

“OTHER” WOMEN IN FLIGHT:
SEXUAL MINORITY AND POLYGYNOUS REFUGEE WOMEN

by

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Abstract

Refugee law scholarship is largely focused on the application of refugee law and the refugee status determination processes of Western host countries. This geographical focus of the majority of scholarly work stands in stark contrast to the global distribution of refugees, the majority of whom are hosted by countries of the Global South. This dissertation exposes this imbalanced knowledge production in refugee law, specifically the way in which the unacknowledged bias in the study of refugee law as applied only in select Western countries, limits and indeed distorts our understanding of international refugee law.

This distortion has particular consequences for some of the most vulnerable and least mobile refugees residing in host countries of the Global South. This dissertation is based on a qualitative data analysis of interviews I conducted with refugee service providers and refugees in South Africa, supported by a study of the existing literature and legislation. This dissertation presents an alternatively located, feminist study of the understanding of especially ostracized women; polygynous and sexual minority refugee women, within the South African asylum system.

I conclude that a variety of factors contribute to the invisibility of these women to service providers, factors which are influenced by and familiar to Western refugee law studies; stereotypical expectations of the refugee figure and of polygynous families and of queer identity, compounded by the socio-economic isolation of these women refugees. I identify particularly relevant distortions in the current study of refugee law, including the neglect of the nexus between economics and experiences of persecution, especially of continuing persecution within

host states. I also problematize the reliance on an identity-politics framing of persecuted identities in the study and application of refugee law, which especially disadvantages refugees with intersectional vulnerabilities. The refugees most impacted by these systemic problems in our understanding of refugee law; the economically disadvantaged and those with intersectional vulnerabilities (including, and amplified by, economic disadvantage), are similarly those whose very disadvantage and vulnerability limit mobility. They are thus those most likely to be underrepresented in the distant and expensive states whose asylum systems form the predominant focus of refugee law studies.

Lay Summary

Refugee law studies tend to focus on the asylum cases determined by Western host states. Yet the majority of refugees seek refuge in the Global South. This dissertation unmasks this bias in the way refugee law is studied and illustrates the impact of this bias in creating a distorted knowledge of refugee law. This distortion has particular consequences for some of the most vulnerable and least mobile refugees in host countries of the Global South who are both underrepresented in the Western host state studies and who are distinctly disadvantaged by the ways of thinking such studies have produced.

This dissertation is based on an analysis of interviews with refugee service providers and refugees in South Africa, with a focus on sexual minority and polygynous refugee women. I argue a holistic understanding of refugee law requires acknowledging the current bias and studying refugee law in a variety of host states.

Preface

I identified and designed this research project myself and I conducted all primary interviews, research, and data analysis and reviewed the literature myself. Interviews were transcribed by an external transcriber. This work is unpublished.

This research required approval of UBC's Behavioral Research Ethics Boards, Certificate

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List of Abbreviations

AU	African Union, previously the Organisation for African Unity
CAL	Coalition of African Lesbians
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
DHA	Department of Home Affairs
JRS	Jesuit Refugee Services
LGBTI	Lesbian, Gay, Bisexual, Transgender, Intersex (discussed in detail in Chapter 5.4)
LHR	Lawyers for Human Rights
NGO	Non-governmental Organisation
OECD	Organisation for Economic Co-operation and Development
ORAM	Organization for Refuge, Asylum and Migration
PASSOP	People Against Suffering, Oppression and Poverty
PSG	Particular social group
RAB	Refugee Appeal Board
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SADC	Southern African Development Community
TWAIL	Third World Approaches to International Law
UN	United Nations
UNHCR	United Nations High Commission for Refugees

List of Symbols

- U Mathematical logic set theory uses the symbol ‘ \cup ’ to denote the union of sets, including those elements that are common to both.¹ In attempting to discuss women who are queer, women who may not identify as queer as well as men who are queer, acknowledging also the complexity involved in gender being neither binary nor static, the use of ‘and’ between the groups ‘women’ and ‘sexual minority’ aggravates a problem at the heart of this dissertation: that queer persons and the refugee figure generally are predominantly imagined as male, and the inhibiting practice of a disaggregated listing of identities. Similarly the use of ‘and/or’ fails to draw attention to the overlap of intersecting identities. The symbol ‘ \cup ’ can therefore serve as a useful means of listing overlapping and interconnected identity markers and is used in this work for this reason.

¹ S Shen et al, *Basic Set Theory* (American Mathematical Soc., 2002), p.2.

Acknowledgments

It is customary to acknowledge that the university is located on the traditional, ancestral, and unceded territory of the Musqueam people, before convening events at the University of British Columbia. In my case I both studied and I and my family lived on this land for the majority of my doctorate. It has been suggested that in academia, we go beyond a rote recitation of this land acknowledgment by purposively linking the work we create with the histories and experiences of this land's indigenous peoples. In this vein, I would like to acknowledge that whilst refugee law sits uneasily with the experiences of indigenous persons forced off their ancestral land yet whose intra-national displacement has no international border crossing, the knowledge biases disadvantaging both polygynous and sexual minority women, discussed in this work, have distressing parallels for the indigenous peoples of Canada.

I would like to thank my wonderful supervisor Catherine Dauvergne – the confidence in me you always showed and the balance of your guidance meant I felt invigorated every time I left our meetings. Thanks also to my supportive and always helpful supervisory committee, Gillian Creese and Efrat Arbel, to my sister, Caitlyn for all the transcriptions, my parents, Sean and Lynn, for steering me through a lifetime of education that led me to this opportunity as well as for their and my sister's help editing this volume of work. Thanks to my friends and co-students Anna and Meredith, for their constant friendship, energy, faith and support. To my scattered besties: Hadar, Elmarie, Cathy and Jo who were there for me with consolation and laughs in the midnight hours of caring for babies, many thanks.

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Dedication

I dedicate this dissertation to my husband and children, who buttressed my life outside of this work and from whose lives I had to be absent to complete it, and to the strong souls of the refugees I met and those who work to help them.

Chapter 1: Introduction

This dissertation incorporates concerns with gender, sexuality, family and refugee identities, with a feminist and Third World Approaches to International Law agenda. It is located within the discipline of legal studies, more specifically, within refugee law studies. In introducing my dissertation, I set out the purpose of the study, and signpost the structure, arguments and conclusions to follow. I also provide discussion on the theoretical approaches, practicalities and politics which have guided the choices made in how I conducted my research and how the work of this dissertation is presented. This uniquely oriented project argues for a holistic approach to key constructions in refugee law of ‘host country’ and of ‘refugee’. This project both supports a call for differently located refugee law studies, through its distinctive findings, and presents as an example of a Southern-host focused study marking, and demanding the marking, of its positionality.

1.1 Purpose of Study

The purpose of my research is to encourage reflective thought on the part of those engaged with refugee systems in both Western and Southern host states on what is missing, who is being left unheard and unvoiced in the study of refugee law and what implications this may have for a working understanding of the application of refugee law in the world.

This dissertation reveals a bias in the study of refugee law evident in a preoccupation with the study of the asylum systems of Western states. The effects of a disproportionate focus on (minority) Western host states in refugee law studies are pernicious, particularly for the most vulnerable and least mobile. In this regard, women & sexual minorities have particular and

compounded vulnerabilities as refugees and are especially likely to remain within the Global South, thus being markedly neglected by refugee law scholarship focusing only on Western hosts. I demonstrate this with reference to the differences and similarities to Western-focused refugee law study themes by centering the leading destination country of new asylum-seekers from 2006 to 2012, and my home country, South Africa, in an investigation of the interaction with this asylum system of sexual minority women refugees and of women refugees in polygynous relationships, as understood by refugee service providers.

1.2 Overview

This dissertation teases out both the familiar and the novel in a focused study on the position of ostracized groups of women in the South African asylum system. This work highlights, more generally, the importance of expanding refugee law studies to cover a greater variety of host countries, wherein both new and familiar themes can progress a more holistic and authentic understanding of refugee law in the world.

It is thus necessary to identify what existing refugee law analysis, focused on Western host countries, is supported through this study's findings, contrasted with what different perspectives and new challenges these findings unveil. In order to do this, the first chapter of this dissertation, post introduction, provides a literature review illustrating the shortcomings as well as useful insights amongst traditional refugee law studies as well as from newer approaches in refugee law and multidisciplinary perspectives, against which this study can be set.

Subsequently, Chapter 3 discusses the relevant contextual legal background, at both the international and domestic level, which informs this refugee law study, including an analysis of

South African refugee processes, laws and their application and failings. The South African asylum system is under such pressures that any research and representation of this system can only show it as deeply flawed and in crisis. My purpose in this work is not to vilify the South African asylum system, neither is it to romanticise its innovations or Southern-ness. The argument raised is more simply that it is a significant host country whose application of refugee law requires attention and the study of which can further our understanding of refugee law more generally.

The geopolitical gap in much refugee law scholarship, identified in the literature review in Chapter 2, is theorised and expanded upon in the first half of Chapter 4. In this chapter I identify and dissect a number of unsubstantiated binaries and biases. I demonstrate how these biases create conceptual stumbling blocks that implicate the choice and supposed representivity of studies of only select host countries' application of refugee law. The analysis of research data that follows in this Chapter builds upon and reflects the consequences of these identified biases.

The analysis of the qualitative data, presented in this dissertation, is divided into an analysis of the data collected in relation to polygynous refugees (in Chapter 4) and in relation to queer refugees (in Chapter 5). The different chapter lengths in this dissertation are thus a reflection of the differences in data volumes gathered on these two subject groups which are ostensibly opposite ends of a patriarchal spectrum of marriage or relationships, with very different sites of acceptance and disapprobation, different claims of culture and different orientations to religion; the only apparent unifying factor being that neither comply with a 'one man and one woman' formulation of adult, sexual relationships. This is a loose division of the data which was gathered in interviews which were not segregated by population focus. However, the subjects of study are two distinctive groups and those service providers whose services specifically focused on queer

clientele, generally believed they had nothing to comment on polygynous clients (though elements of a happenstance overlap are discussed in Chapter 6). Yet much of the thematic analysis garnered from these Chapters presents parallel findings on the effects and influence of both familiar and unexamined stereotypes embedded in refugee law studies and applications as regards the refugee figure, the ‘host’ label and persecuted identities. I present a discussion on the ‘missing voices’ of the women whose experiences with the asylum system this dissertation sought to investigate and the broader implications of this study’s findings in the concluding chapter, Chapter 6.

1.3 Methodology

The principal focus of the analysis presented in this dissertation is the qualitative data obtained through primary interviews I conducted myself in South Africa over a two month period in 2016 with refugee service providers and with refugees. This work makes reference to limited official government data on asylum applications in South Africa and to various domestic, South African and international legal instruments and legislation.² The discussion of both data and legislation includes the presentation and analysis of interviewee opinion concerning the relevant government data and legislation. The primary focus of the interviews was not the legislation or data per se but more specifically targeted interviewees’ perceptions of the interaction between

² The background theoretical and doctrinal research was conducted through library research using word search databases and following up on readings referenced within works already read, and looking for additional work by relevant authors. Research on the South African legislative background made use of legislative databases: The Southern African Legal Information Institute (SAFLII) available at: http://www.saflii.org/za/legis/consol_act/; the online collection of South African Government Gazettes (the Green Gazette), available at: <https://www.greengazette.co.za/>; South African Parliamentary publications, available at: http://www.parliament.gov.za/live/content.php?Category_ID=7; and the reports of the South African Law Reform Commission (SALRC) available at: <http://www.justice.gov.za/salrc/>.

queer and polygynous refugees with the asylum system. This subsection details how this research was conducted and I expound on the choices I made in both conducting and presenting this research.

1.3.1 Theoretical approaches as methodological tools

It is my intention to turn the critical gaze not on the othered populations featured in the title of this dissertation – sexual minority and polygynous refugee women – but on the representation and understanding of these ‘others’ within the bureaucratic administration and legal and advocacy organisations. Furthermore, I will reflect upon these issues from within a firmly, purposively Southern perspective, wherein I speak of Southern-positionality not as other but as self, highlighting the falsity of the unexamined West-as-self and West-as-host narratives in comparison.³

Third World Approaches to International Law (TWAIL) and Feminist Legal theory have both been described as methodology, as much as theories; encapsulating a political commitment underlying both the ‘what’ and the ‘how’ of research, thus providing guidance as to the way in which research is conducted, as well as the major ethical concerns.⁴ TWAIL require sensitivity to power relations between states and the politics of knowledge production. TWAIL scholars are consequently critical of the interests served by international law. Furthermore, TWAIL stress that

³ Aileen Moreton-Robinson, *Talkin’ up to the white woman: Indigenous women and white feminism* (St Lucia, Qld: University of Queensland Press, 2000).at (xvi) warns that this requires conscious effort where the actual ‘self’ is so automatically othered in academia such that it becomes all too easy to fall into the trap of using othering-language such as ‘they’/‘them’ rather than ‘we’/‘us’.

⁴ Obiora Chinedu Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” (2008) 10:4 International Community Law Review 371–378.; Hilary Charlesworth, Christine Chinkin & Shelley Wright, “Feminist Approaches to International Law” (1991) 85:4 The American Journal of International Law 613–645 at 615–618.

the lived experience of Third World peoples be centred in research so as to transform law from a tool of oppression to one of emancipation.⁵

Feminist Legal theory, in turn, demands gender sensitive methodologies, aimed at producing research with the ethic of contributing towards gender equality.⁶ Thus both feminist legal theory and TWAIL emphasise the importance of missing voices othered by a hegemonic male, First World construction of international law as universal. Another common element amongst these two approaches to legal research is that, whilst maintaining a critical stance to the existing law, many scholars demonstrate an underlying faith in the possibility of law serving as a mechanism for positive change; arguing for different approaches to law-making rather than its abandonment.⁷ Together, these approaches will provide a lens through which to critique the prevailing Western-influenced approach to gender, family and sexuality, thus plumping out an emaciated conception of this aspect of international refugee law.

As regards the knowledge production within refugee law, Feminist and TWAIL perspectives used together reveal the way in which refugee law and the predominant study thereof is both gendered and particular to Western paradigms, yet presented as general. An awareness of the politics of knowledge production requires both an unveiling of impartial knowledge, and its makers, disguised as neutral or the ‘every-man’, and self-reflection on one’s role therein.⁸ Thus,

⁵ Okafor, *supra* note 4 at 375-376.

⁶ See the debate between Halley and Romero in Janet Halley, “Queer Theory by Men”, (15 April 2016), online: *Feminist and Queer Legal Theory* <<http://www.taylorfrancis.com/>>; Adam P Romero, “Methodological Descriptions: ‘Feminist’ and ‘Queer’ Legal Theories”, (15 April 2016), online: *Feminist and Queer Legal Theory* <<http://www.taylorfrancis.com/>>; Martha Albertson Fineman et al, *Feminist and Queer Legal Theory : Intimate Encounters, Uncomfortable Conversations* (Routledge, 2016).

⁷ Antony Anghie & B S Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts Agora: Third World Approaches in International Law” (2003) 2:1 Chinese J Int’l L 77–104.78; Charlesworth, Chinkin & Wright, *supra* note 4.

⁸ Chandra Talpade Mohanty, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press, 2003). at 17-19.

as these perspectives feed into my dissertation, it is the unacknowledged West-as-subject which compounds the gendered effect of the knowledge produced by such scholars, given the male preponderance of refugees in the West.⁹ The distinctive experiences of sexual minority refugees in the West as opposed to those in hosts of the Global South, similarly marks this disparity and points towards the incompleteness and disempowering effects of the Western-biased knowledge being produced.¹⁰

The intended audience of this dissertation are those working within the refugee law paradigm in both developed and developing country hosts, conscious of the significance of ‘speaking to’ in a project of greater inclusivity.¹¹ In advocating for greater research on a greater variety of refugee host countries and their refugee law systems and application of international refugee law, this research is presented both as an example of different work focused on a host not typically studied in a style akin to the in-depth thematic studies of Western host states and as an attempt at broader audience consciousness.

As methodologies, TWAIL and feminist legal theory provide the formulation of a particular set of concerns and the analytic tools with which to explore refugee law. An approach inspired by a

⁹ Gayatri Chakravorty Spivak, “Can the Subaltern Speak?” in Rosalind Morris, ed, *Can the Subaltern Speak?: Reflections on the History of an Idea* (New York, UNITED STATES: Columbia University Press, 2010) 21. The United Nations High Commissioner for Refugees UNHCR, “UNHCR Global Trends 2018”, online: *UNHCR* <<https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html>>. published 7 June 2019, states at 61-2: “Based on the available data, the proportion of women and girls in the refugee population was 48 per cent in 2018, similar to the past few years. [...]At the country level, there was wide variation in the sex and age breakdown of hosted refugees. [...]These differences are also seen at a regional level [Figure 22]. The lowest proportion of both children and women was seen in the refugee population in Europe where only 44 per cent of the refugee population was female and 41 per cent was under the age of 18 in 2018 (although the data coverage was also very poor in this region so the estimates are indicative only). In contrast, the highest proportion of both women and children was in sub-Saharan Africa with 52 per cent and 57 per cent respectively.”

¹⁰ See further the discussion on host-nation continuing experiences of persecution and closetness, experienced with greater prevalence by sexual and gender identity minorities in the Global South, in Chapter 5.

¹¹ See Spivak’s conclusion on the importance of speaking to, rather than for, the subaltern Spivak, *supra* note 9 at 91.

conjoined TWAIL and feminist project also allows for the revelation and analysis of weaknesses in each method: TWAIL has a sister in the critical race theory response to feminist theory and demands the exposition of racialized understandings at the global level, whereas a feminist approach rebukes attempts to sideline gender and sexuality concerns in a post-colonial project.¹²

In making the controversial juxtaposition of topics of sexual minorities and polygyny in this study, I simultaneously challenge both liberal Western *and* African and Middle Eastern cultural perceptions of acceptable and unacceptable women's sexualities. As Moreton-Robinson states: "Knowledge is never innocent or neutral. It is a key to power and meaning. It is used to dominate and control."¹³ This idea is at once the rationale behind a criticism of the hegemonic Western-host focus in refugee law scholarship, a motivator to engage in alternative knowledge-production, and a warning of the responsibility and culpability involved in research. I argue that scholars focused on Western refugee law systems should firstly be aware of the limitations and specificity of their work, and secondly be aware of the generality of their audience, to be purposeful in 'speaking to' Southern scholars, advocates and bureaucrats who are indeed listening. In the angst of the limitations and dire problems of the current international refugee system, this project offers not just criticism but points to an exciting opportunity to learn more and think differently.

¹² Both Merry and Mullaly refer to the difficulties faced by women's rights campaigners situated within a post-colonial political nation-building project in which a sense of the 'fragility of nationality' compounded with an association of women as the keepers of national identity, marks as threatening and so pushes back challenges to gender boundaries. See Sally Engle Merry, *Gender Violence: A Cultural Perspective* (Chichester, UNITED KINGDOM: John Wiley & Sons, Incorporated, 2008); Siobhán Mullally, *Gender, culture and human rights: reclaiming universalism* (Portland, Or;Oxford; Hart Pub, 2006).

¹³ Moreton-Robinson, *supra* note 3 at 93.

1.3.2 Location of study

I conducted field research for this project between mid October and mid December 2016 in Johannesburg, Pretoria and Cape Town, South Africa. I conducted an additional interview at the end of December 2016 via a Skype phone call with an interviewee based in Pretoria.

South Africa, a host country within the Global South, has laws recognising same-sex marriage, unique to Africa, as well as laws legalising polygyny, not found in Western host countries.

According to the annual United Nations High Commission for Refugees world report, South Africa received the greatest number of individual asylum seekers globally, for 7 years continuously, from 2006 to 2012.¹⁴ As a South African, having worked with the refugee system as a lawyer, the South African refugee regime is already centred for me, having defined my experience of refugee concerns. The South African approach forms the basis of my assumptions of the ‘normal’ approach, contrary to the majority of refugee law scholars discussed in the Literature Review below. I aspire to meet that definition of ‘African’ as used by Tamale, to refer to those who believe: “that serious global knowledge creation requires that the lives, experiences, ideas and imagination of people throughout the continent be considered critically important”¹⁵.

However, as a project in generating new perspectives, I should also “own [my] whiteness and ... social authority”, along with the fact that I am undertaking my doctorate from within ‘the West’, based as I am at the University of British Columbia in Vancouver, Canada.¹⁶ For this reason I attempt to step out of a neutral third person researcher position and make use of first person acknowledgments of position where fitting. I have not uniformly used first person, however, as

¹⁴ United Nations High Commissioner for Refugees UNHCR, “UNHCR Global Trends 2012”, online: *UNHCR* <<https://www.unhcr.org/statistics/country/51bacb0f9/unhcr-global-trends-2012.html>> at 25.

¹⁵ Sylvia Tamale, *African Sexualities: A Reader* (Fahamu/Pambazuka, 2011) at 1.

¹⁶ Moreton-Robinson, *supra* note 3 at 118.; see also Spivak, *supra* note 9. at 87 who insists on the marking of the positionality, as investigating subjects, of the Western theorists involved.

to do so could detract from the points being made where the constant disruption of academic expectations of tone and position could become distracting.

I chose South Africa as the study location of my research based on my experience and knowledge of the system and the players, and this choice is supported both by the numerical significance of its asylum system as well as the uniqueness of its domestic laws in relation to the study groups. I did not make this choice because South Africa is either typical or representative of host states of the Global South. From a colony to apartheid, styled as a white, (selectively) developed country, post-apartheid South Africa continues to display a duality in its socio-economic positionality; teetering between a developed and developing status. The terms West and South are used here as politically-charged terms indicative of an imagined, rather than real Geography. An imagined geography, which, it must be acknowledged, seldom takes account of the indigenous peoples within the ‘West’.

‘Third’ and ‘First World’ are terms that, post Cold War, are considered outdated whilst having had much political and academic work put into them. Developed and developing countries on the other hand, are terms that I also use but that I find less conducive to discussions for their attempted neutrality. These terms are approved by the United Nations (UN) and other international institutions. Whereas the term ‘Least Developed Countries’ is an empirical label applied by the UN, based upon qualifying criteria and comparative assessment, ‘developed’ and ‘developing’ are terms of choice. Within the UN system, each country may elect whether to class itself as developed or developing, with consequences for various international obligations, including environmental obligations. In contrast, the geo-spatial narrative structures under discussion here are politically and culturally imbued, with normative assumptions of permanence. The other term I seek to use is Majority World; whilst lesser known, I believe it is

worth attempting to gain traction.¹⁷ The term ‘Majority World’ has the potential to disrupt the dominant narrative centrally problematized in this work: that the author-academic-perspectival ‘I’/‘we’/‘us’ is presumptively the West, and the constitutive West-as-host (my own term, discussed in Chapter 4).

What this project illustrates is that in spite of South Africa being a regional hegemon, the economic powerhouse of Africa, a newly industrialized state and one of the ‘BRICS’¹⁸; in spite of having a European-influenced legal system and all legislative and parliamentary information available in the working language of English, making it one of the most accessible countries in Africa for research; in spite of having (currently) a comparable integrationist rather than refugee-camp policy and one of the busiest asylum systems in the world for almost a decade, it remains severely under-researched.

My research excavates the presence of previously invisible women within one of the largest refugee systems and so re-frames their experiences and special vulnerabilities within the context of the most conspicuous movements of people in flight. This research demonstrates, however, that within South Africa, sexual minority and polygynous refugee women have scarce and apparently fleeting presence. There are a variety of factors which play into their occlusion in terms of the gay community and ‘LGBTI’ spaces and their access, and conceptions of what

¹⁷ A term attributed to writer and photographer Shahidul Alam. Along with Colin Hastings, Shahidul Alam co-founded a photography agency in 2004 named Majority World with the ambition of creating global market access for and highlighting the talents of photographers “from the majority world - Africa, Asia, Latin America and the Middle East”, see: “About Us – Majority World”, online: <<https://majorityworld.com/about.php>>.

¹⁸ From the BRICS Information Centre: “Since 2008, the leaders of Brazil, Russia, India and China — the BRIC countries — have met annually to discuss issues of global significance. At their third summit in China in 2011, the leaders invited South Africa to join, thus becoming the BRICS. [...]While the concept “BRICS” was first created by Jim O’Neill of Goldman Sachs to refer to the investment opportunities of the rising emerging economies, the leaders’ meetings transcend the financial context to embrace a wide range of summit-level issues relating to global governance, such as development, peace and security, energy and climate change, and social issues.” “About the BRICS and BRICS Information Centre”, online: <<http://www.brics.utoronto.ca/about.html>>.

marriage, gender, family and socio-economic contexts means with reference to the lives of refugees and asylum seekers. South Africa, like host countries of the West, has a disproportionately large number of young, male asylum seekers.¹⁹ Though we are told women make up half of those displaced across borders, these women remain ‘lost’ from studies focused on host states further away from conflict zones and so geographically and economically harder to reach for some of the most vulnerable and least mobile.²⁰ Women refugees appear to be pooled in countries immediately neighboring conflict zones. As South Africa lies several countries to the South of such conflict zones, it serves rather as a bridging country to show how specific groups of women remain invisible though present in the system. South Africa’s male-prevalent asylum system, like those of most Western hosts, thus highlights the exaggerated need to engage in fine-grained legal analysis of refugee law elsewhere in the Global South, where it is applied to most of the world’s refugees, and specifically in the areas where women are most prevalent.

1.3.3 Population being studied

The title of my dissertation describes the populations which are centred as the focal point for my thesis. The populations are circumscribed as: sexual minority and polygynous refugee women. However, each aspect of these descriptors is contentious and requires further explanation and purposive use.

¹⁹ Chief Directorate Asylum Seeker Management, Immigration Services, *2017 Asylum Trends Report* (Department of Home Affairs, 2017) at 22.

²⁰ UNHCR, *supra* note 9 at 61–62.

1.3.3.1 Refugees

The population under study is described as refugees. Based on the UN Refugee Convention²¹ in which persons meeting the definition therein of a ‘refugee’ are, *ab initio*, refugees, and following on the work of Hathaway in this regard, the term ‘refugee’ is used here to describe persons who may fit the UN or AU Refugee Conventions²² definition of a refugee rather than as a reference to the official recognition of their status.²³

That is, a refugee is someone who:

owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁴

In the case of the AU Refugee Convention:

The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.²⁵

²¹ UNHCR United Nations, “Convention Relating to the Status of Refugees”, online: *Refworld* <<https://www.refworld.org/docid/3be01b964.html>>. United Nations Treaty Series vol.189 (“**UN Refugee Convention**”), at 137.

²² OAU, “OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis-Ababa, 10 September 1969”, online: *UNHCR* <<https://www.unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html>>. (the “**AU Refugee Convention**”).

²³ James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2d ed (Cambridge: Cambridge University Press, 2014) at 1.

²⁴ UN Refugee Convention Article 1(A)(2)

²⁵ AU Refugee Convention Article 1(2)

Thus an ‘unrecognised’ refugee or a refugee without government or UNHCR²⁶ status, is still a refugee for this purpose. Although the word is never used in either the UN or AU Refugee Conventions, I take the notion of fleeing as central to a practical and humanitarian understanding of the term ‘refugee’. The word ‘fleeing’ captures the sense of fear which compels movement, without requiring elaboration of the complex reasons therefor, and includes those “outside of their country of origin” (the more neutral term used by the Conventions) and those in the troublesome in-between-ness of borders, passport control, bridges, boats and planes.

1.3.3.2 Women

The second common denominator of the groups focused upon in this dissertation is that they are women. As this study will focus upon the understanding of these women amongst refugee administrators, lawyers and advocacy groups, their designation as such by these actors will be taken as the starting point. I must acknowledge that this approach may not reflect the gender as self-identified by the persons involved and so this approach may replicate the violence of such mischaracterisation. Nevertheless, the service providers’ own understanding of gender is an aspect of this study’s enquiry. A focus on women is undertaken as a feminist project in opposition to a male-centric tendency evident in refugee law and refugee law studies, in LGBT studies and in approaches to polygynous families. A destabilization of presumptive gender therefore requires an inclusive understanding of ‘women’ which canvasses all those understood

²⁶ The United Nations High Commission for Refugees, (“UNHCR”) administers or plays an advisory role in refugee status determination procedures in many countries. United Nations High Commissioner for UNHCR, “Refugee Status Determination”, online: *UNHCR* <<https://www.unhcr.org/refugee-status-determination.html>>.: “In any given year, UNHCR conducts RSD under its mandate in between 50-60 countries, depending on where the applications are received. [...] In approximately 20 countries UNHCR conducts RSD jointly with the government pending the state assuming full responsibility for RSD, while in many more countries UNHCR conducts a range of capacity development activities.”

by the author, by the service providers, by the officials and by individual refugees themselves as identifying or identified as women.

The remaining adjectives of the groups under study refer to women who, in their relationships, or identification of desire, defy the monogamous, hetero-normative family most frequently understood as the default family unit. This presumptive family forms the locus around which notions of refugee women are constructed.²⁷ Yet these descriptors: ‘sexual minority’ and ‘polygynous’, too have their limitations, discussed below.

1.3.3.3 Sexual minority and queer terminology

In this dissertation, refugees for whom sexual orientation-based persecution is a real fear, are most frequently termed sexual minority refugees and queer refugees. The term ‘sexual minority’ was chosen as both demonstrative of the minority status-challenges peculiar to this group of refugees, and as a more fluid term than labels such as ‘lesbian’ and ‘bisexual’. Sexual minority terminology is arguably less culturally specific whereas the term ‘lesbian’ is criticised, along with the conglomeration LGBT, as being a Western-originated term, which fails to capture the self-identity of those who may be included in this term, by Western researchers.²⁸ However, these terms are also gaining acceptance and being taken up from the ground by developing world

²⁷ Thomas Spijkerboer, *Gender and Refugee Status* (Routledge, 2017) at 103.: “In the asylum procedure, women are seen as related, as mothers and as wives. Women are not so much relegated to the family in the normative sense that “women should be good mothers and wives”. Women are, rather, considered inherently part of the family; when they behave contrary to the expectations of decision makers, the conclusion is not that the applicant is not a good mother and wife; instead, what the applicant says cannot be true.”

²⁸ Oliver Phillips, “Constituting the Global Gay: Issues of individual subjectivity and sexuality in southern Africa” in Didi Herman & Carl F Stychin, eds, *Sexuality in the legal arena* (London: Athlone, 2000) at 18.

queer persons, especially by those advocating for greater rights.²⁹ Furthermore ‘sexual minority’ is subject to the same charge of a preoccupation with the sexualisation of identity as many of the alternatives.

Whilst sexual minority was initially conceptualised in this project as a term easily demonstrative of the refugee law sexual orientation-based persecution link and served to parse this population from a trans refugee population with an anticipated gender identity-based persecution link, the resulting study called into question this distinction. As discussed further in Chapter 5, sexual-orientation based persecution appears to be both salient in transgender refugees’ experience of persecution, for reasons of their imputed sexuality, and aligns with the grounds for refugee status that may be used in these persons’ asylum applications, in South African.³⁰ A more complete definition of the group being sought out in the data is therefore: ‘women’, identified as such by the system, the persons administering it or the persons providing legal assistance, for whom same-sex sexuality or perceived same-sex sexuality is understood as an aspect of their flight.

The interviews conducted with refugees, which form part of the data analysed in this dissertation, were with six³¹ male-identified same-sex oriented persons and a transgender woman. Thus the broader term ‘queer’ is predominantly used to capture a gender non-binary populace. The inclusive and simple term ‘queer’, is useful for this project in its being politically infused as a

²⁹ See the chapters by both Phillips, *supra* note 28; Jennifer Spruill, “Post-with/out a Past? Sexual orientation and the post-colonial ‘moment’ in South Africa” in Didi Herman & Carl F Stychin, eds, *Sexuality in the legal arena* (London: Athlone, 2000) at 5.

³⁰ B Camminga, *Transgender Refugees and the Imagined South Africa: Bodies Over Borders and Borders Over Bodies*, Global Queer Politics (Cham: Springer International Publishing, 2019) at 109.

³¹ Although I include in this number “Noah” whose identification is complicated by a quiet remark in passing that he was “also a woman”; see the discussion in Chapter 5.4.1. Noah, *Interview with Anonymous Refugee: pseudonym “Noah”* (2016), Cape Town. The interviewees’ self-identification, including choice of sexual orientation terminology is thoroughly discussed in Chapter 5.4.

challenge to normative productions of sexuality and identity. It is for this reason used regularly herein.

1.3.3.4 Polygyny

I have chosen to use the term ‘polygyny’: one man with more than one wife – over the more common ‘polygamy’: more than one spouse. In spite of the fact that polygyny is the lesser known term and is thus less accessible, and contrary to most literature which refers to polygamy even where only polygyny is actually discussed, I consistently use the term polygyny. The concern in this study, is specifically with the plural wives of polygynous marriages and the gender neutral approach which refers to ‘spouses’ or even ‘polygamy’ fails to sufficiently emphasize the gendered nature of the practice and of its prohibition. Although polygyny is a lesser known term than polygamy, in this regard the difference in terminology is essential for the advocacy position of this research. I could also easily explain my use of the term by raising the comparative definitions of the terms polygamy and polygyny to interviewees.³²

The more complicated aspect of the term ‘polygynous women’ relates to the underlying relationship and its legal status. The understanding of polygny, as is used in this thesis, includes those women in both *de facto* and *de lege* marriages (in terms of the laws of their country of origin, or the country in which the marriage was celebrated, where applicable). In a discussion on polygynous refugees, and most especially where children are involved, whether the underlying

³² Many service providers interviewed were indeed unfamiliar with the term ‘polygyny’ and my use of this term in place of ‘polygamy’ prompted a useful discussion on this gendered aspect of the practice with at least one such interviewee, others continued to use the term ‘polygamy’ in our interview whereas some took up the use of ‘polygyny’ themselves in their response; David Cote, *Interview with David Cote, Strategic Litigation Programme Coordinator, LHR (2016)*, Pretoria.

marital relationship is ‘common law’, *de facto* or fully legally compliant and registered, or a traditional or formal marriage is not really relevant to their protection and unification needs and would seem an improper distinction to make in data collection. An expanded notion of marriage and a looser legal understanding of ‘spouse’ seems more in keeping with an equality-minded trajectory.

Ultimately, my choice to use the term polygyny is influenced by the same lines of thought as my choice to use the terms sexual minority and queer. I am not using the most common or accessible terms but rather the most academic word choice, for reasons of the politics and advocacy role behind the choice. These terminology choices reflect an attempt to use appropriately gendered language.

In the case of both sexual minority and polygynous women, their experiences are foreshadowed by some of the contexts and conceptual stumbling blocks identified in this dissertation but their voices are not represented here. Discussed further below under 1.3.5, this dissertation uses silence around these women, rather than representations of these women’s voices, to indicate the spaces where these women should be but from which they appear absent.

The populations under study in the South African asylum system will be circumscribed to those entering South Africa, or with a partner in South Africa, subsequent to the commencement of the Refugees Act in South Africa on April 1, 2000, which states in the definitions section thereof that: ““**social group**’ includes, among others, a group of persons of particular gender, sexual orientation, disability, class or caste”.³³ Section 3(c) of the Refugees Act includes in the definition of a person qualifying for refugee status, the defendant of a refugee which is defined

³³ Government Gazette, “Refugees Act 1998”, online: <http://www.saflii.org/za/legis/consol_act/ra199899/>. Act 130 of 1998 (hereafter “the Refugees Act”).

in the original Refugees Act as “the spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of such asylum seeker or refugee”.³⁴ An amendment to the Refugees Act, which was assented to in 2008 but only came into force in 2020, creates a new definition for both “spouse” and “marriage” that is inclusive of both same sex and plural (polygynous) partnerships.³⁵

1.3.4 Participants

There are in fact two different ‘populations’ studied; the refugee women around whom I attempt to centre my thesis, and also those who interact with them as they navigate the asylum system. In determining the understanding and approach of the latter towards the former, the participants in my study include those who provide services to refugees in South Africa; the lawyers who specialise in refugee assistance, including the Law Clinics of various South African universities; and some of the key refugee non-governmental organisations (NGOs), researchers and refugee-community advocates who are broadly referred to as ‘refugee service providers’ in this work.³⁶

³⁴ The Refugees Act, section 1.

