



Assessing Transgender and Gender Nonconforming Asylum Claims: Towards a Transgender Studies Framework for Particular Social Group and Persecution

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In this article, I focus on gender identity and gender expression as grounds for international protection. After clarifying issues of terminology and theoretical framework, namely Transgender Studies, I criticize the current framework for determining membership in a Particular Social Group (PSG) for the purposes of the Refugee Convention, drawing on Berg and Millbank's work on the concept of self-identification and gender non-conformity as a means to assess transgender asylum claims (2013). I problematize the issues arising in the assessment of well-founded fear of persecution and the form it may take in transgender and gender non-conforming asylum claims. Drawing connections between sexuality and gender identity/expression claims, I attempt to provide a humanizing and depathologized framework for assessing the credibility of transgender and gender non-conforming applicants. Finally, by critiquing the work of Hathaway and Pobjoy and drawing from current human rights norms, I reflect on how to make good law with transgender cases without reproducing medicalized notions of gender identity or placing all the burden of proof on the applicants. In so doing, this article attempts to achieve a balance between theoretical and practical challenges that arise in the Refugee Status Determination (RSD) process involving transgender and gender non-conforming applicants. This article serves as an attempt to critically review the existing scholarship within the framework of transgender studies and offers insights for a refined framework of refugee status determination based on an inclusive reading of Particular Social Group and persecution drawing on the reading of crucial case law from anglophone countries.

Keywords: refugee law, asylum, gender expression, SOGI asylum claimants, transgender studies, gender identity, persecution, particular social group

INTRODUCTION

According to Principle 23 of the Yogyakarta Principles, a human rights' experts' initiative promulgated in 2006 and revised in 2017, States shall:

Ensure that a well-founded fear of persecution on the basis of sexual orientation, gender identity, gender expression or sex characteristics is accepted as a ground for the recognition of refugee status, including where sexual orientation, gender identity, gender expression or sex characteristics are criminalized and such laws, directly or indirectly, create or contribute to an oppressive environment of intolerance and a climate of discrimination and violence.

OPEN ACCESS

Edited by:

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Specialty section:

This article was submitted to
Refugees and Conflict,
a section of the journal
Frontiers in Human Dynamics

Received: 14 January 2021

Accepted: 29 March 2021

Published: 24 May 2021

Citation:

Avgeri M (2021) Assessing
Transgender and Gender
Nonconforming Asylum Claims:
Towards a Transgender Studies
Framework for Particular Social Group
and Persecution.
Front. Hum. Dyn. 3:653583.
doi: 10.3389/fhumd.2021.653583

Though this formulation is quite explicit and gender identity can be grounds for asylum under EU law¹, there are many issues arising in the application of the refugee criteria in transgender/gender non-conforming applicants. This article serves as a critical review of current literature through the framework of transgender studies in refugee law, and attempts to offer a starting point for further insights in PSG and persecution based on a depathologizing theoretical lens beyond both biological determinism and queer iconoclasm.

Terminology

The terms “trans” and “transgender” are nowadays widely used in community settings, but have also come to the forefront of mainstream politics and academia. According to Currah and Stryker, some variants of the word “transgender” started appearing in the United States in the 1960s “among self-organized communities of predominantly white, middle-class, male-bodied individuals who persistently expressed feminine comportment, identities, and dress” (2014, 5). This was a way to resist medical, psychiatric, or sexological labels such as “transvestites,” which referred to periodical cross-dressing relating mainly to erotic gratification, or “transsexuals,” which referred to medicalized and binary (male to female or female to male) bodily modification of attributing sex-signifying physical characteristics and usually allowed for the legal change of social gender. On the other hand, “transgender” was meant to depathologize experiencing a gender other than the one that was assigned at birth, or combining various styles and gender presentations that transcended the cultural alignment of biological sex and gender. From the very beginning, the term “transgender” entailed a resistance to the medicalization, binarism and heteronormativity of the *status quo* and gave the space for the emergence of “disruptive potentials of sex/gender atypicality, incongruence, and non-normativity” (Currah and Stryker, 2014, 5). It arose then as a catchall term for gender variability in the 1990s, when it started being mainstreamed in the intellectual and political sphere.

“Transgender” implies a transcendence of the initial gender position that is expected to derive from the sex assigned at birth. It has been used recently to describe people who identify with a gender other than that assigned at birth and create some other gender location, but it can be used also more widely to describe “the widest imaginable range of gender-variant practices and identities” (Stryker, 2008, 19). According to the Declaration of the Trans Rights Conference, “[t]rans people [...] includes those people who have a gender identity which is different to the gender assigned at birth and those people who wish to portray their gender identity in a different way to the gender assigned at birth. It includes those people who feel they have to, or prefer or choose to, whether by clothing, accessories, cosmetics, or body modification, present themselves differently to the expectations of the gender role assigned to them at birth” (ILGA Europe Transgender Europe, 2019). In this article, the

term transgender will be used to refer to people whose gender identity does not align with the sex assigned at birth demarcating a category narrower than gender expression and larger than “transsexual,” a category used initially to describe those who seek morphological changes in their body in order to attain sex-signifying characteristics of a gender other than that they were assigned at birth. People, whose gender expression does not conform with expected societal standards deriving from the sex they were assigned at birth will be referred to as gender non-conforming, in accordance with the most current definition of gender non-conformity in transgender communities (GLAAD and Refinery 29, 2019). Gender non-conforming expression will be explored in this article, in juxtaposition with transgender identities, since it can be argued that the law does not cover both in the same or uses separate terms for gender identity and expression. In addition, not all transgender people have gender non-conforming expression, and not all people who have gender non-conforming expression identify as transgender. Many gender non-conforming people are indeed cisgender.

Sharpe argues that transgender bodies of law are crucial sites for the production and non-production of gendered, sexual and sexed identities (Sharpe, 2002). Law, according to Sharpe, aims to reproduce—when encountered with transgendered bodies across different legal cultures—“medico-legal binary understandings of sex, gender, and sexuality as well as a particular interrelationship of that constellation” (Sharpe, 2002, 5). This article though views law as an evolving structure reflecting social contestations and advocates for a critical view of law that does not downplay the power of law to encompass the needs of those who it has formerly marginalized. Such an inclusive view of law does not disregard its productive capacity, but instead it strategically incorporates it to its tools for everyday survival and justice in a context that is particularly disadvantaging for some people, who should not bear the burden of systemic liberation on them.

In response to the challenge of sex as naturally immutable that transgender bodies pose to the law, Sharpe argues that:

law, in a number of different contexts, deploys pre/post-operative, transgender/crossdresser, transgender/homosexual, natural/unnatural, sexual/non-sexual, and sexually functional/dysfunctional dyads as regulatory strategies around bodies (2002, 4).

