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Sexual and Gender-based Asylum and the Queering of Global Space

Reading Desire, Writing Identity and the Unconventionality of the Law

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Part II

Asylum



Asylum: Introduction

Agnes Woolley

Asylum is an ambivalent term, freighted with a set of often contradictory interpretations. As Alison Jeffers notes in this volume, it is a less localised, more abstract concept than its cognates ‘sanctuary’ and ‘refuge’, which suggest geographic specificity. Where these have retained predominantly positive associations, asylum has a more uneven history; from its earliest uses as a place of sanctuary where fugitives from the law were sheltered from its power (from the Greek *asylos* meaning that which is inviolable), the nineteenth-century asylum movement in the English-speaking world engendered popular understandings of asylums as spaces negatively associated with madness and deviance. Now asylum occupies a precarious position in the cultural imaginary, especially as it relates to migration. As both Jeffers and Anthony Good point out in these pages, a popular commitment to the *idea* of asylum continues, despite ever-increasing hostility to its practice. Perhaps in part a Victorian hangover, in the UK asylum seekers are readily associated with state dependency and aberrant behaviour; cast as one of Stanley Cohen’s ‘folk devils’, as Good notes in his chapter. More recently, Imogen Tyler (2013) has used the notion of ‘revolting subjects’ to describe the ways in which groups such as asylum seekers are figured as socially abject in mainstream media representations, which are largely responsible for that enduring opposition between ‘fraudulent’ or ‘bogus’ asylum seekers and an idealised, ‘genuine’ refugee.

But contemporary asylum is not only a scandal in the journalistic sense. As David Farrier has argued, it is also a ‘scandal’ for those critical discourses that have overlooked the legal and economic conditions of asylum seekers and refugees in their endorsement of the unhampered mobility of the cosmopolitan migrant. The national and supranational legal context in which asylum seeking exists today is crucial to a nuanced understanding of the ways in which asylum and refugeedom differ from voluntary migration. The idea of asylum as a universal, individual and claimable legal right is a twentieth-century phenomenon formalised in the 1951 UN Refugee Convention and the 1967 Protocol, and remains the prevailing mechanism for adjudicating asylum claims.¹ While the lived experience of migration emerges from a broad spectrum of

circumstances, the international legal instruments designed to adjudicate the basis on which someone might be granted refuge are narrow, developed in the immediate aftermath of the Second World War to address the numbers of refugees crossing between European countries. In answer to Farrier's question 'What is the place of the asylum seeker before the law?' (2011: 10), the chapters in this section tackle both the written letter of the law and the culturally conditioned social laws governing interactions between individuals in societies and communities.

Through case studies, both Anthony Good and Sudeep Dasgupta engage in detail with current legal mechanisms for determining refugee status, probing the limits and legacies of legal systems in Europe and the Global North. Dasgupta's rigorous discussion shows how asylum claims based on gender identity and sexual orientation both register and challenge conventional or normative understandings of the tripartite relationship between sex, gender and desire. Importantly, Dasgupta focuses on the writing and the reading of the law: both how it is constituted through language, and how it is 'read' by decision makers on asylum. As he points out, the narrative basis of the asylum adjudication process – its dependence on a credible, but also narratively teleological, account of persecution – has implications which extend to the shaping of an idealised legal subject. In the case of sexual and gender identity, for example, 'coming out' is read exclusively as 'an emotionally affirmative act of self-valuation', which results in a 'fully realised sexual and gender identity'. However, for Dasgupta, asylum claims based on sexuality and gender also work to 'queer global space' by registering 'unstable desires' that pull against those national laws that seek to read bodies straightforwardly. This means that it is the global space in which the deregulation of sexuality becomes possible.

Good approaches the legal workings of asylum through the lens of morality, interrogating the interaction between lay and legal understandings of the morality of asylum. Despite the principle that common law judges should not appeal to 'general, non-legal moral precepts', Good shows how 'asylum decision making lends itself to the making of such judgements in practice, because of the central role played by credibility'. This is truer still of non-common law countries such as France, where a judge must appeal to their 'intimate [or innermost] conviction' (*intime conviction*) when making a decision. Although decisions on asylum in both the UK and France are based on adherence to the 1951 Refugee Convention, the historical and cultural contexts of these national legal systems lead to distinct approaches to decision making at appeals stage. What is more, lacunae in the original Convention, such as gender and sexuality, are dealt with differently according to the national context. Troubling the law in this way, both Good and Dasgupta participate in a critical reassessment of the legal mechanisms governing asylum, one that is increasingly pressing given the geopolitical and climatic upheaval currently producing record numbers of displaced people.

The rigorous analyses of the law in the first two chapters of this section provide a useful counterpoint to the final chapter by Alison Jeffers, which takes up Good's sense of a general moral approach to the issue of asylum by considering the 'lore' surrounding culturally and historically inflected understandings of duties and obligations to one another in communities. Jeffers looks to alternative spaces of determination – cities and, specifically, theatres of sanctuary – popular movements that exist outside state apparatuses of asylum and offer ways of acting 'under the conditions whereby fundamental ideas about protection and asylum cannot keep pace with contemporary realities'. Focusing on the *Queens of Syria* project, in which a group of Syrian women residing in Jordan take part in a production and reinterpretation of Euripides' *The Trojan Women*, Jeffers assesses what she calls the 'politics of the empty gesture'. Productions such as *Queens of Syria*, she argues, stick to the letter of the UN Convention by 'evoking sanctuary practices based on the traditional power of Church and city to shelter strangers on a more human scale'; they are faithful to the Convention, where nation-states seek to evade its conditions. As well as 'redefin[ing] a sense of what is possible in terms of a response to refugees in this historical moment', Jeffers's chapter returns to the sense of hope and possibility embedded in the earliest uses of the term 'asylum'.

