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Four Challenges, Three Identities and a Double Movement in Asylum Law: Queering the 'Particular Social Group' after *Mx M*

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ABSTRACT

This article examines the construction of identity and the 'particular social group' (PSG) under the 1951 Refugee Convention. In particular, it analyses the ways in which the identity of a non-binary asylum claimant is discussed in the *Mx M* case in the UK, and what the implications of this might be for the project of queering the PSG. The article identifies four central challenges for queering and navigating the PSG, informed by Judith Butler's notion of a 'double movement'. These are the demand for recognition; the threat of erasure and/or misrepresentation; the contestation of universal, objective and/or essentialist categories; and the inseparability of violence from resistance. The article argues that strategic flexibility offers the greatest potential for individual claimants and for the wider project of queering the PSG, rather than trying to resolve the challenges by consistently adopting any single approach to PSG construction.

KEYWORDS Asylum law; queer theory; Judith Butler; membership of a particular social group; Refugee Convention

1. Introduction

The relationship between sexual minorities¹ and asylum is uneasy. The exclusion of sexual minorities from the wording of the 1951 Refugee Convention² has left a number of persistent obstacles,³ even as claims based on sexual

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¹This article uses the term 'sexual minorities' as an umbrella for all minority sexual orientations, gender identities, gender expressions and/or sex characteristics. The term 'LGBTI' to refer to lesbian, gay, bisexual, transgender and intersex people is used only in reference to its use in asylum law.

²*Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (UN Refugee Convention)

³Moira Dustin, 'Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK' (2018) 30 *International Journal of Refugee Law* 104.

orientation and gender [identity]⁴ (SOGI) have come to exemplify ‘membership of a particular social group’ (PSG)⁵ and even to represent ‘the archetypal figure of the refugee’.⁶ Today, the primary question has, in a sense, shifted away from the legitimacy of SOGI as a basis for an asylum claim *per se*, to assessments of whether the individual claimant is ‘really’ a member of a sexual minority.⁷ Asylum outcomes thus hinge on the ways in which adjudicators construct the identities of claimants and the PSGs to which they belong. At the same time, Vogler has argued that gender determination procedures in asylum law have an important function in the wider construction and contestation of sex and gender categories.⁸ The PSG is thus a key forum in which to interrogate the mechanisms by which identity is constructed in law, with implications beyond SOGI.

The case of *Mx M* in 2020 arguably represents a significant moment in this regard, being the first case in which the UK recognised a refugee on the basis of non-binary gender [identity]. The claimant had previously identified as a gay man and experienced violence at the hands of police and others in El Salvador. They were refused asylum on this basis, but made contact with a ‘specialist support group’ in the UK and later submitted a fresh asylum claim based on a different understanding of their own gender [identity]. This claim was again rejected by the UK immigration authorities and the First-tier Tribunal (FTT), which referred to the claimant by he/him pronouns and acknowledged only superficial changes in appearance. The claimant appealed to the UK Upper Tribunal (UT) and was ultimately recognised as a refugee on the basis of the additional threat of persecution they would face as a non-binary person in El Salvador.⁹

Mx M is the first case in which the category of ‘non-binary’ was successfully invoked in UK asylum law, but construction of the claimant’s identity and the PSG is by no means clear or consistent. There are at least three overlapping descriptions of identity applied. The UT begins by recognising very simply that the claimant ‘identifies as non-binary’, and nowhere appears to question

⁴This article uses the terms ‘gender [identity]’ and ‘trans*’ in specific reference to their usage by Dianne Otto and Jack Halberstam, respectively. Otto uses the term ‘gender [identity]’ to challenge divisions between feminist and queer approaches to gender-related violence. Halberstam uses the term ‘trans*’ to indicate transition and transitivity without situating them in relation to a final destination. See Dianne Otto, ‘Queering Gender [Identity] in International Law’ (2015) 33 *Nordic Journal of Human Rights* 299; Jack Halberstam, *Trans*: A Quick and Quirky Account of Gender Variability* (University of California Press 2018).

⁵UN Refugee Convention (n 3), art 1(a).

⁶Calogero Giametta, ‘New Asylum Protection Categories and Elusive Filtering Devices: The Case of “Queer Asylum” in France and the UK’ (2020) 46 *Journal of Ethnic and Migration Studies* 142.

⁷Laurie Berg and Jenni Millbank, ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants’ (2009) 22 *Journal of Refugee Studies* 195.

⁸Stefan Vogler, ‘Determining Transgender: Adjudicating Gender Identity in U.S. Asylum Law’ (2019) 33 *Gender & Society* 439.

⁹*Mx M v Secretary of State for the Home Department* [2020] UKUT(IAC) 313. The decisions of the FTT are not generally made public but the UT’s decision in this case contains references and insights into the reasoning adopted by the FTT.

the meaning or credibility of this statement.¹⁰ At other times, they are described more ambiguously as ‘no longer a gay man but [...] now a member of the wider LGBTI community.’¹¹ If ‘the wider LGBTI community’ is the salient legal category, why was the claimant previously rejected for asylum as a gay man? If they must instead belong specifically to the ‘non-binary’ subset, what (if any) is the relevance of the broader category? Later, the Tribunal goes on to say that ‘[r]egardless of what label we, or Salvadorans, might affix [...] their identity is visibly ‘other’.’¹² Is being ‘other’ interchangeable with being non-binary or a member of the wider LGBTI community?