³⁵ Department of Home Affairs, *Refugees Amendment Act, 2003, 33 of 2008* (Government Gazette, Vol .512 No.31643, 2008). (hereafter “**the Amendment Act**”).

³⁶ I had initially intended to include interviews from the South African government officials working with the refugee system: the Refugee Status Determination Officers (RSDOs), where possible, and the Refugee Appeal Board adjudicators. I wasn’t able to include any of these officials, they simply don’t seem to have a response rate which would have fitted in my timeline and I suspect require connections I did not have available. There are insufficient RSDOs to handle the workload and appalling backlog in the South African system and, as discussed further in this thesis, the Refugee Appeal Board had too few members to be officially constituted, contributing to the impracticality of interviewing these players in the course of my fieldwork.

1.3.4.1 Refugee service provider participants

This study was conducted in accordance with UBC ethics protocols, as noted in the Preface.

Initial contact was made via email, with an attached Initial Letter of Contact and a Participant Consent Form.³⁷ All refugee service providers were given the option of remaining anonymous in this work or of using their names. Refugee participants however, discussed further below, were all anonymous bar one. Service providers were interviewed based on their own experiences and personal views and were not asked to represent the views of the organisations for which they work. Kizitos Okisai, a UNHCR resettlement officer, agreed to the use of his name specifically on the understanding that his views did not represent those of the UNHCR.

The contact information for relevant individuals at the Law Clinics, Law firms, refugee advocacy groups and research institutes is publicly available online. I drew up a list of relevant refugee service providers in South Africa, focusing on the hubs of Johannesburg, Pretoria and Cape Town, based on my previous experience with the South African asylum system and the contact list available at the South African Pro Bono Directory of the International Refugee Rights Initiative, Rights in Exile Programme.³⁸ With regard to primary data collection, I began my fieldwork by engaging with ‘key informants’, those working at my South African alma mater university’s Wits Law Clinic and Migration departments, to attain updated information on the South African asylum system, common concerns, and contacts for the persons engaged therein. Simultaneous data collection and superficial thematic analysis as well as onward referrals allowed for progressive growth in the project, informing further interviews organically as I proceeded.

³⁷ See BREB approved sample letters in Appendix A.

³⁸ Available at: <http://www.refugeelegalaidinformation.org/south-africa-pro-bono-directory>

Significant resource groups of whom I was already aware and contacted prior to my arrival for field research in South Africa, included the Refugee Unit of the Wits Law Clinic³⁹, the project examining gender and asylum run by Ingrid Palmary in the African Centre for Migration & Society through the Forced Migration Studies Programme (FMSP),⁴⁰ the multiple offices of Lawyers for Human Rights (LHR) and a high profile, local advocacy group for refugee rights PASSOP (People Against Suffering, Oppression and Poverty: “a not-for-profit human rights organisation devoted to fighting for the rights of asylum-seekers, refugees and immigrants in South Africa”)⁴¹; particularly the LGBTI, Gender and Refugee Reception Centre Monitoring projects thereof, as well as the UNHCR offices in South Africa.⁴² Further research and referrals by interviewees grew this list to include Amnesty International’s Johannesburg office, the Jesuit Refugee Services (JRS), Future Families, the Coalition for African Lesbians (CAL), and Holy Trinity, a Catholic Church providing support for refugees in Johannesburg.

The research was conducted in English. All professional interviewees were expected to understand English well, being the primary working language of South Africa, and those service providers who referred refugees for interviews also relied on English in their communications and all refugee participants were able to understand and communicate effectively in English.

I designed my own interview script, based upon some broad theme direction and open-ended discussion points. My project required and received Behavioural Research Ethics Full Board approval; a Full Board was required given the vulnerability of especially the refugee

³⁹ “Refugee Unit - Wits University”, online: <<https://www.wits.ac.za/lawclinic/refugee-unit/>>.

⁴⁰ “African Centre for Migration and Society - Wits University”, online: <<https://www.wits.ac.za/acms/>>.

⁴¹ “PASSOP”, online: <<https://www.passop.co.za/>>.

⁴² United Nations High Commissioner for Refugees UNHCR, “South Africa”, online: *UNHCR* <<https://www.unhcr.org/south-africa.html>>.

participants.⁴³ The length of interviews varied depending on the comfort and interest of interviewees, generally around half an hour to 45 minutes though some service provider interviews were longer and some refugee interviews were much shorter.

I interviewed service providers: lawyers and community advocates, to gain insight into their awareness of the women refugees under study, their experiences in dealing with their cases, or lack thereof, their understanding of the legal concerns specific to these women and related to family (derivative) refugee status generally and their awareness or otherwise of legislation on the books which could affect these women, should it be brought into force. It should be noted that at least three of the service providers interviewed could themselves be classified as refugees, as that term is primarily used in this paper, to refer to *de facto* refugees.

1.3.4.2 Refugee participants

I sought out refugee participants indirectly through referral by their service providers, mindful of the ongoing homophobic danger faced by queer refugees and the social ostracization I expected polygynous refugee women may face. I initially expected that referrals would come from lawyers aware, through their interactions with their clients or the nature of the clients' asylum cases, of their clients' polygynous family form or of their sexuality or transgender identity. However, all referrals came through queer support group service providers. Due to privacy and security concerns for the refugees, the offices of their service providers upon which they would normally attend, was the preferred and suggested location for interviews with refugees. At the

⁴³ The University of British Columbia has a Full Board review process and a simplified Minimal Risk process of the Behavioural Research Ethics Board, see "BREB FAQs | Office of Research Ethics", online: <<https://ethics.research.ubc.ca/behavioural-research-ethics/breb-faqs>>.

refugee participants' discretion, I indeed conducted all interviews at PASSOP's office with one phone interview facilitated through Dumisane Dube, the coordinator of an LGBT programme of Holy Trinity.

As discussed in the data analysis of this dissertation, many service providers had little knowledge of or interaction with polygynous clients or queer, especially queer women, clients. The lawyer with polygynous refugee clients and an advocate who had worked with and previously interviewed a queer woman refugee both offered to try and get me access to these clients' redacted files, however, the necessary consents were not forthcoming. In this regard, LGBT support groups were perhaps the standout service providers who had continued and regular contact with their clients, necessary for obtaining consents or interview opportunities, whereas lawyers and other service providers had ad hoc interactions and imperfect communication with their clients. Services directed to the particular needs of queer refugees are few and there is no such provision of services targeting a polygynous refugee community. I therefore sought to identify the interactions of these groups of refugees within both targeted service providers and the major providers of services to refugees. Tellingly the multiple service providers who discussed a particular lesbian refugee couple, who appeared to have sought out an unusual variety of supports, had lost contact with the couple who had fled the country. The scant interview opportunities I had with these groups of refugees are a reflection of their absence (and fleeting presence) in these spaces. It is therefore no coincidence that the majority of refugee interviews were facilitated through the LGBT Coordinator of PASSOP, the most prominent service provider for queer refugees and, as revealed by a UNHCR resettlement officer, the key strategic partner in generating better access to the queer refugee population, for the UNHCR.

I asked the service providers to pass on the letter of initial contact and consent letters, specific to refugee participants, together, via their normal means of communication with their clients ahead of the interview. I again provided these letters in person and discussed them at the commencement of our interviews, with all refugee participants bar the phone call interview, in which confidentiality, consent to participate and the interviewee's comfort and safety in continuing the interview were discussed verbally only.

I informed all refugees that they would be anonymous in the reproduction of their interviews and in the collection and storage of the interview data. I have given pseudonyms to all but one refugee. In the process of interviewing one refugee, both in the discussion of the unique and high profile details of her story and her request to pass on her thanks to organisations she listed, it became apparent that either her story would have to be substantially edited or her anonymity lifted. Subsequent to the interview, this refugee, Tiwonge Chimbangala, confirmed that she wished to be named in this research.

The pseudonyms I chose for the other anonymous queer refugees who interviewed with me – six in total, all men – are based on the boys names listed in the ‘top US baby names’ for 2016, found online at Baby Center.⁴⁴ Many of those I spoke with, if they gave me their names, did actually have, or at least were using, anglicized names. Yet my choice to use this American baby name list purposefully marks the disjuncture in time and place of my representativity of their voices. These pseudonyms were ‘born’ with my brief encounter with these persons, in 2016, and the

⁴⁴ “Most popular baby names of 2016 | BabyCenter”, online: <<https://www.babycenter.com/top-baby-names-2016.htm>>.. When discussing refugee stories, the most common approaches to naming the anonymous are to either revert to a ‘Mr X, Mrs Y’ trope – which to me comes across as a law school-style depersonalization of personal stories – or to give ‘common’ (stereotypical) country-of-origin based names. I liked Spijkerboer’s decision to use familiar names for foreigners with the intention of interrupting the reader and pointing to the alienating effect of the process in which “the applicant we see in the asylum procedure is a [in his case] Dutch product”. Spijkerboer, *supra* note 27 at 45.

popularized, American nature of these names marks my position both as white and studying in a North American university. Though I am also South African, many of those I interviewed assumed I was foreign as they knew I was coming from a Canadian university, was in South Africa for the purposes of my research and my relatively neutral accent combined with my whiteness served to mask my own ‘country of origin’. When writing my thesis and incorporating quotes from my interviews with these refugees, the forced nature of these ‘unfitting’ names served to remind me that I was not giving these people voice, but rather appropriating their voice. Nevertheless, I also struggled when footnoting the quotes with the pseudonyms I had allocated, as the names made these refugees’ voices less distinct in my head and it was harder with the pseudonyms, writing several years after our meeting, to remember their faces and to know, without referencing my notes, which stories belonged to whom.

1.3.5 Matrix for analysis

Using both quantitative and qualitative aspects for analysis and cross-reference, I interpreted my data through an iterative, inductive approach where concepts and analytical themes emerge from the data and are then mapped across interview transcripts, policy and legal documents and the academic literature.⁴⁵ The literature, reviewed in Chapter 2 below, was gathered through electronic university library and scholarly search engine key word searches, through consultation with my supervisory committee and other faculty members, as well as a snowballing of cross-referenced works within the literature. An obvious shortcoming of this work is that I reviewed

⁴⁵Leila Ullrich, “‘But what about men?’ Gender disquiet in international criminal justice.” (2019) *Theoretical Criminology*, online: <<https://journals.sagepub.com/doi/10.1177/1362480619887164>>.

literature in English only; and focused on the library collections of a North American university (including material that is available through interlibrary loan).

The brief quantitative aspect of my study explored existing official data to determine whether my populations under study officially exist on paper and contextualising their possible statistical presence. South African official data on asylum applications was aggregated only with respect to acceptance and rejection numbers, by country and region of origin and by city of application. Gender and country of origin statistics and an age breakdown were also available for some years.⁴⁶ This aspect of the project was undertaken not as an attempt to create objective or reliable data but rather expecting absences and unreliability (discussed further in Chapter 3.2). The purpose of the quantitative element of my study is to make use of the official statistics as an indicator of the population groups' (un)importance and treatment in the system. As identified by Merry, official records are themselves "cultural documents", which indicate the (in)significance of issues to those with power.⁴⁷

In the qualitative aspect of my study, I created data from interview analysis to compare and triangulate with the above quantitative initiative. I therefore inquired about service providers' knowledge of sex orientation-based persecution as a grounds for refugee status and possible links to gender-based persecution and also questioned service providers as to the possibility/usage of same-sex derivative status (refugee status by reason of being a dependent, same-sex spouse of a refugee) and of plural spouse derivative status (refugee status by reason of being one of a refugee's dependant spouses). Finally, refugee participants were sought out amongst interviewed

⁴⁶ See Chief Directorate Asylum Seeker Management, *Asylum Statistics: Year 2013* (2014); Home Affairs, *2015 Asylum Statistics: Analysis and Trends for the Period January to December, Presentation to the Portfolio Committee of Home Affairs* (2016); Asylum Seeker Management, Immigration Services, *supra* note 19.

⁴⁷ Merry, *supra* note 12 at 107.

service providers' clientele who could speak to sexual orientation-based persecution in relation to their flight or polygynous family structures. These refugees expounded on their interactions with the asylum system and provided narratives relating to the role of their gender, sexuality and non-normative family structures in their search for asylum and in their interactions with officials, lawyers and advocates.

The thematic analysis of the interviews was undertaken partly through themes expected and constructed prior to the field research being conducted, which were integral to the framing of this thesis: discussions on women refugees and the relativity of their presence, opinions on statistical data on asylum seekers and refugees and on the changing and uncertain legal landscape for refugees in South Africa. This data was thus prompted by the structuring of the questions asked. In creating an interview script, prior to conducting fieldwork, the main topics on which participant's views and experiences were sought included:

- asylum claims by women, (estimate of proportions) and of sexual minority and polygynous women in particular;
- asylum claims grounded on sexual-orientation based persecution or gender persecution;
- major issues and challenges in women's asylum claims, and of sexual minority and polygynous women in particular, identification of cases of significance and developments;
- institutional barriers to claims and to family reunification of sexual minority and polygynous women;

- the role of legislation in the above and awareness of derivative status (refugee status of dependants) in South Africa and presumptions of gender and sexuality;
- the understanding and/or use of a broadened definition of “spouse” by lawyers, advocates and bureaucrats and awareness of and attitudes towards the Refugees Amendment Acts of 2008 and 2011.

Some of the anticipated themes fell away as a focus in the process of conducting interviews. So, for instance, a focus on family reunification and on ‘derivative status’ – the use of section 3(c) of the Refugees Act to grant refugee status to the dependants of refugees – proved not to be fruitful given the level of disarray of the data and systems of the Department of Home Affairs (DHA) and particularly given the problems with file joinder and the apparent minority of queer refugees with partnerships both predating and extant subsequent to their arrival in South Africa. Other themes emerged organically, and even unexpectedly, as I conducted more interviews and in subsequent analysis, through thematic pattern recognition. This included a reconsideration of the conceptions of ‘family’ used, in place of a ‘family reunification’ focus, and an apparent ‘Somali theme’ emerging relative to polygyny, all of which are analysed in the discussions to follow.

The predominance of male refugees in the South African asylum system ground the expectation of smaller numbers of polygynous women and queer women refugees. However, whilst many service providers seemed to consider polygyny as likely absent within the refugee population (discussed further in Chapter 4), most felt queer women should be present. A discussion on the theories that service providers suggested for their absence is raised in Chapter 6.

This doctoral research produced a very small number of descriptions of encounters with polygynous refugee women and with sexual minority refugee women by service providers

interviewed. There were also no refugee interviews conducted with polygynous refugees, only with queer refugees, all of whom, bar one, were male.

Where gaps and missing voices become apparent, it can be difficult to discern whether such gaps are the result of limitations within the research or an observation of the research. I argue that these groups of women who are only scarcely alluded to by refugee service providers and whose absence is largely replicated in this research, which purposely set out to explore an understanding of their interaction with the asylum system, is itself an important finding, signifying exclusionary spaces and conceptions. Relevant parallel discussions on the attempt to study what is not there, can be found in discourse studies. Zerubavel notes the reinforcing nature of phenomena of absence and their study: “what we ignore or avoid socially is often also ignored or avoided academically, and conspiracies of silence are therefore still a somewhat undertheorized as well as understudied phenomenon. Furthermore, they typically consist of nonoccurrences, which, by definition, are rather difficult to observe.”⁴⁸ Yet Schröter and Taylor urge: “However, this should not lead us to erase absence from any research agenda when we can still use what is present to look at what constitutes, produces or indicates absence”.⁴⁹

In a volume that seeks to encourage silence and absence as a line of enquiry in discourse studies, the editors, Schröter and Taylor, suggest approaches to the empirical analysis of absences with the intention of creating a methodological toolkit.⁵⁰ The authors assert: “we only need to be

⁴⁸ Eviatar Zerubavel, *The Elephant in the Room: Silence and Denial in Everyday Life* (Cary, UNITED STATES: Oxford University Press USA - OSO, 2006) at 13.

⁴⁹ Melani Schröter & Charlotte Taylor, *Exploring Silence and Absence in Discourse: Empirical Approaches*, Postdisciplinary Studies in Discourse (Cham: Springer International Publishing, 2018) at 14.

⁵⁰ *Ibid* at 2–5.

concerned with *meaningful* absences and that for absences to be meaningful, they require an arguable alternative of presence.”⁵¹

The minimal presence of the women in this study, discernible within the asylum system and amongst those who provide services to refugees, indicates not just a failure to provide protection to these particular groups but presents a lens through which to better perceive significant challenges embedded in our understanding of international refugee law. Schröter and Taylor, amongst their methodological approaches suggested for studying meaningful silence and absence in discourse, include ‘comparison’ as a means to identify absence. “If we accept that meaningful absences require a possible presence against which the absence can be identified, then comparison seems to be a good way to locate absences.”⁵² This dissertation exposes the meaningful silences around polygynous refugee women and sexual minority refugee women through political-geographical comparison; in which Western-focused traditions of refugee law studies and their emergent themes can be compared with the findings of my differently located research. A gendered comparison is also used; considering male presences (including polygynous men and queer men) and extrapolating female absences.

This is by no means a comprehensive account of the presence of these groups of women in South Africa and provides very little on the interaction of these women with the asylum system. Yet the work that remains to be done supports my primary call for greater, high detail refugee law research in South Africa and other under-studied host countries. If further research on this topic were to be conducted, approaching women’s violence centres, rather than queer or refugee

⁵¹ *Ibid* at 6.

⁵² *Ibid* at 14.

focused groups, may prove more fruitful in accessing some missing voices (as theorized in Chapter 6.2).

1.4 Principal Conclusions

This dissertation, which sought to forefront a refugee host country deserving of more attention in refugee law studies as well as to centre particularly vulnerable refugee women largely sidelined in the study of the workings of refugee law and asylum systems of the world, produced minimal data on women polygynous or queer refugee clients of service providers. This research includes no polygynous or sexual minority women refugee interviews, and one (trans)woman refugee interview. While I did not find these women, I did find some reasons for their invisibility.

Within South Africa, systemic incompetence and the purposeful blocking of access to the asylum system negatively impacts all refugees, largely denuding the refugee protections guaranteed by international obligations and domestic legislation. This programmatic anti-refugee stance evident throughout the asylum system has particular and sometimes exacerbated repercussions for polygynous and queer women with compounded access and resource limitations and gendered security concerns. Identifying these women and their needs is made more complex, for both service providers and researchers, by virtue of their likely being largely outside of the asylum system. The rendering of the South African asylum system as unworkable is demonstrative of different ways of excluding compared to wealthier Western states with harder-to-access borders and greater border control. As the exclusion from refugee protection is a central topic for refugee law studies, investigating these alternative, systemic ways of excluding is necessary and thus requires an inclusive approach to studying a greater variety of host countries.

Polygynous and sexual minority refugee women are furthermore hidden from view as a consequence of service provider expectations echoing and influenced by Western stereotypes of the refugee figure and of polygamy and queer identities. More than just a commonality of approaches, the impact of Western tropes and knowledge production is particularly evidenced by ‘out of place’ expectations such as typifying polygyny, a domestic and regional African customary practice as a Somali, Islamic practice and a lack of regard for complex queer families whereas reports of queer persons with heterosexual marriages and children are not uncommon in Africa. Both the analysis on polygynous and queer refugee women work to demonstrate the knock-on effects for misunderstanding lived experiences in light of a refugee figure constructed, familiarly, as a static identity, characterised as single, male and poor, but whose persecution is artificially extracted from their poverty.

This dissertation identifies insights applicable to the conceptualisation and study of refugee law generally, yet which can be attributed to the perspective attained from the study of a non-traditional ‘host’. This includes the urgency of a need to re-examine the role of economics in understanding experiences of and vulnerability to persecution, including continuing persecution, and the interplay of mobility challenges and identity politics limitations which disproportionately obscure some of the most vulnerable people, most disadvantaged by a narrow focus on persecuted identity, from a Western-host vantage point. The challenges polygynous and queer women face as refugees are lost in translation in the extraction and abbreviation required by the West-as-host construction, discussed in this thesis, the consequences of which are amplified through the politics of knowledge production.

Having outlined the schema of this dissertation and the methodology informing the conduct, analyses and presentation of the research presented herein, the following chapter outlines the

varied and multidisciplinary scholarly work which has informed the ideas underlying the content and purpose of this research as well as foreshadowing its contribution.

Chapter 2: Literature Review

The launch pad for this work and the discussion engendered is provided by the existing literature in refugee law; the gaps identified therein have provoked the need for this research and the cumulative insights of many authors have informed my thematic analysis. This research has also been nourished by the perspectives and understandings built across other fields of study. A comprehensive review of refugee law literature, even as it pertains to particular groups of refugees is not within the scope of this dissertation, instead this serves as a selective review of the most influential works in refugee law generally as well as those specifically relevant to this dissertations' focus and points towards cross-over opportunities for learning from other areas and disciplines. Reading exclusively in English limits my reach in this review, in particular in relation to European-based research which is only available in other languages. Nonetheless, on the basis of my discussions with my supervisory committee, my focus on influential works, which influence is a product of a substantial English bias, and my efforts to track references suggested by various texts, I am confident that this review represents the current state of the refugee law literature.

This literature review begins with a survey of a provocative gap in refugee law scholarship which is brought about by what I identify as recurring instances of an unacknowledged bias in focus. I move on to discuss the insights gleaned from within a Western-predominant, Southern occluding study of the application of refugee law which have nevertheless inspired and found reflections in this dissertation's analysis. The existent, Southern-focused refugee law studies as well as signals of new developments within refugee law are discussed and finally, the significant and valuable contributions of a multidisciplinary approach to knowledge are canvassed.

2.1 The Western Bias in Refugee Law Scholarship

The canonical literature in refugee law studies is represented by authors whose general and largely descriptive works on Refugee Law are used today as reference works in asylum cases across the world, such as Hathaway's second edition, together with Foster, of *The Law of Refugee Status* and Goodwin-Gill and McAdam's update of *The Refugee in International Law*.⁵³ In the case of the latter, the authors' stated aim is "to indicate with some precision the fundamental interests which must be protected as a matter of law, if the inherent worth and dignity of the individual in flight are to be upheld", with particular focus on the UNHCR positions on the topics canvassed. This book also includes a discussion of the European Union harmonization initiatives for their potential to influence states beyond the EU and thus provide some indicators of possible future directions for international refugee law.⁵⁴ Hathaway and Foster, on the other hand, make extensive use of case law in outlining both best practice and errors in the application of refugee law. This approach allows for consideration of the interesting transnational judicial dialogue, as well as the encouraging impact of academics amongst asylum case decision-makers. However, this focus also illustrates a dismissal of the host states of the Global South. South Africa, with a handful of cases referred to, represents the only developing country jurisprudence reflected in the book. Although the authors acknowledge a common law as opposed to civil law bias, they do not mention this greater geographic imbalance.

Alternative, general approaches with an examination of the ethics of refugee law are proffered by authors such as Price, Haddad, Gibney and Chimni (discussed further under 2.3 below). Gibney discusses ethical political theories underlying different arguments relating to state obligations

⁵³ Hathaway & Foster, *supra* note 23.; Guy S Goodwin-Gill & Jane McAdam, *The refugee in international law*, 3rd ed ed (Oxford ; Toronto: Oxford University Press, 2007).

⁵⁴ Goodwin-Gill & McAdam, *supra* note 53 at 60.

towards refugees in the context of what he conceives of as competing obligations to citizens. Gibney reveals the way in which state structures create a rational self-preservation interest in attending to the interests of insiders and that “most states are responsive to the needs of outsiders in extremis, they do not equate the needs of outsiders with the needs of citizens. When states accept refugees, they are responding to extremity, not equality”.⁵⁵ Gibney thus seeks to balance ethical force with practical relevance so as to argue for politically achievable improvements to asylum processes. Gibney describes this principle as equating to a state obligation to refugees (anywhere) as long as the costs are low. His petition is directed towards Western host states and their ‘organized hypocrisy’ in increasing their efforts to prevent the entry of asylum seekers whilst continuing to proclaim the importance of the refugee regime. Price, on the other hand, proposes that the problems of the blunt instruments increasingly used by states to deny access to would-be asylum seekers, such as unjust fast-tracked processes and increasing limitations on the rights of those that are admitted, can be resolved by ‘returning’ to a more blatantly politicized and much more restricted conception of asylum. This, he states, will more closely reflect states’ interests and so engender greater support and the provision of permanent settlement and fuller rights as the preferred solution. It is Price’s contention that there has been a ‘humanitarian turn’ in refugee law which has moved it away from its Cold War political conception as “connected to a broader political program to reform those [abusive] states”. Price bemoans the ‘unjustifiable expansion’ of protection mechanisms, decoupled from foreign policy, which do not reflect his proposed, very narrowly political understanding of ‘persecution’.⁵⁶ An opposite approach is

⁵⁵ Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge, UNITED KINGDOM: Cambridge University Press, 2004) at 212.

⁵⁶ ‘Persecution’ on Price’s reading (see Matthew E Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009) at 70.) occurs where persons are “targeted for harm in a manner that repudiates their claim to political membership”. His conception of refugees is constituted solely by political

taken by many other writers including Anker, who celebrates the significance of the justiciability and enforceability of refugee law, and its palliative rather than state-responsibility focused nature, as potentially providing focus to and an elaboration of issues at the forefront of human rights law, without facing similar challenges of state-consensus.⁵⁷

Haddad argues that the refugee is inevitable and so ‘natural’ to the state system, whereas the refugee is imagined as “a moving, exceptional figure” compared to “the otherwise ‘normal’, sedentary state-citizen-territory trinity”.⁵⁸ She identifies this disruption of the “national order of things” by the constructed refugee, as the reasons the refugee appears as threatening, prompting a security, rather than humanitarian based, state reaction.⁵⁹ Haddad criticises the Convention grounds of persecution for focusing on problems apparently internal to states and rather points to the international context in which the refugee emerges. The real ‘problem’ therefore, on Haddad’s analysis, is the state system itself and the concept of sovereignty on which it relies. Refugees are thus “the human reminder of the failings of modern international society”.⁶⁰

All of the above authors purport to engage in ‘international’ refugee law studies whilst predominantly reflecting Western host-only refugee law analysis. Chimni, on the other hand, works to expose elements of this bias in his work. Chimni is discussed further herein as a significant TWAIL, refugee law scholar. He particularly exposes and criticises the positivist tendency in refugee law studies. Chimni characterizes the depoliticized academic and advocacy focus on improving refugee determination procedures, during the Cold War, as creating a legacy

exiles and consequently the necessary and distinctive solution required is (permanent) surrogate political membership.

⁵⁷ Deborah E Anker, “Refugee Law, Gender, and the Human Rights Paradigm”, (5 July 2017), online: *International Refugee Law* <<http://www.taylorfrancis.com/>> at 138.

⁵⁸ Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge, UNITED KINGDOM: Cambridge University Press, 2008) at 47.

⁵⁹ *Ibid* at 90.

⁶⁰ *Ibid* at 136.

of legal scholarship which disarmed itself when it came to political and ethical questioning of refugee policies. The missed role of interpretation and power dynamics, Chimni believes, led to a false assumption of the protective nature of refugee law, even in a changed historical context. Chimni describes the subsequent paradigm shift in international refugee policy as founded upon the creation of a myth of difference which itself relies upon the construction of the ‘normal’ refugee; as white, male and anti-communist, against which those fleeing from the Third World could be sharply contrasted. Like Haddad, Chimni also points to an “internalist interpretation of the root causes of refugee flows” – blaming the country of origin, without consideration for external factors and historical influences – as an element of the worldview which promotes a new, more restrictive approach.⁶¹

Comparative country jurisprudence discussed by some of the leading academics in Refugee Law, is commonly exclusively from developed countries. Hathaway and Foster’s book canvassing Western refugee case law, discussed above, is one such example as is Aleinikoff’s chapter on the meaning of ‘particular social group’ in the UN Refugee Convention. Aleinikoff, who subsequent to writing the chapter became Deputy High Commissioner of the UNHCR, usefully summarizes state jurisprudence, discussing the country case law on the protected characteristic approach compared with the social perceptions approach to defining membership of a ‘particular social group’ (PSG); Aleinikoff identifies these approaches as being focused on internal factors and anti-discrimination principles, and external factors and sociological understandings respectively (see further below on Foster under 2.2). Yet the jurisprudence he discusses is exclusively

⁶¹B S Chimni, “The Geopolitics of Refugee Studies: A View from the South” (1998) 11:4 J Refug Stud 350–374 at 351.

Western.⁶² Gammeltoft-Hansen's book, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* focuses on the international aspects of refugee law and forces of globalisation in a thorough excavation of modern exclusionary practices of developed (termed 'traditional') host states.⁶³ It is assumed throughout that the 'state' being encountered is a developed, Western state, and the exclusion of asylum seekers is viewed from a Western entry vantage point only. There is therefore no discussion of the exclusionary mechanisms of Southern host states which differently, yet effectively deny entry to their asylum systems (though not their borders), as is discussed in Chapter 3 of this dissertation.

Southern hosts, and the important and distinct challenges refugees may face therein, thus appear forgotten in much Western-host state focused refugee studies. In outlining the various forms of persecution, direct and indirect, faced by gay asylum seekers in their country of origin, Hathaway and Pobjoy state that it is no surprise that they have "increasingly sought the protection of Northern states that take a more sympathetic view of gay rights."⁶⁴ However, this phrasing omits the presence of LGBT asylum seekers in Southern countries who, whilst seeking protection, are simply 'unseen' and may well remain in the South, facing persecution in their *host country*. Furthermore, a "sympathetic view of gay rights", whilst indeed a potential "pull-factor" for some host countries, does not necessarily result in a safer outcome for queer refugees in different contexts. This latter sombre point is illustrated through much of the discussion in this

⁶² See for instance Alexander Aleinikoff, "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'" in Erika Feller, Frances Nicholson & Volker Türk, eds, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 263. and Hathaway & Foster, *supra* note 23.

⁶³ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2011). See p.15: "forms of extraterritorial or externalised migration control have been rapidly expanding across traditional asylum countries, in particular Australia, the United States and European countries."

⁶⁴ James Hathaway & Jason Pobjoy, "Queer Cases Make Bad Law" (2012) Articles, online: <<https://repository.law.umich.edu/articles/889>> at 318.

dissertation. Thus, although many LGBT refugees are believed to be attracted to South Africa because of the country's legal protections for sexual minorities, a UNHCR resettlement officer described the entire LGBT refugee/asylum seeker population in South Africa as 'of concern'.⁶⁵

Whereas the study of Western asylum systems is regularly extracted from its specificity, the passing, though often positive, discussion of instruments like the AU Refugee Convention is discussed as distinctly located exceptions. Some writers call for the innovation of Global South refugee definitions to be 'internationalized' that is, incorporated into Western asylum systems. Goodwin-Gill and McAdam are critical of the fact that whilst states evidently recognize the gaps in the UN Refugee Convention for serving broader needs and matching realities, there remains a lack of willingness to create or systematize state obligations, leaving a weak discretionary gap. The authors' position is that the AU Refugee Convention realistically extends the definition of 'refugee'.⁶⁶ Discussing Canada's guidelines on gender-related persecution, Macklin describes the way in which millions of women are left out of the Refugee Convention protection realm, "not because the impetus for their flight was gender-specific, but because starvation, war, and environmental disaster 'don't count' for purposes of the legal definition".⁶⁷ In this regard she criticises the failure of countries such as Canada to take up a supplementary definition to that created by a Eurocentric liberal rights paradigm, as reflected in the African and Latin American regional agreements.

⁶⁵ The views expressed were the personal views of the interviewee and not attributable to the UNHCR, Kizitos Okisai, *Interview with Kizitos Okisai, UNHCR Resettlement Officer, United Nations High Commission for Refugees (UNHCR)* (2016), Pretoria.; See further the discussion in Chapter 5.2

⁶⁶ Goodwin-Gill & McAdam, *supra* note 53 at 292–294.

⁶⁷ Audrey Macklin, "Refugee Women and the Imperative of Categories" (1995) 17:2 Human Rights Quarterly 213–277 at 218.

In her seminal piece, “Can the subaltern speak?”, Spivak seeks to uncover how the disavowal of a subject position and location reinscribe the “unacknowledged Subject of the West” and the only-imagined, muted Other.⁶⁸ Spivak criticises how the neutral and disembodied authorship by white, Western men investigating others as objects of study contributes towards cementing a very specific perspective of subject-object study which both masks its specificity and location and produces a knowledge of an always silent object, spoken about but not spoken with. In refugee law, the unacknowledged subject is of the Western host, disguised as a typical host and presented as representative of the application of refugee law, understood as exclusively located in Western asylum systems. The Third World ‘Other’, in the majority of Western refugee scholarship, is imagined only as the source of refugees, rather than also the primary host of the world’s refugees. This produces several gaps in analysis, missed opportunities for advocacy and indeed the positing of solutions which would be disastrous if applied in the unimagined Southern host. It is both the exposition of this bias and the analysis of its consequences that this dissertation sets out to achieve.

Many of the proposals suggested by authors whose work relies upon a limited yet hegemonic framing of Refugee Law issues, may thus be awkwardly applicable or completely inappropriate for the majority, neighbouring host states of the Global South.⁶⁹ Revisiting some of the authors whose work has been discussed above, reveals such problematic proposals. Gibney refers to the national examples of Germany, the UK, the US and Australia in drawing out his conclusions on the issue of practicality of proposals for change in the asylum system; arriving at his supposedly more principled position that state obligations are owed to refugees anywhere, but only extend to

⁶⁸ Spivak, *supra* note 9 at 87.

⁶⁹ See the criticism of power-imbalanced knowledge production from the Third World feminist perspective by Mohanty, *supra* note 8.

circumstances of low-cost.⁷⁰ The effects of such a principle were it to be applied in the developing countries who host 86% of the world's refugees, and especially in the least developed countries, which play host to 25% thereof, are not considered.⁷¹ Similarly proposing a solution to the problems of excluding and rights restrictive asylum processes, Price advocates for 'returning' to a more blatantly politicized and much more restricted conception of asylum.⁷² Should Price's proposals for eliminating refuge for those displaced for reasons of generalized violence, for those coming from states unable to protect their citizens or from failed states, be implemented in the *host* states of Africa, not only would this leave stranded a vast number of those displaced within the African continent, but his advocacy for the granting of refugee status as a political tool for condemnation, and one device amongst a set of interventionist strategies, would, in the case of African neighbours, effectively amount to war-mongering. In considering the general passing over of the South as not only refugee-producer but also the largest refugee-acceptor, evident in the refugee law literature, Price's book provides perhaps the best example of how such an approach is not only incomplete but can result in dangerously inappropriate proposals.

Identifying the dissonance in these proposed solutions to an anti-refugee backlash in the domestic application of refugee law with the circumstances of the Global South which hosts the majority of the world's refugees requires first that these works be located as exclusively based on the study of Western asylum systems and these systems' exceptionality called out. This is the larger work undertaken and illustrated by this dissertation.

⁷⁰ Gibney, *supra* note 55.

⁷¹ United Nations High Commissioner for Refugees UNHCR, "UNHCR Global Trends 2014", online: *UNHCR* <<https://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html>> at 2.

⁷² Price, *supra* note 56.

2.2 Useful Insights: Lost in Translation

Much of the literature surveyed above purports to be international in character or application, yet as my analysis suggests, such refugee law studies reveal a preoccupation with Western host states. This literature poses challenges for Southern scholars and for the application of such findings within Southern hosts, in part, due to the invisibility of their bias. Nevertheless, the work of authors writing on Western host states provides many useful insights: both in relation to the ideas which have influence in the world beyond false imaginings of ‘international’, and in raising themes familiar to other, albeit unexamined, locations. In drawing insights from different places (differently located studies and different disciplines, discussed further in 2.5 below) it is important to remember place specificity (perhaps especially so where this is not considered by the author) and one should not assume universal applicability of experience. However, the familiar themes which arise are also illustrative of how useful insights from different places can be, with the caveat that their difference be remembered. The following briefly outlines some of the instructive works and ideas which have informed the differently placed analysis of this dissertation. This suggests the more we learn about the application of refugee law from different places, this dissertation standing as an example, the better we will be able to understand which lessons are indeed widely applicable and which are more specific to place or circumstance.