Note

1. There are important refugee-receiving countries which have not signed up to the Convention: Jordan, Lebanon, India, Bangladesh and Pakistan to name a few. Given that Africa is the continent that receives the most refugees, it is also worth noting that the African Union has its own definition of a refugee that is more expansive than the UN's.

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Sexual and Gender-Based Asylum and the Queering of Global Space: Reading Desire, Writing Identity and the Unconventionality of the Law

Sudeep Dasgupta

The asylum seeker is located between the category of the refugee and a space of sanctuary. In sexual and gendered asylum cases – that is, specific cases dealing with sexual identity and orientation, as well as gender identity – gays, lesbians and trans-persons become the objects of law as well as agents in the transformation of law. Cases of sexual asylum conjoin time and space in particular configurations in which national interests and international instruments give form to sexual identity through shifting cultural norms. The tripartite relation between biological *sex*, cultural notions of *gender* and sexual *desire* are implicated in cases of sexual asylum. The heteronormative understanding of the relation between these three assumes that sex (male/female) is determined by biology, leading to corresponding cultural notions of masculinity and femininity, and this sex–gender relation is lived through sexual desire for the opposite sex. Feminist and queer theory has powerfully critiqued the assumed naturalness of this relation, and sexual asylum cases provide important vantage points from which the stabilisation of this tripartite relation is being undone. The Refugee Convention of 1951 and other international instruments such as the 1967 Protocol Relating to the Status of Refugees are works-in-progress which often have both regressive *and* emancipatory effects for those seeking asylum based on sexual orientation or gender identity. Through inscriptions and altered reiterations they register both the conventional understandings of class, nation and race and the unconventional trajectories of sexual desire narrativised by displaced bodies. Asylum law and advocacy on sexual orientation or gender identity register this charged conjunction between conventions and unconventionality.

This chapter first analyses how the asylum seeker is written into being through laws and conventions that produce a queer subject shuttling between the poles of normalisation and critical destabilisation. By analysing

specific court judgments in different countries, I argue that heteronormative understandings of the sex–gender–desire relation restrict access to refuge in sexual asylum cases. At the same time, I show how the application of the law also destabilises these heteronormative understandings, opening up such restrictive understandings of sexuality and gender. Some parenthetical remarks on the implications of my analyses below are in order here. The different national contexts in which these court judgments are made limit their concrete effects. The cases analysed below do not have universal relevance across all nations. At the same time, these judgments have repercussions in international law, as I will show in relation to the UK and the European Court of Justice. My argument does not aim at a comprehensive picture of sexual and gender-based asylum cases across the world. Neither is my argument a comparative one in which laws in specific countries are related to each other. The focus is on how *specific* sexual asylum cases across different countries serve as exemplars that provide a broad sketch of shifts at a global level in the way sexual and gender identity are being understood. By analysing sexual and gender-based asylum cases in a number of countries, and their real and potential consequences beyond these countries, my argument identifies *specific* shifts in certain jurisdictions as well as the possibilities for developing their legal arguments more widely.

The second part of the chapter analyses the ways in which the testimony of sexual and gender-based asylum seekers is interpreted during court proceedings in order to make status determinations. This legal interpretation of asylum seekers' speech in specific cases I term 'reading'. The dialectic of sexual normalisation and deregulation in cases of sexual and gender asylum is exacerbated by the protocols of reading (by the law) which demand a *linear narrative* of sexual identity from the asylum seeker. An exposition of sexual identity assumes an essential and stable form of gender identity and sexual desire whose gradual realisation is narrativised teleologically, such that at the time of demanding sexual asylum a clear, non-contradictory and fully realised sexual and gender identity has been formed. The assumption that this form of narrative exposition is the right form of 'evidence' of sexual identity is, as we shall see below, found in many court judgments. By reading *for* such narrative evidence of sexual identity, the law is unable to countenance the decentred, ambivalent and contradictory forms through which sexual desire is *lived* by asylum seekers. The stability of sexual identity is queered when the renderings of sexual desire in asylum seekers' speech and the reading strategies by the law which attempt to convert them into clear narratives of sexual identity intersect.

