

## Chapter 25

# Evolving Bodies: Mapping (Trans)Gender Identities in Refugee Law

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### Introduction

Despite the increasing extension of protection obligations to sexual minorities, the international jurisprudence has yet to resolve the question of recognizing the queer mobilities of asylum claims on the basis of gender identity or expression. While the administrative and judicial decisions in anglophone jurisdictions evince a growing trend towards recognizing transgender or transsexual asylum-seekers, there remains considerable conceptual uncertainty about how this ‘particular social group’ (PSG) should be defined and about what ought to be considered as a ‘well-founded fear of persecution’ (UNHCR, 2010, p. 14). Despite the expansive analysis on sexual orientation-related asylum claims, current academic research and policy debates in relation to (trans)gender-identity refugees remain largely in their infancy. While domestic laws governing refugee determinations vary across jurisdictions, there remains little consistency about how the Convention definition is applied. Focusing on the historic US case *Hernandez-Montiel v Immigration and Naturalization Service* [2000], this chapter examines the definition of a PSG; the quantification of persecution; and how the nexus of gender identity-related harms is recognized to consider the queer mobilities possible for both refugees and the laws and processes that govern them.

This chapter opens by examining how the veracity of gender-identity claims is assessed against immutable qualities or personal psychological narratives of gender dysphoria from early childhood. In quantifying persecution, decision-makers’ preference for identifying persecution in terms of state actors often obscures the complex domestic and familial contexts in which gender-diverse individuals experience violence and social opprobrium. The chapter concludes by seizing on some of these juridical and administrative limitations, and examines how consideration of gender identity-related asylum claims enables us to rethink the legal mobility of the UN Convention Relating to the Status of Refugees (1951) and the 1967 Protocol to offer protection to displaced individuals. Comparing the differing interpretations of the Convention, this chapter reviews a limited number of publicly available administrative and judicial decisions from the USA and Australia to indicate some ways in which refugee

jurisprudence and decision-making in this area must grapple with the mobility of migrating bodies and laws in order to offer more appropriate recognition for these complex claims. While the gamut of terms used to describe non-normative gender identities is historically and culturally contested, this chapter adopts the self-identified terminology used by asylum-seekers in their individual cases. In doing so, this chapter seeks to provoke ongoing reflections into the ways in which queer decision-making connects with queer mobilities in refugee law.

## Contextualizing International Refugee Law and Gender Identity

International law provides the appropriate starting-point for contextualizing the scope of refugee protection. Under Article 1A(2) of the 1951 Refugee Convention there are no specific categories for persecution on the basis of sexual orientation or gender identity. In order to seek asylum, a person must be outside their country of origin and must face a 'well-founded fear of persecution' owing to their ethnicity, nationality, religion, particular social group or political opinion. International human rights law in recent years has moved to recognize the distinct forms of persecution and discrimination suffered by sexual and gender minorities in the context of asylum. For example, Article 23(A) of the United Nations Yogyakarta Principles (2007) identifies an obligation on states to:

*[r]eview, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum. (International Commission of Jurists, 2007)*

Although the Yogyakarta Principles do not legally bind countries to recognize sexual orientation and gender identity in their domestic application of refugee law, a number of anglophone jurisdictions have come to accept similar recommendations for more two decades. In Australia, this category has taken its legal currency from the *Morato* case in which a person 'belongs to or is identified with a recognisable or cognisable group within a society that shares some interest or experience in common' (*Morato v Minister for Immigration, Local Government and Ethnic Affairs* [1992]). In the USA, *Matter of Toboso-Alfonso* [1990] established the precedent that sexual orientation could constitute a valid social group. Despite the statutory variations relating to refugee recognition in the USA and Australia, sexual identity has largely become reduced to a universal identity that can be attributed to a particular set of shared experiences in both jurisdictions. Thus, clearly delineating sexual orientation within the definition of a particular social group is often essentialist (Millbank, 2003).

Claims for gender-diverse applicants, however, need to be distinguished. Public policy discussions of sex or gender often defaults to assumptions of women and men being delineated by a fixed binary category. Gender, however, is a more elusive concept to define. It can be relationally and hierarchically defined: women are defined in terms of their lack (to men) and are subordinated to men. It is also a porous and performative category. Specifically, gender should be understood as the disparate social practices that constitute the identities, experiences and roles that are typically associated with the binary category of sex (Butler, 1990, pp. 22–34). Gender works as a set of culturally and historically situated expressions that give shape to individual psyches and subjectivities. These dichotomous sexed/gendered identities are also

tethered to binary notions of (homo/hetero) sexual orientation and erotic desire – an assumption that excludes intersex bodies that do not conform to these binary expectations. Such a conflation exemplifies the way in which sex, gender and sexual orientation are often rendered co-extensive. In the refugee law, legal scholars Laurie Berg and Jenni Millbank (2013, p. 123) note that the non-conforming gender expressions are often reduced to questions of sexual orientation, at least in the context of understanding the nature of persecution. As Andrew Gorman-Murray (2007, p. 109) suggests, queer bodies often risk having their identities ‘aligned’ to fit into sedentary categories that deny slippage, movement and contradiction. The proper delineation of gender identity is one that continues to plague refugee law and it is to this to which this chapter now turns.