Thus whilst the canvassing of jurisprudence used to create a very useful summary of an issue in refugee law is done with a Western bias (referencing only Western host state jurisprudence), the summary itself that Foster provides in her chapter in Arbel et al’s *Gender in Refugee Law* book, is useful in establishing the base line so influential beyond the countries from which it is drawn. Previous, problematic and now rejected approaches towards establishing a group as a ‘PSG’ are summarized: the alleged need for voluntary association, homogeneity or internal cohesion of the

group, and interpreted limitations with regard to the size of the group – not ‘too small’/‘too large’. Foster then turns to outlining current approaches towards a PSG: (i) the ‘protected characteristics approach’ (with associate interpretations of immutability), inspired by anti-discrimination grounds – a link which Foster sees as the desired solution to a uniform PSG approach; and (ii) a ‘social perception approach’, which requires that a PSG be cognizable as a group in society.⁷³

Whereas some conclusions drawn by refugee law scholars studying Western host refugee law application may not be as universal as they imagine, in other instances, problems imagined as Western-host specific may surprise as being more broadly encountered. In this regard, discussions on the reliance on stereotype and cultural misreading of asylum applicants, sometimes presumed to be a consequence of the Western adjudicator’s view of Southern originating refugees, find echoes in the Southern-located adjudication of the claims of neighbouring states’ refugees. This is perhaps especially so in the case of queer refugees, who are always a minority for the adjudicator, wherever the adjudicator is placed.

Examples include a paper discussion between authors where Pobjoy and Hathaway construct an argument on queer case law which is criticised in a follow-up article by Millbank; a debate is raised as to the scope of identity and of activities or expressions as part of identity.⁷⁴ Hathaway and Pobjoy importantly discredit a ‘discretion duty’ argument made by many asylum adjudicators; wherein the adjudicator reads in a *sui generis* imposition of a duty to internalize

⁷³ Michelle Foster, “Why we are not there yet: the particular challenge of ‘particular social group’”, (16 April 2014), online: *Gender in Refugee Law* <<http://www.taylorfrancis.com/>>.

⁷⁴ Hathaway & Pobjoy, *supra* note 64.; Jenni Millbank, “The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms is Not Bad Law: A Reply to Hathaway and Pobjoy Symposium: Uncovering Asylum: A Conversation on Refugee Law, Sexual Orientation, and Moving Towards a Just Jurisprudence” (2011) 44:2 NYU J Int’l L & Pol 497–528.

repression, or to conceal identity to avoid risk, which the authors discuss and dismiss as nullifying Convention protection. The authors also identify how the modification of behavior (and so denial of the right to a private life), or the psychological impact of such repressive modification (which may constitute cruel, inhuman or degrading treatment), based on fear of persecution upon discovery or being ‘outed’ (being forced into hiding one’s sexual orientation), may itself constitute the relevant persecutory harm, which they discuss as ‘endogenous harms’. However, much of the paper is focused on a discussion of “the scope of activities protected as inherent in sexual orientation”, referring to the guidance on scope existing in relation to religion or political opinion grounds for asylum. The authors criticise the judgments in the cases discussed for failing to properly grapple with this question of the scope of inherent/integral and thus protected activities, and taking too broad a position which may call into question the nexus element of the refugee definition. The authors feel that the judgments were at once under-inclusive – in failing to be sufficiently “attentive to the endogenous harms that follow from having continually to mask one's true identity”⁷⁵ – and over-inclusive in failing to interrogate the protection interests related to sexual orientation, based on “associated activities, rather than simply as a function of identity per se”.⁷⁶

The focus with regard to the latter point on activities instead of identities is difficult to understand with regard to a Refugee Convention which protects *only* identities and never ‘activities’, beyond their link – real or imputed – to signal identity; in which case whatever the form or nature of the actual activity in question is irrelevant. This aspect of Hathaway and Pobjoy’s paper is roundly criticised by Millbank. Millbank is critical of Hathaway and Pobjoy’s analysis in so far as it rests “upon a misleading and unsustainable act/identity distinction

⁷⁵ Hathaway & Pobjoy, *supra* note 64 at 335.

⁷⁶ *Ibid* at 336.

(comprising equally unsustainable binaries of integral/peripheral and necessary/voluntary acts).⁷⁷ As well as the false distinction underlying their analysis, Millbank is concerned with both the likely misapplication of their proposed test for ‘protected activities’, described as those “reasonably required to express sexual orientation”, and the way in which this analysis serves to reintroduce a form of ‘discretion’ reasoning.⁷⁸ Millbank shows how adjudicators have historically clearly considered trivial what most would consider integral forms of identity expression, in determining these activities or expressions are reasonably avoidable, and hence her discomfort with Hathaway and Pobjoy’s proposal.

Lines between what is "integral" and what is "marginal" conduct associated with sexual minorities in another culture prospectively drawn by Western decision makers have often failed to properly encompass accepted human rights standards ... Put bluntly, the more marginal a group is in social and legal terms, the more likely that what is experienced as core by them is deemed marginal by adjudicators.⁷⁹

Although the above discussion is conducted with reference to Australian case law, the insights regarding misreading, particularly of marginalized groups are applicable beyond a Western-host, Southern refugee reading to South-South readings.

Several scholars bring to light the problematic construction of the refugee figure, and of women refugees and their experiences, in particular. Barsky, examining Canadian asylum cases, tracks the movement in the process from human being to refugee status claimant and from claimant to Other. A very narrow aspect of the claimant’s experience is deemed relevant and they are expected to fit their experience into a very particular yet generic construction.⁸⁰ Dauvergne and

⁷⁷ Millbank, “The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms is Not Bad Law”, *supra* note 74 at 501.

⁷⁸ *Ibid* at 513.

⁷⁹ *Ibid* at 516.

⁸⁰ Robert Barsky *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (Philadelphia: John Benjamins Publishing Company 1994)

Millbank criticize the use of stereotypes and blunt proxies in their analysis of Australian, Canadian, US and UK forced-marriage case law. The authors demonstrate the way in which women applicants especially are required to meet the script of poor, rural, young and uneducated, or have their claims rejected.⁸¹

In a book titled *Fleeing Homophobia*, which canvasses the position of LGBTI asylum seekers within the European asylum system, several authors discuss the impact on credibility assessments of pervasive stereotypes which negatively impact evaluations of group self-identification, in particular.⁸²

Spijkerboer, in his analysis of Dutch asylum decisions, discusses the harmful assumptions about femininity, gender and sexuality in an arena in which the powerlessness of the applicant allows the officials to construct the female applicant as they wish. Spijkerboer argues for an increased consciousness of the constructions/representations created by the refugee system and the need to “ask whether the identities we create are actually inhabitable by the people we create them for”.⁸³

Rehaag, in a detailed analysis of sexual orientation-based asylum cases in Canada pays particular attention to the differentiated treatment of bisexual applicants. Rehaag identifies a dominant understanding of sexuality, as an innate and immutable personal characteristic, as the cause for the difficulties bisexual claimants encounter in making a claim capable of positive reception. He argues that “adjudicators should embrace an alternative understanding of sexual orientation that can accommodate a multitude of sexual-minority life stories. This understanding views sexual

⁸¹ Catherine Dauvergne & Jenni Millbank, “Forced Marriage as a Harm in Domestic and International Law” (2010) 73:1 *The Modern Law Review* 57–88 at 77.

⁸² See for instance the chapters by Janna Weßels, Louis Middelkoop, Nicole LaViolette and Thomas Spijkerboer in Thomas Spijkerboer, ed, *Fleeing Homophobia : Sexual Orientation, Gender Identity and Asylum* (Routledge, 2013).

⁸³ Spijkerboer, *supra* note 27 at 7.

orientation as flexible and fluid.” Furthermore, he advocates that decision makers should “focus not on the sexual identity of claimants but rather on evidence of their persecution on account of traditional gender roles and compulsory heterosexuality”.⁸⁴

All of the above discussions of the use of stereotypes and poor stand-ins for understanding the lived experiences of asylum applicants, find echoes in non-Western host country refugee status determination procedures, discussed further in the following subsection.

My work, as well as that of some of the Southern scholars discussed in the subsection below, demonstrates that the criticisms of shallow understandings of issues of gender and sexuality in refugee law, emerging from Western-host focused studies, are in themselves broadly applicable. Whilst gender and sexuality, and the construction thereof, are issues much debated in feminist literature and Butler, for instance notes that “those who fail to do their gender right are regularly punished”,⁸⁵ these terms are often less carefully used or related in Refugee Law analysis and this criticism is not isolated to host states in the West.⁸⁶ The introductory chapter of Arbel et al’s collection *Gender in refugee law: from the margins to the centre*, highlights the gender and sexuality question as being especially important and requiring further study.⁸⁷ These concepts, though sometimes placed beside one another, are rarely understood as intimately related or mutually constitutive (lying within one another). Specifically, the authors call for an unpacking of homosexuality to see men and women’s different experiences of sexuality and related

⁸⁴ Sean Rehaag, “Patrolling the borders of sexual orientation: bisexual refugee claims in Canada” (2008) 53:1 McGill Law Journal 59 at 59.

⁸⁵ Butler, Judith, “Performative acts and gender constitution: an essay in phenomenology and feminist theory” in *The feminist philosophy reader* (Toronto;Boston; McGraw-Hill, 2008) at 99.

⁸⁶ See for instance the chapters by *Ibid* at 97–98.; Oyeronke Oyewumi, “Visualizing the body: Western theories and African subjects” in *The feminist philosophy reader* (Toronto;Boston; McGraw-Hill, 2008) at 168; Catherine A MacKinnon, “Sexuality” in *The feminist philosophy reader* (Toronto;Boston; McGraw-Hill, 2008) at 204–208; Ann Ferguson, “Sex war: the debate between radical and libertarian feminists” in *The feminist philosophy reader* (Toronto;Boston; McGraw-Hill, 2008) at 223.

⁸⁷ Efrat Arbel et al, *Gender in Refugee Law : From the Margins to the Centre* (Routledge, 2014) at 5.

oppression. Buscher is amongst the exceptions in explicitly discussing and emphasising that whilst ‘gender-based violence’ is a term generally “used to refer to violence against women and girls, it also encompasses violence against women and men because of how they experience and express their gender and sexuality”.⁸⁸ This is a necessary insight directly relevant to the world of refugee law and references experiences which protest an understanding of ‘gender persecution’ as either persecution of women or persecution of transgender individuals and necessarily complicates male-only perspectives of sexual-orientation based persecution (discussed further in Chapter 5).

As well as often conflating the term ‘gender’ with women in Refugee Law, many writers also make use of a ‘womenandchildren’ conception of ‘women’, turning what Spijkerboer points out are more or less 50/50 divisions of men and women refugees and of adults and children, into a conglomerated majority.⁸⁹ As well as being inaccurate, this focus upon a constructed majority shifts attention away from the more discriminatory gender gap with regard to the discrepancy in numbers between men and women refugees actually present in the Northern as opposed to (some) Southern host states.

Some authors, in discussion on the stereotypes used to construct a refugee figure, also usefully reveal the construction of a stereotypical ‘self’ as host which has interesting echoes amongst Southern hosts. It is Macklin’s position that a feminist analysis ‘superimposed’ on the constructed Self/Other binary of refugee discourse; that is, the good, Western, refugee-acceptor ‘Self’ (who is not a refugee-producer, and whose responsibility for refugees produced elsewhere is not acknowledged) and the abusive, refugee-producer ‘Other’ (not even imagined by Macklin

⁸⁸ Dale Buscher, “Unequal in Exile: Gender Equality, Sexual Identity and Refugee Status” (2011) 3:2 Amsterdam Law Forum 92 at 95.

⁸⁹ Spijkerboer, *supra* note 27 at 17.

as a ‘refugee-acceptor’), requires a crossing of this boundary by challenging the self-understanding of ‘non-refugee-producers’ with regard to universal gender persecution. Failure to do so can result in cultural difference being used as a yardstick to distinguish ‘our discrimination’ from ‘their persecution’; reflected in the evidentiary barrier created with regard to claims from similar ‘safe’ countries: “one strategy for deflecting this discomforting irony”.⁹⁰

Literature on gender in refugee law often focuses on domestic violence as a particularly gendered experience which throws up challenges for host state asylum adjudicators who see insufficiently ‘other’ applicants in front of them; whose persecution may seem too close to home and must therefore be trivialized, lest acknowledging such experiences as persecution seem treasonous. In particular, Arbel’s Canadian study criticises the tendency of adjudicators to recognize domestic violence claimants only where their experiences can be framed as caused by persecutory cultures, rather than recognizing the persecutory practices (the violence in question).⁹¹ This approach overlooks circumstances and contexts which render women vulnerable to violence beyond ‘culture’ and creates a necessary essentializing and totalizing cultural narrative for success; which results in the rejection of those women who cannot frame their experiences in such a narrative. Arbel also points to the defensive distancing effect of a culture-focus which allows host states to maintain a narrative of superiority over refugee countries of origin in spite of the prevalence of domestic violence across cultures.⁹² In their Western-focused study on forced marriage in immigration and refugee contexts, Dauvergne and Millbank call for an “understanding that forced marriage is a harm that is based upon power imbalances concerning

⁹⁰ Macklin, *supra* note 67 at 264–266.

⁹¹ Efrat Arbel, “The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases” (2013) 58:3 McGill Law Journal 729–771 at 729.

⁹² *Ibid* at 733.

gender and sexuality rather than simply being a reflection of ‘culture’”.⁹³ The authors point to the way in which the location of forced marriage as a foreign cultural practice marks Western romantic marriage traditions as ‘culture free’ and “obscures the role that the dislocations of migration, increasingly restrictive migration policy, and associated intergenerational disconnections, have played in creating a contemporary Westernized setting for forced marriage.”⁹⁴ The authors particularly emphasize, however, a lack of a shared understanding and approach in forced marriage cases, between the UK’s domestic forced marriage legislation and refugee law. The discrepancy in approach is explained by the authors as evidence that refugee law, ostensibly part of the human rights system, is instead used as an immigration law screen and border enforcing mechanism.

As reflected in the discussions on gender and sexuality in refugee law by the Southern-focused scholars outlined below, as well as the data analysis of this dissertation itself, many of the above ideas regarding the role of a constructed ‘culture’ and assumptions of host state superiority in asylum adjudication provide useful takeaways applicable in (unconsidered) Southern host refugee law assessments. Whereas the ethnocentric anxiety accompanying many such Western-located criticisms assumes that there would be no such tensions in South-South asylum adjudications this thesis demonstrates the way in which a familiar yet differently located ‘othering’ process becomes similarly overlain upon asylum seekers within South Africa. I also demonstrate the problematic degree to which South African assumptions of host-state superiority disguise and complicate circumstances of continuing persecution.

⁹³ Dauvergne & Millbank, *supra* note 81 at 66.

⁹⁴ *Ibid* at 63.

The flipside of a simplified good-host future, persecutory past reading of asylum seekers's lives, and a weakness of much of the above literature, is that differently located authors focusing both on 'gender cases' and queer refugee cases are effected by a tendency to discuss family only in the negative. I identify this presumption as limiting conceptions of family in both Western and Southern host states. This characterisation of 'family' leaves empty the same-sex partnership as also constituting 'family' and overwrites the importance of family for support and as a (primary) means to escape to inaccessible Western states, particularly for women, as discussed by Williams and Bhabha.⁹⁵ A notable exception is the discussion of same-sex refugee reunification constraints in Austria by Sußner who exposes the racist underpinnings of a Western normative claim to upholding domestic same-sex equality whilst neglecting or rendering null the right to same-sex reunification of refugees. Sußner points to an intersectional approach as a necessity for a rights-focused queer, anti-racist critique.⁹⁶

Williams' sociological account of cross-border marriage provides an important counter-balance to the legal literature on family and marriage in refugee law which tends to focus on these institutions in the negative as a site of harm. Here Williams points to the importance of marriage as a means of strengthening and maintaining communities, particularly in circumstances of a 'lost homeland', and its value in rebuilding identities shattered by conflict and war. Marriage may thus represent a healing opportunity to normalize a life rendered chaotic as well as opening up a means of escape or protection for family members. Williams' book is particularly focused

⁹⁵ Lucy Williams Dr, "Marriage within Refugee Communities" in *Global marriage: cross-border marriage migration in global context* Palgrave Social Sciences Collection (Basingstoke; New York; Palgrave Macmillan, 2010); Jacqueline Bhabha, "Border rights and rites: generalisations, stereotypes and gendered migration" in Sarah Katherine van Walsum & Thomas Spijkerboer, eds, *Women and Immigration Law* (Routledge-Cavendish, 2007).

⁹⁶ Petra SUßNER, "Invisible intersections, queer interventions: same sex family reunification under the rule of asylum law" in Thomas Spijkerboer, ed, *Fleeing Homophobia : Sexual Orientation, Gender Identity and Asylum* (Routledge, 2013).

on agency in immigrant and cross-border marriages and she also highlights how the refugee label can shape and limit agency.

On the naming and construction of identity generally, Crenshaw raises a criticism of identity politics, with concern for intersectional experiences, which rarely enters refugee law analysis. Although ostensibly located in ‘the West’, critical race feminisms have much to contribute to a Third World approach to reorienting international law and, I argue, with particular relevance to refugee law and important parallels to this dissertation project (see particularly the discussion in Chapters 5.4 and 6.2). Crenshaw discusses the way in which the qualitatively different experiences of women of colour of violence is not represented in either feminist or antiracist discourses, and the way in which their location at the intersection of these identity groups, marginalizes these women. She shows how raced and gendered dominant positions – male persons of colour and white women – define and confine the interests of the whole group and determine the parameters of strategies. It is therefore not just that there are differences between, for instance, white women and women of colour within the ‘women’ identity category but that the former have the power to determine whether the latter’s concerns will be incorporated at all into policy formulation. By only actually reflecting a certain sub-section’s interests and experiences, Crenshaw is thus able to point out how feminist and anti-racist discourses fail even to tackle their discrete sexism and racism projects fully.

Moreton-Robinson in her Indigenous feminist work seeks to expose “an invisible racialized subject position [white women] that is represented and deployed in power relations with Indigenous women through discourse”.⁹⁷ Moreton-Robinson identifies the privilege that white women are not represented to *themselves* as white, but rather (only) variously classed,

⁹⁷ Moreton-Robinson, *supra* note 3. at (xxii).

sexualised, aged and abled. A politics of difference does not include identifying whiteness as a difference that warrants interrogation and is what Moreton-Robinson describes as power-evasive. Furthermore, in a criticism echoing that of Crenshaw, Moreton-Robinson highlights how the consciousness of white Australian feminists that they live in gendered bodies, but not in racialized bodies, has profound effects on the agenda, tools and priorities of this majority group of feminists in the country. Crenshaw argues that, as potential sources of social empowerment and reconciliation, identity groups need to be buttressed by integrating the multiple identities which intersect in real people. For Crenshaw the failings of identity politics are not due to a failure to transcend difference but a failure to recognize intra-group difference. Moreton-Robinson asserts the Indigenous expectation that when advocating for equality for all women, the needs of those who are in the most unequal position in society should be attended to first. In this dissertation's discussion of the differentiated needs of particular vulnerable people, influenced by constructions of the refugee figure and grounds for asylum phrased as identity categories, the above insights are especially valuable.

2.3 Refugee Law Voices from the South

Scholarship on refugees and refugee law centred on Third World host states is comparatively scarce but brings to light significantly different realities to those canvassed by their Western counterparts. As well as the scarcity of focus on Southern host states, the focus is seldom at the level of scrutiny and detail found in scholarship on host states of the West. My project was decidedly fine-grained and several of the professional interviewees explained that because the basic functioning of the South African asylum system was so entirely their advocacy focus, the level of detail I was looking for – on issues of sexuality, gender and alternative family

formations – was never engaged with and indeed considered tangential to the work that needed to be done. The positivist tendency in refugee law scholarship is, I think, aggravated in scholarship focused on Southern hosts where a sense of immediate urgency and the normative necessity of ‘practical’, read as doctrinal, studies reigns. Scholarship on refugee law as practiced in Southern host states has thus been predominantly broad-stroke descriptive work with little theoretical critique (notable exceptions, including Chimni and Abuya are discussed below). This approach substantially denudes our ability to engage with, critique and supplement the voices of the Northern-focused scholars.

In this genre, presentation of ‘the law’ applicable is the key. The ‘PSG’ and other academic discussions highlighted above are therefore left within the purview of those writing from, and for, the developed world. It must be noted that the limited number of home-grown refugee law texts mean that even a classical, descriptive approach to setting out refugee law in a Southern host is thus filling an important gap. In South Africa, Khan and Schreier’s *Refugee Law in South Africa*⁹⁸ is valued by refugee law teachers as the first and only such textbook which is specific to South Africa.⁹⁹ This book is primarily descriptive of the South African refugee legislation including a critique of its application. The authors place an interesting emphasis on the principle of non-refoulement, including highlighting how systemic barriers to asylum can be considered indirect refoulement, for example through narrow or incorrect interpretation in refugee status determination interviews. They add that “where civil, political and socio-economic rights afforded to refugees by international and domestic law are calculatingly denied to refugees in the

⁹⁸ Fatima Khan & Tal Schreier, *Refugee law in South Africa*, 1st ed. ed (Cape Town: Juta, 2014).

⁹⁹ *Ibid* at 5.; Interview with Alicia Raymond, Head of Refugee Unit, Wits Law Clinic, Johannesburg, 11 November 2016: “besides for this book, every other book that I have is for a more international perspective. So this is the only book that is South African. This is the South African perspective. Which is why I like to use it for students and I like them to read them.”

country of asylum thereby forcing them to leave the country of asylum, constructive refoulement can be said to have taken place.”¹⁰⁰

One important difference in approach to refugee law studies from within a Global South *host* perspective, is that the refugee law-in-the-books is unlikely to be taken at face value. This is reflected in Khan and Schreier’s book as well as Abuya; in discussing the Kenyan asylum system, Abuya compares the ‘legal’ and ‘actual’ asylum systems. The eventual collapse of the Kenyan refugee protection regime (and handover to the UNHCR) is described as the result of political pressures, economic decline and rising xenophobia in combination with and in reaction to an incredible and rapid increase in refugees from multiple neighbours, sending shock waves through the asylum system.¹⁰¹ These are all experiences unlike those of most Western host states. Furthermore, the clear inclusion of refugee family members as refugees themselves – although initially phrased in the Kenyan legislation as the ‘wife or child’ of the male refugee and relying on a patriarchal ‘head of family’ conception – is a point of interest more commonly found in African than Western host approaches. An aspect of family reunification remarked on by Abuya, which is not generally reflected by other authors, is that: “[a] reunited family may also be better placed to assess when conditions at home are conducive for repatriation, unlike a dispersed family.”¹⁰²

Writing on the South African asylum system, Middleton raises issues which are at once unique – as the domestic refugee law has been amended so that gender (and sexual orientation) is not merely interpreted under ‘particular social group’ but explicitly listed as included therein – yet

¹⁰⁰ Khan & Schreier, *supra* note 98. at (xxxvii).

¹⁰¹ Edwin Odhiambo Abuya, “Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective” (2007) 19:1 International Journal of Refugee Law 51–95.

¹⁰² *Ibid* at 79.

familiar to the work of differently located authors on gender in refugee law, discussed above. Middleton identifies gendered harm as being effectively understood as persecution only where (i) such harm resulted at the time of a recognized conflict (the AU Refugee Convention's addition of conflict situations as pertinent to refugee status being key here) – being rejected en masse once a political peace is declared, irrespective of conditions on the ground; or (ii) is associated in the decision-maker's mind with a foreign/‘backward’ culture. Although this study was conducted prior to an important legislative amendment in South Africa, all of these findings would contribute to a fuller discussion of gender under refugee law, were the concept of ‘host’, in the mind of Western writers, to be extended to the refugee hosts of the South.

As well as its unique legislation on gender and sexuality grounds in refugee law and its long-standing position as the recipient of the world’s largest number of asylum applicants, South African-focused research can particularly contribute to refugee law for, as remarked by Goodwin-Gill, South Africa has experienced “the full spectrum” of refugee movements, having been a refugee source, to now being a refugee-receiving country.¹⁰³ This history carries with it the potential for thoroughly destabilizing both the geographical and supposedly fixed aspects of the benevolent Western-refugee host/rights-violating Southern refugee-producer binary evident in much Western refugee law scholarship and discussed further in Chapter 4.

The above commentary on the circular nature of migration in South Africa’s history, by Goodwin-Gill, is found in a collection of writings on South Africa edited by Handmaker et al which provides a useful framework for establishing both novelty and familiarity in the South

¹⁰³ Guy S Goodwin-Gill, “International and National Responses to the Challenges of Mass Forced Displacement” in Jeff Handmaker, Lee Anne De la Hunt & Jonathan Klaaren, eds, *Advancing Refugee Protection in South Africa* (Berghahn Books, 2008) at 11.

African asylum system, when compared to the writers presenting only on Western host states.¹⁰⁴

As regards the demographics of asylum seekers in South Africa, Landau reveals they are typically considerably better educated than the South Africans amongst whom they live – “confounding popular images of asylum-seekers and refugees as desperate for aid”.¹⁰⁵ A chapter included in the collection titled “Protecting the Invisible: the Status of Women Refugees in South Africa” reveals that, like Western host countries, there are far more men than women in the South African asylum system (though women are increasing); women regularly represent only 20% of asylum applicants and 5% of those formally granted status. Like differently located authors writing on gender in refugee law (including Spijkerboer, discussed above), the South African authors, Valji, De la Hunt and Moffet, look to the 1951 UN Refugee Convention and its construction of the typical refugee as male and the private/public misinterpretation of women’s political involvement by way of partial explanation for the disparity. Furthermore, the ‘missing women’ in South Africa – like in the West – are in refugee camps elsewhere on the continent for lack of mobility, independence and resources, compared to their male counterparts: “the very low number of women seeking asylum (in South Africa) is overwhelmingly disproportionate to the actual number of women refugees in the African subcontinent”.¹⁰⁶ Similar to the Western-focused authors discussed above, the authors argue that it is not enough to simply add gender

¹⁰⁴ Jeff Handmaker, Lee Anne De la Hunt & Jonathan Klaaren, *Advancing Refugee Protection in South Africa* (Berghahn Books, 2008).

¹⁰⁵ Loren Landau, “Regional Integration, Protection and Migration Policy Challenges in Southern Africa” in Jeff Handmaker, Lee Anne De la Hunt & Jonathan Klaaren, eds, *Advancing Refugee Protection in South Africa* (Berghahn Books, 2008) at 35.

¹⁰⁶ Helen Moffet, Lee Anne De la Hunt & Nahla Valji, “Protecting the Invisible: The Status of Women Refugees in Southern Africa” in Jeff Handmaker, Lee Anne De la Hunt & Jonathan Klaaren, eds, *Advancing Refugee Protection in South Africa* (Berghahn Books, 2008) at 216.

grounds to the listed grounds of persecution (discussed in Chapter 3.1), although from a position where this has actually been done, not imagined.¹⁰⁷

Field-based research from refugee camps within host countries of the Global South, has revealed some important insights in relation to the lived experiences and practical difficulties facing refugees in relation to gender and sexuality concerns from within their host countries. The primary gendered concerns highlighted by Martin, for instance, in a regional, refugee camp setting, are framed as physical security and social and economic rights gaps, adding details often left out by those focusing on the asylum application/refugee status recognition moment. Furthermore she contributes information relating to Western hosts' 'missing women': identifying Central Africa and the Great Lakes region as having the highest proportion of forcibly displaced women and Europe as having the lowest. She points to gendered-resource allocation as one of the reasons behind the discrepancy. Together with the identified socio-economic, health and gendered-structural difficulties particular to women, this also raises interesting questions (briefly alluded to by Martin) regarding the gendered effects of Western resettlement policies with reference especially to gendered differences in access to language skills and camp leadership and employment positions.¹⁰⁸

Furthermore the problem of persecution from within the refugee's host country is more fully elucidated by Southern-host focused authors. Buscher discusses gay Iraqi men fleeing sexual orientation persecution and having to articulate an asylum claim in countries such as Lebanon, Jordan and Syria where there are repressive *host* county laws toward LGBT persons. He also elucidates the problems of local community and refugee community harassment, limited access

¹⁰⁷ *Ibid* at 215.

¹⁰⁸ Susan Martin, "Refugee and Displaced Women: 60 Years of Progress and Setbacks" (2011) 3:2 Amsterdam Law Forum 72.

to social support, employment, medical care or police assistance within host countries. The “caustic mix of marginalization in key areas of life” for LGBTI asylum seekers and refugees is further elaborated upon by the interview-based work of the Organization for Refuge, Asylum and Migration (ORAM) within Turkey.¹⁰⁹ Also produced by ORAM, Grungras et al have collated a truly global survey on NGO attitudes towards LGBTI asylum seekers and refugees.¹¹⁰ ORAM’s report is unique not only as a systemic attitudinal survey of NGOs towards LGBTI asylum seekers and refugees but as the first such survey on any topic to focus on the NGOs which play vital roles in the refugee protection paradigm; ‘the refugee guardians of the civil sector’ and often the ‘gatekeepers’ to official protection channels.

The ORAM report particularly highlights problems of invisibility and silence around sexual orientation and gender identity realities, and the significant lack of awareness amongst NGOs that LGBTI refugees exist within their served populations. The report also critiques the common “blind” approach employed by some NGOs who consider impartiality to the ‘non-issue’ of gender identity and sexual orientation as sufficiently addressing non-discrimination/equality concerns, rather than understanding how these issues are germane to their clients’ protection needs. Sadly, the report also canvasses “a sizable minority” of NGOs with negative views on same-sex conduct and/or expression of transgender identity; unsurprisingly proportionally more significant amongst NGOs within African, Asian, South American and MENA regions than North America or Europe. However, the reports’ corrective potential for a more diverse approach to the host/origin country relationship is limited by the common reference to the

¹⁰⁹ *Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey (Updated edition)*, by Irem Arf et al, www.refworld.org (A joint publication of Helsinki Citizens' Assembly—Turkey and ORAM—Organization for Refugee, Asylum and Migration., 2012).

¹¹⁰ *Opening Doors: A Global Survey of NGO Attitudes Towards LGBTI Refugees & Asylum Seekers*, by Neil Grungras & Cara Hughes, www.refworld.org (Helsinki Citizens' Assembly (Turkey), Refugee Advocacy and Support Program, (Organization for Refuge, Asylum & Migration), 2011).

(Global South) hosts in question being described as countries of ‘transit’ or of ‘first asylum’, despite the very limited number of LGBTI refugees who are believed to openly make sexual orientation claims and become resettled.

Whereas Western-focused writers will often write on their selective focus in refugee law as if it were of universal application, Southern-focused writers will more usually write for a narrower audience or assume more location-specificity to their subject. A significant exception to this and to a positivist trend in Southern-host focused refugee law studies, however, is the work of Chimni, whose work has been discussed above. Chimni particularly works to expose and destabilize a “myth of difference” utilized in a post Cold War exclusionary turn in the application of refugee law. Chimni demonstrates that this myth of difference requires a highly selective view of history, an exaggerated sense of difference and also the representation of certain spaces as ‘filled’ and others as ‘empty’.¹¹¹ Chimni attempts to rebut the assumptions underlying the myth of difference with a longer perspective on history and reference to the burden of refugee hosting which lies so much more substantially on the South, as well as outlining the role of capitalism and imperialism in causing displacement.¹¹²

Although making more of the differences between African and European refugee flows than Chimni does, Abuya similarly calls out the colonial history of the causes of displacement in Africa and the colonial underpinnings of refugee law. Abuya is especially critical of the Liberal assumption of sovereign border control which works to advantage the already-powerful Western states and has weak application to the realities of cross-border movement within Africa. In its

¹¹¹ See for instance Gibney, *supra* note 55. who directly supports the (especially Australian) state view and the construction of ‘full’ and ‘empty’ places criticised by Chimni, “The Geopolitics of Refugee Studies”, *supra* note 61.

¹¹² Chimni, “The Geopolitics of Refugee Studies”, *supra* note 61.

stead, Abuya calls for locally engineered ideas and perspectives, highlighting the centrality of the AU Refugee Convention for refugee law in Africa.¹¹³

A new book, published in 2019, specific to queer refugees and written from legal and political disciplinary perspectives, in many chapters bucks a trend towards positivism, and offers both Western focused work and Southern research side by side.¹¹⁴ This book, an edited collection by Güler et al, also demonstrates something new: it is partitioned (without commentary) into apparently doctrinal, case law studies with a strong bias for Western hosts, sandwiched between more political and theoretical, differently located studies. Temporal divisions mark the partitioning of the book's chapters: before status, the granting of status, and after status. The traditional core of refugee law studies (asylum case studies), the moment at which refugee law appears to be in action, and the middle section of the book is markedly the most doctrinal, the least theoretical and the most Western biased (revolving around the analysis of Western host case law). My own work is more aligned with the ‘peripheral’ work presented in Part I and Part III of this book, which parts are interestingly predominantly focused on Southern host scenarios.

The first content chapter of the book, by Fox, “employs Becker’s theory of moral entrepreneurship to examine Western influence over gender ideologies and the treatment of sexual and gender minorities across the globe, and seeks to explain why non-Western societies that once accepted sexual and gender minorities are now resistant to Western-led LGBTQ rights movements”.¹¹⁵ Part I also includes a chapter advocating a mixed migration approach to

¹¹³ Edwin Odhiambo-Abuya, “Revisiting Liberalism and Post-Colonial Theory in the Context of Asylum Applications” (2006) 24:2 Netherlands Quarterly of Human Rights 193–227.

¹¹⁴ Arzu Güler, Maryna Shevtsova & Denise Venturi, eds, *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (Cham: Springer International Publishing, 2019).

¹¹⁵ Katherine Fox, “Implementing Hostility and Acceptance: LGBTQ Persecution, Rights, and Mobility in the Context of Western Moral Entrepreneurship” in Arzu Güler, Maryna Shevtsova & Denise Venturi, eds, *LGBTI Asylum Seekers*

understanding the decision-making of queer Syrians, arguing that stigma produces different reasons given for flight which reasons are also experienced as changeable. The author, Odlum, argues that a mixed migration approach, evolved beyond the traditional refugee differentiation between forced versus voluntary, migrant versus refugee, is key to actually understanding humanitarian needs.¹¹⁶ A chapter by Winton, discussing research located in Northern Central America and Southern Mexico, presents personal accounts of queer mobility in the region and argues for a nuanced concept of mobility based on intersectional complexities of vulnerability and the need to consider other scales of displacement, beyond traditional conceptions of migration and asylum, which are central to queer survival:

Queer mobility is seen here in terms of the quest for placement, rather than as movement per se. Continuous negotiations to stay put, to make a place for oneself, were based in disadvantage which often resulted in complex displacements. Displacement in these terms is an intrinsic part of marginal queer experience.¹¹⁷

Part II, which reflects the largely case-law based studies of asylum decisions begins with a chapter discussing ‘randomly selected’ case studies of 40 cases from 10 host countries, wherein two South African cases represent the only sources drawn from a Southern host country in the

and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration (Cham: Springer International Publishing, 2019) 11 at 11.

¹¹⁶ Alex Odlum, “To Stay or to Go? Decision-Making of LGBTQI Syrians in Mixed Migration Flows” in Arzu Güler, Maryna Shevtsova & Denise Venturi, eds, *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (Cham: Springer International Publishing, 2019) 71 at 71.