The United Nations High Commissioner for Refugees (UNHCR) states that 'An asylum seeker is someone whose request for sanctuary has yet to be processed. Every year, around one million people seek asylum. National asylum systems are in place to determine who qualifies for international protection.'¹ The 'has yet to be' temporality of the asylum seeker produces a

subject-in-the-making in the transient space of the ‘as yet’. When this subject is to be defined in terms of sexual identity (or orientation), the success of asylum claims depends on the appropriate rendering of sexual self-identity in terms readable by judging officials according to categories and descriptions written into laws and conventions. The stark inequality in power relations between the self whose identity is expressed and the decision maker (individual, agency, state) which determines the legibility and legitimacy of the expression of sexual orientation or gender identity marks the temporality of the interval between the refugee and the asylum seeker. As Jacqueline Bhabha describes it,

most refugees fleeing to safety in developed states do not arrive with a ready guarantee of access to enduring human rights. Rather, they enter as ‘asylum seekers’ – a temporary and increasingly disenfranchised category of non-citizen who need to establish their eligibility for refugee status before they can enjoy the prospect of long-term safety and nondiscriminatory treatment. (Bhabha 2002: 155)

Both the determining power of the law in writing sexual identity and the unstable rendering of sexual desire by asylum seekers intersect in the ‘no guarantees’ temporality of the ‘as yet’. The inscriptions and reiterations of the law meet the reading of sexual desire, and in this conjunction the writing of the sexual subject into case judgments striates the global space produced by bodies on the move. Rather than moving across national borders under international protection to a place of sexual and social sanctuary, the trajectories of individual sexual desire *produce* global space queerly through the experience of forced displacement.

In *Mourning Becomes the Law: Philosophy and Representation*, Gillian Rose describes ‘the work’ of the philosophy of law as a social and historical process which registers the ongoing confrontation between diverse national, cultural, political and humanitarian practices. The law is not a ‘text’ which establishes the final comprehensibility of the concept it expresses – be that refugee, sexual identity, desire. The ‘texts’ of the law can be read ‘deterministically’ as ‘fixed, closed conceptual structures, colonising being with the garrison of thought’ (Rose 1996: 8). Legal texts can also be read as ‘works . . . implying the *labour* of the concept’ that expresses ‘the difficulty which . . . conceptuality represents by leaving gaps and silences in the mode of representation’ (Rose 1996: 8, emphasis added). The law can be read as the garrisoning by thought of a (sexual) being by colonising its (failure at consistent) self-representation and turning it into a text when an asylum case is decided. The work of the concept exposes the law’s inability to comprehensively grasp the reality it expresses, and sexual asylum law and asylum seekers’ speech registers the productivity of these failures for reworking the law unconventionally. A conceptual understanding of both forms of representation as ‘works’ represents the gaps,

failures, stutterings and contradictions that attend any form of representation. Cases of sexual asylum reveal that both the law and the asylum seeker's speech are involved in working through and transforming the meaning of sexual identity as it is lived differentially by specific individuals. It is in this sense that 'the labour of the concept' refers to the *transformative* work that both writing and reading sexual identity perform for thinking gender and sexual identity unconventionally. Both the representation by the law of *the* asylum seeker and the representation by the asylum seeker *to* the representative of the law register this labour of the concept. Writing and reading about the politics of sexual asylum is not about the verification of the givenness of the law but an acknowledgement of 'a multiplicity of eventualities' (Rose 1996: 8) in the time of the interval which exemplify 'the creative involvement of actions in the configuration of power and the law' (Rose 1996: 12).

The work of the law and the writing of identity

The refugee as an object of discourse emerges as the effect of political conjunctures at specific moments. The 1951 Convention Relating to the Status of Refugees came into force in 1954 and is the primary instrument through which protection to refugees is granted by nation-states and international bodies such as UNHCR. The inscription of the Convention was followed in 1967 by the Protocol Relating to the Status of Refugees, which expanded the reach of the Convention beyond events in Europe in the post-war period. The concern over refugees, however, predated 1951 when the International Refugee Organization was founded in 1946 to address the displacements produced by the Second World War. This early focus on the refugee was caught up in fears around preserving the sovereignty of the nation-state rather than protecting the individual fleeing persecution (Goodwin-Gill 2008: 1). The refugee began to emerge as the point of tension between a universal category of the 'human' for UNHCR and the attempts by nation-states to limit its scope. According to the 1951 Convention, refugees were defined as those affected only by events that took place *in* Europe before 1951. However, UNHCR's ambit was universal, 'unconstrained by geographical or temporal limitations, while the definition forwarded to the Conference by the General Assembly' restricted the category of refugee 'to those who became refugees by reason of events occurring before 1 January 1951' (Goodwin-Gill 2008: 2). Nation-states were given the option of retaining the temporally and geographically specific restrictions of the 1951 Convention.

This brief snapshot of the tensions between particular national interests and the more expansive understanding of human rights resonates in the shifting inscriptions of the law produced by sexual asylum cases. Writing the refugee into the law is precisely the work of managing the gaps, tensions and failures that attend any attempt at inscribing the complex social reality of

displaced populations in an international frame. These gaps and complexities are identifiable in the shifting meanings attached to forms of social identity such as gender and sexuality. Article 1(A) of the Convention and the Protocol together define the refugee as ‘any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion’ (Goodwin-Gill 2008: 3). Gender and sexual identity are not stated explicitly and most often fall under the category of ‘membership of a particular social group’.

