be seen to complicate the RSD process, requires knowledge of non-discrimination and human rights law which are not clear, and there is uncertainty whether groups are deserving of protection.⁶⁰

The social perception approach, in contrast to the *ejusdem generis* approach, follows the ordinary meaning of 'membership of a particular social group' and does not require an authoritative and external set of standards.⁶¹ Hathaway and Foster, however, highlight that the

⁵⁸ James Hathaway and Michelle Foster 'Membership of a Particular Social Group, Discussion Paper No. 4' (2003) 15 Int. J. Refug. Law. 477 at 481.

⁵⁹ Ibid at 482.

⁶⁰ Ibid.

⁶¹ Ibid at 484.

ordinary meaning of the concept of MPSG really does not exist.⁶² They criticize the social perception test for being excessively broad and for delimiting the extent of the beneficiary class.⁶³ Further ‘social perception’ is not always assessable.⁶⁴

Hathaway and Foster provide three solutions for the discrepancies in interpreting the MPSG ground. The first solution relates to the rules of treaty interpretation codified by the *Vienna Convention*⁶⁵ where one approach may be strongly favoured over the other. The second solution relies on policy reasons that may prefer an approach. The third solution combines the *ejusdem generis* and social perception approach.⁶⁶ Hathaway and Foster firstly argue that the social perception approach is unlikely to satisfy the requirements of Art 31 (1) of the *Vienna Convention* through a context-sensitive process.⁶⁷ The *ejusdem generis* approach ensures alliance with the other Convention grounds and advances the purpose of the Convention.⁶⁸ For policy reasons, Hathaway and Foster highlight the strengths of the social perception approach as being one that has the capacity to embrace political and cultural specificity. The social perception approach however lacks a principled standard as social perception is fickle and easy to change. The *ejusdem generis* approach on the other hand is principled and aligns itself with the purposes of the Convention.⁶⁹ In relation to the third solution proposed, Hathaway and Foster believe it is premature to determine that a merger of the two approaches would result in the best interpretation of the MPSG Convention ground.⁷⁰ Hathaway and Foster advocate for the *ejusdem generis* approach to be the default doctrine whereas the social perception approach may compliment decisions.⁷¹

UNHCR has provided guidance on the interpretation of the MPSG Convention ground in the *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*

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

⁶⁶ Hathaway and Foster op cit note 58 at 485.

⁶⁷ Supra note 65 at art 31(1).

⁶⁸ Hathaway and Foster op cit note 58 at 486.

⁶⁹ Ibid at 489.

⁷⁰ Ibid at 490.

⁷¹ Ibid.

Status of Refugees.⁷² In the guidelines, UNHCR frames *ejusdem generis* to be understood to “identify a set of groups that constitute the core of the social perception analysis.”⁷³ UNHCR advocate for a single standard that incorporates both approaches:

*[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.*⁷⁴

The UNHCR’s merger approach is said to have resulted from the 2001 Second Track of the Global Consultations on International Protection; however, the expert meeting concluded with the consensus that the *ejusdem generis* approach should be recognized as the default doctrine while still leaving the possibility of evolution that could incorporate the social perception doctrine.⁷⁵ Therefore, the reasoning for UNHCR’s merger approach of the *ejusdem generis* and social perception doctrines remains questionable.

Both approaches to the definition of PSG forms the basis of whether gender alone can define PSG. The protected characteristic approach provides the best argument for the ability of gender alone to constitute a PSG. Following the controversial decision in the United States in *Matter of A-B-* where the judge deviated from the *ejusdem generis* approach and revoked an earlier decision that allowed for the PSG of ‘Guatemalan women.’⁷⁶ In response to the initial decision of *Matter of A-B-*, the Harvard Immigration and Refugee Clinical Program (HIRC) at Harvard Law School, the American Immigration Lawyers Association (AILA), Human Rights First, and Kids in Need of Defense, created an *Amici Curiae* arguing against such decision. The *Amici Curiae* emphasized that ‘gender is an immutable characteristic. Like race or religion, gender is entrenched, innate, and central to identity’ and is therefore sufficient to establish MPSG.⁷⁷ The *Amici Curiae*,

⁷² UN High Commissioner for Refugees (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* (2002) HCR/GIP/02/02 available at <https://www.refworld.org/docid/3d36f23f4.html> accessed on 9 May 2021.

⁷³ *Ibid* at 3.

⁷⁴ *Ibid*.

⁷⁵ Erika Feller, Volker Türk and Frances Nicholson *Summary Conclusions: Membership of a Particular Social Group, expert roundtable, San Remo, September 2001* (2003) available at <https://www.refworld.org/docid/470a33b40.html> accessed on 10 May 2021.

⁷⁶ *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021)

⁷⁷ Brief for the Harvard Immigration and Refugee Clinical Program, the American Immigration Lawyers Association, Human Rights First, and Kids in Need of Defence as Amicus Curiae, *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) at 7.

adopted and advocated for a stronger commitment to the protected characteristic approach as established in *Acosta*.

b) Interpreting well-founded fear of persecution

The ‘well-founded fear’ requirement, as advanced by UNHCR’s Handbook⁷⁸, involves a two-pronged approach which contains both a subjective and objective element – the applicant’s subjective fear which is supported by an objective situation. Although this the accepted general approach, academics such as Hathaway disagree with the involvement of a subjective element. Hathaway argues that the 1951 Convention directs users to make a forward-looking assessment of the risk of persecution and that the subjective element is unnecessary to establish a well-founded fear.⁷⁹ Hathaway and Pobjoy argue that only persons able to show a forward-looking risk of persecutory harm can satisfy the ‘well-founded fear’ requirement and qualify as a refugee.⁸⁰ In their co-written paper ‘Queer Cases Make Bad Law,’ Hathaway and Pobjoy explore the Australian case of *S395*⁸¹ and the United Kingdom’s case of *HJ and HT*.⁸² Both cases questioned whether there was any requirement for asylum-seekers to ‘act discreetly’ to avoid persecution and whether refugee status was owed to those who were able to conceal their sexual orientation or gender identity. Both the Australian High Court and United Kingdom Supreme Court rightfully found no requirement for asylum-seekers to conceal themselves in their home country to avoid harm; however, Hathaway and Pobjoy have issue with the courts failing to identify the persecutory harm for which there is a ‘well-founded fear.’⁸³

c) The Nexus Clause

Asylum is not owed where risk of persecution follows from avoidable and trivial activity. It is for this reasons that the 1951 Convention calls for a ‘nexus’ requirement which is the causal link between the well-founded fear of persecution and the Convention ground. Hathaway and Pobjoy take issue with a far-reaching view of the nexus clause which could hypothetically link fear of persecution with activities that are not inherent to or an integral part of identity.⁸⁴ In relation to

⁷⁸ Supra note 49 at para 38.

⁷⁹ James Hathaway ‘Is there a Subjective Element in the Refugee Convention’s Requirement of Well-Founded Fear?’ (2005) 26 Mich. J. Int. Law 505 at 507.

⁸⁰ James Hathaway and Jason Pobjoy ‘Queer Cases Make Bad Law’ (2012) 44 Int’l L. & Pol. 315 at 331.

⁸¹ *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (S395)* (2003) 216 CLR 473.

⁸² *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31.

⁸³ Hathaway and Pobjoy op cit note 80 at 331.

⁸⁴ *Ibid* at 335.

sexual orientation, Hathaway and Pobjoy challenge the United Kingdom Supreme Court's 'limitless' and extreme approach to the nexus clause in *HJ and HT*. The Supreme Court stated:

*In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with trivial stereotypical examples from British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates. Mutatis mutandis— and in many cases the adaptations would obviously be great—the same must apply to other societies. In other words, gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without fear of persecution.*⁸⁵

Hathaway and Pobjoy oppose the limitless inclusion of activities linked to risk because it tests the objective principle based on human rights standards.⁸⁶ The line between protected and unprotected activities is not clear and can change over time. As the 1951 Convention does not expressly mention sexual orientation and gender identity, guidance is derived from non-discriminatory law and international human rights law.⁸⁷ Hathaway and Pobjoy demonstrate that jurisprudence has protected activities including 'engaging in sexual conduct, seeking and maintaining a relationship, and cohabiting with a partner... to identify oneself as a member of a sexual minority, and to be safeguarded from discrimination.'⁸⁸ However, the right to marry or adopt children has not been recognized as a protected activity.⁸⁹

In response to Hathaway's and Pobjoy's article and their promotion of an objective approach in determining a 'well-founded fear' and nexus between fear and reason, Anker and Ardanan highlight the challenges in obtaining objective evidence for cases involving LGBTQI+ applicants due to the misreporting and underreporting on human right violations against LGBTQI+ persons.⁹⁰ LGBTQI+ asylum-seekers who have first-hand knowledge of the circumstances of the country of origin are then positioned to attempt to 'educate' the adjudicators.⁹¹ In response to

⁸⁵ Supra note 82.

⁸⁶ Hathaway and Pobjoy op cit note 80 at 335.

⁸⁷ Hathaway and Pobjoy op cit note 80 at 379.

⁸⁸ Hathaway and Pobjoy op cit note 80 at 380.

⁸⁹ Hathaway and Pobjoy op cit note 80 at 381.

⁹⁰ Deborah Anker and Sabi Ardanan 'Escalating Persecution of Gays and Refugee Protection: Comment on *Queer Cases Make Bas Law*' 44 Int'l L. & Pol. 529 at 531.

⁹¹ Ibid at 534.