¹¹⁷ Ailsa Winton, “‘I’ve got to go somewhere’: Queer Displacement in Northern Central America and Southern Mexico” in Arzu Güler, Maryna Shevtsova & Denise Venturi, eds, *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (Cham: Springer International Publishing, 2019) 95. At 95: “While the ruptures associated with these displacements can cause damage, so they can disrupt established oppressions and allow room to re-accommodate one’s personal social location. Yet, since this re-accommodation is the result of complex constellations of marginalised existence, it is fragile, and hard-won gains can be short-lived. In particular, the intersection between gender and sexual transgression, economic and social marginalization, and rampant organized and targeted hate violence all translate into pervasive precarity. The gravity and complexity of the experiences shared here highlight the need to ensure that the growing body of work on queer migration and asylum does not overshadow other spatial and temporal scales of displacement which are a crucial dynamic of the relationship between queer mobility and survival.”

study.¹¹⁸ Most of the chapters in this section focus on EU, US and Canadian refugee case law.

The only non-Western host focused chapter in amongst this seven-chapter Part, with a focus on Mexico, is interestingly not a case law study but rather focused on lived experiences, discussing participants living their gender as self-emancipation and whether this can be considered a protection mechanism.¹¹⁹

Part III, an ‘after status’ section on accommodation and integration, is in turn again a Southern-host dominated section and largely focuses on an assessment of the challenges for and different roles of the UNHCR. Particularly relevant for the discussion engaged with in this dissertation is a Kenyan chapter in which the author, Moore, disaggregates experiences of cisgender lesbian, bisexual, and queer women, registered as persons of concern with UNHCR Nairobi, from a homogenizing ‘LBGTIQ’ approach.¹²⁰ Moore makes the important finding, with particular resonance in this dissertation, that “during interviews LBQ refugees said that they struggle to feel heard and understood by service providers, and that their own understandings of community and self-expression differ to other groups within the LBGTIQ acronym.”¹²¹

The construction of Güler et al’s book unintentionally summarises the priorities, limitations, as well as the opportunities currently in play for refugee law scholarship as identified in this

¹¹⁸ Arzu Güler, “Refugee Status Determination Process for LGBTI Asylum Seekers: (In)Consistencies of States’ Implementations with UNHCR’s Authoritative Guidance” in Arzu Güler, Maryna Shevtsova & Denise Venturi, eds, *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (Cham: Springer International Publishing, 2019) 117.

¹¹⁹ María Paula Castañeda Romero & Sofía Cardona Huerta, “Seeking Protection as a Transgender Refugee Woman: From Honduras and El Salvador to Mexico” in Arzu Güler, Maryna Shevtsova & Denise Venturi, eds, *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (Cham: Springer International Publishing, 2019) 251.

¹²⁰ Hester K V Moore, “‘The Atmosphere Is Oppressive’: Investigating the Intersection of Violence with the Cisgender Lesbian, Bisexual, and Queer Women Refugee Community in Nairobi, Kenya” in Arzu Güler, Maryna Shevtsova & Denise Venturi, eds, *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (Cham: Springer International Publishing, 2019) 323 at 325.

¹²¹ *Ibid.*

dissertation. If refugee law, narrowly understood, ‘happens’ when an asylum case is decided upon, this book reiterates the point made in this literature review generally, that it is largely conceived of as only really happening in Western host states. On the other hand, a broader and more critical understanding of refugee law studies may be emerging with reference to the under-examined host states of the Global South, perhaps with particular influence from feminist and queer critical perspectives.

2.4 New Approaches Emerging in Refugee Law – Economics

Demonstrating an awareness of the limitations of a Western-host focused study, Macklin asserts that a “variety of psychological, cultural, and financial impediments render women less able than men to undertake the hazardous, uncertain, and expensive journey to Canada.”¹²² Practically speaking, she therefore reveals that irrespective of the recognition of gender persecution as a basis for refugee status, a country like Canada will never be a viable option for the overwhelming majority of displaced women. The reconsideration of the role of economics in forced displacement and the relationship between refugees and economics in their experience of persecution, economic implications for vulnerability, as well as refugees’ economic life in their host state, is a relatively new focus forming in refugee law studies and migration studies generally.

In *Reconsidering Migration and Class*, Van Hear argues for “renewing attention on the part class plays in shaping migration – particularly who is able to move and to where.”¹²³ Van Hear centres

¹²² Macklin, *supra* note 67 at 220.

¹²³ Nicholas Van Hear, “Reconsidering Migration and Class” (2014) 48:1_suppl International Migration Review S100–S121 at 100.

his argument around the seemingly self-evident point: “that patterns and outcomes of migration are shaped by the resources migrants can mobilize, and those resources are largely determined by socio-economic background ... that different people reach different destinations, shaped largely though not entirely by endowments of resources, or class for short”.¹²⁴ Van Hear goes on to demonstrate that class issues have been largely abandoned in social sciences approaches to migration studies and, where broached, are restricted to studies on migration outcomes in destination countries, not choices and routes of migration.¹²⁵ Betts, in turn, attempts to challenge assumptions of refugee dependency and to revitalise an interest in refugees’ economic lives in refugee studies with his work on Refugee Economies (*Refugee Economies: Rethinking popular assumptions* (2014); *Refugee Economies: Forced displacement and development* (2016)).¹²⁶

Within refugee law, more specifically, Foster has pioneered a focus on economics; engaging in a discussion of the hurdles decision-makers seem to require of asylum applicants invoking persecutory violations of socio-economic rights which have no equivalent in other cases. Foster highlights the decision-makers’ disquiet that specifically seems to attend cases of economic persecution, in light of assumptions of the role and place of refugee law; criticising a hierarchical attitude towards human rights in which economic persecution is relegated least important and unenforceable, and asylum claims on this basis, hardest to make.¹²⁷ Adding to this small and emerging work on the relationships between economics and persecution, this dissertation develops this theme with the benefit of perspective from a differently located study of refugee

¹²⁴ *Ibid* at 101.

¹²⁵ *Ibid*.

¹²⁶ Alexander Betts et al, *Refugee Economies: Rethinking Popular Assumptions* (University of Oxford, Refugee Studies Centre, 2014); Alexander Betts et al, *Refugee Economies: Forced Displacement and Development* (Oxford University Press, 2017).

¹²⁷ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2007) at 156–167.

law in an under-studied host country. Benefiting from an approach which recognises the correlation between resources and mobility, this work takes a related but different approach to those above by revealing the interconnectedness of economic resources and vulnerability to and the experience of persecution.

2.5 Beyond Refugee Law

Another South African author whose work has usefully informed this project is B Camminga; particularly their own sociology doctoral thesis, subsequently printed as a book: *Transgender Refugees and the Imagined South Africa: bodies over borders and borders over bodies*. This book focuses around the journeying of the term ‘transgender’ in South Africa – the marking of transgender phenomena – and the journeying of gender refugees, wherein Camminga dissects “the variegated role of the state and its representatives, from apartheid through to constitutionalism, as the arbiter of both sex and gender and eventually refugee status, and the logic or politics of this”.¹²⁸ Whereas ‘gender refugees’ in refugee law studies is most often used to reflect the gender-based persecution claims of women asylum seekers (see Arbel and Spijkerboer) it is interesting to note that Camminga uses the term ‘gender refugees’ to mean “the journeying of people fleeing persecution, violence, and discrimination on the grounds of their gender identity/expression.”¹²⁹ Camminga’s book usefully even included research and interviews

¹²⁸ Camminga, *supra* note 30 at 4.

¹²⁹ *Ibid* at 1. In a talk given at the University of British Columbia, Allard School of Law titled “What if the State No Longer Sexed Us?” (August 27, 2019) Davina Cooper discussed how the common understanding of the term ‘gender’ is changing from its use as a stand-in for ‘women’ to a stand-in for ‘trans’, though remaining an indicator of subjects not of concern to cisgendered men. Davina Cooper, *What if the State No Longer Sexed Us?* (University of British Columbia, Allard School of Law, 2019).

(with interviews conducted prior to and published after my own interview work) conducted with one of the same participants in my study, analysed from a different disciplinary perspective.

As evidenced by the previous subsections of this literature review, refugee law studies regularly call for buttressing with the approaches used in other legal arena and indeed other disciplines.

Note the references above to the contribution of a West-as-subject construction by Spivak, feminist contributions from Butler, insights from the sociological study of Williams, criticisms of identity politics by Crenshaw and Moreton-Robinson, fieldwork interviews and insights drawn from the work of ORAM, and migration studies and economics approaches courtesy of Van Hear and Betts respectively. Another example of this inter-disciplinary contribution relates to the emerging literature theme discussed immediately above. Whereas the relationships between economics and persecution is relatively new and limited in refugee law studies, and even in migration studies generally, there is a greater level of specificity as regards the relationship between economics and queer experiences of persecution, outside of the asylum context within queer social justice research. Hollibaugh and Weiss's discussion on economic vulnerabilities of queer persons and its implications, focused on economically marginalised queer experiences in America, throws up many useful insights and statistics on intersectional experiences and compounded vulnerabilities:

LGBT/Q people who are low-wage workers, immigrants, and people of color are already economically vulnerable; gender and sexuality add new layers of vulnerability that target us and keep us isolated from others who face similar circumstances. ... But old-style identity politics are not adequate to understand how the complex multiplicities of gender, race, sexuality, and class interlock and play out, changing the ways that queer people can move in the world or are vulnerable to attack.¹³⁰

¹³⁰ Amber Hollibaugh & Margot Weiss, "Queer Precarity and the Myth of Gay Affluence" (2015) 24:3 New Labor Forum 18–27 at 20.

Providing some useful insights supplementing the sometimes doctrinal refugee law studies, more purposively theoretical and critical studies in law with particular application to this study's subjects can thus be found within the literature on Queer studies, Feminist legal approaches and Third World feminisms, expanded on below.

2.5.1 Queer and feminist theorizing on gender, family and marriage

My choice to focus upon sexual minority women and the women in polygynous families in this thesis is itself a feminist project; this dissertation stands as a corrective to the predominant focus on gay men, when addressing issues around homosexuality, and upon the husbands, with property/victim wives, in polygynous relationships. With echoes of the intersectionality concerns raised by Crenshaw and Moreton-Robinson, discussed above, Cooper illustrates how the relationship between gender and sexuality is problematized for those who, as lesbians, do not fit into the politically constructed and divided groupings of gender - where 'gender' stands for heterosexual women - or into a sexuality grouping where 'sexuality' stands for homosexual men.

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Both sexual minority women and polygynous wives are arguably 'queer' in the challenges they pose to the imagined nuclear, heteronormative family.¹³² For this reason, feminist legal theory, particularly that focusing upon questions of culture and sexuality, as well as the blurred/blurring

¹³¹ Davina Cooper, "A retreat from feminism? British, municipal lesbian politics and cross-gender initiatives" (1994) 7:2 Canadian Journal of Women and the Law 431.

¹³² Margaret Denike, "What's queer about polygamy?", (10 June 2010), online: *Queer Theory: Law, Culture, Empire* <<http://www.taylorfrancis.com/>>..

line of feminist and queer theory focusing upon alternative families, have influenced this project.¹³³

Feminist critiques of the legal and institutional understanding of gender are more developed within international law than within refugee law. In criticizing the role and Resolutions of the UN Security Council with regard to their (i) selective engagement with feminist ideas, (ii) tendency to invoke ‘protective stereotypes’ of women and (iii) poor accountability mechanisms, Otto raises her perspective on the possibilities for combining feminist activism with a critical approach. Otto considers the “institutional reception and management of feminist ideas”¹³⁴ as an instance of cooption, in which such ideas are divested of their emancipatory content; the use of the term ‘gender’ in the UN system is, for her, one such instance. ‘Gender’ is here read as a synonym for ‘women’s issues’, stripping the term of its focus on contesting the feminine and masculine and so its political content and thus similarly limiting the ‘gender mainstreaming’ project in international law. Furthermore, Otto refers to concerns that the mainstreaming of gender language can serve to become a goal in itself, rather than a means to promote the actual goal of gender equality. This approach provides interesting fodder for the contemplation of whether gender should be included as a listed grounds of persecution in refugee law, engaged with by various authors (discussed further in Chapter 3.1).

Crompton provides a rare historical analysis of the impact on lesbian women of homophobic criminal legislation which, though not undertaken with a queer asylum case in mind, usefully

¹³³ Romero, *supra* note 6 at 190–196. Romero criticises the “troubling assignment of ‘proper’ objects of study (gender here, sexuality there); [which] obscures significant currents of feminist and queer thought; and falsely assumes possible an identifiable yet general distinction between feminist theory and queer theory.” Romero instead advocates for an open and undefined approach to both feminist and queer studies, not conceived of as project-specific, in the interests of preserving a democratizing role and possibilities for transformation.

¹³⁴ Dianne Otto, “The exile of inclusion : reflections on gender issues in international law over the last decade” (2009) 10:1 MELBOURNE JOURNAL OF INTERNATIONAL LAW 11–26 at 13.

informs an understanding of state persecution directly relevant to queer women's claims. Crompton provides a historically-based rebuttal to assumptions that male homosexual acts only were targeted. The conflation of sexual-act prohibitions with the short-hand: 'sodomy laws', which in turn is read as referring to male same-sex sex acts only, is effectively displaced by Crompton's history of the laws, their origins, uses and her discussion of some of those persecuted by them. Crompton highlights how assumptions that criminal laws historically 'ignored' lesbian acts are based upon laws specific to England which are not historically or geographically representative. Crompton illustrates the applicability and indeed historical application of legislation (with death penalty provisions) prohibiting 'acts contrary to nature' to lesbian sex acts. She also canvasses the existence of laws specifically aimed at women and even of the history of references to 'sodomy' as including references to women 'abusing' other women.¹³⁵ Recognising the way in which criminal sanctions can and have impacted upon queer women is an important counter-narrative in support of this dissertation's refugee law analysis and feminist advocacy position which is doubly endangered by a male-oriented understanding of both minority sexual orientations and of persecution for reasons of sexual orientation.

Other useful insights for this thesis' subject matter can be gleaned from feminist and queer authors examining institutions of family and the legal expectations and dynamics created thereby. The power of alternative families to challenge and change fixed notions of the 'proper' or 'normal' family, positively, is raised by many authors. Kapur speaks of the disruptive sexual subaltern potentiality and Butler of the "[d]isruptive effects of kinship variability" for national projects. This challenge is particularly important in light of the transfer and reproduction of

¹³⁵ L Crompton, "The myth of lesbian impunity: capital laws from 1270 to 1791" (1980) 6:1–2 Journal of homosexuality 11.

culture which is associated with heteronormative, child-bearing couples, wherein this national-cultural project implicitly carries norms of racial purity and domination.¹³⁶

These authors dissect assumptions of ‘difference as danger’ which play out in nation-building projects. These authors demonstrate how such defensive reactions to human variability feed into family laws generally. Specific to my project, the work of these authors provide analytical tools that can be extended into the realm of refugee and immigration laws. Here, nation-building policies in a different incarnation can be identified; reflected in refugee and immigration laws and implicating responses to foreign families.

Some writers go on to consider, amongst the new insiders and outsiders¹³⁷ the place of polygamy in the ‘hierarchy of illegitimacy’,¹³⁸ and continuing stigmatization of “alternative models of intimacy”.¹³⁹ Denike particularly broaches the constitution of polygamy as queer within the same-sex marriage debate by referring to the conjuring of polygamy within the anti-same-sex marriage camp as well as the reaction thereto amongst its advocates. Advocates for same-sex marriage invariably distanced their campaign from polygamy-as-a-slippery-slope and polygamy thus becomes a backdrop for staging gay relationships as proper and *not* queer, underwritten and substantiated through racial and colonial assumptions about the practice of polygamy.¹⁴⁰ Racial and post-colonial assumptions about the practice of polygyny are evidenced in the preoccupation with Islamic practices, conspicuous in many writings, including the thorough comparative survey

¹³⁶ Judith Butler, “Is Kinship Always Already Heterosexual?” (2002) 13:1 differences 14–44 at 22; Ratna Kapur, “De-radicalising the rights claims of sexual subalterns through ‘tolerance’”, (10 June 2010), online: *Queer Theory: Law, Culture, Empire* <<http://www.taylorfrancis.com/>> at 44.

¹³⁷ Brenda Cossman, *Sexual citizens: the legal and cultural regulation of sex and belonging*, Book, Whole (Stanford, Calif: Stanford University Press, 2007).

¹³⁸ Butler, *supra* note 136 at 23.

¹³⁹ Susan B Boyd, “Marriage is more than just a piece of paper’ : feminist critiques of same sex marriage” (2013) 8:2 National Taiwan University Law Review 263–298 at 274.

¹⁴⁰ Denike, *supra* note 132 at 138.

of Bailey and Kaufman on polygamy. Bailey and Kaufman consistently reference the Muslim populations of the countries canvassed, which works to defuse the otherwise clear relationship between the ban of polygyny and colonialism, impacting African colonies as well as indigenous peoples, including amongst First Nations in Canada.¹⁴¹ Like other authors, Denike draws attention to the need to consider how one participates in other prohibitions/exclusions in the quest for assimilation into institutions such as marriage, although her attention on the prohibition of polygamy within this framework is rare.

The unspoken tension for feminist writers in acknowledging polygamy as queer is that, unlike the positive assumptions of queer challenges to heteronormativity, polygamy is considered an unemancipatory ‘other’. It must be noted, however, that even as relates to queer challenges to heteronormativity, many writers discuss the way in which, particularly a focus on same-sex marriage has engendered co-option and claim that state recognition of same-sex relationships has had a de-radicalising effect upon the heteronormative challenge itself. Many queer scholars discuss the need to consider those excluded from the new horizons of state-legitimated ‘normal’/normalized relationships.¹⁴² Continuing a challenge to the assumption of queer progressiveness, Boyd offers a critique of the re-inscribed privatization of the costs of social (re)production, which is merely redistributed within the newly legitimated, ‘good’ families.¹⁴³

The concept of choice and autonomy is a fraught one amongst feminist writers. The subject of choice in feminist scholarship is marked with disagreements over the concept of free choice,

¹⁴¹ Martha Bailey & Amy J Kaufman, *Polygamy in the monogamous world: multicultural challenges for Western law and policy* (Santa Barbara, Calif: Praeger, 2010). A discussion of the colonial underpinnings of anti-polygynous initiatives can be found in Denike, *supra* note 132 at 138., 145-146; specifically relating to First Nations in Canada see Sarah Carter’s *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008).

¹⁴² Butler, *supra* note 136; Cossman, *supra* note 137.

¹⁴³ Susan B Boyd, “Family, Law and Sexuality: Feminist Engagements” (1999) 8:3 Social & Legal Studies 369–390; Boyd, *supra* note 139.

allegations of ‘false consciousness’ countered by criticism of patronising readings of othered women’s choices, and threads of a postmodern disillusionment with notions of choice and agency.¹⁴⁴ Nevertheless, polygamy – conceived of in the form of polygyny – is understood by some of those who discuss it in terms of choice, rather than assume duress, as a hard choice, curtailed by “a package of laws, policies and practices that maintain gender inequality”¹⁴⁵ and continuing subordinate status.¹⁴⁶ Thus irrespective of a stance on agency, polygyny is understood here, for the majority of women in these relationships, to be an effect of and have the effect of classed and gendered social subordination.

One of the prominent limitations of much of the literature reviewed above, for the purposes of my study, is the lack of attention to or awareness of foreign queer families. Although Cossman makes the important statement that sexual practices are a central dimension of contemporary citizenship, her discussion revolves solely around the already-citizen.¹⁴⁷ She, and other writers, make use of citizenship, and border crossing, as an allegory for the gay-citizen.¹⁴⁸ However, reducing immigration and citizenship issues to illustrative terms only overlooks the intersectional experiences of non-normative immigrant families and erases such families from the reader’s

¹⁴⁴ See Saba Mahmood, “Agency, Performativity, And The Feminist Subject” in *Pieties and Gender* (2009) 11. Mahmood proposes a different conception of ‘agency’: “not as a synonym for resistance to relations of domination but as a capacity for action that historically specific relations of subordination enable and create”. This conception allows for a contextual and contingent understanding of women’s agency, speaking to the problems of a choice/force binary. Her insight allows for the criticism of an agency-as-resistance discourse, which does not necessarily encapsulate the self-conceptions, motives or desires of the women concerned. Mahmood argues at 25 that “the capacity for agency is entailed not only in acts that resist norms but also in the multiple ways in which one inhabits norms”.

¹⁴⁵ Bailey & Kaufman, *supra* note 141 at 5.

¹⁴⁶ Penelope E Andrews, “Who’s afraid of polygamy? Exploring the boundaries of family, equality and custom in South Africa” (2009) 11:2 *Journal of Law & Family Studies* 303.

¹⁴⁷ Cossman, *supra* note 137 at 5.

¹⁴⁸ See also Butler, *supra* note 136. and Carl F Stychin, “‘A Stranger to Its Laws’: Sovereign Bodies, Global Sexualities, and Transnational Citizens” (2000) 27:4 *Journal of Law and Society* 601–625., who make use of the non-citizen/‘illegal alien’ as illustrative of gay citizen’s disenfranchisement or identity as ‘dangerous stranger’ respectively.

vocabulary, resulting in the continued silencing of the ‘outsider within outsider’.¹⁴⁹ An exception: Seuffert, unpacks the raced, gendered and class normativity inherent to the *immigration* reforms in relationship-recognition, revealing how they serve to reproduce rather than disrupt imperial domination and its domesticated, ‘properly sexualised’ subjects.¹⁵⁰ My dissertation revolves around women experiencing a confluence of ostracized identities, for whom gender and sexual orientation or different marital arrangements influence their vulnerability yet to artificially separate these identities from the impacts of their foreign status would be harmfully reductive of their experiences in South Africa.

2.5.2 False universalism and Third World counters

My focus in this dissertation on polygynous and sexual minority refugee women raises questions of culturally-specific approaches to normative sexuality and family groups. Norms of sexuality and of family formation can be described as culturally specific as opposed to universally shared or neutral. Such an approach where sexual prohibitions or family-type provisions are considered cultural products, often frame the resultant laws as a clash between culture and human rights.¹⁵¹ Nyamu, in her analysis of human rights and development discourse, criticises the way in which conventional gender equality arguments, through their reference and opposition to an impoverished and vague notion of ‘culture’, work to implicitly endorse dominant articulations of

¹⁴⁹ Lara Karaian, “The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis, Queer Porn, and Canadian Anti-discrimination Law”, (15 April 2016), online: *Feminist and Queer Legal Theory* <<http://www.taylorfrancis.com/>> at 389.: “The troubled relationship of feminist and queer legal theory to strategic essentialism: theory/praxis, queer porn, and Canadian anti-discrimination law”.

¹⁵⁰ Nan Seuffert, “Reproducing empire in same-sex relationship recognition and immigration law reform”, (10 June 2010), online: *Queer Theory: Law, Culture, Empire* <<http://www.taylorfrancis.com/>> at 173–175.

¹⁵¹ See the criticism of this tendency in Celestine I Nyamu, “How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?” (2000) 41:2 Harvard International Law Journal 381; Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, 2018).

culture as being ‘The’ accurate description of social custom. “By distancing themselves from the debate on the construction of culture, proponents of gender equality allow culture to be defined exclusively by those whose view of culture disadvantages women”.¹⁵² By referencing colonial-influenced succession and property laws, Nyamu also shows how the focus on culture as the problem can miss the extent to which law can be the problem; highlighting the inter-relationship between formal law and a vague notion of culture and the active role of state apparatus in defining culture.¹⁵³

Phillips, discussing Southern Africa, reveals how the construction of ‘culture’, when phrasing it as oppositional to gender rights, relies on an imagined immutable culture. This very mode of conceiving of a “congealed tradition” is itself a colonial narrative – used to refer to the barbaric ‘is’ and civilized ‘ought’.¹⁵⁴ Furthermore, the selectivity of portrayals of ‘culture’/‘tradition’ is highly political and tends to involve a construction of consensus around the choices which, as remarked upon by Nyamu, best serve the power interests of those involved.¹⁵⁵ A conglomeration of normative readings of fixed past versus mobile progress, overlaid on place, is a narrative with echoes in the good-host, bad country-of-origin binary discussed further in Chapter 4.

Moreton-Robinson discusses the way in which Indigenous women’s gender has been (mis)represented, reflecting the ethnocentric notions and gender politics of the writers. Moreton-Robinson critiques the prevalent white, feminist scholarship in which Indigenous women are only written about, not for, by, or with and argues the representations thus produced disempower Indigenous women because of the way in which they become ‘truth’ in feminist discourse and

¹⁵² Nyamu, *supra* note 151 at 401.

¹⁵³ *Ibid.*

¹⁵⁴ Phillips, *supra* note 28 at 26.

¹⁵⁵ Nyamu, *supra* note 151.

white culture. Lines are drawn between ‘traditional’ and ‘contemporary’ Indigenous women by white anthropologists for whom this line comes to distinguish authenticity or contamination of an *a priori* ‘race’ and ‘culture’ and against which imagined representation (from which image there cannot be resistance), Indigenous women are measured. This discussion adds another nuance to the idea of stereotypes and the role of ‘culture’ in refugee law adjudications, raised in 2.2 above.

Mohanty focuses a critical gaze within feminist discourse, on ‘Western’ feminist writings and academia and their depiction of and impact upon ‘Third World women’. This focus is based on an understanding of the power of (a hegemonic) feminist discourse in producing knowledge and framing solutions which have material effects upon the women they canvass.¹⁵⁶ This insight, extrapolated into refugee law scholarship, points to the effects of the production of Western-focused knowledge, whose results include the sidelining of the AU Refugee Convention which, though incorporated into domestic refugee law in South Africa is under-utilised, poorly understood and appears neither sufficiently researched, theorised or taught.

To counter the (Western) refrain wherein patriarchal practices are deemed as emanating from a perceived cultural milieu, such that Third World ‘culture’ is phrased as oppositional to gender rights, some authors argue for pluralism over universalism and allege the infeasibility of universal human rights. This line of argument alleges that supposedly universal norms are not compatible with or natural to all cultures and thus a pluralist approach to the ‘international’ is more tenable.¹⁵⁷ However, other authors seek to rescue the universal normativity of human rights, often based on the understanding that the concept of universal human rights is a flawed

¹⁵⁶ Mohanty, *supra* note 8.

¹⁵⁷ See generally Brian Z Tamanaha, “Understanding legal pluralism : past to present, local to global” (2008) 30:3 SYDNEY LAW REVIEW 375–411.

yet necessary resource in the fight for complex equality. This response consequently involves (i) a critique of the construction of culture in the pluralist argument as well as (ii) a reorientation of the critique of Eurocentric human rights as a problem of essentialism and of purported but insufficient universality, rather than a problem with the concept of universal human rights.¹⁵⁸

Benhabib states that anxieties about a universalist approach being ethnocentric or falsely eliding differences, itself relies on falsely homogenous views of Western and non-Western cultures, of an imagined ‘us’ and ‘them’, which misses the complex history of global dialogues across cultures and civilisations and the multiplicity of any ‘identity’. ¹⁵⁹ Echoes of this international law debate can be seen in relation to the criticism raised above and further elaborated on in this dissertation with regard to a Western bias in the construction of a refugee ‘host’ identity as presumptively a Western host, which fails to take account of changing and changeable state roles and of the ethnocentric concerns which ignore the dynamics of refugee host states of the South. I do not intend to claim that this bias means that Western scholars are not critical of the refugee determination systems, and refugee jurisprudence, of Western states. Certainly, such critiques dominate this literature. Rather, what I am terming ‘Western bias’ arises because little or no attention is paid to Southern states (especially Southern host states), or Southern perspectives, despite the persistent presence in refugee law of *people* from the Global South: the refugees themselves.

Kapur argues that binaries such as West/Rest, colonizer/colonized, here/there are particularly acute in the arena of sexuality where pleasure, desire and agency are associated with the West and violence, victimization and impoverishment make up the Third World gendered and sexual

¹⁵⁸ Benhabib, *supra* note 151; Mullally, *supra* note 12.

¹⁵⁹ Benhabib, *supra* note 151.

subject.¹⁶⁰ Denike refers to “the ethnocentric notion that the (mis)treatment of women is a measure of the backwardness and incivility of *other* cultures”.¹⁶¹ This binary thinking and construct of linked connotations is repeated and exacerbated by the false host/country of origin distinction perpetuated by refugee law scholarship, criticised in Chapter 4 herein which links up the multiple problematic assumptions attached to the label ‘host’ as both beneficent and located exclusively within the West.

The international human rights law ‘abolitionist approach’ (with regard to ‘harmful traditional or cultural practices’, which phrase includes polygyny) is criticised by Nyamu as being state-centric and shaming, both of which aspects hinder the sustained engagement with communities required for effective social transformation. A holistic, context-rich understanding of practices and thus comprehensive and creative solutions are blocked. Furthermore, this approach assumes an absence of women’s rights within custom or local practice, silencing the potential for alternative readings of culture to themselves offer solutions that can be owned by the community and instead opening the way for accusations of cultural imperialism. The proposed solution is the necessity for parallel processes of internal discourse and cross-cultural dialogue to locate the legitimacy for human rights principles within all cultures. Nyamu advocates for a “critical pragmatic engagement with the politics of culture” which considers both the flexibility and variation of custom to combat ‘cultural’ justifications for gender inequalities. Positive opportunities within cultural and religious traditions exist and should be used to advance gender equality arguments rather than dismissing culture and/or religion as only ever a negative influence.

¹⁶⁰ Kapur, *supra* note 136.

¹⁶¹ Denike, *supra* note 132.

In a similar vein, Benhabib argues for the “recognition of the radical hybridity and polyvocality of all cultures”.¹⁶² An understanding of the ongoing change within and multiple and alternative readings of ‘a culture’ provides room for “insider-methodologies”¹⁶³ to work towards gender-positive change as coming from within rather than imported into any culture.

Several writers who support the ideal of universal rights respond to the pluralist case by arguing that the universality of human rights does not require uniformity in approach.¹⁶⁴ This perspective is of particular relevance to refugee law which, birthed at the level of international human rights conventions, is domestically, and differently, incorporated and implemented.

International law authors such as Charlesworth promote, rather than a distinctive morality, the reference to distinctive experiences which are missing from the discipline of international law and thus prevent its universal validity.¹⁶⁵

As an ardent believer in the importance of refugee law in the interests of protecting vulnerable people and as a tiny yet strong instance of true freedom of movement, as well as of the utility in this regard of refugee law’s claim to international normativity, my project falls very much in line with this logic for adding distinctive and missing experiences. The many applicable insights of these TWAIL-feminisms can be usefully applied to my project. However, an additional step of extrapolation is necessary to consider their application to the ‘Third World Woman’ who is othered yet remains within the Third World as a refugee.

¹⁶² Benhabib, *supra* note 151 at 25.

¹⁶³ Mullally, *supra* note 12. at (xlvi).

¹⁶⁴ See for instance Bailey & Kaufman, *supra* note 141; Nyamu, *supra* note 151; Mohanty, *supra* note 8 at 7. who advocates for a “communicative, in-process understanding of the “we” ... the result of active struggle to construct the universal on the basis of particulars”.

¹⁶⁵ Charlesworth, Chinkin & Wright, *supra* note 4.

This research thus responds to the gaps and blind spots within refugee law scholarship which I have canvassed in this literature review, and has been fortified by multiple disciplinary perspectives and approaches which complement one another by at once filling gaps, exposing different insufficiencies of their own and providing critical insights in comparison with one another. This literature review has set out the many conceptual building blocks and ideas which have percolated this thesis. It is also an acknowledgment of, and expression of gratitude for, all that I have learnt from these very different authors and an interdisciplinary approach to research.

Chapter 3: The Lay of the Law

This chapter presents the background context to the research project, giving an outline of the relevant aspects of refugee law doctrine pertinent to the analysis of data findings which are presented in Chapters 4 and 5 to follow. The refugee-law frame of reference is laid out, working from the international, to the domestic South African setting. Beginning with the international refugee law sketched below, this section outlines the legal and academic refugee law issues which form the architecture for this study and against which the difference and sameness of a South African host study locale can be measured.

3.1 Alphabet Soup: PSGs, LGBTs - Add Gender and Stir

It is customary in refugee law studies to begin with a legal analysis of ‘who is a refugee’. This section introduces some of the more technical academic debates which spin off this definitional concept in relation to gender and sexual orientation as impacting refugee identity and refugee claims, so as to ground the discussion in the chapters to follow.

The United Nations Convention Relating to the Status of Refugees (the UN Refugee Convention) is the international law launch pad for all modern domestic refugee legislation as well as the starting point for subsequent regional binding and non-binding refugee law initiatives. As such, the UN Refugee Convention has been very thoroughly reviewed in the academic literature.¹⁶⁶

¹⁶⁶ See for instance the work cited above by Goodwin-Gill & McAdam, *supra* note 53; Hathaway & Foster, *supra* note 23., and the work of the UNHCR’s legal protection division itself.

The term “refugee” is defined in Article I of the UN Refugee Convention. Article 1A(2) (edited to exclude the original temporal limitation which restricted the notion only to World War II refugees) reads:

For the purposes of the present Convention, the term “refugee” shall apply to any person who:

[...] owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Although national refugee legislations, adjudications and many authors typically discuss the granting of refugee status, Hathaway has consistently argued that the term ‘refugee’ applies to a person who meets that definition, at the moment they meet the criteria of the definition, irrespective of the asylum system machinations.¹⁶⁷ Refugee status is thus recognised through domestic (or UNHCR) processes, not granted by them. The analysis presented in this dissertation adheres to this understanding of a refugee as someone factually meeting international law criteria, albeit prior to, contrary to, or even subsequent to a determination of their status through an asylum system. This approach to the refugee definition in the UN Refugee Convention and, for the purposes of refugee law in South Africa, to the extended AU Refugee Convention definition, paves the way for a different kind of examination of refugee status. One that is capable of contemplating a depth of experiences which encompass both the *de facto* and *de jure* refugee as well as consideration of the limitations which create a disjuncture between factual and officially recognised refugees.

¹⁶⁷ See Hathaway & Foster, *supra* note 23 at 1. which restates this position and also references Hathaway’s previous work.

Contesting our ability as legal scholars to broaden our understanding of variety and nuance amongst lived experiences is the practical need to classify, summarise and, ultimately, stereotype. Law and legal systems are beholden to the need to classify and refugee law is typical in this respect; having taken a description of a category: ‘refugee’ and, referencing the definition found in the UN Refugee Convention – “persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” – using this description as a closed list. This closed list has, in turn, become a tick-box of identity categories in the hands of officials and administrators, with much academic and judicial muscle having been put behind a new list of identity categories to definitively populate the daunting ‘other’ that is “members of a particular social group” (PSG).

Significant and important work has thus been geared towards populating ‘members of a PSG’ with descriptors attempting to capture particularly vulnerable, persecuted people who are thought not to necessarily have a claim based on fear of persecution for reasons of their race, religion, nationality or political opinion. Membership of a PSG is typically the dominant category applied to the asylum cases of many women and of sexual minorities, whose defiance of gendered and heteronormative social norms are seldom read as political. Thus PSG has been read to include those persecuted for reasons of their sexual orientation and those persecuted for reasons of their gender, or gender expression.¹⁶⁸

The resulting descriptors of ‘the group’, which scholars have identified in Western host administrative or judicial decisions on asylum applications, have been criticised for their sometimes elaborate and bizarre definition, particularly as pertains to women. Rather than simply

¹⁶⁸ James C Hathaway & Michelle Foster, “Membership of a Particular Social Group: Discussion Paper No. 4 Advanced Refugee Law Workshop International Association of Refugee Law Judges Auckland, New Zealand, October 2002” (2003) 15:3 International Journal of Refugee Law 477–491 at 478–479.

describing the relevant social group as ‘women’ where a female refugee claimant fears persecution for reasons of their gender, Foster in a chapter on the challenges of ‘particular social group’, refers to several examples in multiple Western jurisdictions of overly narrowed definitions of the group in question. This includes one Australian judge who defined a woman refugee’s social group as:

A particularly vulnerable group of married women in Pakistan, in dispute with their husbands and their husbands’ families, unable to call on male support and subjected to, or threatened by, stove burnings at home as a means of getting rid of them yet incapable of securing effective protection from the police or agencies of the law.¹⁶⁹

Such narrow definitions become circular and run afoul of the interpretive rule that a PSG should not be defined by the persecution, lest the description of a ‘refugee’ becomes: any person who, owing to wellfounded fear of being persecuted for reasons of being a member of a persecuted group...¹⁷⁰ These unnecessarily detailed ‘group’ descriptors desperately attempt to restrict the group label to as few persons as possible, reflective of host state’s politically-infused xenophobia which produces an anxiety, frequently coded in the decisions as a ‘floodgates’ argument.¹⁷¹

Amongst those advocating for the recognition of refugees fleeing gender and sexual orientation-based persecution, there has been discussion whether the UN Refugee Convention or even domestic legislation would be improved by explicitly adding these grounds of persecution.¹⁷² This has been particularly discussed as regards women refugees fleeing gender-based persecution given the overly detailed and circular group definitions that have emerged in much

¹⁶⁹ Foster, *supra* note 73 at 30. citing *Khawar* 2002, [129].