For sexual and gender asylum seekers, the individual realities of living one’s shifting gender and sexual identity are intrinsically bound up with processes of forced displacement caused by persecution. How these realities are garrisoned in thought is discernible in the mode of writing gays, lesbians and transgender persons into the category of ‘membership of a particular social group’. Bhabha notes that ‘it is increasingly the case that the asylum seeker’s flight is tortuous; it is likely to be indirect, facilitated by commercial intermediaries and false documents . . . Questions of identity may be problematic – who exactly is the applicant and what is his or her nationality?’ (2002: 156). Beyond national identity, identifying the ‘social group’ they belong to becomes problematic when their identities are continually, and often forcibly, transformed by the power dynamics involved in the process of displacement. Conventional stereotypes of gender, age and sexuality come into conflict with the transformations in identity produced through culturally specific locations and their traversal through displacement. Bhabha argues that such conventional understandings

narrow the scope for advancing asylum claims on behalf of claimants who do not fit the prevailing stereotype. Thus, if women from a particular region are categorized as submissive, voiceless victims, then a woman who flees persecution on the basis of her political activism . . . will face the additional hurdle of persuading the decision-maker that her political opinions, as a woman in that country, are taken sufficiently seriously to count as a threat. (Bhabha 2002: 162–3)

The conventionality of refugee law and its instantiation in asylum cases is undone by the continual appearance of unconventional figures whose trajectories come into contradiction with the politics of nation-state sovereignty and the cultural presuppositions that layer over social identity and thus impinge on the consistency of the ‘human’ in human rights discourse. Identity emerges as the contingent effect of the displaced body’s forced trajectories. Elsewhere I have argued that in the condition of ‘scattered subalternities’ (Dasgupta 2017), the bodies of displaced peoples do not move through a stable global cartography of readable spaces. Rather, their bodies are writing instruments

that inscribe shifting borders and spatial coordinates through which national, cultural and social identity get rewritten. The scattered subaltern's (un)readability is both cause and effect of heterogeneous global space and its outmoded cartography.

Martin Manalansan (2006) has rightly argued for extending Adrienne Rich's (1986) insistence on a politics of location for understanding the intersection of gender and sexuality in migration.² *Forced* migration exacerbates the need for an intersectional analysis of sexual asylum given that the cultural presumptions of the law seek to stabilise a heterogeneous global space according to conventional stereotypes of gender and sexual identities. Expanding on Eric Santner's analysis of the embodiment of (national) political sovereignty in relation to the body of 'the people', I argue that asylum seekers' bodies exhibit what Santner describes as 'biopolitical animation' where 'biological life is amplified and perturbed by the symbolic dimension of relationality at the very heart of which lie problems of authority and authorization' (Santner 2001: 30). The authorisation executed through the granting of asylum is based on the inscription of an identity whose bodily integrity must be readable to an authority (the immigration service, for example) according to the cultural, political and symbolic protocols of a Convention. Yet the Convention's conceptual vocabulary exposes the unstable relation between an authorising inscription and the being whose desire must be read. When sexual and gender identity is at issue, this failure of inscription is an effect of the fact that 'the flesh' is a 'fantasy construct, charged with [. . .] human desires, fears, and values, a virtual reality that has gathered around bodies' (Goodman 2016: 7).

By seeking to make sense of sexual and gender identity in the wake of global displacements, the sensory perception of the world itself is deranged. 'Sense' perceives itself, argues Jean-Luc Nancy 'as a world of separation, and of pain . . . the world of exteriority from which life withdraws giving way to an endless displacement from one term to the next that can neither be sustained nor gathered in an identity of meaning' (2002: 3). A politics of *dislocation* emphasises how forced movement to flee persecution results in the asylum seeker as the operator of a queering of sexuality. The effect of bodily displacement exacerbates the errancy of sexual desire, undermining the fixing of identity by the law of the sexual subject fleeing homophobic or gender-based violence. At this point, it is crucial to insist that intersectional understandings of bodily displacement are not mere examples of an abstract theory of sexuality or sexual identity based on fluidity and fragmentation. Forced migration caused by persecution on the basis of sexual and gender identity concretises abstract notions of fluid sexuality and gender by exposing the specific operations that discipline sexualities through the stabilisation by the law of 'the shifting line between legal and illegal status' (Luibhéid 2008: 289). The application for asylum is the moment when *specific* intersections of multiple power-relations such as gender and sexual relations give form to an individual, thus throwing into question the relation between a desiring

body's identity and the possibility of ascribing it membership 'in a particular social group' (Landau 2004: 102). An emphasis on the 'authorising' power that seeks to contain 'bodily animation' interrogates the prevailing intellectual focus on the global 'power of flows' (Castells 2000: 500) to help identify where and how 'flows of power' intersect (Ampuja 2011: 287).

Some specific legal examples will help to contextualise the foregoing discussion. Joseph Landau has argued that crucial legal shifts in US court rulings exemplify how sexual asylum starts to produce unconventional understandings of gender and sexual identity. The decision in 2004 of the Ninth Circuit Court in the US to honour 'an asylum seeker's expression of gendered traits, including a person's hairstyle, clothing, demeanor, use of makeup, and choice of names' as the 'true and honest depiction of identity and self-determination' undid any 'natural' (i.e. biological) basis for establishing gender identity (Landau 2004: 102).³ The decision exemplified the long-standing critique in queer and feminist theory of the biological basis for establishing sex, as well as the naturalised link between sex and gender. By acknowledging that the behaviour and bodily traits 'exhibited' by a person are legitimate grounds for determining gender identity, a performative understanding of gender identity and existing social perceptions of gender were combined.