Traditional legal scholarship has failed to examine these attempts to defuse the transgender challenge and has consequently ignored the possible wider interrelationships and intersections of transgender jurisprudence. According to Sharpe, “(t)his has served to conceal the ways in which medico-legal discourse has deployed transgender people in furtherance of much wider regulatory strategies around sexual practice and gender performance” (Sharpe, 2002, 4).

In this article, transgender will be used as a short hand for all gender identities which transcend male or female categories, but as noted above it will not cover gender expression, namely the individual’s manifestation of gender identity through “masculine,” “feminine,” or gender-variant traits. This is a choice that relates mainly to the legal disaggregation of gender identity from gender expression, categories that are covered differently by

¹Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9-337/26, recital No 30.

the law in many instances. For example, the Recast Qualification Directive, clearly states gender-identity as a ground for granting asylum, but not gender expression², which in the European Union legislation is only explicitly protected in the context of the Victims' Rights Directive³. Defining trans identity narrowly in this aspect can help identify the legislation governing gender-identity and its shortcomings in relation to gender expression, which is included in most definitions of transgender phenomena, but has not been seen as an inseparable part of gender identity by the law (see Hathaway and Pobjoy, 2012, 315). Also, the reduction of gender identity to the gender expression of the individual can lead to stereotyping gender non-conforming people and defining them as a gender that they are not. Finally, there is the question of whether gender expression should be protected separately from gender identity, since gender non-conforming people can identify as male or female, despite the way they tend or chose to express their gender. In this light, using "transgender" for people whose gender identity does not align with the sex they were assigned at birth is a strategic choice that can help disentangle the complex relationship between gender identity and gender expression, and the way the law deals with it in different circumstances.

Transgender Studies in Refugee Law

Transgender studies arguably first came into the foreground as a distinct field with Sandy Stone's foundational book "Posttranssexual Manifesto," which was published in 1992.

Stone attempted to explore the concept of the "transsexual" that was often experienced by people leading transsexual lives as a category limiting transgender people to mainstream narratives and forcing them to be silent about their own stories in order to access legal and medical procedures that they needed. Stone attempted to break the silence surrounding the issue and reshape what she saw as "textual violence inscribed in the transsexual body" into a challenging "reconstructive force" (Stone, 1991, 295). Stone suggested opening up "new and unpredictable dissonances" in which "we may find the potential to map the refigured body onto conventional gender discourse and thereby disrupt it." In order to pursue this disruption and reconfiguration, Stone juxtaposed "medically constituted transsexual embodiments against the backdrop of culturally intelligible gendered bodies" (Currah and Stryker, 2014, 3). Her goal was to "to take advantage of the dissonances created by such a juxtaposition to fragment and reconstitute the elements of gender in new and unexpected geometries" (Stone, 1991, 296).

One can understand that Stone's attempt was both one of deconstruction and validation of marginalized gender variety. She embarked on an exploratory project that went beyond

the then meaning of "transsexual" and gave birth to new sets of questions and phenomena "whose potential for productive disruption of structured sexualities and spectra of desire has yet to be explored" (Stone, 1991, 296).

According to Stryker and Currah, since as early as the nineteenth century, scientific, medical and legal discourse in the U.S. and Europe has dealt with transgender phenomena in a way that has rendered people that manifest gender transgressing characteristics and behaviors as distinct types of beings whose bodies and minds need social or medical intervention, consensually or not (Currah and Stryker, 2014, 4). In that sense, the "science" of transgender phenomena has been there for a long time, as has technical and professional literature on the matter. The project of naturalization of "gender congruence," while disciplining "gender incongruity" has been a biopolitical project of the modern world which was heavily institutionalized in the last centuries. It has produced the development of expert organizations, academic research, clinics, legal jurisprudence, and medical standards and discourse (Currah and Stryker, 2014, 4).

The interdisciplinary field of transgender studies takes a different approach from the above discourse, especially that found in medical and juridical frameworks. It moves away from investigating transgender phenomena as the object of study. It attempts to archive and explore the practices of knowledge/power that delegitimize gender variant bodies and treat them as valid subjects with their own narrative. It denaturalizes the gender ideology that demands gender congruence as a status quo. It does so by dismantling previously existing agendas that frame transgender phenomena as the targets of psychotherapeutic, medical, legal, or social intervention (Currah and Stryker, 2014, 9). Transgender studies seeks to contest normative knowledge on gender that was developed mainly in the twentieth century and draws from critical theory, postcolonial studies, postmodernist epistemologies and identity-based critiques of dominant culture. The latter one is its main difference from queer studies, namely the fact that it does not deny the relevance of identity claims, especially those which emanate from feminism, people of color, displaced and diasporic communities, disability studies and AIDS activism. Queer subcultures and lives of gender transgressive people have informed transgender studies, which nonetheless is a distinct field from queer theory (Currah and Stryker, 2014, 4).

Queer theory arose from the conjunction of feminism and sexuality studies, and transgender studies can be considered, according to Stryker, its evil twin, since it emerges from the same schools of thought. In addition, it deliberately disrupts dominant heteronormative and homonormative family narratives that favor sexual orientation labels over the gender categories and embodiment that enable desire to be framed and find its target (Stryker, 2004, 212). Sexuality, gender and identity are seen by queer studies as effects of normative power. This very conceptualization of identity can erode the grounds on which transgender individuals ask for the innate sense of gender to be recognized as valid. This can further replicate the denial of transgender experience and perpetuate the stigma that has shaped medical and political discourses. By giving value to transgender phenomena only when and in so far as they disrupt

²Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L. 337/9-337/26.

³Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L. 315/57-315/73.

gender norms, queer theory “has historically sorted, cited, and disciplined some portions of trans into itself while rejecting others as retrograde or conformist (crossdressing, genderqueer, and androgyny are welcome; transsexuality is not)” (Keegan, 2018, 8). Early on, queer theory was criticized by scholars from the transgender studies discipline for its treatment of trans as an exemplary to the disruption of gender. Hale for example suggests that scholars “beware of replicating the following discursive movement: Initial fascination with the exotic; denial of subjectivity, lack of access to dominant discourse; followed by a species of rehabilitation” (Hale, 1997). Prosser suggest that queer theory treats trans as “a symptom of the constructedness of the sex/gender system and a figure for the impossibility of this system’s achievement of identity” (Prosser, 1998, 6) and in this way institutionalizes homosexuality as queer (Prosser, 1998, 5). Finally, according to Namaste queer theory as it is currently practiced must be rejected both for political and theoretical reasons because of its citational relationship with transgender phenomena (Namaste, 2000, 9).