¹⁷⁰ Aleinikoff, *supra* note 62 at 286. citing the case law established by *Applicant A. and Another v. Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, (1997) 190 CLR 225; 142 ALR 331, at p. 341.

¹⁷¹ Foster, *supra* note 73 at 30.

¹⁷² Anker, *supra* note 57 at 139.

of the studied asylum cases.¹⁷³ Many of those advocating for women refugees and for better adjudication in their cases have argued, however, that simply adding gender to the list of grounds of persecution would not aid a properly gender-sensitive approach to decision making in asylum cases.¹⁷⁴

To add gender to the UN Refugee Convention would elevate gender-based persecution to an equal ground to the other listed grounds such as race and political opinion and remove any debate on the subject. However, most writers do not advocate for this change, in part due to a general fear amongst refugee law advocates that any revision of the UN Refugee Convention could result in a step backwards and loss of protections; a belief that to add ‘gender’ could potentially marginalize women further as not having political opinions, being activated by religion or having ‘racial presence’; and, predominantly, a cynicism that simply adding gender would be insufficient since the majority of hurdles facing women within the legal asylum process originate with the attitudes and interpretations of decision-makers rather than with the black-letter law.¹⁷⁵ Simply adding in tokenistic wording and a reliance on amended, yet narrowly understood lists are indeed insufficient for achieving inclusive and appropriate protection goals. Dianne Otto identified a similar problem to the limitations consequent to simply ‘adding gender’ as a listed grounds of persecution within the realm of human rights and the United Nations system wherein an increase in the use of the term ‘gender’ and specialized sub committees

¹⁷³ Arbel, *supra* note 91 at 745.

¹⁷⁴ Like most writers, in discussing the tactical merits of augmentation (including the importance of naming) versus reinterpretation of existing categories, Macklin falls on the side of interpretation. Macklin, *supra* note 67 at 258. describes the former approach as insufficient to address the gender concerns raised, and having the tendency to create the assumption “that every case of gender persecution is persecution because of gender” as well as potentially marginalizing women further as not having political opinions, being activated by religion or having ‘racial presence’. Anker, *supra* note 57 at 139., takes the position that gender should be read into the interpretation of refugee law, rather than requiring the amendment thereof and advocates for a gender-mainstreaming approach as having “surprising normative effect”.

¹⁷⁵ Arbel, *supra* note 91; Macklin, *supra* note 67; Buscher, *supra* note 88.

dedicated thereto have more often sidelined these ‘women’s issues’ than actually mainstreamed gender concerns.¹⁷⁶

These arguments in refugee law scholarship are typically made in a way that is anticipatory of adding gender as a listed ground in refugee law, rather than discussions of inclusive amendments already made, such as in South Africa. A chief detraction of the literature on this issue is thus that most writers discuss ‘adding gender’ in the hypothetical. However, their arguments that this would ultimately be insufficient to cater for the concerns they raise would be buttressed if they were to refer to one of the largest asylum systems in the world, which also has in fact ‘added gender’ to the domestic refugee legislation, South Africa, yet they routinely fail to do so.¹⁷⁷

What is thus interesting in the South African context, yet which has generally failed to catch the attention of authors focused only on Western host refugee law applications, is that PSG membership is itself detailed with explicitly listed example groups in our legislation. The South African Constitution is a relatively new democratic Constitution and has received much international acclaim for its thoughtful and progressive wording.¹⁷⁸ The Constitutional anti-discrimination provisions expressly prohibit unfair State discrimination including on grounds of gender, sex or sexual orientation.¹⁷⁹ This modern and express anti-discrimination position with regard to gender and sexual orientation has consequently influenced the South African Refugees Act. A PSG is further defined in the South African Refugees Act: “**‘social group’** includes,

¹⁷⁶ Otto, *supra* note 134 at 11.

¹⁷⁷ See Julie Middleton’s lonesome exposition on this issue in South Africa: Julie Middleton, “Barriers to protection: gender-related persecution and asylum in South Africa” in Ingrid Palmary, Professor Erica Burman & Peace Kiguwa, eds, *Gender and Migration: Feminist Interventions* (London, UNITED KINGDOM: Zed Books, 2010) 67.

¹⁷⁸ See Rosalind Dixon & Theunis Roux, eds, *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution’s Local and International Influence* (Cambridge: Cambridge University Press, 2018) at 1.

¹⁷⁹ Constitution of the Republic of South African, 1996 section 9(3) “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

among others, a group of persons of particular gender, sexual orientation, disability, class or caste”.¹⁸⁰

Thus, at least in terms of the written legislation, if not in its actual application, refugees in South Africa having fled gender or sexual-orientation based persecution should not encounter debate as to these groups being each a PSG for the purpose of refugee status determination. In spite of this, and likely influenced by the Western-focused refugee law resources on the subject, I encountered South African-based practitioners who referred to gender or sexual orientation-based persecution grounds as ‘unspecified’ or ‘unlisted’ grounds.¹⁸¹

Furthermore, an appropriate understanding of ‘gender’ appears absent from the asylum process. Middleton criticises the approaches apparent in South African first instance refugee status adjudication, particularly as regards assumptions of ‘private’, family harms of domestic violence and much sexual orientation-based persecution. She points to similar dismissals of gender-based persecution amongst higher level officials, such as the previous Chairperson of the Standing Committee for Refugee Affairs who said domestic violence was difficult to fit into a definition of persecution.¹⁸² A strategic litigation specialist interviewed commented that, generally, “gender hasn’t really been well defined in the South African law.”¹⁸³

¹⁸⁰ Refugees Act 130 of 1998 (hereafter “**the Refugees Act**”) available at http://www.saflii.org/za/legis/consol_act/ra199899/

¹⁸¹ Cote, *supra* note 32.: “what we’ve tried to do is say that we use the ‘51 Convention and the ‘social groups’, but the new amendments to the Refugees Act is going to allow gender to be a specific area of persecution, so there might be a place ...” Alicia Raymond, *Interview with Alicia Raymond, Head of Refugee Unit, Wits Law Clinic* (2016), Johannesburg.: “[in cases of clients who fled sexual orientation-based persecution] we specifically make it on a specific ground – membership of a Particular Social Group, because it doesn’t have membership of a specific sexual orientation as one of the grounds in the Refugees Act, so we put it under that ground of membership of a social group.”

¹⁸² Julie Middleton, *Barriers to Protection: Gender-Related Persecution and Asylum in South Africa* (Master of Arts, University of the Witwatersrand, 2009) [unpublished] at 49.: “The Chairperson of the Standing Committee said that they have seen a number of domestic violence cases, however such cases are not seen as fitting under the definition of a refugee, and so are usually rejected. “*Domestic abuse we have difficulty in setting aside the RSDO*

In South Africa both the UN and AU Refugee Conventions are binding and incorporated into the domestic legislation. A common ground for refugee applications, applying to those from certain countries who may not want or feel able to disclose their sexual orientation or gendered experience of persecution is to rely essentially on country conditions; the AU Refugee Convention's reference to:

[E]very person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality¹⁸⁴

In reality, polygynous and queer refugee women in South Africa therefore have different opportunities and options for interacting with the asylum system which circumvents much of the discussion on PSGs above. South Africa, as a case study, could, for this reason, usefully supplement the debate on the necessity or utility of including gender as a listed ground in the refugee definition, as illustrative of an alternative path. The following section takes a closer look at the peculiarities of the South African asylum system, detailing the applicable legislation and moving beyond the written legislative presentation of the asylum system to a discussion of its (dys)functioning and the assessment of the system by those service providers who work with it.

decision. We have a number of domestic violence cases, but the domestic violence is not easily covered by the definitions. So we would get a case where the woman claims her husband beats her up or the husband's family doesn't like her or something like that, but seeing her as a particular social group and suffering domestic violence is difficult to currently bring into the Refugees Act. Those that we have seen have been decided as manifestly unfounded."

Similar to the previous chapter, where RSDOs implied that rape outside the time of war is too normal to be persecution, here the Chairperson of the Standing Committee diminishes the harmful impact of domestic violence. He compares "her husband beats her up" to "the husband's family doesn't like her or something like that," trivialising the significance of a claim based on domestic violence. Such claims are rejected, not based on the merits of the cases, but because violence in the home or family is perceived as private and accepted as too commonplace to be persecution.¹⁸³

¹⁸³ Cote, *supra* note 32.

¹⁸⁴ AU Refugee Convention, Article 2.

3.2 Over the Rainbow: The State of Refugee Law in South Africa

To begin, this section provides a brief account of the actual processes, as determined by South Africa's Refugee legislation which, at least on paper, dictates what should be the typical progress of an asylum application within the Rainbow Nation.¹⁸⁵ This section thus commences with an examination of what the legislation says about refugee law in South Africa, supplemented by what the service providers think about refugee law in South Africa and what this means for the subject groups and this study. Interspersed with a thematic collection of quotes from service providers and refugees on the pitfalls of the South African asylum system by those who experience it, this section will attempt to provide some insight on how the South African system actually works, or fails to, with reference to the thesis subjects as asylum seekers or recognised refugees. This will also include a discussion of the debates which appear to have arisen around the dubious official data, problematic statistics and their limitations and the confusion surrounding attempts to amend South Africa's refugee legislation.

The interesting combination of international law foundations and domestic law implementation that marks refugee law means that state asylum systems are conceptually related and often draw on foreign jurisprudence for inspiration and analysis of principles yet are often unique in their processes. A background on the official processes of South Africa's asylum system as well as the way it is experienced by those on the ground who work with it is intended to ground an understanding of what is systemically different and what is familiar about how South Africa's asylum system operates. The challenges it faces, and the opportunities and challenges it creates

¹⁸⁵ Attributed to Archbishop Desmond Tutu and reiterated by late President Nelson Mandela, post apartheid South Africa was symbolically referred to as the Rainbow Nation, representing a peaceful, multicultural union of peoples.

for refugees will thus be elucidated for comparison with other host states, particularly the Western host states most frequently the focus of refugee law studies.

3.2.1 Painting a picture

The asylum application process in South Africa consists of three permits and at least two interview interactions with officials wherein a *de facto* refugee applicant ideally moves from being an asylum seeker to a recognised refugee. Often referred to by officials, refugees and service providers by the section number of the Act which governs their provision, a refugee crossing into South Africa and claiming asylum is supposed to be issued a ‘section 23’ permit at a port of entry, a so-called ‘transit permit’ in terms of the Immigration Act (no.13 of 2002) which grants them the right to move within South Africa and gives them 14 days in which to access an inland Refugee Reception Office (RRO) to make a claim for asylum. At the RRO, the official account of the process is that biometrics are taken, if necessary an interpreter is found, an admissibility hearing, also referred to as a first interview, is undertaken with a Refugee Reception Officer and an asylum claim is lodged on the proscribed form (BI-1590). A ‘section 22’ or asylum seeker permit is issued to the applicant upon the lodging of their application, in terms of the Refugees Act, and this grants the right to remain in South Africa, to work and to study whilst their application is processed.

A section 22 is supposed to be valid for 6 months and is renewable – where the applicant approaches the same RRO upon the permit’s expiry – for a further 6 months. Whilst holding a valid section 22 permit, the applicant is then required to have another interview with a Refugee Status Determination Officer (RSDO) who must make a decision on their application by either

accepting it and recognising their refugee status, in so doing granting them a ‘section 24’ refugee status permit, in terms of the Refugees Act, or rejecting their application. There are two forms of rejecting an application on the merits: an RSDO can simply reject an asylum application as unfounded – an application properly made, on the grounds reflected in section 3 of the Refugees Act (which includes the UN and AU Refugee Convention definitions) but adjudged to be without merit – or an RSDO can reject it as “manifestly unfounded, abusive or fraudulent”¹⁸⁶. A manifestly unfounded decision reflects the decision maker’s position that an application is not made on grounds contemplated by section 3 of the Refugees Act.¹⁸⁷ This is regularly the finding where, for instance, an asylum applicant is deemed to be an economic migrant who inappropriately applied for asylum instead of work permits (see further the discussion in Chapter 5.3). A straight forward rejection entitles an asylum applicant to an appeal to be heard, in person, by the Refugee Appeal Board (RAB). Such an appeal is to be lodged within 30 days of the RSDO’s rejection decision. A manifestly unfounded rejection, however, entitles an asylum applicant to a review, in writing only, by the Standing Committee for Refugee Affairs (SC). Such a review is to be lodged within 14 days of the RSDO’s manifestly unfounded rejection decision.

This official account of the asylum process provided by the government ministry responsible, the Department of Home Affairs (DHA)¹⁸⁸, only vaguely resembles the actual process encountered by many refugees. Those not entering the country at a port of entry are unlikely to get a section 23 transit permit. Their first step into the asylum process therefore comes through their interaction with the RRO and the lodging of their asylum application, assuming they have gained knowledge of the process and know where to go and what to do, an assumption which is not

¹⁸⁶ Refugees Act, section 24(3)(b).

¹⁸⁷ See the definitions in the latest data Asylum Seeker Management, Immigration Services, *supra* note 19 at 27.

¹⁸⁸ Department of Home Affairs, “Refugee Status & Asylum, PROCEDURE: APPLICATION FOR ASYLUM”, online: <<http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum>>.

borne out by the stories of many of those refugees interviewed for this project. Rather than applying for recognition as a refugee within two weeks of arriving in the country, the majority of refugees interviewed, due to lack of knowledge or necessary resources, waited years before attempting to interact with the asylum system.¹⁸⁹

Refugees who are yet to make an application for asylum can become caught in a self-perpetuating cycle of undocumented vulnerability. Failure to interact through the limited and difficult to access official channels means newcomers are reliant upon local compatriot communities for information. Declaring their undocumented status – that is, that they possess neither work nor study permits, nor asylum papers – can create susceptibility to abuse or manipulation by others. It thus becomes difficult to ask for assistance or to enquire as to processes for acquiring documents without incurring this vulnerability. As one anonymous service provider and her colleague explained:

“The thing is, documents is a very quiet issue. Because the minute you are found not to have documents: ...out. So it’s hard to even tell your friend that you don’t have documents. Because you don’t know when you’re going to fight with this friend and then they’re going to say ‘hey, remember, so and so, please go there and ask her for her documents.’ So, if I don’t have documents, I’m not going to tell anyone that I don’t have documents. Until something happens that I will have to prove my documents.”¹⁹⁰

As a foreign national herself, the service provider’s colleague explained how in her interactions with refugees at a point where they indeed needed documents to progress with the service programs offered, she had experienced just such a tentative enquiry about how to obtain

¹⁸⁹ See the discussion in Chapter 5.1.2. Five of the seven refugees interviewed had not been able to apply for asylum at all despite all being in the country over 2 years. Only a refugee with an exceptional case with unusual levels of assistance had immediately applied, with the assistance of lawyers, for asylum; Twonge Chimbala, *Interview with Twonge Chimbala, Refugee, Passop* (2016), Cape Town. The other refugee who may have applied following due process (though the DHA had not followed due process itself, having failed to decide upon his application in a timely manner) had previous lived experience as a refugee in another country; “Lucas”, *Interview with Anonymous Refugee: pseudonym “Lucas”* (2016), Cape Town.

¹⁹⁰ Anonymous, *Interview with Anonymous, Refugee Social Services, HIV Programme Coordinator* (2016), Cape Town.

documents. Her answer also reveals, however, how acquiring documentation requires resources and a series of potentially unsafe networks:

[Colleague] “Sometimes we are doing also English class, and I say: ‘now we are [having classes], you can come if you have documents’, and sometimes you can just continue. Like yesterday, [during] our workshop, one of the men came to tell me ‘I don’t have document, can you help me to have a document?’ because I tell them they are doing documents at Pretoria. If you can go to Pretoria. And he’d say: ‘I don’t have money to go to Pretoria’. I tell them to go to ... to the restaurant and [they will] give him money to go to Pretoria. But he says he’s scared to go there. Those are some things that can happen. But they will not tell you they don’t have [documentation], quickly. It will take a little bit.”¹⁹¹

Furthermore, reliance upon informal community networks for information on the South African asylum system places certain refugees, including queer refugees, for whom such communities may prove more threatening than supportive, in a particularly precarious position (discussed further below in relation to interpreters). Access to information is inequitably informed by other vulnerabilities and this can have long-term consequences for the exclusion of vulnerable groups from the asylum system.¹⁹²

There are only five RRO in South Africa, four of these RRO are located far from the land borders which most refugees will cross to enter South Africa. Two coastal RRO, Cape Town and Port Elizabeth, have been closed for years despite court orders demanding their reopening.¹⁹³

¹⁹¹ Colleague of *Ibid.* who sat in on interview.

¹⁹² The Regulations to the Refugees Act previously stipulated at Regulation 2(1) that application for asylum be made “without delay”. Whilst the DHA argued this meant they could refuse to consider asylum applications from people who had waited to make an asylum claim, this was found by the Supreme Court of Appeal in *Ersumo v Minister of Home Affairs* 2012 (4) SA 581 (SCA) at para [14] to be too vague and too subjective a determination by the RRO to form the basis for determining refugee rights; see Khan & Schreier, *supra* note 98 at 27. This reference to delay has since been removed in the updated Regulations of 2020. However, a delay in applying for asylum regularly negatively impacts decision-makers’ credibility assessments, see for instance the case law that had to be established in Canada related by Robert F Barsky, *Constructing a Productive Other: Discourse theory and the Convention refugee hearing* (Amsterdam, NETHERLANDS, THE: John Benjamins Publishing Company, 1994) at 108.

¹⁹³ An advocate involved in the litigation on the Cape Town RRO closure explained: “We went to court with Home Affairs over it. Still going. Still going to the Supreme Court of Appeal. We won originally, on the grounds that Home Affairs was less than forthcoming in their public consultations. And that they were required by law to consult with the public over the closure. They didn’t do that. But what the court said was ‘you have to make a new

This has meant newcomers had one overworked land border RRO to report to, Musina – with 100% rejection rates – or an RRO located in Pretoria, Gauteng province or in Durban. The Cape Town and Port Elizabeth RROs were supposedly re-opened in 2019 though the Cape Town reopening has been delayed and the Port Elizabeth RRO remains closed to new applications.¹⁹⁴

The cost of traveling to a distant RRO was cited by several refugees as the reason they either had not made an application for recognition as a refugee at all or were not in a position to renew the section 22 temporary asylum permits (see the discussion on this in Chapter 5). The overrun RROs have taken to only accepting certain nationalities on certain days, meaning a refugee may have one day a week in which they are able to approach the RRO (or an RRO anywhere in the country).¹⁹⁵ Thus even where refugees have been issued with ‘section 23’ permits and told where

decision, and you have to consult everybody. You have to consult interested parties.’ So they had a consultation in Cape Town and everybody said that closing the office is a bad idea and then they went and closed it anyway. So now we’re going back to court on that closure. And unfortunately we just lost in the High Court. So we’re appealing to the Supreme Court. It’s a tough road for us so I don’t know if we’ll be successful.” - Corey Johnson, *Interview with Corey Johnson, Advocacy Officer, Scalabrinini Centre* (2016), Cape Town. The Supreme Court of Appeal case was decided in 2017, reported as: *Scalabrinini Centre, Cape Town v The Minister of Home Affairs* (1107/2016) [2017] ZASCA 126 (29 September 2017). The court found in favour of the appellants and held: “The decision of the second respondent [the Director General of the DHA], taken on or about 31 January 2014, to close the Cape Town Refugee Reception Office is declared to be unlawful and is reviewed and set aside” it furthermore directed the relevant DHA officials “to reopen and maintain a fully functional refugee reception office in or around the Cape Town Metropolitan Municipality, by Friday 31 March 2018”. Interestingly the court also ordered the DHA to report monthly to the Scalabrinini Centre on the progress being made to fulfill the order to reopen (see p.3 of the judgment; Order: (2)(a)-(c)).

¹⁹⁴ The DHA website lists the Port Elizabeth RRO as closed to new applications see “Refugee Centres: Port Elizabeth Refugee Reception Centre” Home Affairs <http://www.dha.gov.za/index.php/contact-us/refugee-centres/28-port-elizabeth> [accessed June 2, 2020] although the same website contains a notice of the reopening of the RRO for both new and previous applicants with the new centre on October 22, 2018, see “Services Affected by re-opening of Port Elisabeth Refugee Reception Centre” Home Affairs <http://www.dha.gov.za/index.php/notices/1192-services-affected-by-re-opening-of-port-elisabeth-refugee-reception-centre> [accessed June 2, 2020]. Frustratingly, the Cape Town RRO reopening was reported as delayed in February 2020, see Kaylynn Palm, “Reopening of CT refugee reception office delayed again”, online: <<https://ewm.co.za/2020/02/03/reopening-of-ct-refugee-reception-office-delayed-again>>. The Port Elizabeth and Cape Town RROs have effectively been closed to new applications since 2011 and 2012 respectively, see “The Cape Town Refugee Reception Office closure case, explained” *Scalabrinini Centre of Cape Town* (March 20, 2018) <https://scalabrinini.org.za/news/the-cape-town-refugee-reception-office-closure-case-explained>.

¹⁹⁵ The ‘Nationality Days for Asylum seekers’ listed on the Department of Home Affairs’ website, are listed for each RRO, for example see <http://www.dha.gov.za/index.php/contact-us/refugee-centres/29-preTORIA> yet the same schedule is used for each centre, (attached as an Appendix B hereto), so for instance a non-English speaking Somali could only approach an RRO on a Thursday, anywhere in the country.

to go and what happens next, the 14 day time limit is difficult to meet. A delay in accessing an RRO makes these refugees vulnerable in terms of their undocumented and unprotected status and extends the time over which they have no right to work or study. Furthermore, the requirement to repeatedly renew a section 22 permit at the same RRO as the application was originally lodged, and the consequent expense of travel between the RRO and the city in which an asylum applicant may have settled, leads many applicants to ‘drop out’ of the system and forgo protective documentation. If an asylum applicant allows their section 22 permits to expire, a fine is charged prior to being able to renew them. A litigation specialist explained: “other people who allowed their permits to expire – they have to pay fines before they can be allowed to renew again, and that fine, at least in Pretoria, is R1000, so that’s quite expensive. In Cape Town, it’s around R3000, so it’s very inconsistent.”¹⁹⁶ Thus impoverished refugees who are unable to afford the time and travel required to timely renew their permits are effectively blocked from regaining valid documentation.

The Refugee Reception Office and its processes are rife with problems. Judicial review and appeal cases are full of instances of failures of interpretation both at the initial hearing and RSDO hearing. Judicial review of RSDO, Standing Committee and RAB decisions, or their failure to take a decision, is available to asylum seekers under the Promotion of Administrative Justice Act (PAJA), which gives effect to the Constitutional right to administrative action that is lawful, reasonable and procedurally fair.¹⁹⁷ In some review cases it appears interpreters were not found when they were needed, in others interpreters were used who did not actually speak the same language as the asylum applicant. Lax or informal interpreters have been shown to often write down the same story for everyone enlisting their help. Abusive interpreters have also

¹⁹⁶ Cote, *supra* note 32.

¹⁹⁷ Section 33 of the Constitution of the Republic South Africa, 1996; Khan & Schreier, *supra* note 98 at 194–196.

regularly arisen as challenges in asylum applications; in the case of *Naemo Hassan Gaal vs The Chairperson of the Standing Committee for Refugee Affairs*¹⁹⁸ a woman claimant had the rejection of her asylum application overturned and was granted asylum in part because the interpreter was shown to have sexually harassed her and written a false account of her story upon her refusal of his advances. The Advocate in the case explained:

The other matter that was related to gender was a Somali woman whose brother had been killed and she was also under pressure to start wearing the full...and the problem had been where the Somali interpreter here had basically harassed her and pretty much implied that if it wasn't...it was indirect...that she should see him afterwards, but it was one of those matters, and what went onto her paper was that she had come looking for a husband. And she absolutely denied that this is what she said. And she was rejected on that basis. That she had come to South Africa to look for a husband. But it was a very badly handled matter, and the court gave her refugee status. But the inappropriate involvement of the interpreter was one of the reasons why the court ruled in her favour.¹⁹⁹

Judicial reviews regularly reference problems with interpretation and reviews of the asylum cases of refugees fleeing sexual orientation-based persecution, reveal complaints against interpreters who demeaned or discouraged applicants from making their genuine claim.²⁰⁰

Discussing a case which she was preparing to take on judicial review, Advocate De la Hunt highlighted the multiple instances in this single case where a queer refugee had been discouraged from making his claim based on sexual orientation grounds by interpreters:

¹⁹⁸ High Court of South Africa, Western Cape [unreported], case 16782/12 (25 August 2014).

¹⁹⁹ Leanne de la Hunt, *Interview with Adv Leanne de la Hunt, Advocate, Cape Bar* (2016), Cape Town.

²⁰⁰ See *A v Chairperson of the Refugee Appeal Board and Others*, [2017] 19 ZAWCHC .[“*A v RAB*”] discussed further below; see also *FNM v The Refugee Appeal Board and Others*, 4:228 All SA . (“*FNM v RAB*”) at para.12: “Because his English was poor he asked another Congolese man, whom he understood to work for the Department of Home Affairs, to assist him with the completion of the relevant application form. The man asked him for payment for doing so but he was not in a position to pay him as he did not have any money. He asserts that he told this person his “entire story” in French but noticed that he only wrote down a few of the words in response to each of the questions on the relevant form. He was told by a woman official through the interpreter to return to the RRO the following day.” With respect to interpretation problems compounded by queer vulnerability to homophobic attitudes see *Esnat Maureen Makumba v The Minister of Home Affairs and others*, 2014 Western Cape High Court. discussed further in Chapter 4.4 below.

At the initial stage he had an interpreter who didn't speak his language. But he didn't disclose his sexual orientation. Second [interview] he did, but the interpreter discouraged him and said: 'look you know there's enough in your case relating to your brother's connections, don't do it, it's shameful'. Then when he did the appeal to the Standing Committee, he got a similar attitude from a refugee volunteer at the centre. He said: 'it's not god's will and it's shameful'; [he] did the submissions on other grounds. So we're arguing that he should be given the opportunity for a rehearing.

Academics studying the case law of other jurisdictions have commented on similar problems with regard to sexual orientation and interpretation challenges amongst Western host states.²⁰¹

The nature of the linguistic vulnerability and access to information barrier identified in these challenges with interpreters is another instance of a problem which is not limited to Western hosts. Such challenges follow refugees wherever they may seek to apply for asylum in a place without a shared language and are likely exacerbated where there are systemic inefficiencies and corruption.

Beyond the challenges which are posed by interpreters for many, though not all refugees the RSDO interview process has substantial problems both structural to the presentation of applications for asylum and within the decision-making process and furnishing of decisions. The dire access problems have been alluded to above and the under-resourced overburdened offices at which interviews take place raise concerns with both a lack of privacy and a lack of sufficient time to adequately conduct an interview. Very practical deficiencies of space and time combine to create an atmosphere unfit to support a fragile 'window of tolerance' in which a traumatised person is not hyper or hypo-aroused and may be reasonably able to discuss a previous trauma in a coherent and relatable way.²⁰²

²⁰¹ See for instance Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21:1 International Journal of Refugee Law 1–33 at 8..

²⁰² Talk by Frank Cohn, Executive Director of VAST (Vancouver Association of Survivors of Torture) titled "Psychosocial Impacts of War on Women and Children" at a Canadian Red Cross event: *Vancouver International*

Amongst service providers, blatant copy and paste decisions on clients' asylum applications are notorious. One advocate commented:

There's overuse of rejection – Rony Emmett – she did a collection on RSDO decisions and they're absolutely abysmal, they really are poor, poor quality. They quote bits and pieces from other jurisdictions but they don't actually explain the context. Sometimes they use outdated country of origin information. They rely very much on one paragraph of James Hathaway's book that says the burden of proof is on the asylum seeker and then don't quote the second part of the paragraph that says that however, there is a shared burden. So everything falls on the asylum seeker to prove. Very little wonder we have a 4% acceptance rate here.

Such instances in which an asylum applicant is presented with written reasons for a decision which are generic, and may not even be applicable to their actual case, have been documented by an African Centre for Migration and Society study of RSDO decisions and are even evident in the case law.²⁰³

Virulent criticisms from the courts of poor asylum application handling, and court decisions with no apparent forthcoming action from the DHA, have become commonplace in South Africa. This is evidenced by the horrific irony of the Human Rights Commission having to issue a subpoena to force a meeting with the DHA, after failing to meet with the Commission for a year. The Human Rights Commission was attempting to investigate the Department for its failure to render

Humanitarian Law Conference: Women, Children and War; Frank Cohn, *Psychosocial Impacts of War on Women and Children* (University of British Columbia, Allard School of Law, 2019). Thank you to Frank who brought up Siegel's concept of a window of tolerance, see FM Corrigan, JJ Fisher & DJ Nutt, "Autonomic dysregulation and the Window of Tolerance model of the effects of complex emotional trauma" (2011) 25:1 J Psychopharmacol 17–25 at 17.: "One model for understanding and explaining the fluctuations in clinical features that can occur unpredictably and rapidly in the disorders that arise from the effects of severe trauma is the 'Window of Tolerance' model of autonomic arousal. Siegel (1999) proposes that between the extremes of sympathetic hyperarousal and parasympathetic hypoarousal is a 'window' or range of optimal arousal states in which emotions can be experienced as tolerable and experience can be integrated".

²⁰³ Middleton, *supra* note 177.; See *A v Chairperson of the Refugee Appeal Board and Others*, *supra* note 200.[75].

timely services.²⁰⁴ The incompetency and unreasonable delays which plague every step of the asylum system in South Africa is unflinchingly described in the judgement of *A v RAB* (2017) of the Western Cape High Court:²⁰⁵ “The respondents [the RAB, and DHA] have failed to fulfil their legislative mandate at every stage of the applicant’s application.”²⁰⁶ “The applicant’s application for asylum has been beset by procedural obstacles and delays at every step.”²⁰⁷ The Judge provides a critical account of the actual process of the applicant’s asylum application:

I am satisfied that a proper case has been made out for the review and setting aside of the decision, for the following reasons:

[59.1] The applicant did not receive the required support and assistance when he first applied for asylum in 2009. He was not interviewed by a RRO, the relevant procedures were not explained to him, he was not advised of his rights and he was not provided with the services of an interpreter, which he clearly required. As appears from the Eligibility Determination Form for Asylum Seekers, annexed to the founding affidavit as annexure ‘M2’, the second respondent was fully aware that the applicant required the services of an interpreter;

[59.2] more than two years elapsed before the applicant was called to an interview with the RSDO, at which the RSDO failed dismally in his obligation to conduct the enquiry in a supportive and inquisitorial manner. The RSDO’s decision is incoherent, misquotes the law, and is made without proper foundation;

[59.3] A further two years elapsed before the hearing before the RAB, at which the inquorate board, consisting of a single member (it is not known whether he is legally qualified as envisaged in section 13(2) of the Refugees Act), without considering

²⁰⁴ See Chanel Retief and Zoë Postman, “ON THE CARPET: HOME AFFAIRS : Subpoena forces ‘unco-operative’ Department of Home Affairs to appear before Human Rights Commission”, (17 May 2019), online: *Daily Maverick* <<https://www.dailymaverick.co.za/article/2019-05-17-subpoena-forces-unco-operative-department-of-home-affairs-to-appear-before-human-rights-commission/>>. “The Department of Home Affairs is under fire from the South African Human Rights Commission, which claims to have been trying to meet the department for more than a year to address complaints that the department takes too long to render services. The Commission is investigating why applications for asylum seekers and permanent residence permits take so long to process. The Department of Home Affairs appeared before the South African Human Rights Commission (HRC) on Thursday, 16 May 2019 after the commission issued a subpoena against the department. The commission said the reason for the subpoena was that department had failed to co-operate with the HRC, as required by the Constitution”.

²⁰⁵ *A v Chairperson of the Refugee Appeal Board and Others*, *supra* note 200.

²⁰⁶ *Ibid.* [97].

²⁰⁷ *Ibid.* [98.3]

objective facts about the applicant's country of origin, and without making the necessary finding of facts, or even credibility findings, rejected the applicant's version of events out of hand as being 'implausible'; and

[59.4] The applicant was ultimately only informed of the outcome of his appeal on 11 May 2015, six and a half years after he first applied for asylum.

Tragically, nothing about the above case is unusual. As can be seen from the frustration evident in the Judge's decision and reference to the multiple such decisions which have emanated from our courts:

[62] Regarding the appeal findings, it is apparent from the numerous reported and unreported decisions involving judicial reviews in refugee matters, that all too often the approach by the relevant decision makers is sceptical and cynical, and that, rather than giving applicant's the benefit of the doubt in the absence of good reasons not to do so, the evidence given is frequently rejected, even though there were no facts to controvert it.

[63] It has been said time and again that the burden of proof applicable in civil proceedings is inappropriate in refugee cases, that the enquiry has an inquisitorial element, that a lower standard of proof is required, and that the relevant body should liberally apply the benefit of doubt principle.

However, the RAB, which is required by legislation to have at least three members, has been inoperative and thus in fact inoperable since mid 2016 when the RAB had only two remaining members.²⁰⁸ Nevertheless, the RAB appears to have been hobbling along in its workload, though its still operating at all whilst unconstituted renders procedurally invalid everything they do. There has been reproach by the courts on a case by case basis but no public domestic or international outcry at this preposterous failure to ensure the continuous work of a vital government function. Another strongly worded condemnation, specifically discussing the role of

²⁰⁸ Cote, *supra* note 32.

the RAB in an asylum case is provided by the recent judgment of *FNM v RAB* (2018), of the Gauteng High Court²⁰⁹:

[93] The RAB also displayed incompetence. The quality of its written decision is poor. It is internally contradictory, unclear, indicative of a lack of understanding of the governing legislation and lacking in reasoned analysis of the information available to it. This should not be the case when the RAB is meant to represent the apex of the administrative decision-making process.

[94] Added to this, the RAB failed properly to apply the burden of proof - this despite its having been criticised in relation to its application of the burden of proof in judgments of the High Court going back almost a decade.

[96] Having regard to the incompetence displayed by the RAB in its decision making in this case, its apparent unwillingness to apply the correct burden of proof and indications of bias in its assessment of the country of origin information, it would be unjust and inequitable to expect the applicant to place his fate once more in the hands of the RAB.

However, as one legal service provider stated: “The problem is not getting the court order, the problem is compliance with the court order. [Refugee advocates have] gotten some great decisions and, if the Department doesn’t want to comply with that, it just means very little.”²¹⁰

The vehemence of various service providers’ criticism of the asylum system and of the Department of Home Affairs and its constituent refugee offices, varied from carefully worded discussions of necessary reform to expletives, apparently depending on the interviewee’s character and on the organisation with which they worked.

Litigation advocate, David Cote gave the following description:

That first level, the adjudications are terrible, particularly when it comes to LGBT claims. And a lot of it has to do with lack of credibility: “we don’t really believe you”, “yeah, sure, everybody’s going to come from Uganda and they’re going to claim to be gay

²⁰⁹ *FNM v The Refugee Appeal Board and Others*, *supra* note 200.