Conventional understandings of the relation between sex, gender and sexual desire produce a 'heterosexual matrix' (Butler 1999a: 194) in which biological sex implies a corresponding gender and the opposite sexual object of sexual desire. By delinking gender from the body's sex, the Ninth Circuit Court's ruling has consequences not just for transgender identity, but by implication for the determination of sexual orientation too.⁴ Whether or not transgender asylum seekers identified as homosexual, the social assumption that their *sexuality* (rather than their gender) was being manifest through their outward appearance and behaviour was marshalled as evidence to successfully claim homophobic persecution. The theory of 'imputed gay identity' (Landau 2004: 102) produced by the law expanded the non-biological understanding of gender by redefining homosexuality as a question of social perception rather than self-affirmation. Further, the imputation argument of the law linked an individual affirmation of gender identity to social perceptions of sexuality. In effect, a non-biological inscription of gender identity by the law produced an imputed sexually desiring body on the basis of potential social legibility.

The sexually desiring gendered body literally *comes into being* through the process of seeking asylum and legal decision making. Crucially, the meaning of *belonging* to a social group is uncoupled from a biological and individual ascription of identity. This albeit geographically limited development in the US of a 'soft immutability theory of identity' and 'imputed gay identity' (Landau 2004: 103) has global implications since the national courts' rulings are based on the international ambit of the Refugee Convention. These two understandings of identity uncoupled the link between sex, gender and desire by framing the individual through the social. But the place of the 'social' is not unambiguous. The very possibilities that social perception open up for

fleeing sexual persecution can also close it down in other interpretations of international law.

In 1985 the US Board of Immigration Appeals defined a ‘particular social group’ as based ‘solely on the existence of an “immutable” characteristic’, one that ‘an individual either cannot change or should not be required to change because it is fundamental to identity or conscience’ (quoted in Marouf 2008: 48). This ruling emphasised individual characteristics within a defined group rather than social perception as the basis for granting asylum. In 2002, however, UNHCR issued guidelines to Convention signatories which expanded the basis of defining a ‘social group’ to include ‘social perception’ (Marouf 2008: 63, 65) in deciding asylum cases. The increasing reliance on social visibility, Marouf argues, led ‘to incoherent, inconsistent decisions that have no basis in the 1951 Refugee Convention and its 1967 Protocol’ (2008: 49). Marouf shows that

[W]ith respect to sexual orientation, the United States and international authorities have rejected the notion that gays and lesbians who remain ‘discreet’ – and therefore ‘invisible’ – are not protected by the refugee definition . . . Under the ‘social visibility’ test, however, their claims may well be denied. Indeed, even claims brought by ‘out’ gays and lesbians may be rejected if they come from societies that do not recognise homosexuals as a group or homosexuality as a social identity. (2008: 50)

The visibility (being out) of sexual identity undermines sexual and gender asylum claims since ‘social perception’ is deemed impossible in societies where the category of ‘homosexual’ is considered non-existent. The reliance on social visibility turns the asylum seeker doubly invisible both in the home country and the place of desired sanctuary through the use of prevailing cultural stereotypes. ‘Soft immutability’ of gender and ‘imputed gay identity’ (Landau 2004: 101) loosened the understandings of the gendered and sexually desiring body by inserting the social while writing the sexual asylum seeker into law. ‘Social perception’ (Marouf 2008: 63) based on the culturally stereotypical assumptions of non-Western societies, on the other hand, shut down the chances for successful asylum claims. The unconventionality of the Convention emerges precisely here in the normative inscriptions of the sexual asylum seeker and the selective deployment of legal alternatives for establishing its culturally normed body.

Sexual determination and the indeterminate reading of the asylum seeker

[H]uman sexuality . . . is inherently perverse, inherently in excess of teleological function . . . [it] emerges on the basis of a constitutive swerve . . . from a norm that is established only retroactively. (Santner 2016: 48)

What happens to the ‘virtual reality’ (Goodman 2016: 7) of the desiring body when the speaking subject confronts the sexual determination by the law of its identity? Reading the writing of the sexual asylum seeker exposes the unconventionality inherent in the inscriptions of the sexual subject when sexual identity is to be determined in actual asylum cases. Linearity, consistency and transparency guide the law’s demand for a narrative of sexual identity, yet this demand is confounded by the silences, contradictions and fractured renderings of an asylum seeker’s sexuality, particularly when transformed by the traumatic consequences of the experience of displacement and persecution. Testimonies solicited in the asylum hearing reverse the temporality of Santner’s description of sexuality by testing the swerving constitution of sexuality against a norm established before the asylum seeker has arrived at the desired place of sanctuary. The fraudulent telos of a narrative of sexual identity is exposed precisely when the complex experiences of the globally displaced are tested at the culmination of their journeys. The narrative of sexual identity in the West culminating in the event of ‘coming out’ fails to successfully overlap with the moment of sexual determination by the law of the asylum seeker’s testimony. The heterogeneous global space produced by sexual and gender asylum seekers is doubly critical: it exposes both the universalist pretensions of a linear and progressive narrativisation of sexual identity, and calls into question the straightforward and stereotypical readings of forcibly displaced queer global subjects.