## Scoping the Particular (Transgender) Social Group

Identity is a challenging concept to define in the law. Political scientist Georgia Warnke (2007, p. 87) argues that identity cannot be reduced to a biological reality. Rather, identity should be considered as a historically and culturally contingent phenomenon. More specifically, gender identity adds a further complexity as it is frequently used as an umbrella term to refer to transgender, transsexual and other gender-variant individuals. For example, transgender persons may exhibit characteristics of a gender that may not necessarily correspond to their assigned sex (J. Green, 2004, pp. 2–6). Transsexual is frequently cited as a more specific term to refer to individuals who have undergone some form of medical, hormonal or surgical intervention to affirm their chosen sex or gender identity. Gender identity also incorporates those who may not identify with any particular gender role or sex (Butler, 2004, pp. 85–7). This term is often contested, however, and some prefer the use of ‘gender diversity’ to capture their non-conforming gender expressions and identifications which do not subscribe to a specific psychological or social sense of identity. Understanding identity requires us to appreciate that bodies are textual surfaces on which social, legal, cultural and biological meaning is inscribed and understood (Butler, 1990, pp. 30–34). Specifically, identity becomes a means by which individuals understand themselves and their relationships to others.

In refugee law, the question of identity and social relationships takes on significant prominence. Justice Gerard La Forest provides an instructive precedential starting-point when defining the ‘particular social group’ that may qualify for refugee protection. He says that 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 group and groups associated by a former voluntary status, unalterable due to its historical permanence – should be considered for the purposes of asylum law (*Ward v Attorney-General (Canada)* [1993]).

Drawing determinative conclusions on the associated cases that seek to deal with gender identity-based PSG claims is undesirable, if not impossible, given the limited published decisions and the lack of appellate jurisprudence in this particular area. Moreover, the complex transitional and disparate identifications and expressions of some gender-diverse individuals means that some claims for protection fall outside the schema outlined by *Ward*. Some transgender asylum-seekers do not seek sex affirmation/reassignment procedures so lack

the ‘historical permanence’ that comes with surgical interventions whereas others have evolving fluid social or cultural identifications that are not necessarily reducible to ‘innate qualities’.

The US Ninth Circuit Court of Appeals in *Hernandez-Montiel* provides one of the more considered judicial opinions on asylum-seekers who seek protection from transphobic persecution. The case concerned an applicant from Mexico who identified as a homosexual man with a feminine identity. The applicant sought asylum in the USA after suffering a brutal history of sexual assault from police and familial ostracism (*Hernandez-Montiel v Immigration and Naturalization Service* [2000], pp. 10488–9). During the initial administrative appeal, the Bureau of Immigration Appeals (BIA) defined the applicant’s PSG simply as ‘homosexual males who dress as females’. Justice William Schwarzer, however, noted that this was an erroneous PSG on the basis that it conflated sartorial presentation with the question of sexual (or, rather, gender) identity: the passive, feminine role of a same-sex-attracted male (ibid., p. 10482). Instead, the court opted to define the PSG more narrowly: ‘gay men with female sexual identities living in Mexico’ (ibid., p. 10468). The judicial reasoning placed significant emphasis on academic testimony: the ‘female’ role performed by a man in a same-sex relationship is subject to heightened level of abuse. Here, personalized country information was used to distinguish a highly specific PSG that incorporated gender expression rather than a more general category of ‘homosexuals’ that eclipsed gender identity (ibid., p. 10471).