²¹⁰ Raymond, *supra* note 181.

because they just want to get into South Africa". So there's been a lot of rejections based on that.... The system here is broken down, it does not work anymore. The corruption at the Refugee Reception Office is hideous. Offices have been closed in Cape Town, Port Elizabeth and Johannesburg, contrary to court orders. The corruption, like I said, is such a huge issue that ... we have this one corruption report, I can probably share that one with you, if you like, where they found that 50% of people who went to Marabastad, which is the office here in Pretoria have been asked to pay a bribe at some point along the road. So it's a very high level of corruption, unfortunately. And it's frankly quite dangerous; so you have to be there very very early in the morning to get into the queues, the area of town there is also dangerous, people know – there's predatory crime that happens there, and the police do not help whatsoever, in fact they've been often implicated in a lot of the crime that happens there.

University refugee clinician, Alicia Raymond summarised: "The whole system is a mess, basically".²¹¹ Similarly an anonymous health care focused service provider stated: "our refugee system and asylum seeker system in South Africa is horrible. It's horrible, it's really not working".²¹² Queer refugee community advocate Victor Chikalogwe described the corruption and bribery facing queer refugees without documentation as "pathetic". He and another service provider separately expressed profound concern about queer refugees being asked by officials to 'prove' their sexuality; Victor exclaiming that this was so unprofessional and the program coordinator of JRS, Samson Samuel Khosa, saying it was inhuman and nonsensical to ask such questions. Even as the most circumspect in her critique of the asylum system, compared to other service providers interviewed, Yolisa Mfaise of Amnesty International said: "that whole status determination system needs a serious revamping. There used to be guidelines at least. We need clearer guidelines rather than [an] ad hoc kind of system."²¹³

An anonymous gender program service provider commented:

²¹¹ *Ibid.*

²¹² Anonymous, *supra* note 190.

²¹³ Yolisa Mfaise, *Interview with Yolisa Mfaise, Project Coordinator: Rights of Marginalised persons and Groups (LGBTIs, Refugees and Asylum seekers)* (2016), Johannesburg.

The problem with that in South Africa is that it always looks great on paper, but then the implementation is terrible. ... Obviously we are an attractive destination for economic migrants and for people who are leaving their own African countries, like Uganda for example, because they think that they will have a better experience living their gender identity, or their sexual orientation in South Africa. And I think that often, again while that may be the case on paper; we have a Constitution that guarantees your right to equality, we have various pieces of legislation that talk about equality, I don't think that's always the experience. When people come here I think that they realized very quickly that the system is very harsh, so there's a form of administrative violence that takes place and there is also a lack of understanding of gender and sexual orientation, certainly within our Department of Home Affairs. And so if someone from Uganda who is homosexual comes to South Africa and says I'm applying for asylum on the basis of my sexual orientation, Home Affairs will say 'well that doesn't make any sense, we're sending you home'. So there's this weird lack of understanding, despite what's in our laws on paper, people don't get it. ... And there's always a fear of letting people in. They will do whatever they can to keep people out.²¹⁴

There were very few positive comments; two interviewees gave positive descriptions of the progress made within the RAB with regard to sexual orientation claims.²¹⁵ It appeared several organisations had been involved in training provision for RAB decision-makers including the UNHCR, African Centre for Migration and Society and the Coalition of African Lesbians, however, the RAB having become defunct, this progress and the individuals having received training were lost.²¹⁶

... the Appeals Board and the DHA structure ... they are incredibly progressive on [sexual orientation]. I was so pleasantly surprised. And I think I shouldn't be because it is, the standard has been raised because of the brilliance of our Constitution. So, we had this judges' conference a few weeks ago, and we had incredibly hard discussions about the way in which the DHA treats refugees in our country; the appalling state of the asylum system and how it's broken. And how it unfairly discriminates against people, and the most vulnerable. And there was denial. There was just denial from the Deputy Minister of Home Affairs, where she addressed this audience and basically said that we are changing

²¹⁴ Anonymous, *Interview with Anonymous Legal Services professional, Gender Programme* (2016), Cape Town.

²¹⁵ Sharon Ekambaram, *Interview with Sharon Ekambaram, Head of Refugee and Migrant Rights Programme, Lawyers for Human Rights (LHR)* (2016), Johannesburg; Cote, *supra* note 32.

²¹⁶ Okisai, *supra* note 65; Carrie Shelver, *Interview with Carrie Shelver, Advocacy Manager, Coalition of African Lesbians (CAL)* (2016), Johannesburg.

our policy because what we found is that people are exploiting the system, they've come in and they've taken over all the trade, the informal traders, they've taken over all the spaza shops,²¹⁷ they've pushed South Africans out. So a clear populous position without any substantiation, no...the research she quoted from some, you know like rural, deep way out place in the Western Cape, when there's sufficient evidence in Gauteng, which is the capital of migration if you like, demonstrating that less than 10% of people who own spaza shops are foreign nationals. Demonstrating that people get registered. So all your myths, there is research to debunk that. And so the Department of Home Affairs is extreme on those levels, but it really engages very positively in how they struggle on cases of people coming to our country on persecution because of their sexual orientation. A genuine wanting to engage with that and a real understanding of that. On the African continent. I found that incredibly inspiring.²¹⁸

The other advocate commenting positively on the RAB's more nuanced decision-making was more circumspect about how much of this advantage had been lost:

Before, probably 2012, when you got to the Appeal Board level, you had a better adjudication process and one that really was able to take into account the different types of persecution and whatnot. After 2012 when all of the Appeal Board members were ... didn't have their contract renewed and they hired a whole new group of people, we lost that, unfortunately. It was building back again but the Appeal Board now doesn't exist basically, there are only two members and so because of that we are again starting from scratch about how to build up a bit of knowledge. ... The RSD process at the moment is abysmal and the RAB process is going to take a long time to get back on its feet, it's been destroyed basically.²¹⁹

As well as the RAB having become defunct and all training advantages lost, the DHA's focus on progress in LGBT matters has itself been met with scepticism given the failure to recognise refugees *in totum* and the absence of recognised queer refugees amongst service providers' clientele.

What does it mean when you have a department that actually is quite anti refugee. Let's be real. They're actually anti it. And then they make this little...they say we're really interested in this group. What does that mean? What does...so is this about...is this

²¹⁷ Small grocery stores

²¹⁸ Ekambaram, *supra* note 215.

²¹⁹ Cote, *supra* note 32.

because there's some person in the Department that's queer obviously, or an ally, who has been really relentless in pushing this, is that what's happened? Or, in my case I am a bit more cynical, one says: is this a way for the Department to be able to say 'look how progressive we are and look at what great work we're doing and here's the illustration of that'. I don't know. Because as you point out, it is very much on the level of rhetoric. Because if that training is anything to go by, the people in that training were telling us, what we kept hearing from people, was that people who had been in the research unit were being...people who were engaged in any part or aspect of the refugee process who were trying to push a more progressive line, were being redeployed into positions where they had less sphere of influence. So it's a contradiction in structure. So there's, on the one hand, they're saying this thing and they're saying [it] in very particular places and spaces, but what is actually happening, it seems, is that there is increased restriction on this. And this heightened security and border control thinking and approach.

Not many of the refugees interviewed commented on the asylum system beyond acknowledging they really did not understand the process, which was unsurprising given their limited interaction with it.

The poor quality of the physical spaces for RROs, the understaffing and lack of training and/or oversight of decision-makers is compounded by a blatant disregard for legislated processes, bizarrely increasing the DHA's own burden. Whereas section 22 asylum permits are supposedly a short term, 6-month valid, temporary provision of documentation pending an assessment and decision on an applicant's case, the Department's failure to timeously determine or even hear cases means that applicants have to renew these permits multiple times. This places a considerable burden on applicants in terms of the time and money required to travel to the RROs and wait in queues to renew their permits, also prolonging the indeterminacy of their status as well as burdening the RROs with a continuum of new applicants and old applicants renewing permits. Whereas the Refugees Act makes provision for the renewal of a section 22 permit, it was not intended that these permits be renewed more than once. The DHA website states: "The section 22 permit which is valid for a period of six monthslegalizes [sic] the asylum seeker stay

in the Republic of South Africa temporarily pending a final decision on his application. The permit can be extended by an RRO for a further six months while the process of status determination is in progress.”²²⁰ The service standard states: “Applications may take up to six months”.²²¹

Many service providers, however, reported hearing of persons living many years with repeatedly renewed short-term asylum permits:²²²

“I’m under the impression Cape Town is a little bit of a special case in terms of protracted adjudication processes, because of the way the office is closed and it seems like it was really poorly managed for a long time. But we consistently see people waiting eight to ten years for refugee status. I mean we have people who applied in 1999. Still no asylum status. You see on their permits, number of extensions: twenty three. Just insane”.²²³

“Because one of the people we work with at [redacted] they tell me that she’s doing pharmacy. For four years. The law says: six month asylum seeker, then you come back - refugee status. But for him, for four years they’ve been renewing his asylum seeker. For four years. So instead of having refugee status now, he’s still an asylum seeker for the last four years. And he’s not the only one. Some people will borrow money from the community to go to the refugee offices. When they get there, they get a stamp: come back in one month. And you’re thinking: ‘how will come back in one month? I even borrowed the money to come here now’. To go back. So that’s one of the other reasons that many people are choosing not to renew their statuses. Because where is the money to travel?”²²⁴

As evidenced above, there have also been reports of section 22 permits being issued for shorter than 6 months, contrary to the Refugees Act, as an apparent form of harassment; burdening the refugee with even greater frequency of compelled return to the RROs and, nonsensically, further

²²⁰ Department of Home Affairs, *supra* note 188.

²²¹ *Ibid.*

²²² Four service providers spoke of asylum seekers waiting from 4 to 15 years for a status decision: Anonymous, *supra* note 190; Johnson, *supra* note 193; Ekambaram, *supra* note 215; Anonymous, *Interview with Anonymous Social Worker, Refugee and Stateless Persons Social Services Programme* (2016), Pretoria.

²²³ Johnson, *supra* note 193.

²²⁴ Anonymous, *supra* note 190.

burdening the asylum system. This was reportedly the experience of a lesbian couple: “The two ladies also had an asylum [seeker permit] that they had to go and renew every month. So they were always given one month, one month ... I think that’s one of the things that made them just give up and leave.”²²⁵

There is a significant difference in the rights of and protections afforded to ‘section 24’ recognised refugees compared to ‘section 22’ asylum seekers. The extraordinarily lengthy period in which many *de facto* refugees are trapped under a temporary asylum denomination expose them to lengthy hardships. As one service provider commented: “sometimes it’s hard even to get a job with that [section 22] paper. Some companies don’t take it, if you have six months. They will tell you they can’t hire you. You need to renew your papers. It’s hard even to get [a] poor paid job with that paper.”²²⁶

A social services interviewee illustrated the substantial services and supports gap into which asylum seekers fall, which her organisation attempted to address:

SASSA [South African Social Security Agency] in South Africa can only provide grants for people with refugee status only. So the asylum seekers are left out, of which they also have a need. So we come into that gap, that we provided grants. It can be the elderly grant, disability or chronically illness grant. And also we have identified that there are kids who are unable to go to school because they are physically or mentally disabled. They cannot go to the proper schools, and then the special schools are mostly expensive. So then we have a grant for them as well, for children with special needs.²²⁷

Given the substantial difficulties in graduating through the asylum system as actually practiced on the ground, compounded by wholesale rejection rates (the latest statistics speak of a 92%

²²⁵ Anonymous, *supra* note 222.

²²⁶ Colleague of Anonymous, *supra* note 190.

²²⁷ Anonymous, *supra* note 222.

rejection rate)²²⁸, asylum applicants have only a very slight chance of actually getting recognised refugee status. However, as regards those who do receive a positive result from their asylum application and are issued a section 24 permit, they remain beholden to the asylum system. The section 24 permit is only valid for a period of 2 years and is itself renewable. Such renewal is based upon a review of a written request for renewal, made by the refugee, by an RSDO. After 5 years as a recognised refugee, a refugee may apply for ‘certification’; a written application, completed at the original RRO at which asylum was applied for, reviewed by the Standing Committee which determines whether or not the applicant will remain a refugee indefinitely. In practice, this has meant the Standing Committee decides between certifying a refugee with indefinite refugee status or a cessation of status; high stakes for the applicant. If successful, such ‘section 27’ certification becomes the first step in then applying for permanent residence. Both renewal and certification provide the asylum system officials with an opportunity to revisit already established refugee status. This can be considered a South African instance of the move, criticised by Chimni and influenced by the work of the UNHCR, away from permanent settlement as an ideal and natural solution for refugees towards conceiving return as the preferred solution. The shift from a preference for resettlement to repatriation as the preferred, humanitarian solution is roundly criticised by Chimni as “a marriage between convenient theory, untested assumptions and the interests of states”²²⁹. At the time I was working in a refugee law clinic in 2007 and 2008, Angolan refugees, having become long-term, settled residents with businesses and children in schools, were regularly having to imperil their refugee status by having their continued need for refuge revisited upon application for renewal or for permanent residency. This amounts to a cynical waste of resources the Department does not have. One

²²⁸ Asylum Seeker Management, Immigration Services, *supra* note 19 at 29.

²²⁹ Chimni, “The Geopolitics of Refugee Studies”, *supra* note 61 at 365.

service provider reported experiencing different challenges as the DHA appeared to change tack, going from fixing one problematic approach to finding a new loophole to exploit in an anti-refugee agenda:

A lot of the work that we do, you can get it done, it's just very frustrating. So things like, you'll finally get into a rhythm of something and things will be working properly, and then the Refugee Appeal Board will disappear. Or everything's going well in the Reception Offices and then they decide to close one Reception Office down in four months so your clients can't get their permits renewed. ...

What I've found out they're doing now is, they're waiting for the child to become the age of majority and refusing certification on the basis that they've reached the age of majority and they must go and apply for asylum on their own basis. After spending basically 18 years here, or growing up here and getting status based on their parents. So that's a new thing that they've started to do. Just simple things of: if husband and wife came in separately, met here and got married here, one's an asylum seeker and one's a refugee, they want the asylum seeker to finish the asylum process, rather than being joined to the husband. Which makes no sense because it's an automatic entitlement in terms of the Refugees Act – if a dependent has refugee status then you should derive that same status. And it's also just a waste of resources, why make someone go through the whole asylum process and clog up the Refugee Appeal route, only to be given the same [result] – because you can't deport her based on the rejection of her asylum seeker [application] because we have case law in this country [referring to *Dawood*]²³⁰ which says: you can't separate a husband and wife.²³¹

The self-defeating approach of the DHA in which common RRO practices appear to substantially and perpetually increase their own workload, seem less bizarre if considered part of a purposeful program to systematically block refugees rather than recognise them. The following subsection furthers this line of argument through a discussion of the systemic criticisms and concerns with official data and government legislative amendments raised by refugee service providers.

²³⁰ *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others*, [2000] 8 ZACC .

²³¹ Raymond, *supra* note 181.

3.2.2 Colour me pink

Perhaps the most rampant problem in South Africa’s asylum system and one that critically informs so many of the above mentioned failings is the ubiquitous ‘backlog’. Having begun to implement refugee laws in 2000, the Department of Home Affairs had racked up a backlog of about 100 000 asylum applicants by 2006 and has supposedly been attempting to deal with this backlog ever since.²³² In 2016, the scale of the problem and the pace of its efforts were estimated to require 20 years for the DHA to clear the backlog.²³³ In 2019, the DHA responded to the South African Human Rights Commission enquiry into their delayed processing by apparently passing off the analysis of the backlog and construction of a way forward to the UNHCR.²³⁴ This same year, an Amnesty International report “found that poor decision-making, including mistakes of fact and lack of sound reasoning, has resulted in a 96% rejection rate of asylum applications and a massive backlog of appeals and reviews – around an estimated 190,000. This has kept some asylum seekers in the asylum system without a final decision of their case for as long as 19 years.”²³⁵

The 2017 DHA statistics on asylum, which remain the most recent, publicly available statistics conclude that: “[a]ccording to the statistical information, it is clear that the current backlog is with the Refugee Appeal Board and the Department will work with the Board during 2018 to

²³² Jack Redden, “South Africa tackles its growing backlog in asylum applications”, (6 July 2006), online: *UNHCR* <<https://www.unhcr.org/news/latest/2006/7/44ad25654/south-africa-tackles-its-growing-backlog-asylum-applications.html>>.

²³³ Siyavuya Mzantsi, “SA’s ‘alarming’ asylum seeker backlog”, (20 June 2016), online: <<https://www.iol.co.za/capetimes/news/sas-alarming-asylum-seeker-backlog-2036664>>.

²³⁴ Zoë Postman, “Home Affairs asks UN for help with refugee backlog”, (16 May 2019), online: *GroundUp News* <<https://www.groundup.org.za/article/home-affairs-asks-un-help-refugee-backlog/>>.

²³⁵ Amnesty International, “South Africa Failing asylum system exacerbating xenophobia”, (29 October 2019), online: <<https://www.amnesty.org/en/latest/news/2019/10/south-africa-failing-asylum-system-is-exacerbating-xenophobia/>>.

address the backlog in this area.”²³⁶ This is hardly surprising given that the RAB has only two members and is, or at least in terms of legislated procedural requirements, should be, non-functional. “Working with the Board” does not yet appear to include hiring the necessary number of board members.

Both statistics and the government analysis of the asylum system’s volume are briefly outlined in the Green Paper on International Migration (“the Green Paper”), published in June 2016:²³⁷

SA continues to receive a high volume of asylum seekers, over 90% of whom do not qualify for refugee status. When the Refugees Act was enacted in 1998, the numbers of asylum applicants were very low; with about 11000 people applying for asylum in 1998. This number has ballooned over the years due to various ‘pull’ and ‘push’ factors. In 2013, a total of 70 010 new applications for asylum were recorded, whereas this number increased marginally in 2014, when a total of 71 914 new applicants were registered.²³⁸

In May 2015 the Department undertook an analysis of the National Immigration Information System (NIIS) which records data on asylum seekers and refugees. The analysis showed that 1 061 812 Section 22 permits (asylum seeker temporary permits) had been issued to asylum seekers. Most of these permits were not active (983,473) with only 78,339 still active. The analysis also showed that 119,600 Section 24 permits (formal recognition of refugee status permits) had been issued to refugees. Most of the refugee permits were active; that is, 96,971 were still active while 22,629 permits had expired. The expiration of these permits could be explained by the fact that refugees might have moved onto an immigration permit (permanent residence, for instance) and have allowed their refugee permits to lapse. It could also indicate that the asylum process might be a stepping stone to obtaining other immigration visas or to use SA as a transit country.²³⁹

²³⁶ Asylum Seeker Management, Immigration Services, *supra* note 19 at 44.

²³⁷ Department of Home Affairs Minister MKN Gigaba, *Green Paper on International Migration* (Government Gazette no.40088, Government Notice No.738, 2016). (“the Green Paper”).

²³⁸ *Ibid* at 29–30.

²³⁹ *Ibid* at 30.

Whilst South Africa's extremely high rejection rate is taken by service providers and human rights organisations as an indication of poor decision-making and an anti-refugee, exclusionary agenda, the government response is to use this data on the extreme rejection rate, particularly with reference to the number of 'manifestly unfounded' rejections, as an indicator of the abuse of the system and of high numbers of false claims.

South Africa at the moment has a 96% rejection rate of all claims so it's a very, very high rate. The Musina office, for example, has a zero percent acceptance rate so in 2015 not a single genuine refugee walked through their doors so to speak and so they have said this is the reason why we have such high numbers and that we have these pull factors; we have to get rid of the pull factors.²⁴⁰

Although not reflected in the political approach expounded in the Green Paper, DHA asylum statistics and departmental performance analysis betray more concern with the apparent rejectionist tendencies of the RROs:

During the 2016 reporting period the number of cases reflected as fraudulent comprised 6.2% (2 559 out of 41 241) of total decisions made, however during 2017 this has increased to 41% (11 469 out of 27 980).²⁴¹

The increase in the decisions in finding asylum seekers' claims to be fraudulent during first instance adjudication will be monitored, as the burden of proof in these cases tends to be higher. The statistics received from the Standing Committee for Refugee Affairs reflects a high volume of referred back and set aside, that may indicate a concern at first level adjudication by the RSDOs as it relates to fraudulent and manifestly unfounded findings.²⁴²

Government statistics on South Africa's asylum system appear to be differently compiled, without any standardised presentation to Parliament or regularity in their reporting.²⁴³ The 2017

²⁴⁰ Cote, *supra* note 32.

²⁴¹ Asylum Seeker Management, Immigration Services, *supra* note 19 at 24.

²⁴² *Ibid* at 44.

²⁴³ "Asylum Statistics: Year 2013" is available, as a very brief, 12-page text, published by the Chief Directorate: Asylum Seekers Management of the DHA, March 2014; "2015 Asylum Statistics: Analysis and Trends for the Period January to December, Presentation to the Portfolio Committee of Home Affairs" is available as a 36-page point-

Asylum Statistics Report indicates “The report is mainly based on asylum records from the National Immigration Information System (NIIS)”. According to a presentation by Statistics South Africa (Stats SA), the national statistical service whose mission is “to lead and partner in statistical systems for evidence-based decisions”²⁴⁴, whereas the agency has access to a Movement Control System and Permit System data sets, Stats SA has not been granted access to the NIIS data set and so cannot provide its own data or analysis but is similarly reliant on these as hoc reports.²⁴⁵ The UNHCR report on Global Trends, Forced Displacement 2017 and 2018 note that South Africa had not yet submitted national asylum data.²⁴⁶

The available official data, integrated into the discussions above, on rejection rates and on the backlog, is itself limited and the subject of much controversy amongst different service providers. There is scepticism that overblown data allows government to throw up its hands, claiming a flood of improper and fraudulent applications that cannot reasonably be dealt with, whereas service providers feel that the actual numbers could be handled by a properly functioning asylum system.

form presentation with graphics, with no information on the authorship or date of publication; finally, despite the biannual availability of publicly accessible statistics documents, the latest asylum statistics available as of June 2020 are titled: “Asylum Seeker Management, 2017 Annual Report: January – December 2017” Chief Directorate: Asylum Seekers Management, Immigration Services, of the DHA - a traditional 47-page written report. See Asylum Seeker Management, *supra* note 46; Home Affairs, *supra* note 46; Asylum Seeker Management, Immigration Services, *supra* note 19.

²⁴⁴ STATSSA, “Statistics South Africa: Vision and Mission”, (27 May 2020), online: *Statistics South Africa: The South Africa I know, the home I understand* <http://www.statssa.gov.za/?page_id=560>.

²⁴⁵ Ramadimetja Matji, *Immigrants and asylum seekers’ data from administrative systems in South Africa* (STATS SA, 2018) at 8–9, 24.

²⁴⁶ UNHCR, “UNHCR Global Trends - Forced Displacement in 2017”, online: *UNHCR Global Trends - Forced displacement in 2017* <<https://www.unhcr.org/globaltrends2017/>> at 7., footnote 10: “The estimate does not include data from all countries, including three important asylum countries: the Russian Federation, South Africa, and the United States of America.”; UNHCR, *supra* note 9 at 41., footnote 67: “As some countries have not yet released all of their national asylum data at the time of writing, this figure is likely to be revised later this year. In particular, it should be noted that South Africa is yet to submit national asylum data.”

One service provider explained in relation to family file joinder delays: “we went to court, and then because of the closure of the Refugee Office in Cape Town, a lot of what they’re trying to do is say ‘we can’t properly determine these claims because we’re closed, we’re only doing backlog stuff’.”²⁴⁷ The frustration expressed by service providers with the failure of the DHA to properly affect joinder of family files – both David Cote and Corey Johnson used the phrase “almost impossible”²⁴⁸ – which would reduce the Department’s own workload, and the irony of the refusal to do so based upon the backlog is all the more profound given that the Department’s own analysis of the 2017 asylum statistics concludes that family joinder represents a significant portion of the country’s meagre recognition of refugee status. The 2017 Asylum Statistics Report states:

Analysis of the 2017 Refugee Status Determination (RSD) decisions shows an inclusive rejection rate of 92% with a total of 25 713 rejected cases against an approval rate of 8% with a total of 2 267 approved cases.

Included in the approvals is 1 788 cases flagged as possible family joining or reunification, this may result in the approval rate being artificially inflated.²⁴⁹

In relation to the government’s statements on the backlog, the LHR program manager roundly criticised the numbers and the xenophobic logic she perceived behind their use:

The backlog can be anything between 200 000 people waiting to get their status determined, or the figures that the DHA gives which is 1 million. Which is just unfounded; which is contributing to the fear and to this impression that we’re overflooded with all these asylum seekers coming to rig our system. But in reality it’s not ... it’s a smaller figure. It’s much smaller than what Kenya is dealing with, what Uganda is dealing with. And we definitely have the capacity to manage those numbers. And we have the resources to provide urban based integrated support and protection. And so, the [planned] policy is, because all these people are coming in at this point in the country,

²⁴⁷ Johnson, *supra* note 193.

²⁴⁸ Cote, *supra* note 32; Johnson, *supra* note 193.

²⁴⁹ Asylum Seeker Management, Immigration Services, *supra* note 19 at 29.

they're abusing the system, so we're going to deal with the backlog and then we're going to move everything to the border²⁵⁰

Another service provider highlighted how the largest government asylum numbers are inclusive of mostly inactive files:

Now the Green Paper has some interesting figures in it; so they say that there are over a million asylum seeker files with the Department of Home Affairs but of those only 79 000 are active. So the numbers are very, very difficult to determine who we have in the country and who they're planning for as well. And of the 119 000 recognised refugee files, there are 96 or 97 000 that are still active. So the numbers are actually quite small when you look at it that way, but we have to take those barriers into consideration; – so the barriers to people who have come in who have through corruption not been allowed to renew their permits because they didn't pay a bribe, other people who allowed their permits to expire – they have to pay fines before they can be allowed to renew again, and that fine, at least in Pretoria, is R1000, so that's quite expensive. In Cape Town, it's around R3000, so it's very inconsistent. And so with those barriers it's really hard to say what the accurate figures are because 75 000 active files does not take into account the 71 000 people who applied last year [2015], so it's really hard to say what the numbers are. But at least we get a bit of insight that way.²⁵¹

Amnesty International has made a call for better data a central aspect of their recommendations to the South African government:

...our call for accurate research and data, especially around statistics... because there has been quite a contestation between NGOs that work in the migration centre and the Department of Home Affairs itself as to the accurate number of refugees and asylum seekers that we actually have in the country. So, some have argued that they seem to inflate their numbers and it then causes this panic and this uncertainty among South Africans who then say 'there are so many refugees, there's a sudden influx' so to speak and yet independent researchers have given a different story to say actually, research shows we don't have that high a number of refugees in the country. So it's very important to get the accurate data.

It's important to know exactly 'how many people do you have in your country' 'where are they from?' and so on rather than these inflated numbers. So that's another concern

²⁵⁰ Ekambaram, *supra* note 215.

²⁵¹ Cote, *supra* note 32.

that we raise in the [submission by AI on proposed legislation] paper. And I mean, having accurate research and data will actually assist government's vision.²⁵²

The backlog thus appears as a self-imposed Sisyphean task which usefully allows the DHA to throw up its hands under apparently insurmountable pressures. The backlog itself politically necessitates inflated data, by way of excuse, and in turn appears to support such data as indicative of the volume of claims.

As regards identifying polygynous or queer refugee women from within the available government data, this is rendered impossible, beyond their likely existence within a general number of women in the system, by a lack of specificity. The two study groups would require a very different level of depth of data, and different data to one another to have any official presence. Whereas queer women may present a sexual orientation-based persecution grounds for applying for asylum – and there are a great many factors dissuading them from doing so, discussed further in this dissertation – the government statistics do not provide a grounds-of-claim breakdown of asylum application numbers. Polygynous women, on the other hand, do not necessarily experience their relationship form as an element of the persecution they flee. Instead, they might acquire statistical visibility from within asylum data through information on family joinder which demonstrated plurality of spouses. However, only raw numbers of accepted 3(c) claims – that is, refugees recognised by virtue of being a dependent of a recognised refugee – is brought up in one government paper with no age or gender breakdown to demonstrate whether the files are of wives, husbands or children and certainly not whether they may be from plural wives.

²⁵² Mfaise, *supra* note 213.

There is thus only anecdotal evidence on the situation of queer refugees, even those who may make an application for asylum grounded on sexual orientation-based persecution. When it comes to trying to identify women within the queer refugee subgroup, even anecdotal evidence is fleeting as queer women do not appear to present themselves as queer either to service providers or within LGBT support groups. Similarly, it is only through experience and social-mobility expectations that one assumes many of the family joinder cases are of women joining already recognised male partners. There is no way to know where there may be polygynous families in the system based on official data and even anecdotal data is largely absent beyond the very rare occurrence of a polygynous family seeking resettlement as an intact family group (see the discussion in Chapter 4). Even in ideal circumstances of thorough data breakdowns, polygynous refugee women are particularly likely to be statistically invisible as a group in any host country, given that applications may be made separately rather than as a family, wives may not necessarily arrive after their husband and wives and husband may still be in different countries. Much more than statistics, both groups had a multitude of factors which rendered them invisible, as such groups, to legal, health and social service providers, discussed further in this work. Women appeared left out of the network of ‘LGBT’ groups and polygyny amongst refugees seemed to be a question unasked by service providers.

Taking this absence of official data on polygynous and queer refugee women as reflective of a lack of significance for the groups to those in power (as suggested by Merry’s take on data as cultural document)²⁵³ guides an understanding as to how statistical invisibility can engender expectations of absence, limiting research, policy-making, and even the creation of appropriate safe spaces and services. An ORAM report on a global survey of NGO attitudes towards LGBTI

²⁵³ Merry, *supra* note 12 at 107.

refugees and asylum seekers discusses the ‘Hazards of the ‘Blind’ Approach – Protecting the Unmentionable’:

In the open-answer portion of the online survey, many respondents vented frustration about the survey’s focus on LGBTI needs, insisting that sexual orientation and gender identity are irrelevant to the work they carry out. Many seem unaware that ignoring a refugee’s sexual orientation or gender identity is likely to compromise his or her protection needs ...

It is perhaps self-evident that only service providers who are aware that their clients are LGBTI can provide targeted and appropriate support. Equally important, if staff members fail to outwardly express support for LGBTI people, LGBTI refugees, often traumatized by the discrimination they have already faced, will find it difficult to come forward and self-identify. Because LGBTI asylum-seekers face unique obstacles and perils, refugee-service providers who are unaware of sexual orientation in handling LGBTI cases may fail to adequately address the needs of their clients. For example, placing a gay refugee in homophobic housing may imperil his safety and impede his successful integration. Failure to acknowledge the specific medical needs of a transgender woman may result in deterioration of her physical and mental health.

... many LGBTI refugees are afraid to self-identify. Thus, the more a refugee believes that the service provider conducting the intake is unaware of what it means to be LGBTI, the less likely the refugee is to reveal his or her identity. In turn, the fewer LGBTI refugees who reveal their identity to NGO staff, the weaker the staff’s understanding of the needs of these highly vulnerable refugees.²⁵⁴

For those researching refugee law in South Africa, particularly ‘fine-grained’ subtopics, understanding the South African asylum system beyond a superficial, official version is complicated by the actual, sometimes policy-contrary, implementation of asylum processes, limited and inaccurate data and a system overburdened by its own backlog. Reaching beyond these data and implementation discrepancies, as regards the refugee laws in effect, this confusion is abetted by an apparent legislative quagmire, outlined below.

²⁵⁴ Grungras & Hughes, *supra* note 110 at 20–21.

South Africa ratified the UN Refugee Convention in 1996, signifying an important post-apartheid shift towards the international community, international human rights protections and towards the African continent and the continent's refugees within South Africa. The Refugees Act of 2000 was thus the country's first refugee legislation, and provided a solid foundation for the recognition of refugees and provision for their rights and protection in an integrationist, free-movement rather than camp-based system. One service provider, however, described the Regulations to the Refugees Act as an attempt to backtrack the more progressive Act:

The interesting thing about the background to refugee law here, is that the 1998 Refugees Act was a great piece of legislation, it was meant to really reflect our obligations under International Law. There was a lot of consultation that went into it with a lot of civil society and blah blah blah. The Regulations, however, were used to damper down the progressive Refugees Act and there was no, not a lot of consultation that went into the Regulations.²⁵⁵

The political climate in South Africa has become increasingly xenophobic and refugee legislation has been in a state of flux over the last two decades since the Refugees Act was promulgated. Confusingly, two significant Amendment Acts, in 2008 and 2011, were publicly consulted on, went through Parliament, were legislated and enacted but never brought into force until 2020.²⁵⁶ The effect of these amendments and an understanding of what the refugee law was has been a cause for confusion amongst practitioners as well as officials.²⁵⁷ These Amendments were not proclaimed (and thus not brought into force) for 'technical reasons'; it was understood

²⁵⁵ Cote, *supra* note 32.

²⁵⁶ Department of Home Affairs, *Regulations to the Refugees Act, 1998* (Regulation Gazette, No. 6779, General Notice R. 366, 2000). (hereafter "**the Regulations**"); Department of Home Affairs, *Refugees Amendment Act, 2011 (Act 12 of 2011)* (GG vol.554, no.34560, 2011). Department of Home Affairs, *Proclamation: Refugees Amendment Act (33/2008) Commencement; Refugees Act, Refugees Regulations* (Government Gazette, Regulation Gazette no.11024, vol.654, Proclamation no.R60 of 2019, 2019). ("**the New Regulations**").

²⁵⁷ See further discussion in Chap 3.4

that this was because the Amendments were not accompanied by Regulations and could thus not be brought into effect.²⁵⁸

Significant for the research conducted in this study, which involved field work interviews conducted in 2016, contradictory definitions of ‘spouse’ were found in the Regulations to the Refugees Act of 2000 and the Amendment Act of 2008. The Regulations to the original Refugees Act, in force since 2000, define: “‘**spouse**’ … [as] the party of the opposite sex to whom that person is joined in marriage”.²⁵⁹ The amendment to the Refugees Act, which was assented to in 2008 but remained dormant for over a decade, creates a new definition for both “spouse” and “marriage” which would include same sex and plural partnerships.²⁶⁰

'spouse' means a person who is a party to—

- (a) a marriage as defined in terms of this Act; or
- (b) a permanent homosexual or heterosexual relationship as prescribed;

'marriage' means—

- (a) either a marriage or a civil partnership concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006);
- (b) a marriage concluded in terms of—
 - (i) the Marriage Act, 1961 (Act No. 25 of 1961); or
 - (ii) the Recognition of Customary Marriages Act, 1998 (Act

²⁵⁸ Johnson, *supra* note 193; Cote, *supra* note 32.; see also the *Department of Home Affairs Annual Report 2013/14: Vote No.4* at 40: “the priority in the reporting period was to develop and gazette regulations that allow the implementation of Acts that were amended between 2007 and 2011. These were the Immigration and Refugees Amendment Acts and Regulations” and yet, as evidenced by the report itself at p.47, this was not accomplished: “The department is still working on the amendments to the Refugee Regulations in order to bring into operation the Refugees Amendment Act, 2008 (Act No. 33 of 2008) and the Refugees Amendment Act, 2011 (Act No. 12 of 2011), respectively”.

²⁵⁹ Department of Home Affairs, *supra* note 256.

²⁶⁰ Department of Home Affairs, *supra* note 35.

No. 120 of 1998);

(c) a marriage concluded in terms of the laws of a foreign country;

or

(d) a marriage concluded in terms of Islamic or other religious rites;²⁶¹

These additions appear to have been kept intact by the Amendments of 2011, which were also enacted but never proclaimed.²⁶² A thorough domestic campaign for same-sex marriage rights and sexual orientation equality saw the South African courts prompt new readings of ‘spouse’ throughout different legislation to ‘read in’ same sex relationships, leading up to the legislation of same sex unions.²⁶³ It is therefore surprising that in the case of the country’s refugee law, this has meant an unconstitutional definition of monogamous, opposite sex spouses has theoretically been the law in effect for two decades, whereas an updated definition which made room for plural, customary and same-sex relationships has been in limbo until 2020. The apparent failings at the legislative level, had significant impact for this study and for the understanding amongst service providers of the family and protective rights for the study groups, adding a further difficulty for any attempt at advocating for socially ostracized people already ‘unseen’ in the data and falling within a legal lacuna.²⁶⁴

The decade-dormant 2008 Amendment Act was finally brought into force by a proclamation accompanying new Regulations which was published on 27 December 2019 and came into force

²⁶¹ *Ibid.*, Section 1, (xii); (xxi).