Stryker notes that Stone’s essay does not make reference to the term “transgender.” In 1992, when the “Posttranssexual Manifesto” (1992) was published, the term “transgender” was on the rise as an alternative less medicalized and more encompassing term than transsexuality and was used as a point of reference for collective organizing. At the same time, “queer” was also gaining ground as a critique to U.S. gay and lesbian integrationist politics. The proximity and relationship between these movements created a complicated dynamic around what “transgender” could signify, both as a personal identifier as well as a social location from which one gains knowledge of the world. In Stryker’s words:

transgender became associated with a “queer” utopianism, the erasure of specificity, and a moralizing teleology that condemned certain practices of embodiment that it characterized as transsexual. From other positions, “queer” became something that excluded the consideration of gender altogether. Depending on one’s subject position and political commitments, these trends could be embraced or bemoaned (Stryker, 1998, 153).

Furthermore, in a way, transgender studies begins with the suggestion to leave behind the figure of the transsexual, conceptualized mainly in medical terms. On the other hand, it is argued, that what gives critical relevance to the figure of the transsexual is the fact that it is an obstacle to “romantic narratives of antinormative queerness” (Chu and Drager, 2019, 103). It has been debated whether queer theory can be possible without antinormativity (Wiegman and Wilson, 2015, 1) but it is certain that trans studies has brought forward a new way of theorizing without negating normativity. According to Chu and Drager, the most relevant contribution that researchers working within the transgender field can make, is “defend the claim that transness requires that we understand, as we never have before, what it means to be attached to a norm—by desire, by habit, by survival” (2019, 108). In light of this realization, this article does not see critically attachments and identity claims, but rather seeks to encompass and accommodate them in the context of naturalizing alternative personal and social locations.

In view of the foregoing, Kimberlé Crenshaw has also argued that there is crucial importance in defending those identity categories through which oppression is channeled as part of the strategic empowerment of marginalized groups:

At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate and destroy it (Crenshaw, 1991, 1).

One sees that in that the definition of transgender phenomena (Stryker, 2008, 1) includes both gender expression as manifestation and non-binary identities as particular gender location beyond the binary. This is as opposed to most of the research in the 1990s and early 2000s that had not addressed the experience of transgender individuals with non-binary identities. Transgender studies operate in wide gender framework, as opposed to many, even transgender groups up to the early 2000s (Beemyn and Rankin, 2011, 1).

In view of the foregoing, queer theory has provided us with a subversive analytical tool regarding gender and sex representation (Romero, 2009, 190). This subversive dynamic of queer theory involves challenging the still persistent heteronormativity in how we perceive and reconstruct social reality through the use of theoretical, literary, and activity-based means (Whittle, 1996). For Whittle though, this subversivity needs to expand in Transgender Studies to encompass “... not just deconstruction but also reconstruction” in order to provide more validity to those sexes/genders/sexualities that are real to those who experience them (1995, 204). Given though the constant identity-contesting nature of queer theory and its suspicion toward self-categorizations, it may become problematic for those seeking acknowledgment of what they experience as oppression deriving from the lived reality of their gender. This is especially true in cases where the social location of a particular subjectivity and the preservation of its referential foundations appear essential. Whittle’s “reconstruction” imperative calls for the theoretical involvement of critical and arguably normative transgender studies perspectives grounded in socio-political realities as a necessary precondition for the reconceptualization of the legal and moral content of rights.

Transgender theory does not attempt to refuse or deconstruct differences but rather to encompass new geometries of gender configurations as equally valid. One must not forget that transgender status and gender expression as manifestation, is more like race and class, since it cuts across sexual identity categories (Stryker, 2007, 67). Furthermore, “transgender” is also both more and less than an identity term like “man” or “woman,” since it designates a way of being a man or woman or marking a resistance to this binary. According to Stryker:

Transgender analyses of gender oppression and hierarchy, unlike more normative feminist analyses, are not primarily concerned with the differential operations of power upon particular identity categories that create inequalities within gender systems, but rather with how the system itself produces a multitude of possible

positions that it then works to center or to marginalize (Stryker, 2007, 67).

Transgender studies provide a standpoint with a moral imperative of individual yet relationally defined freedom, in that what is socially mediated (gender) does not conflict with human agency *per se* nor is it untrue either as an experience or a pragmatic condition (positive or negative). Gender may be fluid (or without a substance, see Butler, 1990) but it is still integral although often marginalized and excluded through its lack of social and legal recognition. Avoiding naturalist reductionism but also poststructural deconstruction through transgender studies is arguably the best way to address the legal complications of the protection of transgender/gender non-conforming people who are need of international protection. It provides us with a critical lens to both address the productive power of law when it comes to gender ideology, but also focus on the need for institutional protection.

CRITERIA OF INCLUSION IN A PSG

Fundamental Characteristics Test vs. Social Perception Test

According to Article 1(A) of the 1951 Refugee Convention, a refugee is:

any person who...owing to a 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 to, or owing to such fear, is unwilling to avail himself of the protection of that country....

Thus, when RSD bodies come across sexual orientation and gender identity (henceforth "SOGI") asylum applicants, they try to determine whether they belong to a PSG, and because of that reason have a well-founded fear of being persecuted in their country of origin.

UNHCR defines "a PSG" for this purpose as 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 (2002). The characteristic according to the first test, the "protected characteristic" test, will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights. According to the UNHCR guidelines, such characteristics include gender identity and sexual orientation for the most part as innate and unchangeable characteristics [UNHCR (UN High Commissioner for Refugees), 2012]. On the other hand, there are several issues that arise in the identification of transgender, gay and bisexual individuals as belonging to a PSG.

The "fundamental characteristics" test, when it comes to the transgender refugee, has indeed some negative aspects, which relate for example, to a certain degree of uncertainty that applicants may have about their gender identity. These applicants have difficulty in proving that their gender identity/expression is fundamental to their personhood. This is the reason why identity-based questions exclude this kind of applicants alongside

those who cannot or do not wish to establish a link between their gender expression and identity claims. I refer here to applicants who demonstrate non-stereotypical gender expression without a fixed gender identity and are nevertheless in fear of persecution due to their non-normativity (henceforth gender non-conforming asylum applicants). There are also applicants who experience their gender identity and/or expression as a choice and thus cannot present it as a characteristic which is innate and unchangeable. Furthermore, given that sexuality and gender identity/expression can be fluid and not easily categorized, there could be a problem for the applicants to establish it as a fundamental characteristic. On the other hand, given the foregoing, one could move to the formulation of the fundamental characteristics including gender identity or expression as *a priori* fundamental to the exercise of human rights, since they are fundamental traits of personhood and/or conscience, such as religion and right to hold political opinions, instead of trying to prove every time in the RSD procedure how innate and unchangeable they are in terms of identity. As one can clearly see from Angel's testimony, an asylum seeker from Zimbabwe who was not believed to be lesbian, since she had only had one homosexual relationship that was considered to be in a phase of adolescence or confusion, applicants should not have to prove the immutability of their sexual orientation or gender identity (University of Sussex, 2020). A transgender applicant should not have to prove that their gender identity is innate, just that they experience it with a social impact. It seems that immutability is a substitute for medicalized notions of sexual orientation and gender identity, that prescribe how one should experience their sexuality or gender in order for it to be real.