Hathaway's and Pobjoy's issue with the inclusion of trivial activities, Anker and Ardalan explain that the trivial activities mentioned remain hypothetical and in cases involving LGBTQI+ applicants activities can be fundamental expressions of identity and should be analysed as such.⁹² Further, the severity of harm inflicted for apparently 'trivial activities' may be evidence of an underlying reason and of the persecutor's concern for the LGBTQI+ status of an individual rather than that of the action.⁹³

Academic and legal discourse reveal the dispersed interpretative methods of the refugee definition. Literature alludes to the idea that an adherence to legal principle and the protection of transgender rights are at opposite ends of a scale, where an emphasis on one would lead to the erosion of the other. This thesis argues that the commitment to protecting transgender rights is fundamental to legal principle. Adjudicators, practitioners, and RSD officers require a better understanding of transgender identity and experiences to ensure deserving transgender asylum-seekers are not wrongfully rejected refugee status.

Chapter 2: The Historical and Legal Framework for the Protection of Transgender Asylum-Seekers

I INTRODUCTION

This chapter provides the historical and legal developments of the protection of transgender individuals, transgender asylum-seekers, and the RSD process and serves as a foundation for which an analysis of more recent developments can be built upon. It also introduces the concepts of rule of law and human rights which are foundational doctrines to international refugee law.

II THE DEVELOPMENT OF THE INTERNATIONAL FRAMEWORK FOR THE RIGHTS OF 'QUEER' PEOPLE

The Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations' General Assembly in 1948, marked the rights-centred reformist movement following the Second World War.⁹⁴ The UDHR expanded the scope of individual rights and encouraged universal protection. The push for universal human rights, however, was met with counter-movements that

⁹² Ibid at 546.

⁹³ Ibid at 548.

⁹⁴ Bonny Ibhawoh 'Human rights for some: Universal human rights, sexual minorities, and the exclusionary impulse' (2014) 69 *International Journal* 612 at 612.

attempted to exclude rights of certain people. The exclusion, for instance, of colonized people in the process of developing the UDHR demonstrates the limitations of human rights' claim to universality.⁹⁵ The exclusion of groups in the domestic and international human rights framework can at times be due to the lack of technical and resource capacity; however, exclusion also occurs due to the lack of political will to extend human rights.⁹⁶

The UDHR should be interpreted in ways to address the discrimination and oppression of LGBTQI+ people; however, international human rights law has been for the most part silent on the rights of LGBTQI+ people.⁹⁷ The realization of an all-inclusive human rights framework has been progressed through the emergence of 'specialized' conventions such as refugees and irregular migrants, women, children, people with disabilities, and sexual minorities.⁹⁸

The UDHR has largely been accepted as customary international law. However, the binding nature of the protection of LGBTQI+ individuals' rights in international law remains questionable as there is a lack of state practice and *opinio juris*. Of course, the UDHR should be interpreted in ways to address the discrimination and oppression of LGBTQI+ individuals as their rights are human rights. The practice of such interpretation is not yet established as many states both in the global north and south still oppress individuals that identify with the LGBTQI+ community.⁹⁹

It is against this backdrop that transgender asylum-seekers seek refuge. Human rights are not static and evolves through interaction; and although there is a legal framework that attempts to protect members of the LGBTQI+ community, a stronger process of persuasion is needed to ensure the protection and create binding norms.

III HISTORY OF INTERNATIONAL PROTECTION OF 'QUEER' ASYLUM-SEEKERS

The history of international refugee law in the context of human rights is significant and reflects the Eurocentric, ethnocentric, and heteronormative characteristics of the development of refugee law that inevitably left 'categories' of asylum-seekers without protection. The history of international protection of refugees is inseparable from the League of Nations. Following World

⁹⁵ Ibid at 618.

⁹⁶ Ibid at 619.

⁹⁷ Ibid at 620.

⁹⁸ Ibid at 619.

⁹⁹ See: Supra note 2; See also: Supra note 4.

War I (1914-1918) and associated wars prior and after, considerable disruption resulted in associated States, notably in the Russian Empire where an estimate between one and two million people left Russian territories principally between 1918 and 1922.¹⁰⁰ Dr Fridtjof Nansen was appointed High Commissioner for Russian Refugees of the League of Nations in 1921 and his responsibilities were subsequently extended to ‘other categories of refugees.’¹⁰¹ The High Commissioner was described in resolutions of the League of Nations as ‘the legal and political protection of refugees.’¹⁰² Agreements were only relevant to specific categories of refugees and were ratified by a handful of states with frequent reservations.¹⁰³

Treaties relating to the protection and rights of refugees were superseded by the Convention relating to the Status of Refugees which was adopted on 28 July 1951 by a Conference of Plenipotentiaries held at Geneva under the United Nations’ auspices.¹⁰⁴ The 1951 Convention provides a broader definition of refugee. According to the Convention, ‘refugee’ applies to persons who:

*As a result of events occurring before 1 January 1951 and 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*¹⁰⁵

The 1967 Protocol further removed the 1 January 1951 dateline and geographic limitations and transformed the 1951 Convention into a human rights instrument with the ability to address contemporary forms of human rights abuses.¹⁰⁶

The history of the international protection of refugees has European origins and has thus influenced an ethnocentric system that categorizes countries into places of ‘refuge’ and places of ‘danger’. A focus on an asylum-seeker’s country of origin and determination on whether that country is a place of ‘refuge’ or ‘danger’ is misleading. Asylum-seekers are thus condemned to

¹⁰⁰ Gilbert Jaeger ‘On the history of the international protection of refugees’ (2001) 83 IRRC 727 at 727.

¹⁰¹ Paul Weis ‘The Development of Refugee Law’ (1982) 3 Mich. J. Int’l L. 27 at 28.

¹⁰² League of Nations OJ Spec. Supp. 183 (1938) at 137. For other instances, see League of Nations OJ Spec. Supp. 75 (1929) at 145-146. Also see League of Nations OJ Spec. Supp. 84 (1930) at 157-158.

¹⁰³ Weis op cit note 101 at 28.

¹⁰⁴ Ibid.

¹⁰⁵ Supra note 37 at art 1(a)(2).

¹⁰⁶ Rodger Haines ‘Gender-Related Persecution’ in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 326.

associate themselves, at times unnaturally, to fit into a refugee category. There have been significant jurisprudence developments in cases involving gender-based asylum claims such as the inclusion of ‘women’ as a particular social group; however, developments remain premature, and application remains unclear.

Historically, the international definitions of refugee have been interpreted and understood through male experiences.¹⁰⁷ Asylum-seekers seeking refuge for gender-based claims have gone unrecognised; however, in parallel with developments of human rights law and standards, jurisprudence and academic writings reflect the growing understanding of gender and sex in the refugee context.¹⁰⁸

Although the 1951 Convention does not make specific reference to gender claims, the refugee definition does cover gender-related claims if properly interpreted. UNHCR has provided guidelines interpreting the 1951 Convention and 1967 Protocol in relation to gender claims and calls for gender-sensitive interpretation for elements of the refugee definition, such as ‘well-founded fear of persecution’, the ‘causal link’, and convention grounds.¹⁰⁹

IV IMPORTANCE OF RULE OF LAW AND HUMAN RIGHTS

In 2005, member states at the United Nations World Summit committed to ‘actively protecting and promoting all human rights, the rule of law and democracy’ acknowledging the ‘interlinked and mutually reinforcing’ nature of these concepts.¹¹⁰ Coen articulates that compliance with human rights norms and the rule of law are sustaining pillars of international order.¹¹¹ The violation of international standards and the inability of practitioners and adjudicators to comply with international human rights and the rule of law in the asylum system breaks down global justice,

¹⁰⁷ UN High Commissioner for Refugees (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* (2002) HCR/GIP/02/01 available at <https://www.unhcr.org/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html> accessed on 25 May 2021 at 2.

¹⁰⁸ *Ibid* at 3.

¹⁰⁹ *Ibid* at 3-8.

¹¹⁰ United Nations General Assembly *2005 World Summit Outcome* (2005) A/RES/60/1 available at <https://www.un.org/ruleoflaw/files/2005%20World%20Summit%20Outcome.pdf> accessed on 7 September 2021 at para 119.

¹¹¹ Alise Coen ‘International order, the rule of law, and US departures from refugee protection’ (2018) 22 *Int. J. Hum. Rights* 1269 at 1269.

a founding principle of the 1951 Convention which encourages international cooperation and burden sharing.¹¹²

a) The Rule of Law

The rule of law is a set of principles for ensuring order and fairness within society. Adherence to the rule of law provides a sense of stability and predictability at the domestic and international level.¹¹³ Understandings of what the rule of law is vary; however, Coen conceptualises the rule of law, as it relates to refugee protection, as entailing four main principles:

[G]overnments and other actors are accountable under the law; laws are just and applied evenly and protect fundamental rights; the processes by which laws are enacted and enforced are accessible and fair; and the delivery of justice is competent and ethical.¹¹⁴

This research exposes how asylum systems undermine the rule of law through convoluted interpretative methods of legal doctrines of RSD which consequently results in a failure to adequately protect fundamental human rights.

The relation between the rule of law and international refugee law is significant as a disregard for the rule of law would lead to unprincipled jurisprudence and would threaten the legal doctrine of non-refoulement. The principle of non-refoulement is widely acknowledged as binding international customary law which guarantees no one should be returned to a country where they would face persecution. A lack of compliance with the rule of law, which results in the rejection of gender identity asylum claims, can lead to breaches of the non-refoulement principle and will render international refugee law meaningless and leaves victims of human rights violations without international protection.

b) Human Rights

Along with the rule of law, human rights norms are fundamental to the refugee regime and international law in general. Coen argues that ‘compliance with human rights norms has become paramount to shared understandings of global governance, justice, and accountability’ and that ‘states are increasingly willing to prioritise commitments to international human rights law over short-term material interests, even at significant economic costs.’¹¹⁵ The 1951 Convention is

¹¹² Supra note 37 at 151.