²⁶² See Department of Home Affairs, *supra* note 256.

²⁶³ A summary of the judicial work done in relation to same-sex life partnerships, prior to their legislation, can be found in *Minister of Home Affairs and Another v Fourie and Another*, [2005] 19 ZACC .at paras [51]-[58].

²⁶⁴ See further discussion in Chap 4.4

on 1 January 2020.²⁶⁵ After such a long delay, the rushed timing of the Government publication of this proclamation and new Regulations, right over the holiday period, when much of South Africa shuts down between 15 December and 3 January would have caught most by surprise. As with the previous Regulations, the new Refugees Act Regulations would not have undergone the same consultation process as the underlying Amendment Act legislation and appear to go substantially beyond ‘regulating’ the Act but work to introduce new and substantial restrictions, again working to practically ‘dampen down’ any progressive elements of the 2008 Amendment Act. Particularly worrying is the introduction, within the new Regulations of a new discretion as regards asylum seekers’ rights to work and study which had previously been considered constitutionally protected.²⁶⁶

Whilst the introduction of “integrity measures” appear to be an attempt to address the rampant corruption within the asylum process, the new Regulations appear to give legislative force to many of the existing abusive practices, such as the requirement to “show good cause” for illegal entry and stay in the Republic prior to being permitted to apply for asylum where they do not possess a section 23 transit permit and the blatantly punitive one month asylum seeker visa (rather than a 6 month permit, as legislated in the Refugees Act) given to those who are awaiting judicial review of a rejected asylum application.²⁶⁷ The requirement to keep returning to the same RRO is now spelt out, as is the binding nature of an asylum applicant’s written application (discussed further in Chapter 4.4), making things particularly difficult for applicants who do not declare all of their minor children in an application; requiring in this instance paternity tests or

²⁶⁵ Department of Home Affairs, *supra* note 256.

²⁶⁶ See the Constitutional Court affirmation of this right at paras. [107]-[109] in *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others*, [2006] 23 ZACC .

²⁶⁷ Department of Home Affairs, *supra* note 256. Regulation 8(3), 12(3).

the removal of the child under the care of social services.²⁶⁸ Tellingly, the instructions given to RSDOs in the new Regulations require that officials: “In deciding the application, the Refugee Status Determination Officer— (a) must test any claim made by an applicant for asylum against any information, evidence, research or documents at the disposal of the Refugee Status Determination Officer”²⁶⁹, leaving instructions as to fair proceedings to the Act itself, with no mention of a shared burden of proof or benefit of the doubt requirement.

The proclamation means that, as of 2020, the definition of ‘spouse’ should now be clearer, and substantially broader, in South Africa’s refugee law. The new Regulations create stringent requirements for establishing the ‘authenticity’ of marriages (Reg.2) and of permanent heterosexual and homosexual relationships (Reg.3).

The new Regulations, as contrasted with the 2008 Amendment Act, both in the differentiated consultation processes and the conflicting anti-immigration / refugee-rights rhetoric and rationale, evident therein, seem to exemplify South Africa’s attempt to be seen as rights progressive yet adopt highly restrictive practices. The new Regulations have come under fire particularly for their politically oppressive limitations on refugees, who are prohibited from engaging in politics or voting in their country of origin under threat of withdrawal of their refugee status; these activities are inappropriately defined in the Regulations as indicating a refugee has re-availed themselves of the protection of their home country.²⁷⁰ When the Minister

²⁶⁸ *Ibid.* Regulation 8(6), 8(9) and 12(8).

²⁶⁹ *Ibid.* Regulation 14(6).

²⁷⁰ *Ibid.* Regulations 4(g) 4(i); see the criticisms raised in Abu-Bakarr Jalloh, “South Africa: New refugee laws ‘target political dissidents’ | DW | 08.01.2020”, online: DWCOM <<https://www.dw.com/en/south-africa-new-refugee-laws-target-political-dissidents/a-51933065>>; Nation Nyoka, “Amended Refugee Act restricts fundamental rights”, (19 January 2020), online: The Mail & Guardian <<https://mg.co.za/article/2020-01-20-amended-refugee-act-restricts-fundamental-rights/>>; Press Release Freedom House, “South Africa: Authorities Must Improve Treatment of Refugees and Asylum Seekers”, (14 January 2020), online: Freedom House

responsible for the Regulations, Home Affairs Minister Aaron Motsoaledi, was rebuked with the irony of compelling such political abstention from refugees, given the role of South Africa's exiled anti-apartheid heroes, his response indicated at once contempt for refugees, a refusal to understand our history on the continent and ignorance of contemporary human rights abuses in Africa: "The ANC people who lived in countries did not go there to say: 'I am a refugee, just protect me'. They went there and said I am a freedom fighter ... We are talking of countries that sit with us at [the African Union], sitting together to resolve some of these problems. ... Countries that have been democratically elected... you might not like them, you might not like their economy, their principles, but the fact is that they were democratically elected in an election that was supervised and passed by international organisations," Motsoaledi is reported as saying. Furthermore this abuse of political freedom is justified under the rubric of xenophobic propaganda regarding supposed security concerns of politically active refugees.²⁷¹

Seeing the direction of the country's immigration and refugee policies, prior to the new Regulations coming into being, two Black female service providers expressed their sorrow and sense of betrayal of post-apartheid principles in South Africa's xenophobic turn:

Yolisa Mfaise commented:

Even outside my experience at Amnesty, the refugee asylum seeker migration focus area, is an extremely sensitive one, in the sense that we unfortunately as a country have been known to be quite xenophobic. You recall with the 2008 and 2015 attacks. Not that other attacks didn't happen in between but those were the major ones. So, in a country like ours, with the way we've seen those kinds of attitudes coming up, on a policy or legal framework front, the government has...we have the existent Refugees Act, which has

<<https://freedomhouse.org/article/south-africa-authorities-must-improve-treatment-refugees-and-asylum-seekers>>.

²⁷¹ Tshidi Madia, "ANC members were freedom fighters, not refugees - Motsoaledi defends changes to refugee laws", (9 January 2020), online: *News24* <<https://www.news24.com/news24/southafrica/news/anc-members-were-freedom-fighters-not-refugees-motsoaledi-defends-changes-to-refugee-laws-20200109>>.

been commended as one of the best. It gives protection to refugees in ways that other countries are still lagging behind. You have our Constitution which obviously is the corner stone of our legal framework which also gives protection to everyone who's in the country and ensures certain social economic rights to every person who's in the country. And what we are now seeing, is sort of a move by government to...I don't want to use 'shift away' but to...try and introduce amendments which will then compromise the protection that refugees and asylum seekers already enjoy"²⁷²

Sharon Ekambaram was more blunt in her criticism and further lamented a rise in xenophobia which effectively returned to a (capitalist rather than apartheid induced) Anti-Black African position:

I cannot understand, given our past, given the way in which the entire, all our policies right up to this current green paper on international migration, has been the first to try and actually get rid of all the apartheid laws around immigration, around migration, which was very much framed on race. So you have the Aliens Act, you have all those [Acts where the] objective was to keep black people out and to encourage rich white people to come to the country. Now what I feel the changes are, is to encourage rich people to come in, people with skills, and to keep really poor people, and those just happen to be black people [out].

Ekambaram attributed this anti African-xenophobic turn to a continued failure to understand South Africa's history and place on the continent:

And the shift, and I suppose it's disingenuous to use the whole thing around "taking our jobs" and this and that; "they're coming in and abusing the system", and it's all very schizophrenic. Because there's no clear analysis of what's happening in Zimbabwe. There's no clear analysis and understanding of what's happening in the DRC, what forced people to come to our country. It's just for me, I find that quite sad that people are not giving that more thought. South Africans are not giving that reality...and it may be that apartheid has isolated us so much, a bit like America. Not many South Africans have travelled into the continent. We don't see ourselves as part of the African continent. And all of that plays into them buying this propaganda that the Department of Home Affairs spews.²⁷³

A similar xenophobic trend has been identified in South Africa's immigration and citizenship legislation, running parallel to as well as informing South Africa's refugee legislation and

²⁷² Mfaise, *supra* note 213.

²⁷³ Ekambaram, *supra* note 215.

implemented by the same governmental department, the DHA. Christine Hobden in a 2019 paper “argues that since 1995 there has been a slow but steady move to restrict access to Citizenship through the legislative amendments of 2004, 2007 and 2010 and the Department of Home Affairs’ unduly restrictive interpretations of the law in formal regulations and policies. The evidence suggests an agenda of ‘shrinking the state’ or, at the very least, an inclination to keep South Africa for South Africans.”²⁷⁴

3.2.3 Edge of frame: how the asylum system applies to queer and polygynous lives

Whilst special efforts, particularly focused on the subsequently defunct RAB were made in relation to improving the adjudication of queer refugee claims, many of the systemic failings identified in this discussion have particular or exacerbated effects on the study groups of polygynous and queer refugee women.

The various barriers to access which pervade the South African asylum system have, in many instances, gendered effects or particular consequences for queer refugees. Rampant corruption has a gendered effect spinning off the gendered economics of patriarchal systems which means women may have fewer resources to pay bribes. A gendered paucity of resources can be exacerbated by gendered forms of corruption; one service provider commented that where men would be asked to pay bribes, women are expected to trade sex for services to which they should normally be entitled:

And part of our work also involves an HRE component; so human rights education component to it. And we’ve just undertaken a project where we are conducting training

²⁷⁴ Christine Hobden, “Shrinking South Africa: Hidden Agendas in South African Citizenship Practice” (2020) 47:2 Politikon 159–175.

workshops with various migrants, refugees and asylum seeker groups in the country. The first one we did was in Gauteng, and during the course - it was with women migrants and asylum seekers in Gauteng, as a way of empowering them about their rights but also most importantly so that they will be able to enforce those rights ... in the course of the trainings, we handed out a questionnaire we had designed to try and get the information that we needed. And what's come out, I guess it's much to be expected: they raised issues of challenges around when they are actually in transit from whatever country to South Africa. So the vulnerability that women face. Issues of rape along the way, issues of having to exchange sex for transportation into the country, issues of having...I could say issues of sexual harassment and rape came out at the top. Because even some allegation, and of course this has not been tested, it's just from the questionnaire, but some of the allegations are around having to use sex in exchange for whatever services they should be receiving. So the argument is whilst their male counterparts will pay bribes, pay to receive services, they found themselves having to use sex in exchange for those.²⁷⁵

Another service provider argued that institutionalised xenophobia also had particular effects on women who are socially more likely to have to negotiate with bureaucracies and health providers. This service provider outlined how suspicion and contempt for foreigners ran throughout South Africa's public service sector:

There's definitely a horrible feminization of people fleeing. I mean if I have to reflect on how, just going back to HIV and AIDS, I think again its women that have to deal with the bureaucracy in the country. So, its women that have to go and negotiate with...for me the concentration of institutional xenophobia is the Department of Home Affairs. So, the entire way in which they are engaging with people seeking asylum is the presumption is that: you are wanting to exploit the system and I'm going to exclude you. And so: hostility and anger and contempt. And we find a similar situation when it comes to education and it comes to health. Where foreign nationals are presumed to be exploiting the system; and it's even though our Constitution guarantees access to education, access to basic health services.²⁷⁶

Not only are women more likely to have to interface with these public services but their poor treatment within the education and health systems have particularly negative consequences for women:

²⁷⁵ Mfaise, *supra* note 213.

²⁷⁶ Ekambaram, *supra* note 215.

... it's the women that bear the brunt of the severity of the way in which they're treated. Just the point of indignity. I think it really; it's greater disrespect for women's human dignity than for men because generally in society men are more respected than women. But also we know from the way that society ... the inequality, is that the women are normally going to school to get their kids in school, or women are the protectors in the family and there's a very...maybe you need to speak to Section27²⁷⁷, their following on women and pregnant women, and their experiences in public health is atrocious. It's just beyond believable. The conditions that they... just giving birth, and how they're treated by the healthcare workers, simply because they're foreign nationals. And so the xenophobia comes out there as well.²⁷⁸

In the case of polygynous women, the arbitrary and ad hoc approach to family file joinder – discussed further in Chapter 4 – can be expected to have particular consequences. The apparently hostile attitude towards more complicated families who do not present as a single unit, at the time of initial application, with all family members fully and properly listed in the application form and present for corroborating interviews, has implications for many refugee families who may be decimated, scattered and confused by the violence they flee. The additional layer of complication added by polygynous families as well as the unexpectedness of queer families (discussed further in Chapter 5.4) means a government approach negatively affecting the rights and resilience of refugees in South Africa is likely to be a burden on these groups.

The very poor quality of first instance decisions and the tendency to rely on country of origin data to stand in for an actual, applicant-specific assessment of asylum as well as a country-of-origin based interview schedule create particular hurdles and even dangers for persons fleeing sexual-orientation based persecution at the hands of their co-nationals.

²⁷⁷ Section 27 of the South African Constitution guarantees the right to access health care, food, water and social security. From their website: "SECTION27 is a public interest law centre which seeks to achieve substantive equality and social justice in South Africa. Guided by the principles and values in the Constitution, SECTION27 uses law, advocacy, legal literacy, research, and community mobilisation to achieve access to healthcare services and basic education" see "Home", online: *Section 27* <<http://section27.org.za/>>.

²⁷⁸ Ekambaram, *supra* note 215.

The stories that we've heard through that research project is just that people are so intimidated at the prospect of going back, so sometimes they would just let their permits expire. Because they felt like the first experience they'd had there was so negative. You know the thing with the security, right? You won't even get into the fucking building because you're not from a designated country. And then you have to disclose 'oh I'm here because of sexual orientation'. And then you're revealing your sexual orientation in front of a whole queue of people and you're putting yourself at risk, so people felt so overwhelmed by that whole story, that very often even if they started off with some kind of right to be in the country, they would let that expire because they just felt so overwhelmed and intimidated by the prospect of what needed to happen next.²⁷⁹

The overall poor first instance decisions are compounded by a defunct RAB for all asylum seekers. This may have disproportionate effect for queer applicants who may have complicated and nuanced asylum cases, of which the RSDO has demonstrably poor understanding, and who may be hesitant to disclose their real reasons for flight at a first interview. Queer refugees are thus especially likely to be negatively affected by a lack of a working appeal body and the indefinite limbo in which they have to wait (and continue to make expensive and dangerous travel to renew temporary asylum permits) for a decision. A refugee advocate explained:

It's frustrating because the Appeal Board is so backlogged we've only had five people have their appeals heard in the last two years at least. I might say three years actually. Five people. In a two year period. So, what that means in these cases of LGBTI refugees being rejected, they're just sitting there. There's no movement. And I don't have any conclusive...there's no finality to it. It's just hanging and pending and it's like that for years.²⁸⁰

In an email update to his interview, two years later, the advocate commented: "The 5 RAB hearings we managed to secure in 2016 – those guys are still awaiting decisions on those hearings as of now."²⁸¹

²⁷⁹ Shelver, *supra* note 216.

²⁸⁰ Johnson, *supra* note 193.

²⁸¹ Corey Johnson, *RE: PhD researcher follow-up from previous interview* (2018).

Similarly, the closure of the Cape Town RRO likely had disproportionate impact upon queer refugees because of a sense of more safety and community in Cape Town city which draws many queer persons, and queer refugees to the ‘pink city’. Most refugee interviews conducted for this research were conducted in Cape Town, many of the queer refugees reported they were drawn to Cape Town because of its reputation as a gay friendly city or because they perceived they could create a queer support network there. Most also discussed the implications of the closure of the Cape Town office as either making asylum applications impossible or very difficult for them (see further the discussion in Chapter 5.3).

Let me give you a very good example from the needs assessment. We targeted 200 from the LGBT community. But in Cape Town alone I managed to get, I think 70, from Cape Town. And that 70 I think I got within two weeks. ... and that's an assurance to say a lot of LGBT community in Cape Town. And after interviewing them why did they choose to come to Cape Town rather than...Durban, they answered that for them, Cape Town is more welcoming, it's more safe than to stay in Joburg. While those who are in Joburg, that are in the [LGBT] community, they say, ‘no Cape Town is more safer than Joburg but there is no money in Cape Town compared to Joburg, that's why we are in Joburg’.²⁸²

It is likely a combination of the very poor refugee acceptance rates in South Africa generally and the compounded vulnerabilities impacting queer refugees attempting to engage the asylum system that several service providers reported almost all queer clients were without asylum papers or on temporary asylum seeker permits with few or no recognized refugees (discussed further in Chapter 5). Indicative of how enduringly problematic the asylum system is for queer refugees, the advocate for the Coalition of African Lesbians said: “in terms of do I know anyone who’s been successful [at obtaining refugee status on grounds of sexual orientation]? So the only people I know have actually moved on to other countries”.²⁸³

²⁸² Victor Chikalogwe, *Interview with Victor Chikalogwe, LGBTI Project Coordinator, Passop* (2016), Cape Town.

²⁸³ Shelver, *supra* note 216.

Perhaps the most shocking indictment of the South African asylum system emerges from within one of the very few stories from service providers with lesbian refugee clients. These clients had apparently attempted to engage with the asylum system, applying for asylum and, what is more, doing so based upon their sexual orientation-based experience of persecution. Based on email communication with a Lawyers for Human Rights advocate, however, this was only done through their assistance; “In the past we assisted a lesbian couple from Burundi who was forced by the officer to declare they left their country for political reasons, because the interpreter would refuse to report their gender based claim, with obvious consequences on the credibility of the claim”.²⁸⁴ This couple repeatedly renewed their status while they awaited an outcome and apparently utilized a variety of non-governmental support services in an attempt to make a life for themselves, their story having come up in interviews with Lawyers for Human Rights, the queer support group coordinator at Holy Trinity and with a social services provider who also referenced their use of Centre for the Study of Violence and Reconciliation resources.²⁸⁵ Despite their following every requirement of a tedious asylum application process and the substantial effort these women had made in identifying and accessing support services, the anonymous social services provider explained that they had fled South Africa:

The other two ladies – they were staying together, they were a couple. So I think because of the pressure from the community, because they’ve been attacked several times and they had to move quite a lot, so I think they decided to just go out of the country. So we are not sure which country they are in, but they just sent an email to one of my colleagues to say they are out of the country. So we are hopeful that they are safe where they are. ... they were not resettled. They just went on their own.²⁸⁶

²⁸⁴ Federica Micoli, *Re: PhD researcher, request for interview* (2016).

²⁸⁵ Anonymous, *supra* note 222; Dumisani Dube, *Interview with Dumisani Dube, Head of LGBT Support Group, Holy Trinity Catholic Church* (2016), Johannesburg; Micoli, *supra* note 284.

²⁸⁶ Anonymous, *supra* note 222.

The social services provider located the reasons for their onward flight as harassment from within the community in which they had lived in South Africa and from the arbitrary treatment of the RRO:

... the two ladies ... had an asylum [seeker permit] that they had to go and renew every month. So they were always given one month, one month, I think that's one of the things that made them just give up and leave.²⁸⁷

Moreover, the social services provider revealed their story to be one of a complex family narrative:

Those two Burundian women, they are from Burundi, from back then they were, they were both lesbians but they tried to hide it from the community so much that the other one had to get married. And out of that marriage she had two kids with that man. But then people could see, no matter how hard they tried to hide it, they could see. So that's when they decided to just run to South Africa. ... So even when they came here, they had to lie to some people to say they are sisters. So people who knew them could just tell, no we know these ones, they are not sisters, they are a couple. So that will also raise concerns around the community. ... [The partner who had children] left them when they came, but then later on the kids joined them. So at some point they were also receiving counselling from CSVR [Centre for the Study of Violence and Reconciliation], so at some point they had to tell the kids. ... But to my surprise the kids were not, they took it well, they were not actually angry or whatsoever. And through that they also got counseling. So they were prepared for that and after the news ... the children had counseling themselves. So they accepted. Cause even when they got married, they were there on the wedding day ... they took the kids with. But we're not sure where they are exactly, 'cause they just said they had to go out of the country. But they are in Africa. That we're sure. But not back in their country of origin. So, I'm not sure what permit they are using there. And we haven't heard from them since they left. Because we were worried they were not coming to the offices anymore, but then they sent an email to say they are ok, they are out of the country and ok also.²⁸⁸

In indicating that they had not left the continent, it meant these queer women, together with their children had left South Africa to a neighboring country with fewer legal protections for queer persons. Every African country has fewer legal protections than South Africa, which is an outlier on the continent for sexual orientation equality. These women thus chose to move to what is very

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

possibly a hostile legal and social environment for queer persons. Although they were able to marry in South Africa, the road to refugee status and stability was made too difficult, implicating their safety in a very different way to on-the-books equality rights. Thus a queer couple able to take advantage of a host of non-governmental supports and of the legislated freedom to marry, who managed against the odds to maintain the unity of their family – all of which point to a privileged position unusual especially amongst queer women – felt compelled to give up on South Africa as a new home. The social reality in South Africa and the obstructionist asylum system were primary factors driving them out of South Africa.

This subsection has set out to describe the asylum system as presented in the legislation and as in effect and experienced in South Africa. The ways in which certain problems are particular to the groups under study as well as the way in which some generic problems have exacerbated effects for women \cup queer refugees have been highlighted.²⁸⁹ Thus while women \cup queer refugees do not appear to have been targeted by the South African asylum system, and indeed in the case of queer refugees some special efforts appear to have been made to cater for their differentiated needs, these groups have borne the brunt of a broken system with brutal effect. However, the predominant picture is one of a deeply flawed and exclusionary asylum system operated in a way which appears to decrease the likelihood of recognising or protecting *de facto* refugees in totality. The advocate for the Coalition of African Lesbians warned: “I think the thing is not to exceptionalize too much the experience of queer people, because I think pretty much the experience is shitty for everyone. And then this just becomes an additional expression of these

²⁸⁹ See the explanation for this symbol and its use here in the List of Symbols used at the beginning of this dissertation.

guys' homophobia. But it's not exceptionalized to queer people. Anyone trying to come in has a terrible time.”²⁹⁰

A duality has thus emerged in this presentation of South Africa's asylum system which gives the appearance of compliance with the international asylum regime, having the legislation and systems in place, though rendering them virtually unworkable. The blend of apparent confusion and incompetence displayed in the processing of asylum applications, the RSDO and RAB decision-makers' decisions, the limited and problematic data, through even to the turbulent governing legislation itself, is confusion and incompetence, with a purpose.

Several service providers hinted at an alternative line to the Government argument of an imposed impossibility of the asylum system, given the official numbers of asylum seekers and resource scarcity. The DHA was described by service providers as anti-refugee, xenophobic and purposefully oriented towards the rejection of refugees. “They're going to find illegal ways to come in if the official formal way is one of exclusion because that's currently; the whole objective of the adjudication process is to reject people. That's our statistics. And Musina [the land-border RRO]: 100% rejection rate. Not a single person has been granted asylum status since the beginning of this year.”²⁹¹

A litigation advocate explained that this anti-refugee policy was essentially a band-aid for ineffective border control.

What they don't talk about though is their ability to enforce trafficking, or the suspicions that there may be trafficking. The Department's ability to enforce; there are very few immigration officers, Jackie McKay, the head of the Immigration Directorate, says that there are more Immigration Officers in the City of London than there are in all of South

²⁹⁰ Shelver, *supra* note 216.

²⁹¹ Ekambararam, *supra* note 215.

Africa and because of that, they don't have the capacity to enforce and so their strategy for enforcement is through barriers to systems and unfortunately that does not really play out in a good protection policy, nor in a good enforcement policy, to be honest, because if you don't have people in the system you can't tell when they're going to come back and the entire system doesn't work.²⁹²

The program manager for Lawyers for Human Rights went on to highlight how official xenophobia, of which an anti-refugee asylum system is a manifestation, had become a standard fall-back means of deflecting criticism over a broader social service delivery failure of the post-apartheid government:

I think what we're struggling with is the way in which the social engineering that's taking place, where the Department of Home Affairs has, at the moment, because it's exploited almost to its maximum, the deep inequalities in our society, it has demonized foreign nationals, so that poor South Africans see them as a source of their problem and not the [government's] failure to implement policy. And it's really managed to do that to a very, very scary extent. And so, again, the daily lived experience of xenophobia, is shocking. It's just shocking. And that comes from the fact that it's being framed in a way which feeds that xenophobia. And I think a lot of it is not that people are stupid, but because of the difficulty of speaking out against a government that has liberated you.²⁹³

The gross neglect of the asylum system and its dysfunctions, illustrated in this chapter, are presented by the Government masquerading as benign incapacity. Thus while service providers may argue that all of the barriers, the systemic failings which render due entry through the asylum process and adequate decision-making near impossible, are set up as a poor stand-in for actual immigration enforcement and border protection, failure to make way within this labyrinthine system designed to reject applicants is in turn conceived of as indicative of dishonest applicants by the DHA.

²⁹² Cote, *supra* note 32.

²⁹³ Ekambaram, *supra* note 215.

A 2008 paper on South Africa's asylum system, based on large-scale survey data from asylum seekers, stated:

The principal finding is that South African officials often go out of their way to prevent asylum seekers from entering the system. This provides support for the argument the Department is beholden to an institutional culture of immigration protectionism. This assessment differs from conventional analyses of poor African performance of status determination which emphasize issues of corruption and institutional capacity.²⁹⁴

Rather than unintentional capacity and resource-based constraints, I argue that the systemic hurdles barring many from access to or the ability to successfully proceed through the asylum process are indeed intentional and serve a purpose. Systemic incompetence is used as a dissuasive technique to combat the so-called 'pull factors' that supposedly attract migrants of all kinds to South Africa. Although it may present differently, this is essentially a South African take on the appalling lengths to which many countries go to dissuade the entry of vulnerable people in need of protection. Unlike many wealthier host countries, South Africa does not have as distant, expensive to access or heavily controlled borders on which to rely. Thus where we see well resourced countries place their defences against the vulnerable as far as possible from their physical borders – letting migrants and refugees die at sea, in Libyan prison camps, fall into the hands of Mexican cartels – making full use of a non-entrée visa regime and totalitarian airline travel procedures and farming off asylum intakes away from North America, Europe and Australia, the very thorough failings of the South African asylum regime outlined in this chapter can be considered a purposeful mechanism in lieu of border control.²⁹⁵ Different techniques with

²⁹⁴ Darshan Vigneswaran, "A Foot in the Door: Access to Asylum in South Africa" (2008) 25:2 Refuge (0229-5113) 41–52 at 41.

²⁹⁵ On non-entrée regimes see James C Hathaway & R Alexander Neve, "Making international refugee law relevant again: a proposal for collectivized and solution-oriented protection" (1997) 10:Journal Article Harvard Human Rights Journal 115 at 120.; Footnote 8 crossreferences the development of the concept of *non-entre* policies ("the refugee shall not access our community") in James C. Hathaway, *The emerging politics of non-entre*, 91 REFUGEES 40-41 (1992)."

a shared exclusionary purpose play to the particular asylum system's perverse strengths, whether it be expense of access, geographical distance or bureaucratic incompetence.

While status determination processes and procedures in Africa have usually departed significantly from “best (and worst) practices” in the Global North, countries on the continent have taken a similar turn towards more limited access. However, the provisions and procedures utilized by African states towards this end have differed from European, Asian, and North American counterparts.²⁹⁶

More work on a greater variety of host countries, facing greater volumes of refugee flows with fewer resources, is likely to produce insights on new ways to exclude being employed by differently positioned countries. The exclusion of vulnerable people from borders and from asylum systems represents an attempt to pre-emptively exclude the application of refugee law, it is thus important that such techniques aimed at denuding refugee protections be exposed and engaged with by refugee law scholars. The perspectives and experiences which are at once necessary to an understanding of refugee law, as applied, internationally, yet are largely missing from a Western-host bias in the study of refugee law is discussed further in the next chapter and advocated for throughout this work.

²⁹⁶ Vigneswaran, “A Foot in the Door”, *supra* note 294 at 41.

Chapter 4: Western Hosts and Southern Ghosts

The following two chapters demonstrate how a set of commonplace and yet unremarked false assumptions in the study of refugee law snap into focus through the prism of certain refugees' lived experience. The flawed premise predominant in much refugee law scholarship and in asylum decision-making revolves around the presumptive characterisation of refugee host countries versus countries of origin. Host countries are understood in asylum adjudication and host country politics to be benevolent, progressive and rights affirming. Whereas many refugee law writers critique these assumptions of superiority and reveal the multiple shortcomings of the Western hosts they study, particularly with reference to gender claims, perhaps the most unexamined assumption, replicated in much refugee law scholarship, , is that the 'host country' is exclusively located in the developed world, or 'the West'. This latter assumption is causally looped into the study of the application of (international) refugee law; primarily the case law of select, developed, wealthy countries, often geographically isolated from points of conflict and countries of origin is studied: the EU, Australia, New Zealand, Canada and the US. Whereas 86% of the world's refugees are in the developing world, these select countries of study numerically host a very small percentage of the world's refugees, yet become reified as representative and constitutive of the label 'host'. The countries of the Global South, or Majority World, which hosts the bulk of the world's refugees and thus is the locale for the greatest application of refugee law in the international arena, are counterfactually relegated not-a-host labels, such as 'country of transit' - even when in fact only a tiny percentage of refugees transit through these countries, most remaining long term in their Southern host. The Global South is rather identified as only the source of refugees such that the 'country of origin' label in this false

host/source binary is contrarily defined as malevolent or at best negligent, regressive, rights abusing and located in the developing world.

I have termed this collation of host/country-of-origin scholarly assumptions a West-as-host presumption. The following two chapters raise the significance of a West-as-host presumption for (mis)understanding some of the most vulnerable and least mobile refugees, particularly socially ostracized women, whose experiences and needs are substantially missing from an imbalanced discussion of refugee law. My study purposefully sought to unveil the cultural narratives constructed around women whose intimate lives did not fit to a heteronormative, monogamous model and identify how this affected their placement in the legal refugee system. In order to highlight the workings of the geographically-normative binary of refugee protector, Western host and refugee producer, Southern country of origin, I sought out accounts of both sexual minority women and polygynous women.²⁹⁷ The predominant finding, however, was that even in the unique conditions of South Africa's legal environment, wherein both polygynous and same-sex marriages are recognised, these women are largely undiscoverable in the asylum system and absent from the view of service providers. As an exercise in signifying and analysing meaningful silences (see the discussion in Chapter 1.4.5), this research thus does not serve to give these women voice but rather to expose their silence.

The rights and partnerships of sexual minority women are recognised based on a framing of the legal recognition as Western-progressive as opposed to the rights and partnerships

²⁹⁷ The term 'polygyny' is preferred here. Though less common than the term 'polygamy' it is more accurately gendered; polygamy refers to a marital relationship with multiple spouses, polygyny, however, is the proper term to refer to a marital relationship with one husband and more than one wife. The term polyandry refers to the much rarer practice of one wife with more than one husband, which is scarcely practiced in very few communities in the world. The relevant South African legislation as well as the International Law women's rights provisions, whilst using the term 'polygamy', in fact exclusively refer to the practice of polygyny.

of polygynous women, which are predominantly recognised based on a framing of the legal recognition as Southern-traditional.²⁹⁸ The spatial-political alignment of the legal recognition of these irregular family forms obviously runs along the same geo-political borders as the West-as-host primary assumption and so the othering narrative that becomes transferred onto an already-foreigner refugee figure is especially potent.

Discussed previously in the methodology section of Chapter 1, my fieldwork consisted of a total of 27 interviews in South Africa, seven of the interviews were conducted with queer refugees: six men and one transwoman. It is a stark indicator of the invisibility of the women under study that neither sexual minority women nor polygynous families were available for interview during my field work. It is my intention, however, to turn the critical gaze on the representation and understanding of these ‘others’ within the bureaucratic administration and legal and advocacy organisations in an examination as to why they seem to be ‘missing’. I make use of comparisons with accounts of polygynous refugee men and with accounts of and by queer refugee men to contrast a potential presence of women, thus dissecting the meaning of their absence.²⁹⁹

South Africa occupies a complex location in the geo-political landscape, having an apartheid-era history of attempted divorce from its own continent, now trying to find its place; at once the

²⁹⁸ Whereas I have identified here a geopolitical purported progressive versus traditionalist divide in support of sexual minority rights, when it comes to gender identity, there are different nuances at play. It is interesting to note, that the most robust legal recognitions granted to gender non-binary persons appear to have arisen not from within the Western-progressive ideological framework but by reference to traditional cultural identities and histories that acknowledge a ‘third gender’ in East Asia. Whereas trans persons continue to face difficulties in matching their official documentation gender designation to their preferred gender designation as well as continuing problems in accessing appropriate gendered facilities from toilets to prisons in the developed West, a ‘third gender’ has been legally recognized in India, Nepal, Bangladesh and Pakistan and language-specific understandings of gender plurality have long histories in much of South East Asia. Homa Khaleeli, “Hijra: India’s third gender claims its place in law”, (16 April 2014), online: *The Guardian* <<https://www.theguardian.com/society/2014/apr/16/india-third-gender-claims-place-in-law>>; Sharon Graham Davies, “The West can learn from Southeast Asia’s transgender heritage”, (12 June 2018), online: *Aeon* <<https://aeon.co/essays/the-west-can-learn-from-southeast-asias-transgender-heritage>>.

²⁹⁹ Schröter & Taylor, *supra* note 49.; see the discussion in Chapter 1.4.5.

economic powerhouse of Africa yet with an interloper-complex, wanting to retain its economically-driven relationships whilst attempting to heal its cultural self-understanding in relation to its global sense of place.³⁰⁰ South Africa struggles with unparalleled inequality: with citizens living in the epitome of both first world luxury and third world deprivation. South Africa is by no means ‘representative’ of the host countries of the Global South. It is not the ‘most Southern’; understood as the least developed country. South Africa is an exceptional top-tier developing country with a unique history. The ‘Global South’ cannot be depicted or represented by any one country, it is an immensely varied collective of most of the countries of the world, far less homogenous in so many ways than the countries constituting the ‘West’, and indeed better described as the ‘Majority World.’

South Africa’s internal juggling of identities has produced a collection of family and anti-discrimination laws unique in the world: it is the only country to recognise both same-sex legal unions and customary African polygyny. Given the central significance of the ‘family’ as a conduit for national identity and the political overlaying of disparate norms which are conducive to the legalisation of either same-sex marriage or of polygyny, it is not surprising that all other countries in the world fall along one side or the other of the progressive/traditional approach and recognise either one or the other but never both.³⁰¹

From this unique position as a newly industrialised, regional hegemon, developing country with a hybrid common and civil law legal system boasting a robust and progressive Constitution employed by constitutional judges who sit behind cow-hide covered benches, a fresh perspective

³⁰⁰ See generally Candice Moore, “Thabo Mbeki and South Africa’s African identity: a review of 20 years of South Africa’s Africa policy” (2014) 12:3–4 *African Identities* 371–389.

³⁰¹ See the discussion by Benhabib, *supra* note 151 at 84–86. on the centrality of women as keepers of a cultural identity.

and alternative narratives can be sought. What also stands out in this research, however, is the power of the West-as-host assumption and Western constructed refugee law regime to overlay meaning in even this context.

This chapter commences by detailing the West-as-host construction; demonstrating the fault lines in the supporting assumptions which create this particular construction of ‘host’, its manifestations and consequences, with particular focus on its gendered and heteronormative consequences. Using qualitative analysis of data gathered from interviews with service providers discussing polygynous refugees, this chapter argues that cultural and gendered stereotypes play out in both particular and yet familiar ways in South Africa. Finally, the stark consequences in refugee law for these unacknowledged polygynous family groups in South Africa are laid bare.