The demand for asylum is ‘the point of acute confrontation’ between ‘the fraught and adversarial insistence on a shared universe of rights and resources that the disenfranchised and persecuted peoples of the developing world import through their physical presence on the territory of developed states and through their claim to asylum’ and ‘the imperative of a new architecture of cosmopolitan democracy that takes human rights claims at face value’ through an ideological discourse of ‘the free flow of ideas across the globe’ (Bhabha 2002: 180) that accompanies transnational capitalism. When the medium of individual life stories is tested by immigration officials, the narrative assumptions of teleological normalcy, consistency and transparency are confounded by transitory articulations of the contradictory experiences of sexual desire. The sexual and gender asylum seeker’s writing of alternative cartographies of desire contradicts the stabilisation of global space through the identification of sexual identity and cultural difference.

The law’s desire to identify and fix the sexual identity of the asylum seeker is countered by the desire for recognition by the asylum seeker. Both desire and recognition undermine the logic of identification. Judith Butler has convincingly argued that for ‘subjects of desire’ (1999b) the outwardly propulsive dynamic of desire, including the desire for recognition, is accompanied by the inadequacy of self-knowledge and incomplete knowledge of the other and *its* desire (Butler 2015). This argument is particularly relevant for sexual and gender asylum seekers whose stories are tentatively articulated in culturally

incomprehensible contexts through the mediation of advocates who themselves translate faltering speech into narrative testimony for authorising interlocutors. The desire for recognition involves both the affirmation of an existing identity and the futural actualisation of its existence through the assent of an inadequately knowable other (Düttmann 2000).

The regulation of sexuality takes place between an affirmation and its confirmation in the ‘as yet’ temporality between the experience of unruly desire and the moment of recognition by the law. That is why an abstract theory of sexual fluidity inadequately expresses the power dynamics involved in the regulation of sexuality. Carl Stychin warns that ‘mobility should not be “celebrated”’ as the unproblematic basis for the constitution of a lesbian or gay identity (2000: 606). His illuminating analysis of transnational mobility in the context of same-sex relationships highlights the deployment of normative demands of sexual behaviour (monogamy rather than promiscuity), financial security and commitment in reviewing immigration requests. In the case of the forced migration of sexual asylum seekers, however, the legal demand for proof of homosexuality in the context of persecution rather than that of class-based, heteronormative norms of homosexual love reveals both the regulation and deregulation of transnational sexualities.

When the self-assertion of sexual identity is experienced as a problem rather than a given, and when its forced narrativisation at the point of granting or denying asylum is determined by the interlocutor who will confer this identity, the narratives demanded of sexual asylum seekers by the law fail the test of legibility. The ‘swerving’ (Santner 2016: 48) of sexuality in life trajectories was clearly identifiable in a Ukrainian lesbian’s testimony before a Canadian tribunal in 2007 (Berg and Millbank 2007: 213). Having ended a relationship with a woman when she was young, the fear of homophobia led her to marry a man, after whose death she entered into a relationship with a woman. The immigration officials argued that since she stated she had been happy in her marriage, and she failed to sexually interact with her close women friends, her testimony was insufficiently credible to support an ascription of lesbian identity. The incredible assumption that proximity to women implies a (missed) opportunity to sexualise this proximity reveals a deliberate refusal to acknowledge the explicitly stated fear of homophobic violence that led her into a heterosexual marriage in the first place. When a narrative model of sequential decisions leading to self-realisation is expected, the testimony of lesbian sexuality swerving between fear and desire cannot be read.

Further, the endpoint of the narrative of sexual identity is assumed to be reached when self-realisation of one’s sexuality is qualitatively understood as an affirmative articulation of desire. This assumption was exposed in a Pakistani man’s repeated characterisation of homosexuality as a ‘problem’ (Berg and Millbank 2007: 200) in an asylum case in Australia. The initial judgment by the Australian immigration service (later overturned) argued that the use of this word showed that he did not see his homosexuality as a positive aspect

of his personal identity. His words were read thus: ‘Whilst claiming to view expression of homosexuality as a right, the Applicant thus also depicted it as a kind of deficiency or defect’ (quoted in Berg and Millbank 2007: 200). The possibility that ‘the problem’ of homosexuality might be the difficulty of living as a gay man in a homophobic society, or indeed that the claimant saw his homosexuality as a *social* problem of homophobia rather than a personal one of internalised self-hatred, was not entertained in the judgment. The positive casting of ‘coming out’ as an emotionally affirmative act of self-valuation here denies the reality that coming out is a process rather than an act in a potentially hostile environment, and one fraught with fears and desires deriving from the uncontrollability of the effects it can generate in situations beyond one’s individual control. *Narrative* resolution reduces this complex and ambivalent process to a single act, the culminating telos of a social, sexual and political trajectory ending in the confirmation of a sexual identity.

The failure of a determining reading practice that confers recognition on a sexual and gender asylum seeker’s speech is most starkly seen in the inability to read the meaning-laden moments of silence; both the involuntary incapacity to articulate as well as the deliberate refusal to speak. Forced sexual and gender migration involves experiences of violence including physical assault and rape as well as emotional persecution such as social ostracisation. Toni A. E. Johnson explains that

[T]he asylum hearing becomes a venue where ‘unspeakable’ occurrences stemming from persecutory experience must be given voice. However, the production of voice [. . .] is often stilted, filled with the gaps and omissions of the things [which] often pertain to violent and violative acts and the space of the courtroom does not induce individuals to be open about their experience, even though it is that openness that may well assist the granting of asylum. (2011: 67)

Narrativising a sexual identity on the basis of personal testimonies of past experiences is not just difficult, but also the occasion for encountering past traumas again in the painfully power-laden context of the encounter between a demand and the conferral of recognition. It is widely acknowledged both in psychological research and studies of jurisprudence that the experience of trauma fundamentally alters a person’s ability to adequately, consistently and clearly articulate details of such experiences. Yet repeatedly in asylum claims, applicants have been rejected because their silences have been read as proof of the absence of evidence.