¹¹³ Coen op cit note 111 at 1270.

¹¹⁴ Ibid.

¹¹⁵ Ibid at 1271.

grounded in its adherence to human rights,¹¹⁶ and RSD must support progressive developments of all human rights.

Chapter 3: Recent Legal Developments

I INTRODUCTION

Since the introduction of the 1951 Convention, over 145 states have become party to the treaty, and it has had a major impact on legal discourse related to the protection of refugees making it the centrepiece of international refugee protection. The RSD process heavily relies on the 1951 Convention; however, the interpretations of the elements of the refugee definition such as ‘PSG,’ ‘well-founded fear,’ and the nexus clause are not provided within the text, and decision makers are expected to use their own discretion. Jurisdictional discretion is however limited as treaty interpretation is conditioned by customary international law, which has been codified in the Vienna Convention of the Law of Treaties (VCLT).

The VCLT mandates that elements of the treaties should be interpreted in accordance with the ordinary meaning in their context and in light of the treaties’ object and purpose.¹¹⁷ The object and purpose of the 1951 Convention, as laid out in the preamble, is to offer a means for providing protection to people at risk of persecution in their countries through international cooperation.¹¹⁸ Jurisdictional discourse and the development of international refugee law demonstrates, in contradiction to the VCLT, the advancement of restrictive and convoluted interpretations of the Convention which hinders the protection of transgender asylum-seekers.

This chapter focuses on the legal development and discourse on the interpretations of the Convention’s refugee criteria, specifically on the meaning of MPSG, well-founded fear, and the causal link in relation to transgender asylum claims.

II MEMBERSHIP OF A PARTICULAR SOCIAL GROUP

A Convention asylum-seeker may apply for refugeehood on the basis that they have a well-founded fear of persecution owing to their race, nationality, religion, membership of a particular social group, or political opinion. The Convention does not expressly have ground for persecution

¹¹⁶ Supra note 37 at 151.

¹¹⁷ Supra note 65.

¹¹⁸ Supra note 37 at 151.

based on sexual orientation or gender. Since the adoption of the Convention, distinct forms of persecution and discrimination suffered by sexual and gender minorities has been recognized. For instance, Article 23(a) of the United Nations Yogyakarta Principles (2007) identifies an obligation on states accept sexual orientation or gender identity as protected grounds to ‘[r]eview, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum.’¹¹⁹

Although the Yogyakarta Principles are not legally binding, jurisdictions such as Australia and the United States have embraced similar recommendations.¹²⁰ The Board of Immigration Appeals in the United States established that sexual orientation could constitute as a social group and therefore a protectable ground in the *Matter of Toboso-Alfonso*.¹²¹ In Australia, the *Morato* case determined that a person belonging to a particular social group was one that ‘belongs to or is identified with a recognizable or cognizable group within a society that shares some interest or experience in common.’¹²² Raj identifies that the judiciaries in the United States and Australia reduced sexual identity to a universal identity that is associated to specific particular shared experiences.¹²³ The essentialist delineation of sex and gender based on binary ideology however hinders the complete protection of gender-diverse refugee applicants.

Extending from the *ejusdem generis* doctrine as set out in the *Matter of Acosta* and the three protected groups as expressed in *Ward*, the United States and Australia developed further the law and interpretative methods used for the meaning of particular social group in gender-related asylum claims. In the jurisprudence of the United States, ‘immutability’ is central in determining a PSG where the applicant’s ‘internal’ characteristics are focused on opposed to their ‘external’ characteristics. Contrastingly, in Australia’s jurisprudence, an external social perception test is used to determine a PSG. Therefore, there is generally a focus on the applicant’s external characteristics. In recent years, there has however been a gradual conflation between the two approaches used in the United States and Australia encouraging a convolution between the two jurisdictional methods.

¹¹⁹ Supra note 14 at art 23(a).

¹²⁰ Senthoran Raj ‘Evolving Bodies: Mapping (Trans)Gender Identities in Refugee Law’ in Gavin Brown and Kath Browne (eds) *The Routledge Research Companion to Geographies of Sex and Sexualities* Routledge (2016) 222.

¹²¹ *Matter of Toboso-Alfonso*, United States Board of Immigration Appeals, 12 March 1990.

¹²² *Morato, G.C.S. v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 70; 34 FCR 321; 106 ALR 367; 26 ALD 435.

¹²³ Raj op cit note 120 at 222.

a) *The USA: Immutability Test*

In the USA, the Ninth Circuit Court of Appeals in *Hernandez-Montiel*¹²⁴ demonstrates the American courts' evolved perception of the 'immutability.' The cases concerned an asylum-seeker from Mexico who identified as a homosexual man with feminine identity.¹²⁵ Initially, the Bureau of Immigration Appeals (BIS) defined the applicant's PSG as 'homosexual males who dress as females.' However, Justice William Schwarzer noted that the PSG identified was erroneous as it conflated style of dress with sexual identity.¹²⁶ The court instead preferred the more narrowly defined PSG of 'gay men with female sexual identities living in Mexico.'¹²⁷

Immutability is central to the specifics of PSGs especially within the jurisdiction of the United States. In recent years, however, the jurisdiction in the United States has accepted a more lenient interpretation for the immutability test. Preceding the *Hernandez-Montiel*, the case of *Sanchez-Trujillo*¹²⁸ demonstrated the courts acceptance of an elastic PSG standard that included voluntary characteristics as long as the associational relationship impart common characteristics. In the case of *Hernandez-Montiel*, the courts again demonstrated their acceptance of an elastic PSG characteristic which involved a shifting gender presentation that suggested volition rather than an innate identity. Although Justice Schwarzer rejected the BIA's initial PSG definition as it trivialized the concept of immutability,¹²⁹ he emphasized that a person's sexual identity goes beyond sexual conduct and is presented outwardly through dress and appearance.¹³⁰ The case of *Hernandez-Montiel* encouragingly framed sexual identity in more elastic terms which included aspects of dress.

Despite the case wrongfully communicating the idea that sexual orientation and gender presentation are interchangeable, it encouragingly reflects a development in refugee law that accepts a more nuanced and elastic understanding of 'immutability'. It should be noted that sexual orientation and gender presentation are commonly conflated, as in the case of *Hernandez-Montiel*,

¹²⁴ Supra note 9.

¹²⁵ Ibid at 10488.

¹²⁶ Ibid at 10482.

¹²⁷ Ibid at 10468.

¹²⁸ *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

¹²⁹ Supra note 9 at 10485.

¹³⁰ Ibid at 10480.

and Raj notes that it reveals that the PSG in relation to sexual minorities is ‘porous’ enough to absorb minority gender identity.¹³¹

b) Australia: Social Perception Test

In contrast to the PSG jurisdictional developments of refugee law in the USA which has been based predominately on the test of immutability, PSG characterization in the jurisdiction of Australia has been largely based on the social perception test.¹³² The social perception test, or sociological approach, follows the ‘ordinary meaning’ of PSG and focusses on the external perception of the group rather than the internal characteristics of the individuals.

The High Court of Australia in *Applicant A v. MIMA*¹³³ diverted from the *ejusdem generis* doctrine which focusses on the internal characteristics of the asylum-seeker. The High Court adopted the ‘social perception’ or ‘sociological’ approach which focusses on the social or external perception of the group. *Applicant A v. MIMA* which is the leading case for the social perception approach provided the following analysis:

*The adjoining of ‘social’ to ‘group’ suggests that the collection of persons must be of a social character, that is to say, the collection must be cognizable as a group in society such that its members share something which unites them and sets them apart from society as large... A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large.*¹³⁴

The social perception approach follows the ordinary meaning of ‘membership of a particular social group’ and does not require an authoritative and external set of standards. Judicial discretion is not as limited when using this approach and decision makers are likely to accept a wider range of groups.¹³⁵

The decisions of the appeal level Refugee Review Tribunal (RRT) of Australia, reveal the evolving legal interpretations of ‘particular social group’. The RSD process is however vulnerable to political climate and influence. Luker suggests that the RRT ‘fast-track’ procedures and serves to limit access to the courts for unsuccessful asylum-seekers as the RRT restricts the grounds for

¹³¹ Raj op cit note 120 at 224.

¹³² Ibid at 225.

¹³³ Applicant A & anor v. Minister for Immigration & Ethnic Affairs & anor (1997) 190 CLR 225.

¹³⁴ Ibid at 13.

¹³⁵ Hathaway and Foster op cit note 58 at 484.

judicial review.¹³⁶ Crock and Berg also reveal that in Australia, the Minister's 'thinly veiled warning to members that they should not expect reappointment if they favoured "reinventing" the definition of refugee' cut acceptance rates by a third at first instance and roughly halved on appeal.¹³⁷ The warning attempted to hinder recognition of protection claims of women victims of domestic violence.¹³⁸ It is against this backdrop that the evolution of RSD interpretation methods for gender-related asylum claims in Australia are examined.