These questions have significance beyond the protection of non-binary claimants, and beyond the development of UK asylum law. Lambert has argued that asylum law is characterised by transnational judicial dialogue and may even be moving towards ‘the emergence of a global jurisprudence.’¹³ Bruce-Jones has noted that the UK occupies a particularly prominent position within contemporary discourses on SOGI asylum, partly due to its position within the Commonwealth and the publicity of the *HJ and HT* case, which also addressed claims based on membership of a PSG.¹⁴ The *HJ and HT* case was notable for supposedly eliminating the requirement that claimants conceal their identities to avoid persecution,¹⁵ however this article is concerned with the construction of the claimant’s identity itself in the context of the PSG. As mentioned above, asylum is an important site for the wider categorisation, contestation and determination of SOGI, which is of central importance to queer politics.¹⁶ Sharpe highlights the treatment of trans* identities and sexual orientation together as a particular concern, arguing that such cases often operate as a site for regressive stereotyping and the denigration of homosexuality.¹⁷

This article thus considers the implications of the *Mx M* case for the project of queering the PSG. Section two outlines what ‘queering’ should be understood to mean in this context, and sets out four challenges informed by Butler’s notion of a ‘double movement’. These are the demand for recognition; the threat of erasure and/or misrepresentation; the contestation of universal,

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.*

¹³ Hélène Lambert, ‘Transnational Judicial Dialogue, Harmonization and the Common European Asylum System’ (2009) 58(3) *International and Comparative Law Quarterly* 519, 520.

¹⁴ Eddie Bruce-Jones, ‘Death Zones, Comfort Zones: Queering the Refugee Question’ (2015) 22 *International Journal on Minority and Group Rights* 101.

¹⁵ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UK Supreme Court 31.

¹⁶ Vogler (n 9); Bruce-Jones (n 15); Mariza Avgeri, ‘Trans*it: Transgender and Gender Nonconforming Asylum Claimants’ Narratives in Greece’ (2021) 0 *Sexualities* 1; Nof Nasser-Eddin and Nour Abu-Assab, ‘Decolonial Approaches to Refugee Migration’ (2020) 3 *Migration and Society* 190; Judith Butler, *Undoing Gender* (Routledge 2004); Judith Butler, *Bodies That Matter: On the Discursive Limits of ‘Sex’* (Routledge 1993).

¹⁷ Andrew Sharpe, ‘Transgender Jurisprudence and the Spectre of Homosexuality’ (2000) 14 *Australian Feminist Law Journal* 23.

objective and/or essentialist categories; and the inseparability of violence from resistance. Section three considers approaches to the construction of the PSG in asylum law generally, evaluating these in relation to the four challenges and the discussion of identity in *Mx M*. Section four draws on post-categorical and intersectional theories to consider the possibility of asylum law beyond a single category, asking how this might apply to *Mx M* and examining the implications for a queer PSG. Section five contains some concluding remarks and reflections on the general importance of the PSG to queer politics.

2. Queering the PSG

If asylum has an uneasy relationship to sexual minorities, its relationship to queerness is even more so. The language of queerness has often been appropriated as a neutral term for minority SOGI, and is sometimes deployed by Western states in asylum to project an image of their own tolerance and progressive values in contrast to an intolerant and persecutory Other, and thus to rehabilitate their own societies and institutions in the face of anti-colonialism and other challenges.¹⁸ 'Queer' however, is also an ambiguous and fluid term with a more radically anti-normative potential. Queering goes beyond the inclusion of 'queers' or sexual minorities within existing colonial, patriarchal and heteronormative systems or engaging in 'a new round of debate devoted to who is "really queer."' ¹⁹ A queer approach represents a challenge to such mechanisms of inclusion/exclusion, and thus to the use of fixed identity categories altogether. It has been described as 'against borders'²⁰ and even 'anti-identity.'²¹ At the same time, queer politics is about the liberation of queer subjects. In asylum, this goal can only be pursued by navigating the legal structures of determination and categorisation; above all, the question remains 'who is (not) a refugee?'

¹⁸Diana P Garcés Amaya, 'Rethinking Articulations of Nation and Gender through Asylum Policies: Discourses and Representations of Women Seeking Asylum in Spain' in Angeliki Sifaki, CL Quinan and Katarina Lončarević (eds), *Homonationalism, Femonationalism and Ablenationalism: critical pedagogies contextualised* (Routledge 2022); Nasser-Eddin and Abu-Assab (n 17); Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press 2015); Bruce-Jones (n 15); David AB Murray, 'The (Not so) Straight Story: Queering Migration Narratives of Sexual Orientation and Gendered Identity Refugee Claimants' (2014) 17 *Sexualities* 451; David AB Murray, 'Real Queer: "Authentic" LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System' (2014) 56 *Anthropologica* 21; Melissa Autumn White, 'Ambivalent Homonationalisms: Transnational Queer Intimacies and Territorialized Belongings' (2013) 15 *Interventions* 37; Ainsley Jenicek and others, 'Dangerous Shortcuts: Representations of Sexual Minority Refugees in the Post-9/11 Canadian Press' (2009) 34 *Canadian Journal of Communication* 635.

¹⁹Riki Anne Wilchins, 'It's Your Gender, Stupid!' in Joan Nestle, Clare Howell and Riki Anne Wilchins (eds), *GenderQueer: voices from beyond the sexual binary* (Alyson Books 2002) 73. See also Carmelo Danisi and others, 'A Theoretical Framework: A Human Rights Reading of SOGI Asylum Based on Feminist and Queer Studies', *Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on grounds of Sexual Orientation and Gender Identity* (Springer International Publishing 2021).

²⁰Nasser-Eddin and Abu-Assab (n 17) 193.