Just as coming out is not an act but a continual process, the declaration of sexual identity from the compromised position of a traumatised claimant confronting the state cannot be seen as a one-time expression of transparently readable sexual reality. Debora Singer of Asylum Aid, UK, describes

the complexity of the interview situation thus: ‘your own feelings about your sexuality, your reluctance for it to be known publicly, your lack of words related to sexual issues (in English or your own language) all come into play. Plus having to relive the trauma of how you were persecuted’ (Singer 2015). Such expressions cannot be read if the interview is seen as the culminating moment for the transparent expression in words of one’s identity. As Berg and Millbank rightly argue ‘the development of their sexual identity [. . .] may still be in a state of flux or uncertainty at the time of the claim’ (2007: 201). Autobiographical narratives by asylum claimants suffering post-traumatic stress and depression have consistently exhibited discrepancies, but the latter can only be cast as problems for reading if the former conditions are ignored.

In the 2002 case of *Mahmood* in Canada analysed by Berg and Millbank, the 25-year-old male claimant’s solicited testimony was deemed unreliable precisely because initial silences were deemed to contradict information provided voluntarily. The silence involved the claimant’s inability to provide explicit details of a gang-rape perpetrated on him when he was 15. He acknowledged ‘pain and bleeding’ (Berg and Millbank 2007: 202) due to the rape only when explicitly asked, but failed to describe these details voluntarily. This initial silence was contrasted to his ability to describe consensual sex with male partners as he grew older. No distinction was made by the tribunal between consensual and forced sex, with the corresponding assumption that the psychic consequences of publicly recounting both forms of sex were comparable, indeed the same. The experience of trauma, the difficulty of articulating it, and the intimidating official situation in front of (male) strangers were completely disregarded. The meaning of silence was rendered unreadable.

A decontextualised liberal notion of individual agency comes into play in the following example, which interprets the meaning of silence prior to an asylum claim rather than in the temporality of its making. The example registers how cultural blindness and assumptions of individual agency affect asylum decisions. In the case of *Re BYU* in 2003, a Canadian tribunal ruling, upheld by the federal court, stated that the claimant’s failure to report a rape by four police officers *to the police* showed inadequate attempts to seek state protection (Berg and Millbank 2007: 203). This despite the fact that the hospital treating the claimant had reported the crime to the police. The impossibility (indeed the perversity) of demanding justice from a state that had violated the claimant was disregarded by the tribunal. The fact that the rape was reported by those who medically treated the victim was deemed of no consequence. The victim’s silence in the past was interpreted as proof that insufficient recourse to state protection had been made. In effect, a state’s violation of its own citizen’s rights paradoxically became the alibi for negatively judging the claimant’s past silence while in effect silencing the reporting of the crime.

The interview is the time of multiple times across culturally incommensurate places, and silence during testimony eloquently expresses their coexistence in the moment. Silences expose time ‘as an inner redivision of time, as the production of gaps which are not manifestations of ignorance and belatedness but positive ruptures away from the normal logic of the division of temporalities’ (Rancière 2017: 33). Silences rupture the temporal plotting of events according to a narrative of sexual resolution coinciding with the interview-based judgment. These silences are indeed often read as signs of belatedness (‘the homosexual “problem”’ of the insufficiently emancipated Pakistani gay man). Against this temporal plotting of progress, the testimony when narrativised in the moment of an interview constructs time ‘as a milieu’ (Rancière 2017: 33) of the coexistence of multiple times, events, affects and experiences. Silences, seeming contradictions, non-teleological affirmations articulate an injured self’s experiences, which remain unreadable according to the demands of clear narrative articulations of sexual identity. When silence is read as muting or denying testimonies of oppression, asylum advocates are forced to explain them through ‘derogatory characterizations of asylum seekers’ countries of origin, as areas of barbarism or lack of civility in order to present a clear-cut picture of persecution’ (Bhabha 2002: 162). Silences become read as civilisational signals of the ‘belatedness’ of other countries and cultures while simultaneously exposing the particularistic assumptions of universalist understandings of human rights. The logic behind both the excitation to discourse and the reading of silence ‘might be described as “the worse the better” – the more oppressive the home state, the greater the chances of gaining asylum in the host state’ (Bhabha 2002: 162). The readability of degrees of oppression, however, founders on the asylum seeker’s inability to articulate past traumas, particularly in cases of repeated sexual assault. Silence interrupts a narrative viewpoint, turning ‘the worse, the better’ into the worse, the worse.⁵ Thus precisely when derogatory notions of ‘cultural difference’ could be deployed for successful asylum applications according to a sliding scale of oppression, the readability of silences, contradictions and so-called ‘evasions’ in sexual asylum narratives undermines the determination by the law of a person’s sexual identity.