Cases involving gender variant asylum-seekers are commonly collapsed into sexual orientation claims during the RSD procedure. The RRT's decisions are no exception; however, the RRT's decision in the case of *0805932*¹³⁹ provides a more nuanced understanding and distinction between sexual orientation and gender identity. The case of *0805932* concerned an applicant from South Korea who identified 'predominately as male ... [with] a lot of female characteristics.'¹⁴⁰ Following the applicant's concerns of South Korea conflation of the characteristics, the RRT distinguished sexual orientation and gender identity and defined the PSG as 'male homosexual with transgender characteristics.'¹⁴¹ Despite the development and embracement of a more nuanced understanding of gender identity, administrative decisions commonly defined the PSG concerning gender variations alongside 'homosexuality'. In 2009, in the decision of *0902671*,¹⁴² the RRT specifically accepted 'transsexual' as a valid PSG. The *0902671* case concerned a Pakistani male-to-female transsexual asylum-seeker, and the RRT made specific cultural reference to the 'hijra' which referred to the 'third sex' in southern Asian cultures and as transsexuals in the West.¹⁴³ The RRT relied on the Oxford English Dictionary which defined 'transsexual' as a 'person born with the physical characteristics of one sex who emotionally and psychologically feels that they belong to the opposite sex.'¹⁴⁴ The Oxford English Dictionary provides for a limited definition of transsexual that focusses on the disassociation between the physical sex characteristics and gender identifications. A focus on the definition that focuses on a narrow internal characteristics of

¹³⁶ Trish Luker 'Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal' (2013) 25 Int. J. Refug. Law. 502 at 506.

¹³⁷ Mary Crock and Laurie Berg *Immigration, Refugees and Forced Migration* (2011) 361.

¹³⁸ *Ibid.*

¹³⁹ *RRT Case No. 0805932* [2008] RRTA 442.

¹⁴⁰ *Ibid* at 27.

¹⁴¹ *Ibid* at 110.

¹⁴² *Supra* note 10.

¹⁴³ *Ibid* at 25.

¹⁴⁴ *Ibid* at 90.

transsexual individual challenges Australia's external social perception test. In *0902671*, the RRT refers to the preceding case of *Applicant S*¹⁴⁵ where Gleeson CJ, Gummow, and Kirby JJ provided the following explanation on the definition of a particular social group:

*First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large.*¹⁴⁶

Although the RRT in *0902671* encouragingly accepted 'transsexual' as a PSG, the RRT has expressed apprehension to the acceptance of 'transgender' as a PSG as it was considered to be too broad. In the case *0903346*,¹⁴⁷ the RRT accepted the PSG 'Malaysian transgender woman without familial or financial support or protection.'¹⁴⁸ The RRT in *0903346* accepted a narrow PSG and commendably referred to the cultural context of Malaysia where many transgender male-to-female individuals frequently engaged in sex work and drug use and were without financial or familial support. Reference to the persecution itself, however, within the PSG contradicts previous case judgments such as *Applicant S* that determine a PSG should not be identified by the common shared fear of persecution.¹⁴⁹

There is a general understanding within international refugee law that the USA and Australia practice different approaches to the determination of a PSG. The USA has historically prioritized the immutability test, whereas Australia has prioritized the social perception test. Recent legal trends in the USA and Australia reveal, however, that the neat distinction between the 'internal' and 'external' approach to the characterization of a PSG is challenged.

c) Gender Asylum-Claims

The assessment of MPSG within the refugee definition is especially convoluted when dealing with gender asylum-claims. As the above cases reflect, the conflation of sex and gender and the avoidance of using 'transgender persons' as a PSG makes navigating refugee law extremely difficult and calculated for transgender asylum-seekers. The acceptance of gender claims in

¹⁴⁵ *Applicant S v. Minister for Immigration and Multicultural Affairs* [2004] 217 CLR 387.

¹⁴⁶ *Ibid* 387 at 36.

¹⁴⁷ *RRT Case No. 0903346* [2010] RRTA 41.

¹⁴⁸ *Ibid* at 68.

¹⁴⁹ *Supra* note 145 at 36.

general, including the PSG of women, has proven to be a challenge in practice, despite *Acosta* and *Ward* establishing that gender was a protected group.

In the United States, there has been a long battle between adjudicators and practitioners dealing with domestic violence-related asylum claims to have ‘women’ be accepted as a PSG. The first administrative precedent gender asylum decision was established by the Bureau of Indian Affairs (BIA) of the USA in 1993 in *Matter of D-V-*.¹⁵⁰ In *Matter of D-V-*, the board granted asylum to a Haitian woman who had suffered violence in her home by soldiers for her support for former President Aristide.¹⁵¹ In 1996, the BIA established the second precedential gender asylum decision in *Matter of Kasinga* which recognized female genital mutilation as a basis for asylum.¹⁵² Anker notes that around the same time, other jurisdictions, such as New Zealand, the United Kingdom, and Australia, were also issuing gender asylum decisions and developed a two-pronged approach to assessing persecution that required both serious harm and failure of state protection.¹⁵³ In 1999, the United Kingdom House of Lords recognized ‘women in Pakistan’ as a PSG and that it was a ‘simply logical application of the seminal reasoning in *Acosta*.’¹⁵⁴ In 2006, the House of Lords concluded that gender alone could define a PSG when considering cases of women fleeing female genital mutilation.¹⁵⁵ In New Zealand, the tribunals noted that ‘it is indisputable that sex and gender can be the defining characteristic of a social group and that “women” may be a particular social group.’¹⁵⁶ In 2002, the UNHCR published guidelines on *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* where they professed that ‘sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics.’¹⁵⁷

¹⁵⁰ *Matter of D-V-*, 21 I&N Dec. 77 (BIA 1995).

¹⁵¹ *Ibid* at 78.

¹⁵² *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

¹⁵³ Deborah Anker ‘The History and Future of Gender Asylum Law and Recognition of Domestic Violence as a Basis for Protection in the United States’ (27 April 2020) 45 Human Rights Magazine available at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/the-history-and-future-of-gender-asylum-law/ accessed on 25 May 2021.

¹⁵⁴ *Islam & Shah v. Sec’y of State Home Dep’t*, [1999] 2 AC 629 at 644-45.

¹⁵⁵ *Fornah (FC) v. Sec’y of State for Home Dep’t* [2006] UKHL 46 at para 31.

¹⁵⁶ Refugee Appeal No. 76044 (NZ RSAA, 2008) para 92; see also *Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 A.L.J.R. 667.

¹⁵⁷ UN High Commissioner for Refugees (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* (2002) HCR/GIP/02/01 available at <https://www.unhcr.org/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html> accessed on 25 May 2021.

In the United States, however, the controversial 1999 decision in *Matter of Rodi Alvarado* complicated the assessment of gender asylum claims when the board denied asylum to a Guatemalan woman fleeing a violent and abusive relationship.¹⁵⁸ In the succeeding *Matter of S-A*, the board granted asylum based on religion to a Moroccan woman who fled the severe abuse by her father.¹⁵⁹ In *Matter of S-A*, the adjudicators recognized the gender aspects of the claim and relied on the Gender Asylum Guidelines.¹⁶⁰ Advocacy groups joined to have the decision in *Matter of Rodi Alvarado* reversed and in 2009, the case was returned to the immigration judge and asylum was granted to Rodi Alvarado despite a lack of reasoning or explanation.¹⁶¹

In 2014, the board finally issued a precedent decision in *Matter of A-R-C-G-*, which recognized that serious physical harms committed in the context of a domestic relationship was able to constitute persecution and the PSG ground.¹⁶² The PSG was formulated as ‘married women in Guatemala who are unable to leave their relationship.’¹⁶³ Although the decision did not provide for the core principle that gender could define a PSG; however, it was accepted that violence based on gender in private settings could be protected.¹⁶⁴ In 2018, Attorney General Jeff Sessions revoked the decision of *Matter of A-R-C-G-* in the *Matter of A-B-* which concerned a Salvadoran women who had fled fifteen years of brutal domestic violence and pronounced that asylum claims related to domestic violence should generally not be approved. The decision in the *Matter of A-B* caused confusion and was a setback for women asylum-seekers and the protection of gender-based violence victims. In June 2021, the decision of *Matter of A-B-* has since been overturned and there has been a return to the precedent set out in *Matter of A-R-C-G-*.¹⁶⁵

Although the above jurisprudence reflects the United States’ jurisdictional acceptance of gender to define a PSG, it clearly reflects the challenges gender asylum-seekers have in claiming refuge. Gender-related persecution is at times confined to familial circumstances and serious harms remain in private spheres.¹⁶⁶ Persecution is formulated as a serious harm and failure of State protection; therefore, it is accepted that persecution also exists in privacy when the state fails to

¹⁵⁸ *Matter of Rodi Adali Alvarado-Peña*, United States Board of Immigration Appeals, 20 September 1996.

¹⁵⁹ *Matter of S-A*, 22 I&N Dec. 1328 (BIA 2000).

¹⁶⁰ Anker op cit note 153.

¹⁶¹ *Ibid*.

¹⁶² *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).

¹⁶³ *Ibid* at 389.

¹⁶⁴ Anker op cit note 153.

¹⁶⁵ *Supra* note 76.

¹⁶⁶ Haines op cit note 106 at 330.

protect the individual. In practice, however, as highlighted in the decisions of the United States BIA, serious harms inflicted in privacy can be an unprincipled excuse to refuse asylum-claims.

III WELL-FOUNDED FEAR OF PERSECUTION

The discourse and jurisprudence related to the subjective and objective tests to determine well-founded fear has been disunited. In some instances, practitioners and adjudicators would adopt a higher threshold for the determination of well-founded fear which relies heavily on objectivity. Whereas, in other cases, a more subjective assessment of well-founded fear would suffice. A comparative analysis of the Australian RRT and the United States decisions reflect the different approaches embraced.

