

Fixed Categories vs. Fluid Identities: How Are Queer Voices Silenced in the Theory and Practice of Asylum Law?

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Abstract

Taking a queer theoretical approach, our article explores the challenges inherent in defining and/or categorising the sexual and gender identities of certain forced migrants, which can result in queer voices being less heard. We focus on the asylum system as a practical example, examining the tensions between its demands for strict categorisation and the fluidity at the core of certain queer identities. We interrogate the circumstances in which categories may be genuinely necessary or beneficial in adjudicating forced migrants' protection claims. Other practical issues we touch upon include data collection in forced migration settings, and the limited fixed categories and legal statuses available to forced migrants to assert and/or declare.

Introduction

This article examines the knowledge and ignorance which is produced in the process of categorising the sexual orientation and gender identity (SOGI) of asylum claimants. We use a queer theoretical approach to critique the narrow identity categories applied within asylum law. Queerness is a useful analytical lens not least because of its ability to challenge and destabilise common presumptions, including those about LGBTQIA+ identities – particularly the presumption that white gay male experiences are representative or standard. We illustrate our arguments with reference to the queer and/or LGBTQIA+ community generally, and to trans* and non-binary people as particular examples of a marginalised group within a larger marginalised group. We find that the onus is primarily on practitioners and decision-makers to retain a critical awareness and scepticism towards categories; given the circumstances in which asylum claims are made, it cannot be expected that claimants themselves can, will or should challenge the structures of the asylum system or its role in the articulation and regulation of identity. We make here a general comment about a structural characteristic of asylum law generally, and therefore we do not describe or evaluate any national or international framework in close detail. We also examine data collection as a practical example of the real-world manifestations of the legal discourses we analyse.

Our Queer Theoretical Approach

The fact of classifying people according to their SOGI in refugee law is, of course, reflective of wider social, cultural and political norms. SOGI minorities exist in the context of a particular model of gender normativity, whose origins are found in conjunction with the historical projects of European colonialism, human taxonomy, and race. We observe the legacy of these projects in the phenomenon of 'homonationalism', i.e. the instrumentalization of LGBTQIA+ rights in characterising Western states as the site of inclusive and progressive values, in contrast to others' homophobia and regressive attitudes (Puar, 2007, 2013). At the same time, we observe the continued othering of minority groups within these same Western states, as in the contemporary marginalisation of certain SOGI minorities – particularly trans* and non-binary communities (Berg and Millbank, 2013). Refugee law is one arena in which both strands of these legacies interact. In this context, asylum claims can clearly serve to draw attention to a global inequality in access to LGBTQIA+ rights. However, we contend that while the asylum system promises protection for SOGI minorities, it also functions as a site for the regulation and marginalisation of their identities.

Our queer theoretical approach takes a step beyond the interrogation of the specific categories currently employed in the practice of refugee law (Spijkerboer, 2013; Fineman, Jackson, Romero 2016; Otto, 2017; Powell, 2021). Instead, we examine the theoretical foundations of the act of *categorising* identities and consider some of the challenges inherent in categorisation of SOGI *per se* in the context of asylum. The categorisation of forced migrants is clearly central to questions of their visibility, agency and data-gathering. For law and policy to be made equitably and effectively, it is necessary to have a broad picture of the people for, with and about whom it is made. Moreover, the use of collective labels and categories to describe SOGI claimants is an inescapable fact of the asylum law regime; a claimant's well-founded fear of persecution must be based on their 'membership of a particular social group' (PSG) or another of the 1951 Refugee Convention grounds. Though the formulation of PSGs based on SOGI can vary a great deal across time and jurisdiction, it must by definition attach to a social 'group' or category of some description.

Situating contemporary understandings and assumptions about gender and sexuality in their historical context, however, we maintain that the definition and categorisation of people according to SOGI continues to function as a process by which some narratives and voices are made into intelligible identities, while others are necessarily marginalised, silenced and erased. It is crucial to understand that recognition has often meant foreclosing other possibilities. There are thus no easy answers to the complex and important questions around categorisation in SOGI

asylum claims. Our aim here is simply to highlight the tension between the way fluid (queer) identities are lived and the way fixed categories in asylum law are articulated.

Fixed Categories in Asylum Law

In this article, we focus on asylum as one key arena for the adjudication of queer protection claims, whilst noting that there may be many other people for whom this may be relevant, including *inter alia* many who are internally displaced, undocumented, or engaged in regular labour or family migration. One of the reasons for focusing on asylum is that the expansion in PSG interpretation, setting the preconditions for SOGI-based asylum and resulting to a great extent from the past and current battle for recognition from queer claimants, has been 'necessary but not sufficient' (Spijkerboer 2013). Spijkerboer argues that 'the acceptance of minority sexualities in social and political discourse made it possible to articulate LGBTQIA+ rights in legal discourse,' but that they 'have been accepted only to a certain extent – as subdominant, boxed, and unstable categories.' This instability and contestation can be seen in the fact that SOGI asylum procedures regularly involve such profoundly personal questions as 'who are you?', 'how do you know?', 'what do you desire?' – questions which would be more commonly associated with, for instance, psychotherapeutic settings, and which reveal asylum law as 'one of the arenas where debates about the very meaning and significance of gender identity are waged.' If a fact of the claimant's life, such as SOGI, is invoked as the reason for persecution, then, given the asylum system's *raison d'être*, that fact of life will of course be rigorously interrogated and contested by asylum adjudicators whose knowledge and sympathies cannot be assumed.