²¹Stefan Vogler, 'Legally Queer: The Construction of Sexuality in LGBQ Asylum Claims' (2016) 50 *Law & Society Review* 856, 884.

Queering the PSG thus involves an ambivalent approach to identities and categories. It seeks to construct the PSG in ways that enable marginalised people to escape forms of violence and pursue freer and more liberated lives. At the same time, it seeks to challenge and deconstruct the foundations of identity categories and to interrogate the role they also play in generating and legitimating forms of violence. The goals and repercussions of queering the PSG are not limited to SOGI, but methodologically this article begins by asking what Romero has called ‘the gender question’ to strive towards understanding of the operation of identity categories in asylum law.²²

More specifically, this article analyses the ways in which *Mx M* responds to four ‘challenges’ informed by Butler’s notion of a ‘double movement’. Butler writes about ways to grapple with the violence of inherently partial and exclusionary sex categories. ‘To ameliorate and rework this violence, it is necessary to learn a double movement: to invoke the category and, hence, provisionally to institute an identity, and at the same time to open the category as a site of permanent political contest.’²³ Within this, Butler expresses a number of conflicting impulses. These are the need to invoke a category; to institute an identity; to open and contest the category; and to ameliorate violence. The challenges respectively derived from these are the demand for recognition; the threat of erasure and/or misrepresentation; the contestation of universal, objective and/or essentialist categories; and the inseparability of violence from resistance. Queering the PSG involves maintaining these impulses in productive tension without attempting to find a stable resolution to the uses/problems of categories in asylum law.

For the purposes of this article a differentiation is drawn between ‘the category’ that is invoked, and ‘an identity’ that is provisionally instituted. ‘The category’ is the group descriptor or label that may be attached to the PSG. In the case of *Mx M* this may be ‘non-binary’, ‘the wider LGBTI community’, and/or ‘visibly ‘other’’. By contrast, ‘an identity’ is used here to mean a person’s inner and outer life. It goes beyond their (self)description as a sexual or gender being, to encompass the full complexity and fluidity of people’s lives as they are lived, experienced and told.²⁴ For *Mx M* this includes their self-description as non-binary and the development of their identity through contact with a support group in the UK. It also includes their past

²²Adam P Romero, ‘Methodological Descriptions: “Feminist” and “Queer” Legal Theories’ in Martha Fineman, Jack E Jackson and Adam P Romero (eds), *Feminist and queer legal theory: intimate encounters, uncomfortable conversations* (Ashgate 2009) 186.

²³Butler, *Bodies That Matter* (n 17) 221.

²⁴Alex Powell, ‘“Sexuality” through the Kaleidoscope: Sexual Orientation, Identity, and Behaviour in Asylum Claims in the United Kingdom’ (2021) 10 *Laws* 90; M Dustin and N Held, ‘In or out? A Queer Intersectional Approach to “Particular Social Group” Membership and Credibility in SOGI Asylum Claims in Germany and the UK’ [2018] *GenUS* 74; Marita Eastmond, ‘Stories as Lived Experience: Narratives in Forced Migration Research’ (2007) 20 *Journal of Refugee Studies* 248.

identification as a gay man, experiences of violence as a sexual minority, the colonial history and context of contemporary police violence in El Salvador, their experiences of the asylum system, and many more unknowable facets of their inner life.

The first challenge is to invoke an intelligible category as a PSG for the purposes of asylum law, and to broaden or proliferate these categories to expand the recognition of marginalised people as refugees. If an asylum claim is accepted on the basis that the claimant is 'non-binary', the question necessarily follows how to determine who else is 'really' (or 'credibly') non-binary. If it is accepted on the basis of being 'a member of the wider LGBTI community', then likewise it must be asked who else fits within this category – and why was their claim as a gay man previously rejected? This article considers the ways in which the *Mx M* case determines who is persecuted and protected on the basis of their (non)membership of a PSG.

Against this is the risk of misrepresenting or erasing the more complex and nuanced realities of claimants' personal narratives and identities. If *Mx M* fits within the category of 'the wider LGBTI community', does this mean that they must somehow resemble other members of this category? Are the experiences of non-binary people in some way similar or analogous to those of, for example, lesbians and intersex people? If they are defined instead as 'non-binary', does this represent the totality of their experience? Does being fixed to one aspect of their identity (as a non-binary person) limit and erase their realities as, for example, a person who has lived as a gay man, who presents and performs their gender in ways that are complex and context-specific, as a Salvadorian living in El Salvador and the UK, and as a claimant in the asylum system? Avoiding such erasures and embracing the complexity, fluidity and variety of lived human experiences is not only essential to the project of queering the PSG, it is also at the core of decolonial, anti-racist and intersectional critiques of SOGI asylum.²⁵

Further, there is the risk that the legal recognition of a particular category risks reifying and rigidifying it – transforming a provisional, contextual and/or strategic label into a universal classification. The claimant may use the category 'non-binary', for example, to communicate particular features of their identity in ways that are intelligible to a particular audience in a particular context. This does not mean that the category of 'non-binary' necessarily exists as a fixed reality across different contexts. In exploring trans* asylum

²⁵Moira Dustin and Nuno Ferreira, 'Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity' (2021) 40 *Refugee Survey Quarterly* 315; Danisi and others (n 20); Mariza Avgeri, 'Assessing Transgender and Gender Nonconforming Asylum Claims: Towards a Transgender Studies Framework for Particular Social Group and Persecution' (2021) 3 *Frontiers in Human Dynamics*; Nasser-Eddin and Abu-Assab (n 17); Dustin and Held (n 25); Dustin (n 4); Senthoran Raj, 'A/Effective Adjudications: Queer Refugees and the Law' (2017) 38 *Journal of Intercultural Studies* 453; Bruce-Jones (n 15); Jenicek and others (n 19); Pamela Heller, 'Challenges Facing LGBT Asylum-Seekers: The Role of Social Work in Correcting Oppressive Immigration Processes' (2009) 21 *Journal of Gay & Lesbian Social Services* 294.