The RRT of Australia adopts a higher threshold for the determination of well-founded fear which is distinguished from oppressive conduct. For instance, in the case *N03/46498*, which concerned a transgender Thai applicant who had suffered oppressive conduct in the form of a limited degree of (sexual) harassment/discrimination, teasing, and family rejection, the RRT dismissed the applicants claim for asylum inferring the applicant exaggerated their claims.¹⁶⁷ However, the RRT relied on vague country reports that indicated Thailand was tolerant towards transgender people.¹⁶⁸ In contrast, the United States adopts a more lenient method of assessing well-founded fear based on both the subjective and objective test. In the case of *Hernandez-Montiel*, it was determined that a history of persecution was enough to determine the inadequacy of state protection.¹⁶⁹ The United Kingdom as well has scrutinized the well-founded fear criteria objectively, and from 1999 to 2021, the most usual reasoning to deny asylum to SOGI claimants was the assumption of the lack of well-founded fear of being persecuted as it was assumed that claimants could be discreet in their countries of origin.¹⁷⁰ Similarly, in South Africa the most common reason for rejection has been the lack of a well-founded fear of persecution, following the same reasoning used by British decision makers.¹⁷¹ Despite South Africa's progressiveness regarding the recognition of SOGI rights and therefore its ability to reflect a PSG, it was reflected

¹⁶⁷ *N03/46498* [2003] RRTA 879.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Supra* note 9.

¹⁷⁰ Vitor Lopes Andrade 'The British and South African approaches to asylum based on sexual orientation and gender identity' (2020) 28 *Rev. Interdiscip. Mobil. Hum.* 79 at 83.

¹⁷¹ *Ibid* at 85.

in both the United Kingdom and South Africa that strategies were used to deny SOGI asylum-seekers protection under the asylum system.¹⁷²

UNHCR's Handbook provides a two-pronged approach which contains both subjective and objective elements.¹⁷³ From a logistical point of view, the establishment of a well-founded fear of persecution on an individualized and subjective basis restricts UNHCR's ability to assist large groups of refugees.¹⁷⁴ Although there have been arguments for and against both the subjective and objective elements of the well-founded fear assessment, a balance has not yet been struck, and there is not yet a principled explanation for when one should be used over the other.

IV NEXUS CLAUSE

Raj notes that because of the requirement of a causal link between the well-founded fear and the Convention ground, the characterization of the PSG can limit or broaden the scope of harm.¹⁷⁵ For instance, in *Hernandez-Montiel*, the narrowly defined PSG of 'gay men with female sexual identities living in Mexico'¹⁷⁶ broadened the confines of acceptable harms that amounted to persecution.¹⁷⁷ Should the PSG be defined broadly and only as 'homosexuals,' the applicant's claim that he was persecuted for presenting a gender in a particular way through dress would not constitute serious harm. However, as the PSG was framed also around the applicant's 'female sexual identities' the harm was targeted discriminatorily against the individual for how he dressed.¹⁷⁸

On the other hand, Raj notes that a flexible PSG allows for the nexus of persecution to be understood in context.¹⁷⁹ For instance, the 'imputed gay identity' approach can work in the favour of transgender asylum-seekers in some instances as it would not be necessary to distinguish what it is exactly that makes them, as transgender individuals, different from those that are not persecuted against. For instance, in the case of *Hernandez-Montiel*, the court could have determined that the applicant's choice of gender presentation was either volitional or fundamental

¹⁷² Ibid at 90.

¹⁷³ Supra note 49 at para 38.

¹⁷⁴ José H. Fischel de Andrade 'On the Development of the Concept of 'Persecution' in International Refugee Law' (2008) 2 Brazilian Yearbook of International Law 114 at 121.

¹⁷⁵ Raj op cit note 120 at 227.

¹⁷⁶ Supra note 9 at 10468.

¹⁷⁷ Raj op cit note 120 at 227.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

to their personhood/identity significantly altering the outcome of the case. In cases where the qualities of a person's identity are not commonly understood, as in cases involving gender variations, a focus away from the individual and towards the actual persecution and persecutor may provide relief. A focus on 'imputed' rather than 'innate' or 'immutable' provides for the analysis of the persecutors perception which could benefit asylum claims involving the undefinable characteristics of transgender asylum-seekers. An approach as such may pay homage to the mandate of the Convention, which is to provide protection to people at risk of persecution in their countries; however, it would challenge the legal certainty and consistency which could in effect erode the rule of law.

Refugee claims, especially related to gender identity, are riddled with legal uncertainty and the outcomes remain unpredictable. However, as the cases above reveal, the evolution of RSD interpretative strategies related to MPSG, well-founded fear of persecution, and the nexus between the two provides for new ways of understanding transgender identities beyond immutability and social perception.

Chapter 4: RSD of Transgender Refugee Applicants Analysed Using Queer Legal Theory

I INTRODUCTION

Interpretive methods of elements of RSD are diverse between jurisdictions as well as within. Arguments for and against certain methods reveal a lack of in-depth and country-specific understanding of what it means to be a transgender refugee. A queer legal critique of the interpretive techniques of the RSD process reveals the lack of awareness of certain power structures within the asylum system as well as a lack of understanding and conflation of the concepts of sex, gender, and sexual orientation in legal discourse and jurisprudence. Queer legal theory is used to reflect on the influential power dynamics and conflationary stereotypes within the asylum system that challenge certain interpretive methods for RSD.

II POWER DYNAMICS

Queer legal theory offers insights into how international law reinforces unequal power relations.¹⁸⁰ Manganini identifies three narratives of power that underlie and inform the RSD process: gender binary as power, the Western supremacy as power, and the concept of border as power.¹⁸¹ The recognition of power hierarchies within the asylum system reveals the invisibilities, inequalities, and exclusions of transgender individuals.

a) Gender Binary as Power

Manganini firstly identifies the gender binary as power within the RSD process.¹⁸² The gender binary refers to the belief that only two opposite genders exist with distinct characteristics: the masculine and the feminine or the man and the woman. The belief is built on the assumption that there are only two biological sexes, which is a fallacy as proven by the existence of intersex persons. Domestic and international law rarely recognize gender-variant persons.¹⁸³ The belief that the gender binary is natural and biological has influenced discrimination and harassment against gender-variant individuals for being ‘unnatural.’¹⁸⁴

Manganini illustrates how the gender binary as power harms transgender asylum-seekers through her analysis of the laws in Iran. In Iran, homosexual relationships or gender transgression is punishable by death; however, since 1987, sex-reassignment surgeries are permitted as a cure for ‘diagnosed transsexuals.’¹⁸⁵ Transgender individuals, therefore, have the restricted ‘choice’ to either transition from ‘male to female’ or from ‘female to male.’ The authorization of sex-reassignment surgeries in Iran was enough for Sweden to reject applications from Iranian transgender asylum-seekers.¹⁸⁶ The laws fail to recognize and protect individuals that do not identify with or want to conform with the binary forms of gender or sex. Manganini argues that the binary conception of gender forces transgender asylum-seekers to exaggerate their behaviours and perpetuates harmful gender oppression.¹⁸⁷ Gender is a social construct, and the perception of

¹⁸⁰ Dianne Otto ‘Introduction: Embracing Queer Curiosity’ in Dianne Otto (ed) *Queering International Law* (2017) 2.

¹⁸¹ Manganini op cit note 1 at 51.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid at 52.

¹⁸⁵ Ibid at 53.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid at 54.

it can be harmfully influenced by the binary and heteronormative minded society. Queer legal theory provides a means to ‘undo gender,’ to reveal the hierarchies created within society.

b) Western Supremacy as Power

The second power relation Manganini highlights is the power embedded in Western cultural stereotypes. The research of this thesis, is based heavily on anglophone Western jurisdictions due to academic and case law limitations. Although anglophone jurisdictions provide for an ease of comparative research, the development of legal discourse related to queer asylum-seekers can unfortunately influence Western cultural stereotypes. Queer asylum-seekers are at risk of being assessed following Western concepts of what ‘queer’ should be or look like, as reflected in the assessments of their belonging to a ‘particular social group’.

Manganini identifies two issues with queer asylum cases: ‘the problem of ethnocentric gender and sexuality assumptions’ and ‘the asylum-seekers’ country of origin’s culture as source of persecution’ which internalizes Western cultural supremacy.¹⁸⁸ Asylum-seekers are assessed following Western and binary perceptions of what it means to be queer, and, in addition, their countries of origin are assessed on stereotypical perceptions of how ‘intolerant and underdeveloped’ they are.¹⁸⁹ Khan, Sackeyfio, and Paraketsova, in their analysis of asylum claims related to gender-based violence and specifically intimate partner violence (IPV), argue that too much emphasis on the conditions of the country of origin, rather than on the individual, goes against the requirements of the 1951 Convention and reinforces the idea of polarizing countries as ‘safe countries’ and not.¹⁹⁰ This leaves gender-related asylum-seekers fleeing ‘safe countries’ without protection.

Assessing the claims of transgender asylum-seekers following stereotypical Western ideas of transgender identity harms the transgender community as the nature of the danger they face is misunderstood.¹⁹¹ Lord Bingham addresses the inability of judges to fully appreciate cultural differences, as follows:

No judge worth his salt could possibl[y] assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he

¹⁸⁸ Ibid.

¹⁸⁹ Ibid at 55.

¹⁹⁰ Fatima Khan, Cecile Sackeyfio and Liliya Paraketsova ‘Refugee Women as Victims of Intimate Partner Violence: Forever Vulnerable?’(2020) Acta Juridica 227 at 228.