Immutability was central to the formulation of the PSG. Immutability was understood to refer to an innate trait or a shared past experience – it must be an aspect of fundamental significance to personhood. Regardless of element, it was a common characteristic that is unchangeable. *Sanchez-Trujillo* qualifies, however, that the PSG standard is elastic, noting the existence of a voluntary, associational relationship that imparts some common characteristic. However, it must be a small, readily identifiable group (*Hernandez-Montiel v Immigration and Naturalization Service* [2000], p. 10478). In *Hernandez-Montiel*, the judicial idea of immutability was rendered more elastic. The initial BIA decision evinced that the shifting gender presentation/manner (such as moving from male to female dress) was indicative of volition, rather than innate identity. Much of the volition element concentrated on fashion/dress. Here, the BIA referred to the applicant’s presentation as a male sex worker, rather than a homosexual, as the cause for mistreatment (ibid., pp. 10472–3). On judicial review, Schwarzer J chastised the BIA for trivializing the issue of immutability: ‘this case is about sexual identity not fashion’ (ibid., p. 10485). In narrowing the PSG, the court reiterated the intrinsic relationship between gender identity and sexual orientation in the context of this claim – the applicant would have changed identity if it were volitional after the abuse he endured.

Extending the PSG characterization in *Ward*, Schwarzer J emphasized that gender presentation/identity is crucial to individual personhood, in addition to being related to a person’s intimate attractions. In doing so, lawyer Paul O’Dwyer (2008, p. 200) claims that *Hernandez-Montiel* provided a departure-point from current jurisprudence by framing sexual identity in more elastic terms, to include aspects like dress, appearance and other visual typologies. *Hernandez-Montiel* elaborated a more flexible approach for what can constitute an immutable PSG trait. Despite the conflation of gender presentation with sexual orientation

here, the references to presentation and dress gesture towards a broader conception of what can count as ‘immutable’ – including aspects of socialization (O’Dwyer, 2008, p. 205). In doing so, the PSG in relation to sexual minorities was revealed to be porous enough to incorporate minority gender identity.

While the Court in *Hernandez-Montiel* refused to consider whether ‘transsexuality’ could specifically constitute a PSG for the purposes of refugee law broadly, feminist theorist Anna Kirkland argues that the case provided an encouraging, though somewhat contradictory, framing of sexual/gender identity in the law. Specifically, the shift away from immutability, to the consideration of gender expressions as sites of personhood (despite not necessarily being permanent), provided a much more flexible approach to thinking about PSGs (Kirkland, 2003, p. 32). The idea of ‘subordination’ was given legal currency: where particularly identity traits should be protected because of the psychological and emotional importance they hold for the individual. We have to question the efficacy of narrowing the PSG in terms of sexual orientation, rather than having it expressed in terms of gender identity. Moreover, there is a possibility of arguing that, for this particular class of person, the choice of dress was not necessarily volitional. That is, deeply felt experiences of gender identity must be negotiated ‘discreetly’ in heteronormative environments that conflate biological sex with social ideas of gender.

In Australia, while there has been no comparable appellate jurisprudence on the same matter, administrative decisions provide some illuminating examples. The Refugee Review Tribunal (RRT) decisions concerning gender-diverse asylum-seekers exemplify some of the anxieties evident in *Hernandez-Montiel* when it comes to defining the PSG and the inconsistencies in recognizing gender-diverse asylum claims. In an Australian case, an asylum-seeker from Thailand identified as both homosexual and a transvestite. He claimed to be unable to ‘practice being gay openly especially in the workplace’, and this was linked to being unable to ‘dress as a girl to go to work’ (RRT, 2003, p. 6). Although the applicant’s gender identification as a ‘transvestite’ was acknowledged by the RRT, no attempt was made to distinguish it from sexuality. Indeed, the claim was collapsed into whether the applicant was a ‘practising homosexual’ for Convention purposes.

However, another Australian decision evinced a more nuanced approach to the complex question of gender identity. The case concerned a transgender applicant from South Korea who identified ‘predominately as male ... [with] a lot of female characteristics’ (RRT, 2008, p. 14). In elaborating on the blend between his sexual and gender qualities, the applicant noted that South Korea confused being homosexual and transgender. In response, the RRT defined the relevant PSG as ‘male homosexuals with transgender characteristics’. Rather than conflate sexual orientation with gender identity, the RRT clearly distinguished the ‘imputed transgender’ characteristics from ‘homosexuality’ through specific references to country information advice provided by an Australian government department (RRT, 2008, p. 14).

While earlier administrative decisions relied on defining the PSG alongside ‘homosexuality’, in *0902671* [2009], the RRT specifically recognized the validity of ‘transsexual’ as a PSG. In that case, a Pakistani male-to-female transsexual sought asylum from persecution (RRT, 2009, pp. 2–4). The RRT considered the ‘transsexual in Pakistan’ constituted a valid social group with a peculiar characteristic common to them. In

authenticating the particular social group, the RRT made consistent reference to culturally specific terms of 'third genders' (such as references to '*hijra*') in Pakistan and the medical diagnosis of 'gender dysphoria' (such as the 'wrong body' narrative). While the unique focus on transsexuality was encouraging, the RRT sought to rely on the *Oxford English Dictionary* to define transsexualism narrowly as the dissonance between physical sex characteristics and psychological/emotional gender identifications. In a similar vein to the precedent in *Applicant S* (2004), the decision confined the PSG to transsexuals who have a 'common' experience of a psychological identification of bodily dissonance during early childhood (RRT, 2009, p. 2).