claimants' experiences of transphobia in countries of origin and reception, Avgeri highlights that 'its intelligibility and narration changes according to surrounding context and culture.'²⁶ Non-binary in the UK does not necessarily translate to non-binary in El Salvador, for instance, and nor is it necessarily the same when used in asylum compared to other contexts. Demonstrating the socially constructed (and therefore socially contingent and contextual) nature of SOGI and other identity categories is at the heart of queer politics, and a number of critics warn particularly against a tendency in asylum to define all forms of global gender non-conformity according to a single set of culturally specific (white) Western cultural conceptions and gender norms.²⁷

Avgeri also highlights, however, that transphobia nonetheless persists across the country of origin and the country of reception.²⁸ The question of recognising and representing the claimant in the UK asylum system is not detached from the question of their persecution in El Salvador, and queering the PSG must involve navigating and resisting the violence that exists in both these contexts together. This is fundamental to the project of queering; a *queer* stance can only exist as an *oppositional* stance in relation to normativity and anti-queer violence.²⁹ Indeed, the fact of non-conformity to prescriptive and restrictive norms is what brings together the coalition of sexual minorities and other marginalised identities (or all those who are 'visibly 'other') in the project of queering the PSG.

Queering the PSG is thus a project of opposing and responding to the violence of persecution alongside the violence of (non)recognition, (mis)representation, and (de)reification in asylum. It requires the construction and invocation of categories that can be used to argue for recognition and inclusion within refugee protection. It requires flexibility and space to accommodate the diversity, complexity and fluidity of claimants' lives. It requires that universalist and essentialist categories are constantly challenged and contested, and it is fundamentally about strategies to escape and alleviate forms of violence. How then can the PSG accommodate this 'double movement', and how does this play out in the case of *Mx M*?

3. Constructing the Category in Asylum Law

Even without the complications of a queer approach, the PSG is a notoriously inconsistent and unclear area of asylum law.³⁰ Dustin has found substantial discrepancies and confusion between UNHCR Guidelines, EU law, UK

²⁶Avgeri (n 17) 7.

²⁷ibid; Nasser-Eddin and Abu-Assab (n 17); Bruce-Jones (n 15); Murray, 'Real Queer' (n 19); Murray, 'The (Not so) Straight Story' (n 19); Jenicek and others (n 19).

²⁸Avgeri (n 17).

²⁹Romero (n 23).

³⁰Michelle Foster, 'The "Ground with the Least Clarity": A Comparative Study of Jurisprudential Developments Relating to "Membership of a Particular Social Group"' (UNHCR 2012) 25.

Government guidelines and the practical application of the PSG definition to SOGI asylum claims in the UK.³¹ UNHCR Guidelines define a PSG 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.’³² This ‘either/or’ test is replaced with a more restrictive ‘and’ test in UK policy guidelines, though it is not always clear that this is applied in practice.³³ What is clear is that there are two distinct constructions: the PSG must exhibit a ‘common characteristic’ and/or it must be ‘perceived by society’.

The ‘common characteristic’ has generally been interpreted to mean something that is either impossible to change or ‘that is so fundamental to human dignity that a person should not be compelled to forsake it.’³⁴ Sexual orientation has become a well-established example of this, and Giametta has shown that many trans* claimants are represented as gay or lesbian (including by themselves), rather than engaging with the complexities and nuances of their gender [identities].³⁵ The repetition of established narratives in this way may often appear as the clearest strategy to escape the violence of persecution, but it can also serve to reinforce narrow stereotypes and judicial assumptions of what a ‘credible’ gay narrative should look like.³⁶ Reinforcing and universalising a certain set of terms and categories further serves to limit the possibility for different narratives to be expressed in asylum, particularly disadvantaging claimants who struggle to fit into Western conceptions of SOGI.³⁷ It is worth noting that *Mx M* became the first claimant to successfully invoke non-binary identity only after they had been rejected as a gay man.

Expanding the list of ‘common characteristics’ that are recognised as legitimate grounds for asylum is one way to address these difficulties. Wayne has made a strong case for the inclusion of diverse trans* people as a common characteristics PSG on this basis, arguing ‘Though transgender identity can take many forms because it is an umbrella term, this group of people has a common characteristic in that they all do not identify solely with the sex society assigned to them at birth.’³⁸ This would certainly alleviate some of the challenges facing trans* claimants who cannot present themselves as gay or lesbian, and it appears that the UT in *Mx M* is quite willing

³¹Dustin (n 4).

³²UNHCR, ‘Guidelines on International Protection: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees’ (7 May 2002) UN Doc HCR/GIP/02/02, 2.

³³Dustin (n 4).

³⁴UNHCR Guidelines on International Protection (n 33) 3.

³⁵Calogero Giametta, *The Sexual Politics of Asylum* (Routledge 2017) 3; Bruce-Jones (n 15).

³⁶Raj (n 26).

³⁷See Avgeri (n 17); Nasser-Eddin and Abu-Assab (n 17); Bruce-Jones (n 15); Murray, ‘Real Queer’ (n 19); Murray, ‘The (Not so) Straight Story’ (n 19); Jenicek and others (n 19).