¹⁹¹ Manganini op cit note 1 at 55.

would have done or even – which may be quite different – in accordance with his concept of what a reasonable man would have done.¹⁹²

In relation to SOGI issues, the ICJ have noted the following:

*stereotyped notions of a gay man in San Francisco are likely to be culturally and socially so far removed from the behaviour and perception of a gay man in Kinshasa as to be of no probative value whatsoever.*¹⁹³

Manganini articulates that although adequate training is important, a deeper shift is needed from ethnocentrism to ethno-relativism. She argues that ‘the adjudicators would need to perform judgments of equal worth in relation to the cultural as well as the gender differences of the individuals they have in front of them.’¹⁹⁴ It is through queer legal theory that this power structure can be critiqued and broken.

c) Concept of Border as Power

Manganini lastly identifies the concept of border as power which is perhaps the hardest to overcome.¹⁹⁵ She refers not to the physical barrier between countries but to the idea of separation. It is the place where, as Anzaldúa says ‘the Third World grates against the First and bleeds.’¹⁹⁶ This power relation does not directly relate to RSD; however, the concept of border as power does put transgender asylum-seekers in a position of powerlessness when they confront material and immaterial borders.¹⁹⁷ Otto argues that ‘the nation state is itself made possible by putatively natural heterosexual kinship arrangements.’¹⁹⁸ This is demonstrated through the nation-states’ involvement in the regulations of family, reproductive, and sexuality matters.¹⁹⁹ Stoler reflects on how during colonial times by Western countries the state’s involvement over private matters granted them power as decision makers and marked their superiority.²⁰⁰ Same-sex marriage and

¹⁹² Thomas Bingham ‘The Judge as Juror: The Judicial Determination of Factual Issues’ (1985) 38 CLP 1; cited, inter alia, in UK Administrative Court, *MVN v London Borough of Greenwich, Application No.* [2015] EWHC 1942 at para 30.

¹⁹³ International Commission of Jurists (ICJ) *Refugee Status Claims Based on Sexual Orientation and Gender Identity – A Practitioners’ Guide No.11* (2016) available at <https://www.icj.org/wp-content/uploads/2016/10/Universal-PG-11-Asylum-Claims-SOGI-Publications-Practitioners-Guide-Series-2016-ENG.pdf> accessed on 25 May 2021 at 36.

¹⁹⁴ Manganini op cit note 1 at 57.

¹⁹⁵ Ibid at 59.

¹⁹⁶ Gloria Anzaldúa *Borderlands: La Frontera: The New Mestiza* 4th ed (2012).

¹⁹⁷ Manganini op cit note 1 at 58.

¹⁹⁸ Dianne Otto ‘Resisting the Heteronormative Imaginary of the Nation-State’ in Dianne Otto (ed), *Queering International Law* (2017).

¹⁹⁹ Manganini op cit note 1 at 58.

²⁰⁰ Ann Laura Stoler *Race and the Education of Desire: Foucault’s History of Sexuality and the Colonial Order of Things* (1995).

adoption may be seen as ‘victories;’ however, should the arrangements resemble the heterosexual, monogamous, and reproductive normality, the ‘victories’ would reflect heteronormative ideals.²⁰¹ Manganini argues that transgender asylum-seekers, as non-nationals and not fitting the heteronormative standard, challenge the states’ control of who belongs.²⁰²

Building on the realization that power structures exist and influence the RSD process, queer legal theory can further provide practical solutions. Valdes proposes a framework for the analysis of queer stereotypes that are reinforced in the law and provides eight methods to reach sex/gender equality.

III CONFLATIONARY STEREOTYPES AND QUEER LEGAL THEORY METHODS

Valdes argues for the eradication of the ‘conflation’ and identifies it as the following:

*[Conflation], moreover, is both a formal, intellectual belief system that was codified through various clinical theories and a pervasive normative standard that shapes and governs human life more generally. This conflation, in other words, reflects, and simultaneously projects, the dominant Euro-American social and sexual order. This conflation was and is encoded in the heritage and life of the United States--our children invoke terms signifying sex, gender, and sexual orientation interchangeably precisely because our society and its antecedents continually conceived and categorized the three as mutually dependent constructs.*²⁰³

The conflation phenomenon is the historic and contemporary confusion of sex, gender, and sexual orientation as tightly related social and legal constructs. The conflation of the terms sex, gender, and sexual orientation is based on and further perpetuates androsexist and heterosexist biases and in general hetero patriarchy.²⁰⁴

According to Valdes:

*“[G]ender” signifies the social or cultural dimensions derived from and determined by sex, which include attire, grooming, and other aspects of physical appearance as well as behavioral mannerisms or personal dispositions relating to hobbies, careers, intimacies, and other social aspects of human personality and interaction.... “[S]exual orientation” refers to the predisposition, inclination, or proclivity of humans toward affectional intimacy with members of one particular sex or both sexes.... “[S]ex” denotes a physical attribute of humans: external genital anatomy.*²⁰⁵

²⁰¹ Manganini op cit note 1 at 58.

²⁰² Ibid.

²⁰³ Valdes op cit note 9 at 7.

²⁰⁴ Ibid at 8.

²⁰⁵ Ibid at 6.

Valdes accepted definition of sex and gender is one adopted by traditional feminist theorist where sex is biological and gender is social. Butler however questions the distinction of sex and gender and rejects the idea that 'sex' is 'a bodily given on which the construct of gender is artificially imposed, but... a cultural norm which governs the materialization of bodies.'²⁰⁶ According to Butler, sex is 'an ideal construct which is forcibly materialized through time. It is not a simple fact or static condition of a body, but a process whereby regulatory norms materialize "sex" and achieve this materialization through a forcible reiteration of those norms.'²⁰⁷ Influenced by postmodern tendencies to see our conception of reality influenced by language, Butler notes that 'there is no reference to a pure body which is not at the same time a further formation of that body.'²⁰⁸ The purpose of detailing the distinction between Valdes' definition of sex and academics, like Butler, is to provide a deeper and nuanced understanding of the binary and heteronormative norms entrenched in society.

Valdes' research focusses mostly on the American jurisdiction and covers a vast analysis of the misunderstandings of sex, gender, and sexual orientation. However, this section focusses on Valdes' analysis of the conflation of sex, gender, and sexual orientation in legal doctrine. Valdes provides an analysis of rules and doctrines that encompass fields of anti-discrimination law. Similarly, the 1951 Convention, a doctrine with the aim of protecting the rights of those discriminated against, and RSD can similarly be juxtaposed against Valdes' analysis of the law. Valdes notes that legal doctrines and courts do not define 'sex' or 'gender' as legal concepts.²⁰⁹ This allows for judges to use their discretion to determine what these terms mean usually in their limited understanding. Judge Richard A. Posner of the American Federal Court of Appeals acknowledged in 1992 his 'belated discovery that judges know next to nothing about [sexuality] beyond their own personal experience, which is limited, more so than average, because people with irregular sex lives are much...screened out of the judiciary.'²¹⁰

Valdes determines that the freedom judges have in recharacterizing sex and gender discrimination as sexual orientation discrimination 'employs sexual orientation to create a loophole for sex and gender biases, which makes it extremely difficult (if not impossible) fully to

²⁰⁶ Judith Butler *Bodies that Matter: On the Discursive Limits of 'Sex'* (1993) 2-3.

²⁰⁷ *Ibid* at 2.

²⁰⁸ *Ibid* at 10.

²⁰⁹ Valdes *op cit* note 9 at 23.

²¹⁰ Richard A Posner *Sex and Reason* (1992).

eradicate those biases.²¹¹ Valdes analysis sheds light on the international refugee legal system's lack of complexity required when dealing with intricate characteristics of identity such as sex, gender, and sexual orientation. The conflation of the three characteristics reflects the dangerous misconceptions and lack of understanding of gender discrimination. Legal doctrines regarding sex, gender, and sexual orientation must be sensibly created to enforce anti-discrimination mandates and to reflect the reality of society.²¹²

Valdes further argues that the conflation of sex, gender, and sexual orientation 'undermines the law's claim of informed, reasoned, and principled justice' as the practice reveals the law's lack of sensibility and impartial judgment.²¹³ The conflation also fails the professed commitment of the 1951 Convention which is based on human rights and anti-discrimination laws. By failing to distinguish sex, gender, and sexual orientation, the courts fail to uphold the principles of human rights and anti-discrimination instead of advancing equality which causes harm to society as a whole.²¹⁴

Valdes proposes eight general strategies of queer legal theory which include: fighting 'conflationary' stereotypes; bridging social science knowledge and legal knowledge; using narratives; developing constructionist sensibilities; conceptualizing "sexual orientation"; defending desire as such; transcending "privacy"; and promoting positionality, relationality, and (inter)connectivity.²¹⁵ The following analysis of Valdes' methods of queer legal theory link the proposed methods to transgender asylum-seekers and reviews how the methods are not only relevant but necessary to RSD.

a) Fighting Conflationary Stereotypes

Conflationary stereotypes of sex/gender harm individuals and damage legal order within refugee law and the RSD process. Valdes' first method involves fighting conflationary stereotypes. Sex, gender, and sexual orientation as characteristics of identity that are misunderstood and conflated. The conflation of these terms is evident in the asylum system where adjudicators often conflate notions of sex, gender, and sexual orientation within the RSD process. Gender identity related

²¹¹ Valdes op cit note 9 at 24.

²¹² Ibid at 26.

²¹³ Ibid at 27.

²¹⁴ Ibid.

²¹⁵ Ibid at 364-72.

asylum claims have been construed to fit under similar claims related to sexual orientation as 'sexual orientation' has gradually become an umbrella ground for SOGI claims.²¹⁶

Asylum-seekers may in certain contexts benefit from making claims based on imposed sexual orientation instead of claims based on their gender identity. The practice of basing a claim on imposed sexual orientation may be seen as a commendable and creative way to have gender-related asylum claims understood; however, it lacks legal principle and further convolutes the asylum system making it difficult for transgender asylum-seekers to navigate their way through a claim.