It is obvious that some applicants will make clear identitarian claims which have to be assessed as valid. For other applicants, it will be a matter of expression of their conscience, convictions, or personhood. For some it may be just the will to live freely, and one has to see whether that corresponds to a valid claim for the exercise of fundamental human rights. Gender identification and expression have been acknowledged as basic human rights through the Yogyakarta Principles and in various jurisdictions, and it is doubtful whether one needs to prove *ad hoc* that their gender identity/expression is fundamental for them in order for it to be protected. It would be preferable if, like religious freedom and political opinion, they are considered *a priori* fundamental human rights, whose prohibition of enjoyment constitutes a serious violation that can lead to persecution. As one can see in an UK Upper Tribunal case, a gay man was deemed as not belonging to a PSG, because the judge doubted "his commitment to living life as a gay person, rather than merely acting out the role from time to time, even if this has involved relationships with other men⁴." This is a very dubious line of reasoning, that considers the "gay features" of the applicant as not fundamental enough and reveals the uncertainty of the legal framework as to what is protected and what is not. If this rationale is applied to transgender and gender non-conforming claims, it may lead to trans or gender non-conforming applicants being rejected

⁴Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: PA/05183/2019 (UK) para 47.

for acting in a non-normative way while not being serious and committed about it, even though performance is indeed constitutive of gender.

As far as the “social perception” test goes, in cases involving transgender and gender non-conforming refugees, there are also issues arising mainly related to the invisibility of a group or individual and the fact that an applicant can have a socially obscure gender identity or expression. In order to qualify as a PSG on the basis of the social perception test, the individuals of this group must be perceived as a group by their society. On the other hand, there is the possibility to define an individual as a member of a PSG based on the way they are perceived, in this case the perception that they are a member of that group, even if they actually are not [UNHCR (UN High Commissioner for Refugees), 2019, 87]. So, for example, if gender non-conformity cannot be established by reason of an identitarian claim, it can be that the authorities examine whether their non-conformity makes them be perceived as a member of an identifiable group (for example lesbian, gay, transgender) that is imputed to them by reason of certain behaviors or the way they present. Social perception of a group is also closely linked to its persecution, but the reason for the identification of a PSG has to be different from its persecution [UNHCR (UN High Commissioner for Refugees), 2002, 4]. On the other hand, the examination of the social perception of a group can help us establish the link between the persecution and the PSG requirement. If an applicant is perceived as belonging to a socially identifiable group that is excluded and persecuted, then the definition of the refugee is fulfilled.

Gender Identity/Expression as PSG Refugee Grounds

It is undeniable though that, as Berg and Millbank have noted in their study of relevant decisions by administrative tribunals in Australia, New Zealand, Canada, the United Kingdom, and the United States, RSD bodies’ jurisprudence in the area of transgender asylum claims remains fundamentally incoherent (Berg and Millbank, 2013). This condition calls for the re-evaluation of the legal framework that is applied by RSD bodies and throughout the decision-making process on gender-identity related claims. In light of this, Berg and Millbank argue for an RSD framework that seriously takes into account both gender non-conformity in a particular social context and the applicants’ own sense of gender-identification (Berg and Millbank, 2013, 1–2). Indeed, this is a valid and positive direction, since it allows for the conceptualization of transgender persecution and warns against the erasure of transgender identity (Berg and Millbank, 2013, 30). Furthermore, a reconceptualization of the RSD framework on these issues, could work toward ensuring the conditions that allow the acknowledgment of different ways of experiencing transgender identity and addressing transgender persecution in terms that safeguard both the protection of the applicant’s human rights and the human rights’ dimension of international protection.

This is particularly true in gender identity asylum claims. Social stereotyping is widely used for inferences on credibility, and identities are often categorized in medical, psychiatric, or

psychological terms, although they are primarily a matter of gender identification (Jansen and Spijkerboer, 2011). The fixed categories that are most often assumed in RSD in essence negate the fluidity, personal configuration, and social connotations of gender identity. Instead, they impose on applicants criteria that may not be relevant to the impact of gender non-conformity and fear of persecution as they experience it (Spijkerboer, 2013).

One also needs to think about gender expression when it is not really linked with identitarian claims. Gender non-conforming applicants will possibly identify as such due to their social location but may not make clear identity claims. For example, applicants, whether they identify as transgender, gay, bisexual or straight, may be persecuted because they look too feminine or masculine according to gender norms that derive from their perceived sex characteristics [CTDC (Centre for Transnational Development and Collaboration), 2017, 12], without self-identifying as LGBTQ+. One needs to scrutinize whether gender expression as the expression of one’s conscience and personality is an exercise of fundamental human rights, whether these persons have the right to look and express themselves as feminine or masculine the way they want, to what extent the need to renounce these characteristics is inhuman and degrading treatment, whether they constitute *a priori* core rights of personhood. In addition, certain characteristics may be imputed and lead to persecution, for example, a gender non-conforming applicant (for example, a cross-dresser) can be perceived as gay although they do not identify as such (Mason, 2002; Moran and Sharpe, 2004, 403). One needs to decide whether they are protected as belonging to a group whose sexuality is imputed, or a group that is gender non-conforming or both. There must be ways to protect these individuals from persecution even if they are not imputed a clear sexual orientation but are just persecuted due to gender non-conformity (for example, the cross-dresser may not be perceived as clearly gay, but as an effeminate person that unacceptably defies gender norms), and that is the reason why the RSD framework on LGBT persons will not be complete without the addition of gender expression, which is also in line with the reading of transgender phenomena by Transgender Studies.

In light of the above, questions in the asylum interview should take into account the narratives of gender-identification and/or gender expression of the applicants, and the configuration of their personality according to their narrated practices and experiences, and not be exclusively identity-based. For example, a non-binary male-presenting person that was assigned female at birth may not make clear identity claims as transgender, or may have not or just partially socially transitioned. This person will have gone through identification processes but still experiences their identity as not easily categorizable. That is the reason why I propose that the assessment of a person as transgender or gender non-conforming should not require an identity claim, but rather credible narratives of gender identification, expression, and non-conformity. The gender identification process does not require a fixed identity, but rather relates to the process of self-reflection and perception that can be fluid and continuous. There is the risk also that strictly identity-based questions will deeply reflect westernized notions of gender identity and expression. In light

of the above, I propose a framework that is centered around gender non-conformity (non-normativity) and the narratives of the applicants around it, whether they are identification-based or drawn from their everyday practice.