³⁸Adena L Wayne, ‘Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum Notes’ (2016) 102(1) Cornell Law Review 241, 253.

to accept the claimant's non-binary gender [identity] as a key part of their claim.

Taken on its own, however, this approach may nonetheless privilege a particular representation of the claimant's gender [identity] at the expense of other aspects of identity, behaviour and experience.³⁹ This risks forms of flattening and misrepresentation that are antithetical to the project of queering the PSG, and it may also serve to minimise or erase relevant factors affecting the claimant's risk of persecution. Expanding the list of discrete PSGs to include 'trans*' or 'non-binary' also preserves the structure of inclusion and exclusion through which future claimants must present a recognisable narrative to convince adjudicators that they are 'really' trans*. This leaves intact many of the same difficulties that exist with the gay and lesbian PSGs, but with the additional challenge that trans* identities are often *particularly* characterised by fluidity and resistance to categorisation.⁴⁰ In both cases, it is also assumed that there is some fundamental inner 'identity' to be revealed and articulated, distinct from the claimant's outward behaviour. The claimant in *Mx M*, for instance, produced evidence from a 'specialist psychotherapist' to confirm their gender [identity].⁴¹ Such ideas (and medical models in particular) are heavily criticised by queer scholars as naturalising and privileging a notion of 'innate' identity at the expense of behaviour, desire, relationality and the social performance of gender and sexuality.⁴² In asylum law, attempts to distinguish protected behaviours that are 'fundamental' to identity from those that are 'frivolous' have been criticised for legitimating the idea that sexual minorities can be required to downplay or conceal some parts of their identity to avoid persecution.⁴³

An alternative approach to the common characteristic PSG would be to broaden the categories, rather than proliferating them. This could mean shifting the focus in *Mx M* from trans* or non-binary to view the claimant primarily as 'a member of the wider LGBTI community'. This acronym is commonly deployed in UK asylum law and in the wider society, including by members of the community. Nasser-Eddin and Abu-Assab, however, have noted that many refugees cannot identify with the language and schemata of LGBTI,⁴⁴

³⁹Dustin and Held (n 25).

⁴⁰Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group' in Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual orientation, gender identity and asylum* (Routledge 2013); Talia Mae Bettcher, 'Trapped in the Wrong Theory: Rethinking Trans Oppression and Resistance' (2014) 39(2) *Signs: Journal of Women in Culture and Society* 383; Halberstam (n 5); Butler, *Undoing Gender* (n 17).

⁴¹*Mx M v Secretary of State for the Home Department* (n 10).

⁴²Powell (n 25); Halberstam (n 5); Butler, *Undoing Gender* (n 17); Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities, and Healthcare* (Policy press 2020).

⁴³Janna Wessels, *The Concealment Controversy* (Cambridge University Press 2021); Toni AM Johnson, 'Flamers, Flaunting and Permissible Persecution' (2007) 15 *Feminist Legal Studies* 99; Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy' (2011) 44 *New York University Journal of International Law and Politics* 497.

⁴⁴Nasser-Eddin and Abu-Assab (n 17) 197.

and NGOs such as Fenix have developed other frameworks to discuss gender and sexuality with refugees and asylum claimants.⁴⁵ Many scholars are particularly critical of the 'conflation' of sexual orientation and gender [identity] in a number of highly-publicised US asylum cases in which the claimants' trans* gender [identities] are reduced to features/expressions of sexual orientation.⁴⁶ Something similar can be seen in the FTT's use of he/him pronouns for the claimant in *Mx M* and its (mis)characterisation of their non-binary gender [identity] to a mere change of appearance – ultimately leading to a rejection of their claim. This further reinforces narrow cultural stereotypes used to determine and ascribe SOGI, and universalises a particular (Western) conception of what sexual minorities generally 'should' look like. It risks excluding claimants who do not fit these stereotypes, as well as erasing or misrepresenting other narratives and nuances of SOGI.

There is, however, some ambivalence regarding the separation of sexual orientation from gender [identity]. Vogler has suggested that a total separation likewise represents one particular (Western) conception of gender and sexuality that is not necessarily shared by claimants themselves.⁴⁷ If the two are not to be conflated entirely, however, it remains to ask what common characteristic may unite the members of 'the wider LGBTI community'. Some, including Avgeri, Berg and Millbank, have suggested focusing on non-conformity to prescribed sex and gender norms.⁴⁸ This allows flexibility and adaptability to reflect societal differences in norms and standards of non-conformity. It permits more nuanced and diverse narratives of the ways in which the claimant may transgress social expectations, and may include sexual orientation and/or gender [identity] – together or separately – within the general LGBTI umbrella. Such an approach would further emphasise the centrality of violence and restrictive normativity in constructing an oppositional queer identity, queer politics and a queer PSG, without defining the group on the basis of shared persecution *per se*. This is important because it is generally accepted that the PSG cannot be defined solely by the common characteristic of persecution, or else the restriction of refugee protection to persecution 'for reasons of ... membership of a PSG' would be redundant.⁴⁹ Doctrinally, the focus on identity in relation to wider society could also help to blur the 'common characteristic' / 'perceived by society' approaches by refusing to treat personal characteristics separately from their social significance. Such an approach might alleviate some of the challenges of a restrictive 'and' test for membership of a PSG.

⁴⁵ Abby Field and others, 'Naming and Shaming: Harmful Asylum Procedures for Sexual Orientation and Gender Identity Claims on Lesbos' (Fenix Humanitarian Legal Aid 2022).

⁴⁶ Vogler (n 9); Wayne (n 39).

⁴⁷ Vogler (n 9) 452.