Queer legal theory allows not only the acknowledgment of conflationary stereotypes, but it also advocates for a shift in understanding terminology such as sex, gender, and sexual orientation that embraces inclusivity. Queer legal theory also advocates for a shift in attitude towards gender-variant individuals and an embracement of their unique identity. To fight the conflation, it is necessary for judges to acknowledge their own biases and to work towards using the terms sex, gender, and sexual orientation correctly. Further, advisors and researchers that provide context specific analyses of persecution in origin countries' must provide specific and distinctive research of harms against individuals for their sex, gender, and sexual orientation.

b) Bridging Social Science Knowledge and Legal Knowledge

Valdes advocates for the second method of bridging social science knowledge and legal knowledge. The use of social science knowledge in legal development would assist legal decision makers to conform their judgments in line with social realities.²¹⁷

For instance, social science research can reveal how 'hyper-masculinity as a compensation for stigmatized gender identity has been used to explain the propensity for authoritarianism and racism, homophobia, anti-Semitism, juvenile crime and gang activities.'²¹⁸ Understanding the relation between hegemonic masculinity and transphobia for instance could provide better understanding of the harm sustained by transgender individuals. The theorization of masculinity is complex especially as there are competing forms of masculinities between nations, within states,

²¹⁶ Raj op cit note 120 at 224.

²¹⁷ Valdes op cit note 9 at 27.

²¹⁸ Michael S Kimmel and Martin P Levine *A Hidden Factor in AIDS: "Real" Men's Hypersexuality* (1991).

and further within class.²¹⁹ Masculine practices and values are further complicated where opportunities are reduced due to racial and class disadvantage.²²⁰ Analyses of country-specific social features of persecution, such as masculinity and transphobia, could provide a better understanding of the harm sustained by transgender individuals.

c) Using Narratives

Valdes recognizes the limitations of scholarship and advance the use of narratives for legal development. Queer legal theory must be accompanied with narrative scholarship as stories elicit empathy notably amongst decisionmakers. Narratives can capture the humanity, complexity, and diversity of queer lives and legal issues and may be used to help inform and guide decisionmakers. Narratives also ensure that queer legal theory remains grounded and relevant.²²¹

Narratives relating to transgender asylum-seekers are not as easily accessible due to the private nature of individuals being both queer and fleeing persecution. Narratives of the claimants themselves however should not be neglected in the asylum assessment procedure. An assessment of a gender asylum claim cannot be separated from the claimant, and this understanding emphasizes that RSD should be structured on a case-by-case basis taking into consideration the narratives of the applicant. In establishing the applicants' credibility to a PSG and in establishing well-founded fear, the applicants' narrative must be valued. The UNHCR's procedural handbook establishes that when findings during the assessment are not sufficient and there is nothing to contradict the claim, the claimant should be given the benefit of doubt.²²² As RSD should begin with the presumption that the claimant is telling the truth, the standard of proof in the asylum system must adhere therefore to the standard of benefit of doubt or reasonable possibility.²²³

d) Developing Constructionist Sensibilities

Valdes defends that narrative scholarship allows for the recognition of the diversities and realities of queer lives.²²⁴ Developing constructionist sensibilities, as Valdes describes, comes from an awareness that the conflation of sex, gender, and sexual orientation is unnatural and is instead

²¹⁹ Tim Newburn and Elizabeth A Stanko 'Introduction: Men, Masculinity and Crime' in T Newburn and EA Stanko (eds) *Just Boys Doing Business* (1994) 2.

²²⁰ Ibid at 3.

²²¹ Valdes op cit note 9 at 366.

²²² Supra note 49 at para 196.

²²³ Guy Goodwin-Gill *The Refugee In International Law* (1983) 24.

²²⁴ Valdes op cit note 9 at 366.

socially ‘contrived’.²²⁵ This understanding must be articulated repeatedly to make a difference and debunk presumed naturality, normality, morality, and essentiality of sex and gender.²²⁶

e) *Conceptualizing “Sexual Orientation” and Defending Desire as Such*

Valdes methods of ‘conceptualizing sexual orientation’ and ‘defending desire as such’ are intrinsically linked. The concept of ‘sexual orientation’ is used legitimately and as a loophole in sex and gender asylum claims; however, it is a term that carries with it uncertainty. For instance, the concepts of ‘conduct’ and ‘desire’ within sexual orientation are unresolved.²²⁷ Due to the ambiguity attached to the meaning of ‘sexual orientation,’ the dominant and limited view will be carried in decisions. Valdes argues for a sensible and coherent conceptualization of ‘sexual orientation,’ as well as sex and gender.

To conceptualize ‘sexual orientation’ as a legal concept, Valdes opines that queer legal theory should defend ‘desire’ in the promotion of sex/gender reform.²²⁸ Valdes notes, however, that the very notion of erotic desire as a legally significant experience is ‘mired in generalized “ancient proscriptions” against bodily pleasures instilled by organized religion, which (still) dominate Western social and legal traditions.’²²⁹ Valdes advocates that ‘sexual and affectional intimacy, driven by erotic desires, is integral to humanity and society because both intimacy and desire are “affirmations of life and are diametrically opposed to dogmatic regimes.”’²³⁰ Valdes’s method which is focused on sexual orientation can be extended to expressions of gender identity.

Although gender identity is not determined by conscious choice, expressions of gender identity are chosen. Despite being chosen, expressions of gender identity, much like desire, is integral to the person and is a human right. Queer legal theory can defend this actuality and can help efforts to make clear in law that desire and expression is integral to humanity and society. Queer legal theory engages with law beyond rationality and advocates for the protection of characteristics that make us human and are integral to our existence.²³¹

²²⁵ Ibid at 367.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid at 368.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid at 369.

f) Transcending Privacy

Sex, gender, and sexual orientation transcend the private life. This is evident in the manifestation of perceived or actual ‘sexual orientation.’ Forcing queer individuals to keep their sex, gender, and sexual orientation ‘works like a sword’ that beats back the expression of the minorities.²³² Valdes’ methods outlined thus far promote the realization that sexuality and gender are not just about ‘privacy’ but of the ability to function equally in social, economic, and political settings.²³³ As previously mentioned, although there is no requirement for asylum-seekers to conceal themselves in their country of origin to avoid persecution, academics, such as Hathaway and Pobjoy, issue with the courts failing to identify the persecutory harm for which there is a well-founded fear.²³⁴ Hathaway and Pobjoy may be frustrated with the lack of legal principle in accepting asylum-seekers that can ‘choose’ to hide from persecution; however, such analysis undermines the nature of sex and gender transcending the private life. Valdes argues ‘the attainment of sex/gender equality therefore requires reforms that will match the scope and context of all sex/gender inequalities’ and ‘[q]ueer legal theory must transcend the limits of current privacy notions and push for sex/gender dignity and equality in all spheres of life.’²³⁵

g) Promoting Positionality, Relationality & (Inter) Connectivity

Valdes finally calls for queer legal theory to help develop positionality, relationality, and (inter)connectivity to build social and legal empowerment and reconstruction out of intersectionality, multiplicity, and coalition.²³⁶ Valdes explains that ‘humans and their bigotries toward other humans are layered and multiplicitious, and “intersectionality” shows how this multiplicity constructs multiple axes of discrimination that operate in tandem.’²³⁷ To bridge the perceived divides of sex, race, class, age and physical (dis)ability through queer legal theory allows for a more inclusive and nuanced acceptance of what it means to be a transgender asylum-seeker instead of constraining them to a limited ‘universal’ definition based on binary and western ideology.

²³² Ibid at 371.

²³³ Ibid at 370.

²³⁴ Hathaway and Pobjoy op cit note 80 at 331.

²³⁵ Valdes op cit note 9 at 371.

²³⁶ Ibid.

²³⁷ Ibid at 372.

It is through an analysis of power relations within the RSD process using a queer legal lens that enables the adjudicators the ability to recognize their sex and gender biases. Recognition of such biases, however, is only the beginning of needed change. Recognition must be followed by the reshaping of limiting sex and gender understandings to allow for a more inclusive and sophisticated approach to the status determination process of refugees.

Chapter 5: Analyses, Findings, and Conclusion

I INTRODUCTION

A queer critique of RSD reveals the binary and heteronormative norms and misconceptions of sex, gender, and sexual orientation within the judiciary which leaves the transgender asylum-seekers at risk of persecution. A presumed, instead of in-depth, knowledge of country-specific transphobic harms hinders transgender asylum-seekers' acceptance into refugeehood as their fear of persecution is judged through western and binary biases. Consequential shortcomings in the asylum system harm transgender asylum-seekers, breaks down the rule of law, and undermines human rights.

II TRANSGENDER ASYLUM-SEEKERS AND RSD

A more nuanced analysis of gender-related claims to refugeehood would provide for a more inclusive asylum system and promote the protection of transgender individuals from discrimination and harm. As illustrated throughout this research, misconceptions of sex, gender, and sexual orientation bleed into the RSD process and hinder transgender asylum-seekers' claim to refugeehood. The asylum system's aim to provide protection to those fearing persecution is only a fallacy when RSD processes related to the concept of membership of a particular social group, well-founded fear, and the nexus clause hinder the protection of vulnerable individuals.

a) Membership of a Particular Social Group

The formulation of the Convention ground, membership of a particular social group, was established in *Acosta* which devised the *ejusdem generis* approach based on the understanding that the MPSG ground must be understood in the context of the other Convention grounds and anti-discrimination principles that underly the 1951 Convention.²³⁸ The protected characteristic

²³⁸ Supra note 40.

approach established in *Acosta* was further built upon by the Supreme Court of Canada in the case of *Ward*, which determined that gender, as an innate and/or unchangeable characteristic was a protected PSG.²³⁹

The *ejusdem generis* approach has been undermined as an international principle through the adoption of the social perception test, such as in the jurisdiction of Australia. The social perception approach leaves the adjudicator with limitless discretion on what they perceive as PSGs. Although the social perception approach compliments the (presumed) ordinary meaning of PSG, it allows for the divorce of RSD from the anti-discrimination principles of the 1951 Convention.