It is precisely this vicious circle that is slowly being broken in recent court judgments around interview procedures for sexual and gender asylum seekers. In 2014 the European Court of Justice ruled that the requirement of proof of homosexuality had to be removed from asylum interview procedures. In 2016 the UK Home Office issued guidelines to caseworkers basing its advice on the EU Charter of Fundamental Rights. These clearly state that the interrogation of details of sexual experiences and demanding proof of sexual activity (such as photographs) violated the right to respect for private life.⁶ Further, the court ruled that requiring knowledge of places such as gay clubs and other establishments perpetuated stereotypes of gay men and lesbians against which asylum seekers were being illegitimately tested.⁷ Ignorance

of homosexual, mainly urban, life in the West could not be used as evidence in deciding a claimant's sexuality. The universal right to respect for privacy enabled asylum seekers from different countries to maintain silence without being judged negatively qua the provision of evidence of sexuality, while the rejection of stereotypical assumptions of homosexual behaviour acknowledged the culturally specific circumstances of the asylum seeker.

While sexual determination at the time of the asylum claim seeks to convert the reading of desire into the writing of sexual identity, European and international law deploys a range of universal discourses (respect for privacy and human dignity) to paradoxically acknowledge the cultural specificity of asylum seekers' social and sexual experiences. This universal deployment of the defence of the particular is not a contradiction. Rather, as Rancière argues, the universal 'is not the law ruling over the multiple and the particular. It is the principle at work in the operation which calls into question the distribution of the sensible separating universal matters from particular matters' (2009: 282–3). The deployment of cultural difference across nation-states in Europe as a crucial element in the reading of sexual identity folds the universal into the particular in a specific way, thus undoing a clear separation between the universal category of the 'human' and the particularities of lived sexuality.

Conclusion

Applying the law is inseparable from putting the failures of the law to work for unconventional reconceptualisations of the meaning of justice. Gillian Rose argues that 'unaddressable oppositions between morality and legality [. . .] good will and natural desire and inclination, force and generality, can be traced to an historically specific legal structure which establishes [. . .] the juridical fiction of persons, things and obligations' (1984: 2–3). Sexual and gender asylum expands Rose's understanding of the paradoxes of civil society and underlines the relation between morality and legality as the legal fiction of persons and their sexual identity is determined. The continual transformation of this relation by practices of writing and reading sexual asylum cases registers how (inter)national obligations towards those needing sanctuary must keep positing oppositions and identities that cannot be permanently sustained. The hetero/homo and male/female oppositions that undergird sexual asylum cases are both reinforced *and* reworked in the different cases analysed in this chapter. 'The juridical opposition between free subjects and subjected things', Rose argues, 'characterizes [. . .] the relation of the individual to itself in modern states' (1984: 2–3). Sexual asylum cases demonstrate that asylum seekers are individuals who are both subject to the state while also capable of exposing the limitations of the law and altering their relation to the state in transformative ways. Subjects become subjected things before the law just as

their objecthood can be converted into agency through the law. Sexual asylum displaces this opposition by revealing how agency and its absence emerge continually in ‘the historical production and reproduction . . . of illusory contraries’ (Rose 1984: 2–3).

The politics of sexual and gender asylum exposes the force-field between unstable desires writing global space queerly, and national laws seeking to read bodies straightforwardly. The desiring body queerly rewrites global space as the paradoxical place where universality and particularity intersect and are redefined. The claims around sexual asylum also further a reconsideration of the category of the human in the tension between human rights conventions and sexual asylum cases. They put pressure on conventional inscriptions of sexual identity by demonstrating how forced migration in circumstances of extreme persecution centralises the global as the crucial space for deregulating sexuality. The asylum seeker’s body configures the global into the national through international law and deranges conventional understandings of both sexual identity and cultural difference.

Notes

1. <http://www.unhcr.org/asylum-seekers.html> (accessed 17 May 2019).
2. Manalansan’s focus is primarily on employment migration and the heteronormative assumptions of gender in migration studies. My focus is specifically on *the law’s* characterisation of gendered and sexual bodies in refugee law and sexual asylum cases.
3. The 2004 decision applied only to male-to-female (MTF) transgender persons.
4. In the US, gays and lesbian were recognised as belonging to ‘a particular social group’ (Refugee Convention 1951) in 1990.
5. The gendered dimensions of this failure of narrative are also crucial, since in some research a consistently high level of physical assault of lesbians is discernible while percentages vary for gay men across different countries (Berg and Millbank 2007: 202).
6. <http://www.bbc.com/news/30290532> (accessed 17 May 2019). The ECJ’s judgment against the Dutch government’s demand for proof of homosexuality was made applicable to all EU nations. Its impact outside the Netherlands is discernible in the fact that one UK immigration official stated that *one out of ten* asylum claims were turned down on the basis of inadequate proof.
7. Sabine Jansen provides numerous examples of the application of stereotypes to sexual asylum seekers, including knowledge of authors, social venues including bars, and expressions of linear sexual identity development. On reviewing such cases, she observes, ‘It seems that a gay male asylum seeker is someone who visits gay venues regularly, who reads gay classics like Oscar Wilde, who is familiar with rainbow flags and pink triangles, who had a difficult coming-out process and a serious psychological struggle connected to it, who on the other hand can elaborate extensively on his coming-out process, and who is very interested in developing his sexual identity instead of just practising same-sex sexual acts’ (Jansen 2014: 2).

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