⁴⁸ Avgeri (n 26); Berg and Millbank (n 41).

⁴⁹ James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014); Foster (n 31); UNHCR Guidelines on International Protection (n 33).

There is a substantial risk in practice that certain narratives within this broader PSG will continue to predominate and to be taken as representative of the wider community, much as certain gay stereotypes are often taken to represent the totality of gay experience. This tendency can be read in *Mx M* in the FTT's erasing of the claimant's non-binary gender [identity], but also in the UT's application of country of origin information relating to gay men and trans* women without significant discussion of the particular vulnerabilities of non-binary people vis-à-vis these groups. It is thus possible to trace a variety of different approaches to a common characteristic PSG in *Mx M*, based on the proliferation and/or broadening of SOGI categories. Awareness of the relative advantages and costs inherent in each approach may enable SOGI asylum claimants to navigate these approaches, at least in theory, though the FTT decision is a reminder that adjudicators retain considerable power to determine and (mis)attribute identity regardless of the claimant's testimony.

As mentioned above, a broad PSG of sex and gender non-conformity might also be constructed on the basis that this is 'perceived by society' as a group. This is one possible reading of the UT's description of the claimant in *Mx M* as 'a member of the wider LGBTI community', and its clearest expression can be found in the assertion that '[r]egardless of what label we, or Salvadorans, might affix (...) their identity is visibly "other."⁵⁰ The idea that sex and gender non-conforming people, including non-binary people, are perceived by society as a collective 'other' also helps to explain the UT's use of country of origin information relating to gay men, trans* women and other non-conforming people in El Salvador. If non-binary people and other gender-conforming people are collectively perceived as 'other' by society, the relevance of homophobic persecution to a non-binary claimant becomes clear.

This is quite different from recognising that the claimant might be perceived as a gay man (which may also be true), in which case they would still be persecuted as a gay man. Rather, the point here is that they may be persecuted as part of a broader grouping that includes gay men and non-binary people together. The UT cites evidence that '[a]nyone who does not appear to fit patriarchal gender norms is targeted, but most criminal attacks on LGBT people are against trans women, who live "a life of abuse that is a continuum of violence."⁵¹ There is a risk that looking only at the broad PSG perceived by society as non-conforming, 'other' or 'those who do not fit patriarchal gender norms' may overlook the differences in persecution experienced by some members of this group. The UT draws attention to

⁵⁰*Mx M v Secretary of State for the Home Department* (n 10).

⁵¹Internal Displacement Monitoring Service, 'An Atomised Crisis - Reframing Displacement Caused by Crime and Violence in El Salvador' (Research Report, 2018) 16.

the specific vulnerabilities of trans* women, which seems to question the utility or appropriacy of characterising the claimant as broadly 'a member of the wider LGBTI community' or 'other'. Indeed, the UT overturns the FTT's refusal of asylum precisely because it fails to adequately differentiate between the risk of persecution facing the claimant as a non-binary person compared to a gay man. Whilst it is possible to construct a broad category of non-conformity on a 'perceived in society' test as well as a 'common characteristic', therefore, this approach leaves the same problems of (non)recognition and (mis)representation, and judging all claimants against a narrow set of stereotypes.

The picture may be rather different if gay and non-binary people are perceived in society as distinct groups. There is limited discussion of non-binary gender [identity] in particular, but some evidence for a distinction may be seen in the specific references made to the vulnerabilities of trans* people – and trans* women in particular. The claimant in *Mx M* does not describe themselves as a trans* woman in the case, but the focus on trans* women may reflect a belief (whether accurate or not) that trans* people who are assigned male at birth are perceived and targeted similarly regardless of their gender [identities]. It is very likely that the reliance on data about trans* women also reflects a lack of specific information about the treatment of non-binary people. Dustin has found that country of origin information on trans* persecution is often very limited, and warns there is 'the danger that the absence of evidence is taken as absence of persecution.'⁵² This does not seem to be the case in *Mx M*, where the threat of persecution facing the claimant as non-binary is found to be higher than as a gay man, but the question remains how the UT assesses the position of non-binary people specifically. Without clear evidence or discussion of this in the decision, the reliance on data about other groups risks treating as natural or obvious what may be a particular (Western) assumption about the way these groups are similar or will be perceived as such by Salvadoran society.

The 'common characteristic' and 'perceived by society' tests, as proposed by the UNHCR Guidelines, thus present their own sets of challenges and opportunities, whether they are deployed to broaden or to proliferate the categories recognised as a PSG. Recalling that queering the PSG means maintaining multiple objectives in productive tension, it is clear that an 'either/or' test is preferable to either of the two tests taken on its own. There is of course greater flexibility in this approach, meaning that different strategies may be deployed in different cases. If there are obstacles to proving that *Mx M* would be perceived as 'visibly 'other'' in El Salvador, for example, they may find it easier to push their non-binary gender [identity] as the characteristic on which their asylum claim is based (or vice versa). In addition, there may be

⁵²Dustin (n 4) 119.

potential for strategic ambiguity in this dual test. Multiple identities are referred to in *Mx M*, including 'non-binary', 'the wider LGBTI community' and 'visibly 'other'', but also gay men, trans* women and other gender non-conforming people.⁵³ This may create space for *Mx M* to present multiple aspects and descriptions of themselves, allowing for a fuller and more nuanced representation of their identity. It may also reduce the pressure to assert a single term or description too firmly and persistently, mitigating the risk of reification and reinforcement of narrow (anti-queer) stereotypes.