In contradistinction to the above case, the RRT has also demonstrated a preference for extremely parochial constructions of gender-identity claims. A more recent Australian case concerned an applicant who identified as a (heterosexual) post-operative transgender female from Malaysia (RRT, 2010, p. 2). For the purposes of the Convention, the RRT argued that the applicant belonged to the class of a 'Malaysian transgender woman without familial or financial support or protection' (ibid., p. 4). Rendering such a narrow PSG, the RRT expressed considerable concern at accepting 'transgender' as a social group, as it was considered overly broad. In narrowing the PSG, the RRT considered evidence that individuals identified within such a social group lacked employment options and frequently engage in sex work and problematic drug use. No financial or familial support was available to the asylum-seeker either. Elaborating on the culturally specific context of the claim, the RRT made reference to the fact that male-to-female transsexuals or '*mak nyah*' or '*aravanis*' were subject to an Islamic '*fatwa*', and must be subject to policing (ibid., p. 2). Although the culturally specific approach is commendable, the highly specific PSG in this case seems to be determined, at least indirectly, through direct reference to persecution (for example, lack of familial or financial support or protection).

Legal scholar Kristin Bresnahan (2011, p. 661) has suggested that the evolving jurisprudence relating to 'particular social group' has been characterized by analytic and conceptual divisions when considering how approaches in the USA diverge from international refugee law. The USA relies primarily on the test of 'immutability' to determine a PSG (internally focused) whereas Australia evinces a preference for an external social perception test to determine a PSG (externally focused). However, such a neat distinction has been problematized by cases like *0902671* where the issue of 'immutability' (such as gender dysphoria) has been crucial to determining the PSG that transsexuals may belong to. Alternatively, lawyer Joseph Landau (2005, p. 238) indicates that the development of the PSG category in US jurisprudence, like *Hernandez-Montiel*, has ushered in a shift towards 'soft immutability' as the standard to determine what characteristics are protected within the 'particular social group' category. Demographic as well as social identification is included in the formulation – it is not just confined to innate (or bodily) factors. The expansion of the PSG enables transgender bodies greater mobility when seeking recognition before the law. If the PSG is defined in more elastic terms, it invites decision-makers to consider how the thresholds of persecution may change. This consideration demands greater attention to the way in which the 'particular social group' is an entanglement of bodies, places, laws and emotions (Gorman-Murray, 2009a, p. 443). To queer what is meant by the PSG affords greater opportunities for refugee mobility (when seeking asylum) while enabling the mobility of law to navigate

disparate gender identities (when granting asylum).

## (Trans)gendering Persecution

Considering the conceptual difficulties in defining the PSG, quantifying well-founded fears of persecution unsurprisingly poses juridical challenges. Refugee scholar Kristen Walker (2000, p. 177) reiterates that ‘persecution’ is defined in international law as a ‘serious harm’ indexed against a sustained or systemic failure of state protection. What amounts to such ‘sustained failure’ varies in terms of the kind of harm perpetrated. Barrister Rodger Haines QC (2003, p. 330), in discussing asylum claims made by women, points out that gender-related persecution is often confined to familial circumstances, which do not always attract the concern of the state. Persecution is often annexed to state or government actors of harm (Benson, 2008, p. 27). However, such constructions often mask the more systemic absences or institutional prejudices that enables persecution to persist in a number of countries (Benson, 2008, p. 50).

In *N03/46498* (RRT, 2003), the limited degree of (sexual) harassment/discrimination and teasing faced by the Thai applicant, including family rejection, constituted oppressive conduct. However, this conduct was distinguished from a well-founded fear of persecution. Discrimination or violence against the applicant was reducible to private, rather than state, actors (such as family). In rejecting the idea that such conduct amounted to a ‘serious harm’ perpetrated by the state, the RRT relied on vague country information reports, which included reference to a gay tourist guide and an informal email from a former RRT member that indicated Thailand was a tolerant place for transgender people. Thus, the RRT inferred that the applicant exaggerated their claims of discrimination. In dismissing the claim, absence of specific legal recognition of transgender people was not sufficient to constitute serious harm.