This can be challenging enough in the case of gay men, who are often expected to meet certain stereotypes and reproduce established stories of self-discovery and sexual behaviour. It is even more so when asylum claimants assert fear of persecution based on other identities within the LGBTQIA+ umbrella. When faced with less familiar SOGI minorities, as in the recent case of the first successful non-binary claimant in *Mx M* [UKUT 2020], adjudicators will not only have to understand and empathise with such an identity, but they will also have to *categorise* it to determine whether the claimant is entitled to international protection. The primary question being decided here is whether or not a person fits within the category of the refugee (or another international protection status), and the whole system is based on the near sacrality of this binary in/out distinction. Respect for this exercise is what generates the necessary impression of certainty and predictability in asylum law.

It is not surprising that queer asylum claimants represent a challenge for refugee law's need for strict categorisations. As Berg and Millbank (2013) put it, being 'more committed to identity blurring than identity building,' they can be

'extremely confronting for refugee law which evinces a preference for static and concrete identity groupings The process of asylum claims is built on an unrealistic ideal of a definitive and revelatory self, whereas [queer] claims necessarily involve fluidity - of sexed status, identification and bodily expression.'

Queer resistance to categorisation is a political project but it is also an inescapable consequence of the inherent fluidity and uncategorisable nature of (queer) identities, which are lived as fluid, often not entirely definable, ever-changing, blurred, intersecting, and unruly. While categories expressed in law may be fixed, (queer) identities as lived and experienced in the world generally are not. The consequence of such dissonance between the asylum legal system and the realities of queer lives is the tension at the heart of our critique: that of fixed categories vs. fluid identities. While we do not anticipate a resolution of this tension, we nonetheless want to draw attention to those who fall through the cracks, those who cannot or will not constrain themselves into a given category which does not adequately represent them, and whose voices, as a result, are silenced in the theory and practice of asylum law. As we will argue below, this does not necessarily translate into a lack of protection for queer asylum applicants, but it often results in the misrepresentation, and thus the invisibility, of their identities.

Invisibility in Asylum Claims

Not only are some queer forced migrants unwilling or unable to present their identities in legally intelligible ways, but those who strive to do so may nonetheless find their voices become lost or distorted in efforts to moderate and strategically (mis)represent their narratives. Because claimants need to present themselves and their identities in ways that will lead to recognition as a refugee, there is a pressure to repeat (and continue to reinforce) established narratives for which successful precedents exist and a strong disincentive to produce riskier, more novel or nuanced self-descriptions. This means that more divergent voices may silence themselves for fear of being denied protection and returned to situations of queerphobic persecution. They thus remain effectively invisible within case law, policy and guidance on SOGI asylum. If one were uncritically to survey SOGI asylum jurisprudence, including country of origin information (COI) discussed therein, one might remain substantially unaware of queerphobic persecution facing anyone other than gay men. *Mx M* again provides an illustrative example; before recognition as a refugee on the basis of their non-binary identity, they were

previously rejected for asylum as a gay man. While the case recognises that the claimant's identity had in fact changed since the time of the original claim, it is notable that the first successful invocation of non-binary identity only arose in a context where the invocation of a more 'conventional' gay identity would not have been possible.

There are two parts to this knowledge gap, comprising a 'lesser' and a 'greater invisibility'. The 'lesser invisibility' refers to those who are often acknowledged to be missing or underrepresented in case law and COI on SOGI-related persecution. COI often focuses mainly or exclusively on gay men, by whom the majority of SOGI asylum claims are made, while, as Jansen (2013) reminds us, 'information on lesbians and trans people is scarce and information on bisexuals and intersex people is practically non-existent.' They are, at least to this extent, somewhat conspicuous by their absence. In contrast, we use the notion of 'greater invisibility' to describe situations where absence and invisibility itself remains largely invisible. The experiences of these latter groups are thus almost impossible to analyse or discuss beyond the blunt fact of their invisibility. While both phenomena may attach to the same claimants to varying degrees, we suggest that the 'greater invisibility' is particularly severe in the case of asylum claimants belonging to less familiar SOGI minorities such as trans* and non-binary gender identities – not to mention sexual orientations other than lesbians, gay men and bisexuals.