As Berg and Millbank note, “[g]ender and sexual orientation were increasingly accepted as eligible bases for PSG in many receiving nations through the 1990s; trans has often been appended to these categories without additional analysis or explicit articulation” (Berg and Millbank, 2013, 11). Gender and sexual orientation related jurisprudence as qualifying grounds for a PSG group have been critiqued as incoherent and unpredictable (Dauvergne and Millbank, 2010; Foster, 2012). Moreover, according to Berg and Millbank, in many transgender-related RSD cases the jurisprudence has been inconsistent, with a large variety of identified PSGs based on a combination of sexualities, gender identities, and expressions and imputations. Some groups were quite broad, such as “transsexuals,” while others were very specific such as “transgender women in Malaysia without familial or financial support or protection” or a “bisexual man who prefers men and being a transvestite” (Berg and Millbank, 2013, 17). This highlights the fact that PSGs based on gender identity and/or expression are undertheorized in the RSD and analytically yet unclear when it comes to definitions encompassing legal implications.

Moreover, as Jordan notes, “[c]laimants are being asked to give a narrative account of a sexuality or gender identity that they have had limited experience articulating” and “may inhabit only uneasily” (Jordan, 2009: 175). Transgender applicants may find it very difficult to establish both stable identities and gender dysphoria (Jordan, 2009: 167, 173–177). That is, firstly, because gender and sexuality can be fluid; secondly because such expectations are culturally subscribed; and thirdly because many applicants “form an identity under conditions of erasure” (Jordan, 2009: 170). Additionally, many cultures do not have language for transgender identity or expression, and some applicants may have limited comprehension of what that means in a western context (Moran and Sharpe, 2004). Many times, applicants use homophobic language used by persecutors in order to describe their protected traits (Landau, 2004: 260–261; Neilson, 2004: 288). Other times, actual or imputed sexual orientation is used in order to present the evidence of persecution since there is more available data from country of origin information on sexual orientation (Landau, 2004, 113; Neilson, 2004, 284–288). One must be aware of the complications between gender, sexuality, gender identity, and expression and be able to identify the nature of a heteronormative and patriarchal society that persecutes transgender and gender non-conforming applicants, since gender roles are based on a heterosexual orientation, which implies a refusal on the part of the applicants to behave in ways dictated by their biological sex and social classification (LaViolette, 2010, 8–9).

La Forest J. in *Canada (Attorney General) v. Ward*⁵, provides an instructive point of reference when defining “PSG” as: groups defined by an innate or unchangeable characteristics; groups whose members voluntarily associate for reasons so fundamental

to their human dignity that they should not be forced to forsake the associated; and groups associated by a former voluntary status, unalterable due to its historical permanence (para. 739). This indeed is a good starting point, since it reflects a better application of the UNHCR guidelines on the PSG notion, and is more inclusive of gender variance as a persecutory ground, and a ground for international protection, as advocated by an inclusive reading of Transgender Studies. It delinks from linear expectations of gender identity development and medicalized notions of gender non-conformity, and leaves space for diverse transgender experiences and narratives (Raj, 2013, 27). It also limits the ambiguity of positivist legal adjudication which favors certainty and closure against representational fluidity in gender identity and gender expression claims. Doctrinally, it is more coherent and open to analytical clarifications since it puts human rights at the core of the refugee adjudication, instead of the ambiguous notion of immutability (Raj, 2016, 130).

Identity Based vs. Practice/Performance-Based Frameworks for RSD

Abu-Assab et al. (2018) propose the shift from sexual orientation and gender identity protection to Sexual Practices and Gender Performance (SPGP) protection, which would allow for a less identity-based framework of RSD. That indeed is a valid point. On the other hand, it excludes cases where identity, practice and performance formation are prohibited due to the restrictive and oppressive environment from which the applicants originate. According to Nasser-Eddin, Abu-Assab, and Greatrick, one must move beyond identity categories as those presented in LGBTQ+ rights frameworks in RSD. The latter often fail to encompass the context of applicants’ countries of origin and the intersection between gender, sexuality, race, ethnicity, and religion. As Johnson and Repta note, “gender roles can be described as social norms, or rules and standards that dictate different interests, responsibilities, opportunities, limitations, and behaviors for men and women” (Johnson and Repta, 2012: 23). That must, they add, be evident in the narratives of the claimants, whether it is a conscious and reflected-upon fact or not. Interrogating just identity categories is deficient, since some applicants may make identity claims, but other non-normative individuals possibly may not.

According to Nasser-Eddin, Abu-Assab, and Greatrick, it is also very important to identify the binarism reflected in gender oppression, which makes individuals abide by the roles that are prescribed to them, and be at risk when they do not (2018). The binary reflected in complementary and mutually exclusive notions of femininity and masculinity is, according to the authors, the starting point for the discrimination against gender non-conforming individuals in the MENA region and is reflected in gender performance, as opposed to gender identity, since it is exhibited in the way people dress, behave, style their hair, and speak. Gender performance indeed moves away from fixed and unchangeable identities, though there is the possibility that we conceptualize identity as something fluid and fundamental at the same time, and complement it with gender expression

⁵*Ward v Attorney-General (Canada)* [1993] 2 SCR 689 (La Forest J).

whether that is connected to an identity claim or not. In that way, RSD could provide more protection both to transgender applicants who, for example, are in the “closet” and gender non-conforming applicants who view their self-expression as not necessarily deriving from a particularly gendered self-perception.

What is needed, therefore, is a framework that protects identities and expressions that are non-normative and correspond to the transgender/gender non-conforming characteristics of the applicant, whether these are externalized or reflected upon or not or attached to a particular identity. In that context, the practice of RSD bodies that seek to identify to what extent sexual and gender identities are fundamental for the applicants in order to assess them as a PSG, becomes less relevant. Furthermore, as Nasser-Eddin, Abu-Assab, and Greatrick argue (2018), it is very important to acknowledge the fact that the expectations for gender performances in fact vary across cultures, classes and nationalities, so it is important as well to examine the social location of the individuals and their gender non-conformity within the prevalent gender mores. Non-normativity and gender non-conformity is very important to identify a PSG without exclusively relying on identity claims. The distance assumed between heteronormative and patriarchal societies, on the one hand, and the non-normative individual, on the other, can shed light in the determination of their membership of a PSG and can largely fall under the categories of non-conforming identity and/or expression. This is in accordance with transgender studies, which does not interrogate gender identity/expression incongruence's construction, but rather recognizes it as a legitimate way to lead one's life and gender.