4. Asylum Law Beyond the Category

It may be, however, that there are other possible approaches to queering the PSG beyond the proliferation or broadening of a particular category. Lucas has developed a 'value-based approach' to anti-discrimination law, which treats protected categories as a shorthand or proxy for the underlying values of anti-discrimination. Looking beyond the categories themselves, this approach focuses directly on the underlying rationale, which is 'the need to address a history of past discrimination and political powerlessness'.⁵⁴ Other scholars have suggested analysing the discriminatory nature of actions and behaviours, rather than the identity of the victim, developing a theory of 'post-categorical antidiscrimination'.⁵⁵ Alongside this, Dustin and Held have set out a queer intersectional framework to theorise SOGI asylum law, to better account for the nuances of identity that are flattened or erased in the representation of claimants purely as members of a single sexual or gender category.⁵⁶ Interestingly, Markard has proposed a reading of the PSG in which intersectionality can already be observed despite the absence of specific reference to the theory or its vocabulary.⁵⁷ These suggest a number of alternative methods to evaluate *Mx M* and develop strategies for queering the PSG beyond 'the category'.

The UT devotes much more attention to the discussion of persecution in *Mx M* than it does to identity. Asylum being concerned with future risk, the case does not explore the 'history' of persecution so much as the current situation, but it is certainly possible to read something akin to Lucas' value-based approach in this decision. As already mentioned, there is relatively little evidence which specifically refers to non-binary people, and the projection of particular conceptions of identity into other times and places is a well-recognised

⁵³ *Mx M v Secretary of State for the Home Department* (n 10).

⁵⁴ Lauren Sudeall Lucas, 'Identity as Proxy' (2015) 115 *Columbia Law Review* 1605, 1636.

⁵⁵ Maria Lee, 'Being Wary of Categories: Is It Possible to Move Away from Categorisations in Anti-Discrimination Law?' (2017) 1 *University of Vienna Law Review* 107.

⁵⁶ Dustin and Held (n 25).

⁵⁷ Nora Markard, 'Persecution for Reasons of Membership of a Particular Social Group: Intersectionality Avant La Lettre?' (2016) 2 *Sociologia Del Diritto* 45.

challenge in queer approaches to contemporary and historical records.⁵⁸ It is therefore more useful and appropriate to consider the history of persecution against the broader category. This is doubly relevant in *Mx M* because their personal history of homophobic abuse can be taken into account in conjunction with the wider societal persecution of other non-conforming people. The primary use of this in asylum law is to support the construction of a broad PSG ‘perceived by society’, but there is also a subtle temporal difference between stating that a broad group of people *are* perceived as similar/equivalent, and stating that they typically *have been* treated in similar ways. The former may be taken to reflect the adjudicator’s (or a universal) perception, whereas the latter emphasises the contextual specificity of societal perceptions in a particular time and place. The value-based approach may thus help to inform a strategy by which to construct a broad ‘perceived by society’ PSG whilst mitigating the risk of naturalising and universalising a particular conception of SOGI.

In its strongest form, ‘post-categorical antidiscrimination’ would appear to set aside the category altogether in favour of defining particular acts and behaviours as inherently discriminatory (or persecutory) in nature. Refugee law, of course, only protects against persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion.’⁵⁹ Nonetheless, the suggestion that unequal treatment should be taken as *prima facie* evidence for discrimination has significant implications for the purposes of queering the PSG. Take for example the fact that the claimant in *Mx M* was previously beaten by police and harassed in the street when other people were not.⁶⁰ Without attempting to first categorise or articulate the claimant’s identity, post-categorical antidiscrimination would presume discrimination here unless there were evidence that equal treatment ‘would require a disproportionate effort or would be a disproportionate infringement on third-party interests.’⁶¹ This framing could be applied to the claimant’s own past experiences, which in *Mx M* were not found severe enough to amount to persecution. It could also be used to assess the country of origin information, focusing on evidence of discriminatory violence rather than the identities of the people being targeted. Although a category will still need to be invoked to satisfy the PSG, the post-categorical approach relegates this category to a secondary place in the analysis – and does so without attempting to construct a redundant category on the basis of common persecution. This may reduce and mitigate some aspects

⁵⁸ Michel Foucault, *The History of Sexuality Vol. 1: An Introduction* (Pantheon Books 1978); Butler, *Undoing Gender* (n 17); Avgeri (n 17); Halberstam (n 5); Vogler (n 22); Jenicek and others (n 19); Nasser-Eddin and Abu-Assab (n 17); Bruce-Jones (n 15); Murray, ‘Real Queer’ (n 19); Murray, ‘The (Not so) Straight Story’ (n 19).

⁵⁹ UN Refugee Convention (n3), art 1(a).

⁶⁰ *Mx M v Secretary of State for the Home Department* (n 10) at 23.

⁶¹ Lee (n 56) 120.

of asylum as a system which regulates and (mis)represents SOGI. Dustin and Ferreira have argued that focusing primarily on persecution rather than identity may also lead to fairer outcomes for claimants, but also warn that it may reinforce colonialist and homonationalist discourses by encouraging representations of the country of origin as a culture or society defined by violence and regressive attitudes in contrast to the progressive and enlightened world of the receiving state.⁶²

Intersectionality represents another way of going beyond the categorisation of the claimant according to their SOGI. Rather than minimising the importance of identity, however, this allows for a fuller and more nuanced account to acknowledge other aspects of their lives in conjunction with their experience as a sexual minority. This may include acknowledging the colonial dimensions and context of police violence against sexual minorities, the vulnerable position of the claimant within the asylum system, and their shifting experiences of SOGI across different contexts.⁶³ The claimant's non-binary gender [identity] in *Mx M*, for instance, does not replace or negate their past experiences living as a gay man. Nor does this identity exist without context; it is a conception of themselves that emerged through context with a specialist support group in the UK, and may be quite different to the ways they could conceptualise and label themselves in El Salvador and in other social contexts. This is by no means to suggest that their gender [identity] is less 'real', but rather to acknowledge that all gender [identities] can only be interpreted in the context of other bodies and identities.⁶⁴ It is also to acknowledge that their experiences as a non-binary person do not exist apart from their experiences as a Salvadorian or as an asylum claimant; these are inseparable aspects of a single person.⁶⁵ Intersectionality, and Dustin and Held's queer intersectional approach in particular, is an attempt to better recognise and reflect the complexity of the claimant's multifaceted identity.