Invisibility in Data Collection

These problems are compounded by the challenges which arise in data collection and the registration of forced migrants more generally. While the challenges related to data collection in forced migration are complex and go well beyond the scope of this article, it is interesting to observe that the invisibilities generated in asylum law are also evident and inexorably linked to other similar moments of the migratory journey in which asylum applicants find themselves governed and assisted by institutional powerholders (which may be governmental asylum adjudication systems but also supranational entities). Categorisation, which we analyse in the context of asylum law, is ubiquitous within settings in which individuals need to be managed as a group, as in data collection for purposes of migration management. Observing, however superficially, how this works in other instances may offer useful insights into how the categories expressed in asylum law take concrete shape in the practice of organisations working with forced migrants.

UNHCR and IOM, for instance, both have relatively up-to-date guidelines in place for the biographic data collection and registration of forced migrants which recommend going beyond binary sex and gender options (IOM, 2021). The incorporation of such guidelines into regional or national data collection and

registration tools varies greatly, complicated at times by the need to align records with national authorities' prescribed terminologies. However, even when not expressly provided for, spaces for self-definition beyond the sex and gender binary are generally available. For example, the open entry of 'specific needs' enables people being surveyed by various authorities at different stages of their migration journey to disclose personal conditions which might entitle them to heightened forms of protection. Cultural and linguistic barriers, lack of specialist training, and other practical difficulties aside, it would be unfair to suggest that efforts are not being made by international organisations for greater queer inclusion in response to the lesser invisibility. How then do both lesser and the greater invisibility persist in data collection?

In the asylum context, one central obstacle is that, even when queer forced migrants indicate their SOGI as 'other', for example, such responses are rarely reflected in official statistics and reports. As one IOM data analyst described to us in January 2022, 'among hundreds of classical binary options, for instance, you have those two or three who are marked as "other" and you never know how to include them, even if you would like to.' (Bartolini, 2022) Aside from the heavy burden already placed on forced migrants in identity profiling, in which they are required to discuss complex private matters with officials of whom they may be understandably wary, silencing is also a consequence of the apparent statistical irrelevance of the relatively very small number of people who identify beyond established categories. Statistically negligible, these people are rarely included in official outputs such as reports or policy papers, and thus cannot influence decision-makers. Key actors consequently remain largely unaware of the issue, or overlook it to focus on other issues deemed more pressing in terms of urgency and resources. In migration data collection contexts, where large numbers of people with a multitude of different backgrounds are profiled, the voices of those who slip through the cracks do not resound through force of numbers.

Conclusion

Queer forced migrants' voices are thus silenced because the current asylum system is structured in ways that impede their being heard. Though the asylum regime is in many ways dynamic and evolutive, jurisprudence continuing to develop also around the PSG as it relates to SOGI minorities, the refugee definition itself is made to appear fixed. In the tension between fixed categories vs. fluid identities, the former thus prevails as a necessary means by which to preserve the stability of the asylum system. Expanding LGBTQIA+ 'inclusion' and bringing ever more categories within the umbrella of the PSG cannot entirely resolve this tension. The same is true for data collection practices in forced migration, where the proliferation of categories and the recognition of 'others' and migrants with 'specific needs',

however valuable, does not represent a shift away from the basic starting point of categorisation. The fluidity of lived identities remains constrained and cannot be fully expressed within systems that demand and presume fixed categories. Our queer analysis thus represents a more fundamental disruption and challenge to asylum law. It is the need for categorisation itself, we argue, so inherent to the asylum system as it is structured and imagined today, which is central to the silencing of queer voices.

We reiterate, however, that this is not an argument against the categorisation of SOGI *per se*. Rather, we encourage a greater degree of critical distance from the categories being used, considering them not as isolated legal phenomena, but as reflections and articulations of wider social and historical (mis)conceptions and assumptions regarding human sexual and gender diversity. We observe that the ways in which SOGI asylum claims are processed and interpreted can have a regulatory and restrictive effect on the expression of queer identities in these contexts, while often also offering the only realistic route for claimants to escape queerphobic persecution. From this perspective, and without arguing to dispense with categories altogether, we have sought to outline and evaluate some of the tensions that exist within asylum jurisprudence. Remembering always that our queer methodology is also about the permanent contestation of our own methodological and analytical tools, we do not suggest an ideal or even a 'correct' approach to defining SOGI for asylum purposes. Rather, our aim is to maintain a critical awareness as to the potentially violent consequences of different terminologies and constructions, the knowledge and ignorance that they continue to produce and reinforce, and the legal and policy-making consequences thereof. Our queer critique is built around precisely this idea – in Butler's (1993) terms, that '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.' Given how it destabilizes the fixed categorisations core to the asylum system, this conflicting impulse is gradually becoming more visible in SOGI asylum claims, which is why close and critical engagement with the categories currently invoked is, in our view, urgent and imperative.

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