Furthermore, immutability has been central to the formulation of the notion of PSG. Immutability has been understood to refer to an innate trait or a shared past experience—it must be an aspect of fundamental significance to personhood. In *Hernandez-Montiel v. Immigration and Naturalization Service*⁶, the judicial idea of immutability was rendered more inclusive by acknowledging that “[s]exual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance” (Para. 2[6]), when accepting the membership of a PSG of Giovanni as a gay man in Mexico with female sexual identity (Para 4[10]). This serves as an indication of the fact that PSG can stretch to include gender non-conforming individuals, in addition to transgender individuals, and protect gender expression which is not necessarily linked to identity as well. This could be so, under the condition that gender expressions are sites of personhood (not necessarily permanent, but *a priori* fundamental) (Kirkland, 2003, 32). Although the U.S. 9th Circuit Court of Appeals in *Hernandez-Montiel* refused to consider transsexuals as a PSG and conflated sexuality with gender identity, it indicates a possible expansive use of identity and expression linked to fundamental traits of personhood (Raj, 2013, 225).

What becomes apparent is that gender identity/expression claims, which are indeed included in PSG grounds for asylum,

must be assessed in terms that are not exclusively identitarian. What was proposed in this section was, first, the inclusion of gender expression to PSG, and the focus on narratives of gender non-conformity, norms and social impact in order to assess whether an individual qualifies for asylum under the gender identity/expression umbrella.

WELL-FOUNDED FEAR OF PERSECUTION DUE TO GENDER IDENTITY AND GENDER EXPRESSION

According to the 1951 Refugee Convention, for someone to be recognized as a refugee they should have a well-founded fear of persecution. The well-founded fear has both a subjective and an objective element, consisting of fear and the well-foundedness of it, i.e., the fact that it must be reasonably expected. The persecution must constitute a serious violation of human rights, especially those for which no derogation is allowed under human rights treaties, such as the right to life, dignity, and the prohibition of torture and arbitrary deprivation of liberty (Mole, 2000, 10), or a systematic violation of other rights, including socio-economic rights [UNHCR (UN High Commissioner for Refugees), 2019, 13, 173]. I shall examine these concepts in relation to people belonging to a PSG due to their gender identity or expression. One issue that clearly arises is whether the suppression of the right to live freely as transgender or gender non-conforming, besides the violation of rights without a derogation clause that it may bring about (e.g., the right to life), is a serious violation of human rights in and of itself, given its systematic nature [UNHCR (UN High Commissioner for Refugees), 2019, 13, 173]. Another issue that arises is whether the link between serious harm and the membership of a PSG can be disrupted by an expectation to act and live discreetly. This has been a significant issue, especially in sexuality related claims, but here I will assess this requirement specifically in relation to gender identity and expression based on a Transgender Studies framework.

Denouncement of Gender Identity/Expression as a Human Rights Violation

The UNHCR Guidelines No. 9, section IV, state that being compelled to forsake or conceal one's sexual orientation and gender identity, where this is instigated or condoned by the State, may amount to persecution (2012). This is in accordance with Principle 19 of the Yogyakarta Principles (2006), which states:

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means...

It becomes clear that the UNHCR considers forced concealment a human rights violation, and if one takes into consideration Principle 19, it is easy to conclude that gender expression

⁶*Geovanni Hernandez-Montiel v. Immigration and Naturalization Service* [2000] 225 F.3d 1084, A72-994-275, United States Court of Appeals for the Ninth Circuit.

in and by itself is a fundamental human right, whether it is necessarily linked with an identity claim or not. Following that rationale gender expression constitutes a human right and its suppression by the threat of harm is a serious violation of freedom of expression.

Looking closely at the discretion requirement, one can look at Callinan and Heydon JJ. in the Australian High Court in *Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs*⁷. In their dissenting opinion, they found that the appellants were not oppressed as their discreet mode of conduct was voluntarily chosen and not a product of external imposition (2003, para. 106). The responsibility was placed on the applicants to claim that their discretion was due to fear of serious harm and not by their own choice, so that the link between sexuality and serious harm would not be disrupted by volition and in that way not amount to persecution (Wessels, 2011, 23). Nonetheless, given that the burden of proof in RSD is shared, that the persecution must be plausible (likely to happen) [UNHCR (UN High Commissioner for Refugees), 1998], and that volition is shaped by material reason and social context, it is doubtful whether this line of reasoning is correct. Seeing discretion as a voluntary option ignores the above, and makes obvious the fact that it is not analytically clear whether gender expression, like religious expression, is considered a fundamental human right. One must also have in mind that even if a claimant considers discretion their own choice, tribunals have to examine whether this could be potentially linked to a threat of serious harm. Case workers should examine reasons for asylum that are not presented consciously by the applicant and guide the applicant in providing the relevant information [UNHCR (UN High Commissioner for Refugees), 1998, 2]. That is very relevant as regards the construction of volition to live “discreetly” that may be subconsciously related to a threatening heteronormative political and social environment in the country of origin and external/internalized transphobia that relates to the stigmatization of gender incongruence.

Discretion and the HJ Test

Millbank has argued that the concept of discretion has shifted from asking a claimant to be secretive by their own initiative to asking a claimant to reasonably tolerate secrecy imposed on them by society and continue their affairs in private (Millbank, 2009, 398). The toleration of secrecy, though, again sheds light on the discrepancies arising as to whether sexuality or gender identity claims should be examined under the light of freedom of expression or not. In the case of *HJ (Iran)*, which was examined together with the case of a gay man from Cameroon, HT, in 2010, the UK Supreme Court decided that the “reasonably tolerable test” was out of line and contrary to the Refugee Convention. On the other hand, it proposed a complicated test to distinguish between discretion because of fear of persecution and volitional discretion (owing to other factors such as a concern to avoid social or family disapproval).

⁷ *Appellant S395/2002 v Minister for Immigration* [2003] 216 CLR 473 (Callinan and Heydon JJ).

The core of the judgment in *HJ (Iran) and HT (Cameroon) v SSHD* (2010) is in paragraph 82, which is entitled “The approach to be followed by Tribunals” and was delivered by Lord Rodgers⁸. It explains how a decision-maker should decide whether a person is entitled to asylum on the basis of their sexual orientation. According to the test, a decision-maker deciding whether a claimant [“X”] is qualified for asylum on the basis of sexual orientation should ask (i) if it is reasonably likely that X is or is perceived as homosexual, (ii) Are homosexuals at real risk of being persecuted if they live openly, (iii) would X live openly if returned in the country of origin and (iv) if not, why would they conceal their sexual orientation.