Being transgender is an intricate personal experience related to intrinsic concepts of identity. ‘Transgender’ is not a PSG that is easily perceived, identified, nor categorized by ‘others;’ however, it is ‘entrenched, innate, and central to identity’ and should be accepted as a PSG.²⁴⁰ The determination of a PSG requires a principled and gendered analysis which the social perception test fails to provide. An understanding of what gender is in the context of a PSG would allow adjudicators and practitioners to be more self-critical of their own biases. The concept of gender, as a social construct, carries many misunderstandings that are heavily influenced by the binary and heteronormative minded society. Transgender and gender variant individuals that live in such restricted societies are left invisible and misunderstood. The social perception test would risk imposing similar societal biases onto transgender asylum-seekers impelling them to relive repeated harms.

A gender-inclusive and gender-sensitive interpretation of the 1951 Convention will not lead to acceptance that all transgender asylum-seekers are entitled to refugee status as they still must establish a well-founded fear of persecution, that the nature of the harm is serious and that there is a failure of State protection, and that fear of persecution is for reasons a Convention ground.

b) Well-founded Fear

The embracement of identity in the RSD process allows decision makers to hold informed and nuanced understandings of the asylum-seekers’ claim which allows for the use of both the subjective and objective test when determining the applicant has a well-founded fear. Queer legal

²³⁹ Supra note 42 at 79.

²⁴⁰ Supra note 77 at 7.

theory does not do away with identity politics and instead provides a more nuanced understanding of identity that is inclusive and fluid.

Transgender asylum-seekers are not required to ‘act discreetly’ or conceal themselves to avoid persecution to avoid harm.²⁴¹ Such a requirement would be discriminatory and harmful. Still, academics such as Hathaway and Pobjoy take issue with adjudicators extending protection to (presumed) trivial actions and expressions under the asylum system.²⁴² Despite Hathaway’s championing of an objective-only approach to assessing well-founded fear,²⁴³ this research reveals how an objective-only assessment of the well-founded fear requirement puts transgender asylum-seekers at risk of enduring further harm. There is a lack of understanding amongst adjudicators of transgender identities which has been influenced by Western-ideology, stereotypes, lack of country-specific research, and binary and heteronormative norms. A better understanding of transgender identities would help support objective assessments of establishing a well-founded fear; however, returning to the definition of ‘transgender,’ ‘transgender’ is a term that is impossible to define precisely. The nature of being transgender challenges positivists approaches to international refugee law that adheres to pedigree and legal definitions. An objective understanding of transgender identities will never provide sophisticated assessment of a claim to refugeehood, and an assessment based on assumptions and biases is a dangerous disservice to transgender refugee applicants.

c) The Nexus Clause

The nexus clause is important in RSD to establish that a claim to refugeehood is based on the claimants’ predicaments and not on avoidable or trivial activity. The practice of trivialising transgender identity through misunderstandings excludes transgender individuals from being recognized as a protected group. The asylum system is not capable of addressing all human rights abuses and what is protected under refugee law is not clear and evolves which allows adjudicators to exercise discretion. Transgender individuals do not refer to their gender identity as chosen and may suffer from social pressures to conform to a gender that is not authentic to them.²⁴⁴ In reference to chosen gender expressions or activities, such as dress, naming, and demeanour,

²⁴¹ See: Supra note 81; and Supra note 82.

²⁴² Hathaway and Pobjoy op cit note 80 at 335.

²⁴³ Hathaway op cit note 79 at 507.

²⁴⁴ Powell op cit note 52 at 1128.

Hathaway and Pobjoy argue against a limitless inclusion of protected activities as it would test the objective principle based on human rights standards.²⁴⁵ However, as academics such as Valdes and Powell argue, choice and desire are fundamental to our being and should not be trivialized.²⁴⁶

III RULE OF LAW

The rule of law and human rights are at the forefront of international refugee and asylum-seekers protection. The UNHCR note the following on the rule of law:

*The concept of the rule of law is central to a fair and efficient State asylum system. Protection systems grounded in the rule of law offer legal certainty in the application of rules, as well as accountability, equity and transparency. They are built on legal and policy frameworks that meet international standards and are administered by impartial and properly trained officials, supported by a functioning judiciary and other accountability structures.*²⁴⁷

Incorrect and convoluted applications of international law that protect refugees and asylum-seekers at the national level erode the rule of law. Kneebone argues that refugee protection is threatened because ‘the way that the rule of law operates at the national level in relation to refugees and asylums seekers in the jurisdictions examined is denying them access to their rights under international law.’²⁴⁸ The erosion of an adherence to international law and legal principles can lead to breaches of the non-refoulement principle where deserving asylum-seekers are rejected refugeehood. Where refugee law fails to respect fundamental principles such as the non-refoulement doctrine, the refugee regime is undermined and cannot be appreciated as a system of justice.

The convoluted and unprincipled interpretations of the elements of the RSD process relating to the concept of PSG, well-founded fear of persecution, and the nexus clause result in the undermining of international refugee law as a system capable of protecting fundamental human rights. The incapability to protect deserving asylum-seekers harms the people, the legal institution, and the society by betraying professed norms and ideas.

²⁴⁵ Hathaway and Pobjoy op cit note 80 at 335.

²⁴⁶ See Powell op cit note 52; See also Valdes op cit note 9 at 368.

²⁴⁷ UN High Commissioner for Refugees (UNHCR) *Refugee Protection: A Guide to International Refugee Law (Handbook for Parliamentarians)* (2017) available at <https://www.unhcr.org/3d4aba564.pdf> accessed on 25 May 2021 at 55.

²⁴⁸ Susan Kneebone (ed) *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (2009) 281.

IV HUMAN RIGHTS

This research does not advocate any change to the text of the 1951 Convention as interpretive methods can embrace progressive human rights developments. Instead, this research advocates for practitioners and adjudicators to have a stronger adherence to human rights protection and inclusivity. Individuals entitled to asylum protection are denied their right to seek asylum when legal interpretations are unprincipled and based on exclusionary practices.

The asylum protection system is understood to be reserved for those that have suffered human right violations that are protected under refugee law. What is protected and unprotected under the asylum system evolves overtime and decision makers have discretion over determining the protected rights under refugee law. Although this allows for flexibility and an advancement to have more rights protected as society evolves, discretionary powers of decision makers that are obscured by binary, heteronormative, and western ideology can lead to the exclusion of transgender asylum-seekers from refugeehood and protection. Gender identity and gender expressions are inseparable and are fundamental characteristics of people. Human rights norms are at the core of the refugee regime. Interpretations of the elements of the RSD process relating to the concept of PSG, well-founded fear of persecution, and the nexus clause must support the advancement of human rights otherwise international refugee law would neglect its purpose.

V CONCLUSION

An analysis of international refugee law through queer legal theory reveals the shortcomings of the RSD process of transgender asylum-seekers through identifying foundational issues within societal norms and jurisprudence. A queer critique of RSD reveals shortcomings and misunderstandings of legal principles and gender identities within the asylum system. Separating queer legal theory from refugee law has a significant impact on the individual transgender asylum-seekers, the rule of law, and on human rights norms.

Building on Manganini's findings of the power relations within RSD and on Valdes' methods of queer legal theory, the following are recommended in this research:

- To fight conflationary stereotypes of the terms sex, gender, and sexual orientation within the asylum system, adjudicators must acknowledge their own biases and advisors and researchers should provide country-specific reports on harms against individuals for their

sex, gender, and sexual orientation ensuring that their findings are distinctive. Detailed country-specific reports should also erode the emphasis of ‘safe countries’ and ‘dangerous countries’ as an overemphasis on presumed characteristics of the country of origin can hinder a transgender applicants’ claim to asylum.

- The RSD process requires the bridging of social science knowledge and legal knowledge. Analysing the relation between hyper-masculinity and transphobia may, for instance, provide for a more nuanced understanding of the harm sustained by transgender individuals and can assist their claims for refugeehood.
- Narratives are critical to the RSD process and utilised through the appreciation of the subjective assessment of well-founded fear of persecution and the nexus clause. Following UNHCR’s guidance, adjudicators should presume that the claimants are telling the truth and that they should be given the benefit of doubt.
- An understanding that sex, gender, and sexual orientation is socially ‘contrived’ should be repeatedly articulated to invalidate assumptions of naturalness, normality, morality, and essentiality of sex and gender. A more sophisticated understanding of sex and gender can undermine harmful binary and heteronormative beliefs.
- Desire and chosen gender expressions are integral to the person and should be protected under the asylum system.
- Sex, gender, and sexual orientation transcend the private life. There is no requirement for asylum-seekers to conceal themselves in their country of origin to avoid persecution; however, sex and gender dignity and equality should be advanced further in all spheres of life to avoid trivializing the harms transgender asylum-seekers endure.
- Notions of western supremacy are toxic within the asylum regime and can influence adjudicators’ understanding of what it means to be transgender from a western perspective. Queer legal theory should further be utilized to develop positionality, relationality, and (inter)connectivity to enhance social and legal empowerment. Positionality, relationality, and (inter)connectivity should be used to breakdown the presumed and limited ‘universal’ definition of a transgender asylum-seeker based on binary and western norms.

Queer legal theory advances inclusive and non-discriminatory asylum-systems and helps identify shortcomings of international mechanisms protecting transgender asylum-seekers during RSD by revealing foundational issues with power relations and misleading stereotypes within the refugee

regime. Transgender asylum-seekers are in a precarious position where their rights under the refugee regime are trivialised and ignored. Misunderstandings and a lack of research detailing country-specific harms against transgender individuals hinders academics, adjudicators, RSD officers, and practitioners from determining principled interpretative methods of RSD elements which leads to convoluted and questionable precedents that challenge the rule of law and human rights norms.

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