In contrast, Schwarzer J in *Hernandez-Montiel* held that a history of persecution presumes an inadequacy of state protection. Recognizing the series of sexual assaults perpetrated by the police on the applicant meant no further claims of violence and ostracism need to be considered. The Court acknowledged that there was no evidence to highlight that Mexico had taken effective steps to curb violence motivated on the basis of sexuality (*Hernandez-Montiel v Immigration and Naturalization Service* [2000], p. 10491). The Court chastised the earlier BIA decision for reasoning that implied the applicant ‘invited’ the persecution by virtue of his appearance.

While the approaches undertaken to determine the PSG and persecution vary between Australia and the USA, the decisions also evince the need for greater clarity in defining the ‘nexus’ between the two. In the cases discussed above, it is clear that maintaining a broad PSG is not always desirable when attempting to define features of persecution. By narrowing the PSG, *Hernandez-Montiel* broadened the ambit of harm that could qualify as persecution (Neilson, 2005, p. 279). That is, for ‘homosexuals’ as a general category, the moral opprobrium or reprobation for dressing or presenting a gender in a particular way – as an expression of that identity – would not necessarily constitute a serious harm. However, when that category was framed alongside the ‘female sexual identity’ component, discriminatory targeting on the basis of how the applicant dressed could amount to persecution.

There is also value in having a flexible PSG so that the nexus of persecution can be

understood in context. Strategically, in the cases discussed above, using the ‘imputed gay identity’ approach can be effective when adjudicating transgender claims. Imputation, rather than immutability, is preferable because it only requires consideration of the persecutor’s perception, rather than attempting to locate an essential difference (PSG) peculiar to the person (Landau, 2005, p. 238). In *Hernandez-Montiel*, the Court could have accepted that the applicant’s choice of gender presentation was volitional, as opposed to fundamental to their personhood. If it had chosen to do so, and this ‘imputed’ approach were adopted, the perception that such a person was a transgender in their country of origin could have sufficed to warrant protection.

O’Dwyer (2008, p. 262) also points to the importance of distinguishing malicious intent from the act of persecution. Requiring a punitive dimension to persecution can leave many applicants without protection. In one case, a lesbian asylum-seeker from Russia had her claim initially refused because the attempts to ‘cure’ her homosexuality through forced conversion therapies were not done punitively (*Pitcherskaia v INS* [1997], p. 645). Although this was overturned on appeal, the administrative decision revealed the way in which a persecutor’s intent (for example, lack of malice) can work against the applicant’s claim. It can oddly become the determinative test for persecution despite there being no legal precedent to suggest this. In a similar vein, in *Hernandez-Montiel* and *0805932* (RRT, 2008), both the Court and RRT noted that the availability of reparative therapies were used not to ‘punish’ the applicant, but to ‘cure’ what was perceived to be illness. In Australia, the High Court has confirmed this underlying principle: persecution need not require enmity of malignity (*Chen Shi Hai v MIMA* [2000], p. 319). However, gender dysphoria, unlike homosexuality, is still pathologized as cognitive discontent (although it is no longer considered a psychiatric disorder). Given this classification, it remains unclear whether non-consensual reparative therapies directed at ‘curing’ such discontent would constitute a sufficiently serious gender identity-related harm (American Psychiatric Association, 2013, 302.85). This demands further interrogation.

## Conclusion

Adjudicating gender-identity refugee claims is an activity that is fraught with legal uncertainty and unpredictability. Yet, as this chapter has suggested, such unpredictability opens up new paths for thinking about (trans)gender identities beyond ideas of immutability or pathology. Even though gender identity has been increasingly recognized in international human rights and refugee law, gender diversity continues to be conflated with sexual orientation. The inconsistencies in the jurisprudence in the USA and Australia highlight the need for new paths to navigate the two without decoupling their slippages or interconnections. Mobilizing the fissures that emerge between gender and sexuality, domestic law and international law, and recognition and refusal, enables us to think more critically about how to accommodate gender-non-conforming bodies into asylum law. Non-normative gender identities are neither necessarily immutable nor universal, yet they remain subject to ongoing violence, harassment and discrimination.

While this chapter does not provide an exhaustive list of recommendations or answers to resolving these tensions, it does signal the need to draw attention to queer mobilities to further



a more reflective approach to adjudication. Characterizing ‘particular social groups’ in relation to gender identity should not be overly broad, but should also not be confined to sexual orientation. Moreover, persecution must be understood in reference to the way in which gender is negotiated, which includes whether the individual is able to move freely in their preferred gender identity (with or without hormonal or surgical interventions) and able to seek appropriate documentation to be able to participate in public life. For litigation and decision-making in this emerging area of refugee law, we must be attentive to how queering mobility can help expand this area of asylum law. In doing so, we can mobilize the law to better recognize the mobile range of gender-identity asylum claims.