As mentioned above, Markard has argued that intersectionality can already be observed within the jurisprudence of the PSG, highlighting examples such as 'young girls from Nigeria whose economic circumstances are poor' that recognise the importance of multiple factors in assessing the claimant's risk of persecution.⁶⁶ This may provide a useful tool to frame the vulnerabilities of the claimant in *Mx M*, for instance, as both a member of the LGBTI community and more specifically a non-binary member of that community. This may allow claimants greater flexibility to balance recognition against the risk of narrow stereotypes, invoking the category of LGBTI whilst also highlighting

⁶²Dustin and Ferreira (n 26).

⁶³Dustin and Held (n 25); Avgeri (n 17).

⁶⁴Butler, *Undoing Gender* (n 17).

⁶⁵Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241.

⁶⁶Markard (n 58) 53.

the differences between different members of that category. Attempting to apply such a strategy to the complex and diverse narratives of sexual orientation, gender [identity], and the relationships between inner and outer expression, however, bears extreme risks. As mentioned above, Sharpe highlights that cases that refer to trans* identities and homosexuality together can often function as a site for the misrepresentation and denigration of homosexuality.⁶⁷ At times, these cases also serve to misrepresent and erase trans* identities as identities in their own right. The US case of *Reyes-Reyes*, for example, described the claimant as 'a homosexual male with a female sexual identity'.⁶⁸ The claimant's gender [identity] is erased and its outward expression is treated as an extension of their sexual orientation. The FTT in *Mx M* similarly regards their gender [identity] as a mere change of appearance, and both cases misgender the claimants using he/him pronouns despite their stated preferences. Intersectionality is thus a useful strategy for presenting multiple aspects of identity within asylum claims, but it remains imperative to first achieve a base level of recognition for (an aspect of) the claimant's identity from which to develop degrees of nuance.

More generally, the basic structure of the PSG continues to require the invocation of a category that asylum law can recognise. The value-based approach, post-categorical antidiscrimination and intersectionality all offer ways to move beyond some of the limitations of the category, but they cannot altogether leave it behind. These are supplementary strategies to improve the constructing of the PSG, but the basic challenge is still to balance the conflicting aims of the double movement. Queering the PSG means finding ways, including these, to avoid misrepresentation and to contest categories even whilst invoking them. It does so always within the restrictions of the PSG and the inescapable demand for recognition as a member of this category. Value-based and post-categorical approaches can help to highlight the centrality of violence in drawing connections and analogies between diverse groups without essentialising or legitimating their representation as a common 'other' defined against the norm. Intersectional constructions as proposed by Markard must be used particularly cautiously in relation to identities, including trans* and non-binary gender identities, for whom (non)recognition is a primary concern, but have considerable potential to introduce nuance and destabilise simplistic stereotypes in asylum law.

5. Concluding Remarks

The article weighs the conventional 'common characteristic' and 'perceived by society' methods of PSG construction alongside the additional risks

⁶⁷Sharpe (n 18).

⁶⁸*Reyes-Reyes v Ashcroft* [2004] US Court of Appeal (Ninth Circuit) case no. 03-72100, at 13547.

and benefits of supplementing these with a value-based, post-categorical and/or intersectional analysis. The various risks and objectives of the challenges, identities and methods involved in queering the PSG are not resolved but are maintained in productive tension informed by Butler's 'double movement'. Maintaining this tension does not mean rejecting strategy or accepting that there is no way to effectively pursue the project of queering the PSG within the constraints of asylum law. Wessels has found a similar insolubility in the recurrence of tests requiring asylum claimants to downplay or conceal their sexual orientation to avoid persecution, concluding 'The present analysis does not produce the missing piece to solve the puzzle. But what it does reveal is that that piece does not exist – and refugee protection is not a puzzle.'⁶⁹ Wessels proposes a theory and method of 'productive instability', maintaining a critical distance to adapt one's strategies and put forward alternate (even contradictory) arguments in different circumstances to achieve the desired outcomes for asylum claimants. Queering the PSG after *Mx M* means synthesising and incorporating the different challenges and identities in this case into a double movement or a strategy of productive instability, making use of them all in furtherance of queer opposition to the violence of persecution and the violence of a restrictive and regulatory asylum system. Further, it means recognising that the asylum system cannot be perfected or perfectly navigated – queering the PSG is not about finding the 'right' approach to inclusion and exclusion. The question 'who is (not) a refugee?' remains ultimately inescapable, and is inseparable from questions of who is (not) entitled to cross borders, and who is (not) gay, a woman, other or a member of the LGBTI community. The case of *Mx M* thus exemplifies the PSG as a key site in which to perpetually manoeuvre and contest the connected logics underpinning the violent and restrictive systems of asylum, gender norms and borders altogether.

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⁶⁹Wessels (n 44) 251.