The Supreme Court goes on to give two possible answers in question (iv). Answer (a) is that X chooses to conceal their sexual orientation simply (only) because of social pressure or personal choice. Answer (b) is that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a homosexual. As UNHCR stated in its intervention in *LC (Albania)* though, a material reason should in fact be automatically assumed if openly LGBTQ+ people are persecuted in the country of origin [UNHCR (UN High Commissioner for Refugees), 2017, 9] instead of going into subjective matters of construction of volition.

The test of the Supreme Court in *HJ (Iran)* places the responsibility on the applicants to prove that their discretion is based on fear of harm and ignores the shared burden of proof, especially in the case where volition is formed under potentially threatening homophobic or transphobic societal pressures. Discrimination of course does not necessarily amount to persecution unless it is cumulative [UNHCR (UN High Commissioner for Refugees), 2019, 21], but the obligation to conceal one’s sexual orientation or gender identity/expression is, on the one hand, systematic, and, on the other, can be considered a harm *per se*. Discretion should not be a variable in an RSD decision in line with Transgender Studies and the clarification of its parameters should not burden the validation of the applicant.

Gender Identity/Expression and the Public/Private Divide

As underlined above, the *HJ (Iran)* judgment formulates a complicated test for RSD in sexuality claims, that is extended to gender identity/expression cases. What authorities need to establish is that openly LGBT people are persecuted, the choice of discretion is not volitional or based on societal or familial pressures for which the state is not responsible but because of fear of serious harm, and additionally, that the applicant intends to live openly upon their return to the country of origin. The last part of the test is especially problematic, since this is especially difficult to determine. Toohey J explicates in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*, decided by the High Court of Australia in 1989, that “well-founded” fear of serious harm implies a “real chance” which is not remote or insubstantial on the one hand, and on the other

⁸ *HJ (Iran) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and one other action*. [2010] UKSC 31.

hand it is indeed future oriented. But to ask authorities to infer if the applicant would conduct their sexual orientation and/or gender identity, discreetly, obscures the fact that homophobia and transphobia have a 2-fold effect: on the one hand they activate serious harm due to societal and political persecution, on the other hand they activate serious harm due to stigma and shame. Sexuality and gender identity have been examined in international human rights law mainly under the light of the right to privacy (Article 7 CFREU, Article 8 ECHR). One must, however, reconsider this private/public divide especially in relation to gender identity/expression since they entail a social validation of personhood taking place in different levels and layers of the public sphere and do not refer mainly to intimate and sexual practices.

The will to live openly and the threat of harm, if one does so, should be enough for the establishment of well-founded fear of persecution, if one normalizes gender incongruence to the same level to cis-genderism and delegitimizes heteronormative gender ideology. The requirement to show intent and a future choice to live openly in light of the threat of persecution, as established in the test in *HJ (Iran)* question (iv) (see section Gender Identity/Expression and the Public/Private Divide), is unreasonable and unnecessary to prove fear of serious harm and establish the nexus requirement. It is even more so if one accepts that living according to one's gender is an exercise of fundamental human rights of the applicant. The intention to live openly also refers to a projection of a future-oriented choice, and not a desire that can be interrogated and established in the present in the context of the asylum process. Furthermore, the risk of exposure over a lifetime should be deemed at least likely, both for sexual orientation and transgender identity claims, and could be remote only in terms of time but not in terms of certainty even if claimants are "discreet."

The Right to Live Freely as a Transgender/Gender Non-conforming Individual

As is stated in Lord Rodger's judgment in *HJ (Iran)*⁹, the underlying rationale of the Refugee Convention is that people should live freely without fearing serious harm in terms of intensity or duration because of, for example, their race or sexual orientation. It is clear in the judgment that living freely may mean not being cautious about socialization, affect or disclosure, differently from heterosexual people. Any aspect of the applicant's life that is informed by their sexuality should indeed be protected, according to the judgment, from the threat of serious harm. By extension, I would argue, a transgender or gender non-conforming applicant should have the same personal and public variety of options about their life, as transgender studies advocate. This would relate not only to their innate gender identity, but also to all aspects that are informed by the gendered experience of their subjectivities. As Gummow and Hayne JJ underline in *Appellant S395/2002 v Minister for Immigration*:

⁹*HJ (Iran) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and one other action*. [2010] UKSC 31 (Lord Rodger JJ) para 55, 77, 78.

Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense "discreetly") may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality¹⁰.

What becomes apparent is that inferences can be made about gender-identity and gender expression asylum claims from the jurisprudence on sexual orientation claims, but one has to be careful since the applicants may suffer particular forms of persecution, frequently also sexualized violence, frequently also sexualized violence, lack of access to healthcare, education employment, lack of access to gender recognition, which by itself or cumulatively can lead to persecution (see Oxford, 2013). As Millbank and Berg suggest, it is important not to erase transgender identity in the jurisprudence, which is based mainly on sexual identity, as applicants many times self-identify as or are perceived as homosexuals (Jenkins, 2009, 88–89, 94). This can be seen also from the fact that several gender-identity claims are presented as claims related to sexual orientation by the applicants, in order to make the evidence of "persecution" consistent or in order to make use of available country of origin information (Landau, 2004, 113).

MAKING GOOD LAW WITH TRANSGENDER CASES: A CRITIQUE TO HATHAWAY AND POBJOY

The lack of a coherent legal approach to determining membership of a PSG for gender-identity related claims becomes especially apparent when closely examining RSD and the decision-making process. In their attempt to unravel complex legal issues relating to sexual identity asylum claims (but equally relevant to gender-identity claims), Hathaway and Pobjoy have developed the concept of "endogenous harm" as an alternative prerequisite for "persecution" under Refugee Law (Hathaway and Pobjoy, 2012, see also Millbank, 2012). "Endogenous harm" according to their words "is the modification of behavior itself, or the impact that the modification has on the applicant, that is the relevant persecutory harm" (Hathaway and Pobjoy, 2012: 333). According to their analysis, a well-founded fear of persecution in sexual orientation related asylum claims has to involve a real risk of serious harm since "the exogenous consequences of being openly gay are remote in cases of enforced discretion, [but] the endogenous harms that follow from self-repression are likely to be readily established" (Hathaway and Pobjoy, 2012: 347).

For them, an implausible risk of serious harm cannot be considered real for the purposes of RSD. Nevertheless, given that the discretion requirement is not applied in religious or political beliefs, one has to be clear about the scope of the right to sexual orientation and/or gender identity/expression. If,

¹⁰*Appellant S395/2002 v Minister for Immigration* [2003] 216 CLR 473 (Callinan and Heydon JJ) para 82.

indeed, the content and the scope of these rights is such that forced concealment itself constitutes a violation, it is doubtful whether the risk remains implausible or unreal and whether RSD bodies can expect applicants to choose this particular violation (whether it is assessed as severe or not) over the risk of other serious harm. In addition, the rights to gender non-conformity should be established drawing on human rights norms, and should be contrasted with religious freedom and freedom of political opinion. Furthermore, if the applicant expresses a will to live freely, then the harm can be more easily established. If not, then the possibility of the threat of serious harm and homo/transphobia shaping their choices must be examined, as well as the risk of exposure to harm over the course of a lifetime. Plausibility of exposure should be examined in terms of long-term likelihood, not in terms of a time frame. Resorting to the “endogenous harm” approach should be the last resort for adjudicators, since it not only unreasonably burdens the applicant in terms of proof that needs to be submitted, if applied in a standard-setting manner, but also leaves even more space to RSD bodies for ambiguous assessments regarding the criteria by which the harm will indeed be considered a serious violation and the credibility of the applicant.

According to Hathaway and Pobjoy, the voluntary concealment of one’s sexual, and arguably gender identity, eliminates the well-founded fear of persecution due to “exogenous harm” (2012). What is wrong with this line of reasoning is the fact that it ignores that volition is shaped within a social, possibly threatening context, and that it is quite impossible to disentangle the rational and subconscious choice that it entails, especially when fear of serious harm coexists. Furthermore, on a practical level, applicants would have to show the impact the modification of their behavior has had on them, and this brings us back to medicalized notions of sexual identity and particular assumptions of how that is experienced as well as its concealment, which is what transgender studies refuses to legitimize. One does not have to examine the psychological impact of not being able to enjoy freedom to religion or a political opinion. The persecutory harm that is feared by LGBTQ+ applicants is often not the “endogenous harm,” which is an impact of the fear and the forced concealment, but mainly the material conditions that are the reason for not living freely and that can be verified by country of origin information. Asking adjudicators to assess “endogenous harm” as persecution raises many challenges and creates space for stereotypical assumptions on how gender and sexual identity and expression are or are not experienced. Renouncing sexual and gender identity should be a persecutory harm *per se*, without resorting to an assessment of endogenous harm or impact. This entails a false distinction between physical and non-physical harm, with the first being considered as exogenous and self-evident, and the second one as endogenous, although activated by exogenous factors, and thus in need of assessment.

According to Hathaway and Pobjoy, “only persons able to show a forward-looking risk of persecutory harm can establish a ‘well-founded fear,’ and hence qualify as refugees” (Hathaway and Pobjoy, 2012, 331). Nonetheless, this ignores the fact that the lack of freedom of expression in relation to fundamental

aspects of conscience and personhood and the inability or unwillingness of the state to guarantee it, is itself a serious material harm without having to assess psychological impact, and can be considered a severe violation of human rights of the applicant, especially given its systematic nature and broad-ranging impact, both physical/social and mental/emotional. Furthermore, psychological/mental and physical harm do not exclude each other, and many times coexist and interrelate as aspects of harm, as it is most often evident in cases of torture (Oxford, 2012).

Hathaway and Pobjoy go on to say that although courts were right to reject the rigid is/does dichotomy in sexuality claims, trivial activities of applicants identified as gay should not be protected under the Refugee Convention. They make a distinction between integral activities for sexual orientation and peripheral ones such as lifestyle choices (Hathaway and Pobjoy, 2012, 374; Millbank, 2012, 560). This focus on activities is misleading in addressing the nexus and persecution question. As Millbank and Berg note, what is protected by refugee law is the stigmatized traits (identities) that can be expressed or revealed by any kind of activity (2012, 510). This is also supported by the protection of refugee law in cases of imputed characteristics, which shows that it is not the activities *per se* that are protected by persecution; these are only the means through which a stigma may be attributed. What needs to be established instead is a violation of the human rights of a stigmatized group, whether the exposure or expression happens through a trivial activity or not and independently of whether the characterization is valid or imputed. Hathaway and Pobjoy argue that “the protected status of sexual orientation ought (...) to encompass any activity reasonably required to reveal or express an individual’s sexual identity” (2012, 382). The emphasis on a “reasonably required expression” sets very low standards for the protection of human rights and leaves unnecessary space for ambiguous assessments regarding “reasonableness of expression” on the part of adjudicators. Instead, the emphasis must be placed on whether, inadvertently or consciously, applicants may be classified as belonging to a stigmatized group that is in fear of serious harm independently of whether the activities validly reflect membership or not (Millbank, 2012, 513). As mentioned above, it is not activities that are protected, but rather the rights of a stigmatized group.

In particular, for transgender and gender non-conforming applicants, the focus on activities, and the distinction between peripheral and integral is highly problematic and brings back medicalized notions of gender identity that may require bodily modification claims or particular stereotypical presentation¹¹. Viewing certain activities as trivial aspects of subjects’ lives instead of significant expressions of identity obscures the fact that personhood is protected as a whole from serious violations regardless of the activity that exposes the applicants, and no reasonableness criterion could be applied objectively on

¹¹ See also *X, Y, Z v Minister voor Immigratie en Asiel*, App No Case C-199/12 - C-201/12 (European Union: Court of Justice of the European Union, 7 November 2013).

aspects of behavior of stigmatized individuals protected by the Convention as such (Millbank, 2012, 515).

Through the lens of Transgender Studies, the relational nature of transgender and gender non-conforming persecution becomes obvious, and resists medicalized notions of gender incongruence or non-normativity. One must utilize this framework in order to firstly, identify gender non-conforming and transgender applicants as belonging to a particular social group, conceptualize persecution linked to transphobia and absence of state protection due to gender non-normativity and operationalize well-founded fear as a contextual systemic risk. One must start from transgender theorizing in order to assess transgender and gender non-conforming asylum claims in relation to the right for a decent life, where “decent” does not presuppose gender identity/expression/sex congruence but offers protection to different gender geometries. Although this article draws from queer theory, in that it accepts that “[r]eading fear registers how law renders the injuries, intimacies, and identities of LGBT refugees visible for protection while jurisprudential fears confine, contain, and inhibit the terms of that visibility” (Raj, 2020, 96),

it focuses on transgender theory which is less suspicious to the foundations of identity claims and stresses out the importance of norms and categories as tools of institutional and social empowerment. This article, while utilizing the depathologizing framework of Transgender Studies in Refugee law in order to assess inclusion to “PSG” and persecution, attempts to equate the rights to gender incongruence to those of cis-gender people. It attempts to identify transphobia in adjudication and address the relational and systemic oppression of those who are not normalized in their gender identity/expression in the assessment of persecutory harm. In the view of the author, transgender and gender non-conforming people should be seen as a Particular Social Group due to state/social transphobia when they are in risk of serious harm, while gender congruence is delegitimized as the institutional *status quo*.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

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Conflict of Interest: The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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