4.1 The West-as-host

There are many necessary points of critique in a calcified host/source refugee law binary which constitute what I have termed a West-as-host presumption. Such a binary view is both factually incorrect and has myriad harmful implications. On a longitudinal study, countries rotate through phases of producing and of hosting refugees and, indeed, may at once play host to some refugees whilst others of the host’s own nationality flee elsewhere. Current examples of this fluidity can be found even amongst European countries associated with the ‘host’-only label. The Czech Republic has adopted a resistant stance to accepting any refugees and Bulgaria at Europe’s gateway, is grappling with an influx of Syrian refugees. Yet these European Union countries contending with the supposed ‘refugee crisis’ simultaneously have their own Roma

nationals fleeing domestic persecution in search of asylum.³⁰² This illustrates the falsity in both the permanence and the binary nature of a refugee host/source label as an identity marker of a country and of an associated provider of refuge/propeller of refugees characteristic.

There have also been attempts to remind the world that Syria, country of origin for the greatest number of fleeing persons for the past 7 years, once hosted European refugees fleeing war.³⁰³ Upon a larger historical perspective, the host and country of origin labels which seem to be indicative of political stability and instability respectively are themselves revealed to be unstable. Chimni is particularly critical of the “myth of difference” – an understanding employed by many refugee law writers, particularly those writing on Western asylum systems, which supports a different, less accommodating approach by alleging substantial dissimilarities between ‘new’ Third World refugee flows and previous European flows. Chimni attempts to both unveil and counter the ‘myth of difference’ through a longitudinal, historical perspective as well as pointing to flows of European refugees which framed the international refugee law regime yet which are conveniently forgotten or mischaracterized in order to sustain and justify modern, racialized, inhospitality.³⁰⁴

South Africa, the focus of this study, is a prime example of the cyclical nature of refugee source/host identity.³⁰⁵ South Africa is currently a significant refugee host within Africa; identified as the largest recipient of new asylum seeker applications by the UNHCR

³⁰² Foster, *supra* note 127 at 108.

³⁰³ See for example the article Ishaan Tharoor, “The forgotten story of European refugee camps in the Middle East”, (2 June 2016), online: *Washington Post*

<<https://www.washingtonpost.com/news/worldviews/wp/2016/06/02/the-forgotten-story-of-european-refugee-camps-in-the-middle-east/>>.

³⁰⁴ This myth of difference itself relies upon the construction of the ‘normal’ refugee; as white, male, anti-communist, against which those fleeing from the Third World could be sharply contrasted. This requires a highly selective view of history, exaggerated difference and also on the representation of certain spaces as ‘filled’ and others ‘empty’. Chimni, “The Geopolitics of Refugee Studies”, *supra* note 61 at 359.

³⁰⁵ Goodwin-Gill, *supra* note 103 at 11.

annual review for 7 years running: from 2005, a few years after post-apartheid South Africa started receiving asylum applicants in 2002, and until 2013, when the Syrian crisis shifted the global flow of fleeing persons. Many now in political leadership roles were, however, themselves previously hosted by other African countries or further abroad during the apartheid era. ‘Refugee host state’ and ‘refugee country of origin’ are not permanent and opposite identifiers; they are not inherent badges of honour or disgrace, they are temporary markers of a fluid relationship, often only with respect to a particular moving population, at a particular moment in time.

The use of refugee host/source labels as geographically polarized and both normative and static has proven particularly harmful in creating discriminatory state approaches and crippling the ability of mandate-restricted aid agencies to address twice-displaced refugees. For example, aid agencies working in Turkey assisting Syrian refugees, have no mandate to provide assistance to the large Palestinian population who were previously refugees hosted by Syria and are now once again displaced.³⁰⁶ Turkey, however, is the only neighbouring state to Syria to provide equivalent welcome to Syrian-based Palestinian refugees and to Syrians. Other neighbours have provided lesser protections, denied entry or even refouled Palestinian refugees to Syria despite the prohibition in the UN Refugee Convention on country of origin-based discrimination.³⁰⁷

As well as these practical negative consequences to a host/country of origin false bifurcation there are substantial, systemic implications of an identification of the ‘host’ label within this division as being presumptively Western. The hobbling of refugee law scholarship to the study

³⁰⁶ Personal correspondence with Anonymous, based in Kilis, Turkey (April, 2015) with regard to the mandate restrictions which limited the provision of aid by aid agencies in the region, who were focusing on Syrian refugees, to the exclusion of Palestinians fleeing Syria.

³⁰⁷ Noura Erakat, “Palestinian Refugees and the Syrian Uprising: Filling the Protection Gap during Secondary Forced Displacement” (2014) 26:4 Int J Refugee Law 581–621 at 584.; United Nations, *supra* note 21 at 137., Article 3: Non-Discrimination.

of its application in only ‘WEIRD’³⁰⁸ countries has far-reaching consequences. The presentation of this scholarship as exemplifying international refugee law studies or robust comparative studies without mention or regard to the mass of refugee law application having been excluded, imparts and reinforces a West-as-host understanding of refugee law akin to the unacknowledged West-as-subject Spivak sought to uncover.³⁰⁹ Simultaneously, the dynamics of knowledge production mean that the power and authority of those writing from, and for, the West, yet heard throughout the world, raise the profile of West-as-host studies whilst sidelining or marking as of limited application, refugee law studies focusing on the asylum systems of non-Western host countries. Indeed, those writing on developing host countries themselves often take on the not-a-host language. Thus a study might discuss how few refugees travel onwards to other countries yet simultaneously the host country under study is referred to as a ‘country of transit’.³¹⁰

Refugee law scholars have been criticised for a strong positivist, or formalist tendency – with a focus on interpretations of law, understood as an authoritative rule, and the application of discoverable principles to facts – which is no longer so predominant in other legal fields. The tendency towards practical over theoretical-focused research appears to be more marked in the limited Southern-originated refugee law scholarship, which often skirts even a positivist legal analysis of international law mechanisms. The application of refugee law within the developing world is primarily studied in broad-brush, descriptive terms. A sense of immediate crisis means that developing-world scholars tend strongly to relegate critical and theoretical approaches as an

³⁰⁸ A term originally used to critique work in the behavioural sciences which is based on data drawn exclusively from the study of unusual subjects, as if they were representative of the human condition, namely: Western, Educated, Industrialized, Rich and Democratic (WEIRD) societies, see Joseph Henrich, Steven J Heine & Ara Norenzayan, “The weirdest people in the world?” (2010) 33:2–3 Behavioral and Brain Sciences 61–83 at 1.

³⁰⁹ See the discussion in Chapter 2.1 above; Aleinikoff, *supra* note 62; Hathaway & Foster, *supra* note 23 at 5; Spivak, *supra* note 9.

³¹⁰ See for instance the use of an inappropriate labeling distinction between ‘countries of asylum’ and ‘transit countries’ in an otherwise insightful global survey: Grungras & Hughes, *supra* note 110 at 1.

improper luxury.³¹¹ Finer details and analysis of refugee law definitions and workings, such as the use and ambit of the ‘particular social group’ (‘PSG’) membership descriptions and other trending academic discussions are therefore left within the purview of those writing from, and for, the developed world.

Chimni, however, a scholar who decries this positivist turn, also points to the knowledge production role of the UNHCR in legitimizing a less welcoming approach to refugees, including the legitimization of norms shifting from an exile-based understanding of the refugee to a world view in which voluntary repatriation is posed as the ideal solution.³¹² Indeed, the lack of knowledge and advocacy tools available to those wishing to apply the AU Refugee Convention within African host states is exacerbated both by states’ unwillingness to apply more generous definitions and by the fact that training in ‘International Refugee Law’ is often provided by the UNHCR, which focuses on the UN Refugee Convention definition.³¹³ Conversely, the UNHCR does not garner or disseminate information and analysis on the substantial and definitionally-overlapping regional agreements which should properly be influential in most of the Global South, though it employs aspects of the AU Refugee Convention definition in much of its own status determination activities in Africa.³¹⁴ There is thus a commensurate strength in the dispersal

³¹¹ Chimni, “The Geopolitics of Refugee Studies”, *supra* note 61 at 352.

³¹² *Ibid* at 365–366.

³¹³ Cote, *supra* note 32.

³¹⁴ OAU, *supra* note 22., in combination with the Bangkok Principles and Cartagena Declaration represents an international agreement on a similar, broadened refugee definition which in its regional forms is legally binding on a total of 59 countries with an additional 112 states having been parties to nonbinding forms of a broadened refugee definition; “40th Session AALCO, FINAL TEXT OF THE AALCO’S 1966 BANGKOK PRINCIPLES ON STATUS AND TREATMENT OF REFUGEES (New Delhi, 2001); Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 1984 Cartagena Declaration on Refugees (UNHCR, 1984); Marina Sharpe, “The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions” (2012) 58:1 mlj 95–147 at 99–102. on the lack of real scrutiny of the AU Refugee Convention definition despite the UNHCR’s working reliance on it within Africa.

of Western-focused studies as well as a lack of recognition of or similar depth of engagement by Southern-focused studies.

The assumed West-as-host and omitted South are sometimes reflected in what at first appears to be sensitivity by refugee law authors to the criticisms of the international regime made by Third World Approaches to International Law (TWAIL) scholars. For example, we see concerns expressed about the inevitable “cultural imperialism” of Refugee Law and similarly unease with a system which is described as “one-sided, patronizing, and hypocritical” based upon the (counter-factual) understanding of the international refugee regime as constituted “almost exclusively” of “Northern hosts”, making determinations regarding Southern-originating refugee claims.³¹⁵ However, these expressions effectively deny the much more common-place, though differently fraught, application of refugee law by hosts of the South upon asylum seekers from their *neighbours* as an instance of the application of refugee law in the ‘international regime’.

The unusual aspects of both the asylum systems and the application of refugee law within the West as well as the particularities of the refugees who make their asylum claims in these far-off, expensive countries – having benefitted from either special assistance or greater resources than is available to most of the world’s refugees - are thus masked. The marked minority of women refugees in host countries in the West, contrasted against the oft-repeated statistic that half of the world’s refugees are women, is not highlighted as an access or mobility issue.³¹⁶

The disproportional lack of presence of refugee women in the select Western-host countries of study has even been reframed as an excess of ‘unaccompanied’ (and presumably undomesticated)

³¹⁵ See Macklin, *supra* note 67 at 252; Anker, *supra* note 57 at 152.

³¹⁶ Martin, *supra* note 108 at 74; Anker, *supra* note 57 at 772–773; Spijkerboer, *supra* note 27 at 17.

dangerous, brown men.³¹⁷ However, access to resources, both the financial and social networking supports required for mobility, is gendered and differentiated along class, politics, ethnicity, age, able-bodiedness and sexual orientation. This means the greater the resources required to access a host country's asylum systems, the greater the access discrepancies, running along many of the very same vulnerabilities refugee law supposedly prioritises.

The study of the legal asylum systems in only the most inaccessible, Western countries is thus, *inter alia*, gendered and heteronormative. The undisclosed nature of the West-as-host bias in refugee law scholarship, however, means that scholars do not investigate the consequences for the application, development of and advocacy in refugee law where only disproportionately male-applicant asylum systems are studied.

4.2 The West, the Rest and the Dislocated Self

The West-as-host phenomenon is thus premised on a false host/country of origin dichotomy overlain on an inappropriately polarised geography. It is both the presumed Western locale of the ‘host’ label as well as the characterization of a host state as, at least comparatively, a ‘good state’ which fail to accurately describe the location and experiences of persecuted persons. As will be demonstrated here, both of these problematic assumptions, of locale and of comparative beneficence, have gendered consequences.

³¹⁷ See the assessment of Canadian media coverage of the Syrian refugee resettlement programs of 2015-2016 which purposefully prioritized women and ‘whole families’, casting women as victims and men as security threats: Vappu Tyyskä et al, *Syrian Refugee Crisis in Canadian Media*, RCIS Working Paper 2017/3 (Ryerson Centre for Immigration and Settlement, 2017) at 12–14.; and a similar evaluation of the media reporting following New Year’s assaults on women in Cologne: Angie Abdelmonem et al, “The ‘Taharrush’ connection: xenophobia, Islamophobia, and sexual violence in Germany and beyond” (2016) 2016:Mar 1 Jadaliyya, online: <http://www.jadaliyya.com/pages/index/23967/the-%E2%80%9Ctaharrush%E2%80%9D-connection_xenophobia-islamophobia> at 3–4.; Spivak, *supra* note 9 at 91–92.

The benevolent host mythology and its attendant cumulative and oppositional binaries of self/other, ‘civilized’ rights-protecting refugee-acceptor/‘backward’ rights-violating refugee-producer, and West/Rest have been effectively criticised by several refugee law scholars. However, these writers accomplish their criticism by concentrating on the fallacy of the beneficence of the Western host which works to elide domestic violations. However, the coefficient assumption, that the host is Western, is not interrogated by the literature which tends to maintain the focus on West as host (albeit an imperfect one), and the Global South ever-present yet characterized as (only) countries of origin. The states of the Global South which are also themselves significant refugee-acceptors thus remain sidelined or somehow ‘not-hosts’ and this aspect of the host/source false binary is reinforced.

The self-image of states which style themselves as refugee host countries is structured around assumptions of benevolent superiority. Arbel discusses how the use and reference to international human rights principles in Canadian refugee determination processes serves not to internationalize the norms in use but rather to lay domestic claim to human rights norms as a central aspect of Canada’s self-image as rights protector and refugee acceptor.³¹⁸ This self-image consequently requires a narrative of cultural-other to be applied to ‘refugee-producing’ states in order to be sustained.³¹⁹ When a refugee presents with a story of persecution which sounds insufficiently dissimilar to local conditions, several authors have outlined the prevalence of rejections in such cases and the tortured logic which goes into a refugee determination process which must overcome the cognitive dissonance of the insufficiently other.³²⁰

³¹⁸ Arbel, *supra* note 91 at 742.

³¹⁹ *Ibid.*

³²⁰ *Ibid* at 732; Macklin, *supra* note 67; Spijkerboer, *supra* note 27; Dauvergne & Millbank, *supra* note 81.

Patriarchal and heteronormative access and mobility challenges found to a greater degree in distant, expensive, visa-restrictive Western hosts serve to mark the cases of queer & female asylum applicants within these host states as disproportionate to the global population of these asylum seekers. The political and decision-makers' 'good host' assumption also has particular negative consequences for these same populations.

The assumption of host-state moral superiority has particular impact on queer refugees, discussed in greater depth in the following chapter. Queer refugees face a formidable array of barriers to making a claim capable of positive reception, including that the asylum state may itself be persecutory. Whereas guidelines have been published and case law has been established on claims relating to sexual-orientation based persecution and country of origin persecutory criminal laws, the West-as-host approach, amplified by a narrative of a beneficent, morally superior host, fails to recognize the reality of host country persecution of same-sex relations and gender non-conformity. A 2012 Organization for Refuge, Asylum and Migration (ORAM) report based on a global survey of NGO attitudes towards LGBTI refugees highlights the specific vulnerabilities and exacerbated challenges for LGBTI refugees within countries of asylum. "LGBTI refugees often confront social marginalization, hate-motivated violence, and dire poverty. Ostracized by other refugees and rejected by many locals, they endure a difficult struggle for protection and are excluded almost entirely from the international refugee protection regime."³²¹

The UN Refugee Convention recognises as refugees those persons who have fled persecution "for reasons of race, religion, nationality, membership of a particular social group or political

³²¹ Grungras & Hughes, *supra* note 110 at 2.

opinion".³²² The academic and judicial debate relating to the proper interpretation of a 'particular social group' (PSG) as referred to in the UN Refugee Convention, and how to determine which 'groups' are to be identified or are deserving of protection is based on a concern that the PSG 'other box' not be so broad as to endanger the privileged peculiarity of refugee law. The forerunners of the interpretive approaches lie between interpretations which focus on 'protected characteristics' as determinative of the right kind of 'group' and an alternative (argued by the UNHCR to be supplementary) 'societal perception' approach to determining membership of a PSG.³²³ Whichever approach is adopted, the identity markers of a PSG, wherein gender and sexual orientation have been widely acknowledged under both interpretations as constituting a PSG for refugee determination purposes, as well as the listed group categories found in the UN Refugee Convention; race, religion, nationality and political opinion, can all be identified as also being potential hurdles to resource-reliant mobility. Thus the very groups of fleeing persons refugee law seeks to address are also those for whom access to distant, expensive non-entrée Western hosts may be especially difficult.³²⁴

Gender as a 'particular social group' (PSG) has gained recognition as a grounds of persecution and is expressly recognised as such in several countries including countries of the Global South.³²⁵ In order to distinguish gendered persecution from local experiences of gender 'discrimination' the PSG of successful female refugee applicants is therefore often framed with

³²² United Nations, *supra* note 21. Article 1(A)(2).

³²³ Aleinikoff, *supra* note 62 at 294–297.

³²⁴ Hathaway & Neve, *supra* note 295 at 120.

³²⁵ Belgium, Ireland, Mexico, Norway, South Africa, and Sweden are identified as countries including reference to gender in the description of PSG or elsewhere in their domestic legislation of the refugee definition; see the compilation of countries' legislation on the topic in Center for Gender & Refugee Studies & University of California Hastings College of the Law, "Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for U.S. Attorneys", (May 2014), online: *Refworld* <<https://www.refworld.org/docid/54fd6f204.html>>; *Age and Gender Dimensions in International Refugee Law*, SSRN Scholarly Paper, by Alice Edwards, papers.ssrn.com, SSRN Scholarly Paper ID 1535356 (Rochester, NY: Social Science Research Network, 2010) at 56.

elaborate specificity rather than simply ‘women’ in order to underline that only very ‘other’ women are under consideration.³²⁶ Macklin similarly discusses how cultural difference can be used as a yardstick to distinguish ‘our discrimination’ from ‘their persecution’.³²⁷

However, that is not to claim that culturally-othering narratives are not also applied in South-South refugee determination processes. Host countries of the Global South similarly frame their refugee-accepting role as arising from, and indicative of, their superior, rights-affirming benevolent status. With regard to the recognition of same-sex unions, previous Home Affairs Minister Gigaba stated “South Africa is among the leading nations to have advanced to this level of diversity and inclusivity.”³²⁸

There is a sorry irony to South Africa offering protection on gender grounds as it has “one of the highest levels of gender-related violence in the world”.³²⁹ There are also familiar failures, discussed widely in Western-focused research, in omitting the political aspects of ‘private’ harm and the clear emphasis in practice of focusing on direct state persecution despite an acknowledgment that state and non-state actors may be persecutory. An interview in 2007 with the then Chairperson of the Standing Committee on Refugees for South Africa provides a worrying example of this approach; the Chairperson described domestic violence cases as not fitting into the refugee categories of persecution and thus considering such cases ‘manifestly unfounded’, although such cases are considered as gender-related and as eligible for refugee

³²⁶ Arbel, *supra* note 91.

³²⁷ Where ‘mere discrimination’ is considered in much of the authoritative case law to be insufficient for a finding of persecution, see Macklin, *supra* note 67 at 266.

³²⁸ Department of Home Affairs, “Statement by Minister Gigaba on the meeting with representatives of the LGBTI communities”, (7 June 2016), online: <<http://www.dha.gov.za/index.php/statements-speeches/806-statement-by-minister-gigaba-on-the-meeting-with-representatives-of-the-lgbti-communities>>.

³²⁹ Middleton, *supra* note 177 at 70.

status by the Refugee Appeal Board.³³⁰ Forced marriage was also described as generally being rejected as a personal/family problem by Refugee Status Determination Officers and the substance of sexual orientation cases being similarly overlooked as essentially ‘family problems’. However, FGM claims are more regularly recognized, as South African officials are no more immune to the trap of cultural essentialism and ethnocentrism than their Western counterparts.

FGM is practiced by Other Africans and so more easily judged as barbaric and clearly unacceptable. In contrast, domestic violence, rape and forced marriage, which occur on equal or even greater prevalence inside South Africa, even if assumed to be cultural, are less likely to be seen as persecution and a basis for asylum.³³¹

The following two subsections discuss the findings of the interview-based research in relation to polygynous refugee women within the South African asylum system. This research points both to the different contexts in which conceptions of ‘culture’ and markers of difference become relevant in a non-Western host setting as well as the parallels to Western constructions of difference, identified above, with particular consequences for women refugees.

4.3 We Three Kings of Orient Are

“I think here in South Africa if you would really want to talk about polygamous marriage, the first few people that will come to your mind is our President (who is not a refugee), the kings, and the chiefs.”³³²

In attempting to discover the existence and experiences of polygynous women in the South African asylum system, the most common response from service providers who assisted refugees

³³⁰ Interview date supplied in Middleton’s thesis Middleton, *supra* note 182 at 44.

³³¹ Middleton, *supra* note 177 at 80.

³³² Anonymous, *supra* note 190.

was that they were unaware of such women. Unlike queer refugees, polygynous women are not generally considered part of a PSG, targeted for their membership. More especially, their uncommon intimate relationship is not seen as causally connected to their persecution, and they are not specifically identified as a vulnerable group. Their familial structure is thus framed entirely as a ‘private affair’ without bearing on their refugee claim or service needs.

I have identified a collection of scripts relating to assumptions of what it means to be a polygynous refugee, which recurred in the explanations proffered for polygynous women’s absence amongst refugee service provider’s clientele.³³³ These scripts took the form of either their invisibility to the service provider, who did not pry into their family structure, or their presumed nonexistence or limited existence in the asylum system. The most common response from refugee service providers questioned on their dealings with polygynous families was a reference to the secretiveness of refugee communities, and of the family unit in particular, and a failure to ‘come out’ (discussed further in Chapter 6.1). Additional recurring narratives which are investigated here, included: 1) an explanation that only wealthy men can afford more than one wife, refugees struggle just to survive and so cannot support the luxury of many wives, and 2) polygyny was repeatedly defined as a Somali practice. Different service providers from different organisations, themselves representative of different races and genders would regularly explain the incidence of polygyny as an Islamic practice, with particular mention of Somalis.

But when you get to South Africa, you’ll find it’s just a man with one wife. And you ask him: ‘so why is it not happening in South Africa?’ And they are saying that in order for him to have a second wife, you need to make sure the first wife is happy, is doing well, and you also need to get permission from her. So [refugees] in South Africa - their

³³³ Kwame Anthony Appiah explains how advocating for rights for people as members of an identity group necessitates a “script” for what it means to be a member of that group, see Anthony Appiah, *The ethics of identity* (Princeton, N.J: Princeton University Press, 2005) at 21–22; Arbel, *supra* note 91 at 761.

lives are quite miserable, it's difficult. So as a result you will hardly find the man who has got two wives or three wives. They are even struggling with the first wife. So we don't have clients that are coming here with two wives or three wives. No we don't. But there will be those that tell you: 'back home, I'm so disappointed, I'm so embarrassed because I've got one wife, my father had four wives, my father had five wives, we are from a rich family.' To have one wife, it's like you're too poor.³³⁴

The connection between wealth and the ability to have many wives is entwined in the regulation of polygyny in Islam and in African customary law which require that a husband cannot dilute his maintenance obligations to his existing wife, or wives, when taking another wife and is also supported by the most obvious, high-profile cases of polygyny, such as former President Zuma.³³⁵ Furthermore, the traditional cultural support for polygyny relates to the value placed on having many children as a sign of wealth and success, polygyny being a practice which facilitates a man having many children.³³⁶ However, to conflate the hardships of refugees making their way in South Africa with the financial inability to maintain and thus acquire many wives, requires several unsupported assumptions, which I identify and analyze here.

Firstly, the assumption in this argument is that the refugee figure is male. It is the struggling male refugee only who then becomes the subject of discussion and *his* ability to have many wives. Secondly, the male refugee is envisioned as a single individual who then, in financially

³³⁴ Samson Samuel Khosa, *Interview with Samson Samuel Khosa, Social Worker, Jesuit Refugee Services (JRS)* (2016), Johannesburg.

³³⁵ Minister of Justice & Minister of Home Affairs, *Recognition of Customary Marriages Act, 1998* Act No. 120 of 1998 (Government Notice No. R. 1101 (Government Gazette No. 21700), 1998)., Section 7(6)-(8) of the Act requires a husband wishing to enter into an additional marriage to apply to court for the approval of a contract ensuring the equitable distribution of property amongst the spouses, in which application all current spouses must be a party. The Islamic prerequisite to additional marriages that a husband be able to make all his wives happy, though often ignored by the laws and practices of Sharia-based legal systems has been used in Tunisia to support a ban on polygyny, on the reading that no man can achieve this with multiple wives, see Jamal J Nasir, *The Islamic law of personal status* (London: Graham & Trotman, 1986) at 66–67.

³³⁶ See Andrews, *supra* note 146 at 322.: "In traditional African society polygamy was associated with affluence and status. It was largely viewed as a 'stabilizing tool', because of its capacity to generate large families, which was seen as 'a necessary social insurance'. In addition, a man with many wives was an indication of his sense of social responsibility, and added to his social prestige."

difficult circumstances, cannot build himself a polygynous family. Again, the assumption both that a refugee is male and that he presents as a single individual is grounded in experience within a male-dominated refugee system, buttressed by the European production of international refugee law which assumes a male refugee.³³⁷

A third assumption which calls for unpacking is that an identity as refugee necessarily equates to impoverishment. Although South Africa's high unemployment rate and malfunctioning asylum system leave many without proper documentation and create substantial hardships, a struggle to survive is not a universal or permanent experience for all refugees.³³⁸ Fourthly and finally, it must be pointed out that polygyny is not exclusively the practice of the elite. Bailey and Kauffman identify polygyny (they use the term polygamy) as occurring in rural and post-conflict situations in which families are comparatively poor. Addressing some of the misperceptions about the wealth and number of the parties involved, Bailey and Kauffman point to the fact that the women, in particular, in such relationships are commonly from socio-economically disadvantaged families and highlight the way in which polygyny "is generally part of a package of laws, policies and practices that maintain gender inequality".³³⁹ In these circumstances, women may enter into polygynous relationships in the belief they may provide some protection for women in socio-economically vulnerable positions compared to available alternatives and the recognition of their marital status provides meagre rights.

³³⁷ Moffet, Hunt & Valji, *supra* note 106 at 215.

³³⁸ Betts attempts to counter this common assumption of refugee poverty and dependency in his work, see Betts et al, *supra* note 126.

³³⁹ Bailey & Kaufman, *supra* note 141 at 5.

The complexities and the lived realities in the South African landscape following the attempt to regulate domestic polygynous marriages were outlined in an interview with an anonymous legal services professional:

I think that polygyny is something that is maybe practiced quite widely, but the women who end up having problems with it, who run into problems with what I've just described, those women tend to be poorer women. And it's not people even necessarily from rural areas. They might have come from a rural area but they might now live in Cape Town and will have lived in Cape Town for a considerable amount of time. It's more a question of, not so much geographical location, but a question of your level of education and the amount of bargaining power that you see yourself having in your relationship - as a result of traditional norms and cultural practices and ways of being a woman and ways of being a man. I think that that sometimes makes women feel like they don't have much negotiation leverage so it's at that point that they seek legal help. Which is not true of women that are in polygynous set-ups that are middle to upper class. And I think there are less women who are middle to upper class that are in polygynous set-ups because I think it's just more and more [that] women are not willing to accept that they should share with anyone. But I think the people who run into problems with it most often are [poor women]...and we have terrible levels of legal literacy in South Africa. People don't understand how the law works. And I think that's one of the big problems around why the Recognition of Customary Marriages Act doesn't work. Because people don't know about it. They don't know what they're supposed to do. And if you explain it to them they'll be like: 'why?' we've not done it that way ever, why must we do it this way now? Who is this protecting?³⁴⁰

From the perspective of the polygynous women, rather than the husband engaged in supposedly wealth-flaunting marriages, polygyny, in South Africa itself, is thus likely to be practiced more often amongst socio-economically disadvantaged women than wealthier women and the economic, marital-property consequences of polygyny are more likely to be problematic for poorer, less educated women.

A problem arises when commonalities arising from male-focused asylum systems and assumptions of male-centred households become elevated to the level of stereotypes such that

³⁴⁰ Anonymous, *supra* note 214.

alternative stories become unimaginable and refugee women, invisible. Service providers sometimes had to be further prompted to consider already existing polygynous family forms, that is, polygynous families already established in their country of origin, prior to flight, when asked about their dealings with polygynous families. Instances of split polygynous families were generally not imagined by service providers when they were first asked about encountering polygyny in their work. That is, circumstances where, for instance plural wives had been left behind when their husband sought refuge in South Africa, or where one wife was left behind whilst another wife had accompanied their husband, or arrived separately to their husband arriving in the country as a refugee, or even where one wife was left behind and a new wife acquired in South Africa by an already-married, male refugee. Sometimes, after further prompting, service providers changed from an initial denial that they had such clients to acknowledging that they had encountered these issues as regards separated polygynous families.³⁴¹

Furthermore, on a woman-centred approach to polygyny, it becomes more apparent how the likelihood of polygynous women refugees being particularly poor, with a possible uptick in polygyny in conflict zones, stands in contrast to the conflation of polygyny and wealth. This also indicates a possible relationship between an increase in incidence of polygyny and of conditions producing refugees. However, it appears that male-oriented expectations of wealth as a characteristic of polygyny in combination with single, male-oriented expectations of poverty amongst refugees, feed into the notional rejection of the possibility of encountering polygynous refugee family forms on the part of service providers.

³⁴¹ Tendai Bhiza, *Interview with Tendai Bhiza, Office Administrator, Passop* (2016), Cape Town; Khosa, *supra* note 334.

Turning to the Somali-prevalence narrative which emerged amongst service providers, of those service providers who responded to a question on whether they had any polygynous clients with specific mention of Somalia, only one actually had polygynous Somali clients.³⁴² These clients were facing resettlement difficulties, and in their case their family structure was part of their struggle with the asylum system and was thus known. All other service providers who discussed polygyny as a Somali practice were speculating. The comments of service providers discussing polygyny and raising the subject of Somalis are collated here:

- “So, [X] told me that it was...like in Somalia, they can have as many wives as they want.”³⁴³
- “... no, no. usually you’ll find that those who are of the Islam faith. According to their religion, they can be involved in polygamous relationships. I think it’s a maximum of four women. So if you have to go to Somalia and other countries, you’ll find them.”³⁴⁴
- “I do know of Somali families in particular, that are living together in polygynous marriages”³⁴⁵
- “I wouldn’t be able to...I mean I think if it is, it’ll be Somalian families that polygamy is accepted. No I wouldn’t.”³⁴⁶
- “So, I think most of them don’t believe in polygyny. But except the Somalians. There is, I think their culture or religion allows the man to take more than one wife. But then they say the maximum is four.”³⁴⁷

It is difficult to know whether this speculation by service providers, identifying polygyny as predominantly a Somali practice is supportable. Arguably their assumptions are backed by the fact that the clients of the only service provider with known polygynous clients were in fact Somalis. On the other hand it may be that the commonly held presumption that polygyny is a Somali practice makes it easier to ‘see’ these clients when they do ‘come out’. As the known

³⁴² A total of 5 service providers interviewed brought up Somali refugees in their answer on polygyny.

³⁴³ Anonymous, *supra* note 190.

³⁴⁴ Khosa, *supra* note 334.

³⁴⁵ Johnson, *supra* note 193.

³⁴⁶ Ekambaram, *supra* note 215.

³⁴⁷ Anonymous, *supra* note 222.

polygynous clients in question were encountering resettlement difficulties, and resettlement typically only becomes alive as an issue where the family has, or some members have refugee status, it may be that the fact that Somalis have higher refugee status acceptance rates in South Africa, relative to other nationals, could also support a greater awareness of these family forms, for this nationality.³⁴⁸

However, the identification of polygyny as a Somali, Islamic practice by so many of the refugee service providers interviewed stood out as a particularly bizarre cultural reading in the South African context.³⁴⁹ In South Africa, polygyny – almost always termed polygamy in the relevant laws and public discussions – is legal under African Customary Law, a separate, primarily family law division which governs those who choose to celebrate their marriages under customary traditions: “‘customary law’ means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”.³⁵⁰ These customary marriages, including polygynous marriages, were formally recognised under the Recognition of Customary Marriages Act, shortly after the post-apartheid transition to democracy. The recognition of ‘Muslim marriages’, including polygynous Islamic marriages, in South Africa, however, has been a work in progress for the past 20 years; the South African Law Commission published an ‘issue paper’ on Islamic Marriages in 2000 but it is only recently in 2018 that two court judgments have granted orders requiring the government to recognise spouses, including polygynous spouses, married under Muslim rites for the purposes of

³⁴⁸ Johnson, *supra* note 193; Asylum Seeker Management, Immigration Services, *supra* note 19 at 31. shows that Somalis had the second largest numbers of accepted asylum applications in 2017 at 732 approvals, although only being ranked as the fifth largest nationality of asylum seekers for the same year on the table on p.17.

³⁴⁹ About one third of service providers who were questioned on polygyny amongst their clients (5 of 14), singled out Somalis as the practitioners of polygyny.

³⁵⁰ Minister of Justice & Minister of Home Affairs, *supra* note 335. Definition s1(ii).

inheritance and that the government is Constitutionally bound to legislate the recognition of these Muslim marriages.³⁵¹

In the Southern African region polygyny is predominantly practised based on African customary traditions, not Islamic traditions. According to the government statistics, 46.44% of asylum seekers in 2015 were from the Southern African Development Community (SADC), this number dropped to roughly 37% of new, registered asylum seekers in 2017 though it remained the single greatest source-region for South Africa's asylum seeker population.³⁵² The OECD's Social Institutions and Gender Index for the 16 countries which comprise the SADC show that polygyny is legally catered for or practiced in most of the region.³⁵³ Based on the instance of polygyny in the Southern African region and the numbers of asylum seekers and recognised refugees in South Africa from the region, it could be expected as a matter of statistical likelihood that polygynous families, or members thereof were in the country and that their family forms were often the product of African customary laws and traditions. Furthermore, as polygyny is not a foreign concept within South Africa but rather, thanks to its legalization and the public debate thereon as well as high profile polygynous figures in the country, some basic knowledge of the

³⁵¹ South African Law Commission, "*Islamic Marriages and Related Matters*" Project 59: Issue Paper 15 (Department of Justice, 2000); *Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bignham NO and Others, Esau v Esau and Others*, [2018] 109 ZAWCHC ; *Moosa NO and Others v Minister of Justice and Correctional Services and Others (Trustees of the Women's Legal Centre Trust as Amicus Curiae)*, [2018] 25/17 CCT .

³⁵² Home Affairs, *supra* note 46 at 15; Asylum Seeker Management, Immigration Services, *supra* note 19 at 9–10.

³⁵³ The SADC member states are Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini (previously Swaziland), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe, see SADC, "Southern African Development Community : About SADC", online: <<https://www.sadc.int/about-sadc/>>.. See OECD Centre SIGI, "Countries/Territories | Information about discriminatory social institutions for 180 countries and territories", (2019), online: *Social Institutions & Gender Index* <<https://www.genderindex.org/country-profiles/?subregion=sub-saharan-africa>>. The Organisation for Economic Co-operation and Development's gender index does not uniformly record the legality or prevalence of polygamy amongst different countries, for example, South Africa's legalization and practice of polygyny is not reflected in its country profile. However, a survey of the country profiles available for the SADC members (Angola's was unavailable as of March 6, 2019) reflect that polygyny is uncommon but legal in Botswana and Lesotho, permitted in the Comoros, Eswatini (previously Swaziland), Zambia and Tanzania, widely practiced in the DRC, of uncertain legal status but practiced in Mozambique, and prohibited yet practiced in Malawi and Namibia.

domestic practice of polygyny, even amongst those who do not hail from its cultural background, can be expected, particularly legal service providers. However, it is perhaps a combination of both the very familiarity of the practice of polygyny and the influence of Western framing that produce the impetus to create an othering narrative.

Much as artificial ‘cultural’ constructs are used, as discussed above, to distinguish ‘their persecution’ from ‘our discrimination’, it could be that reference to Islam as well as to Somalia worked to distinguish ‘our African polygyny’ from ‘their foreign polygyny’ in the minds of the service providers.³⁵⁴ Somalis are arguably some of the most conspicuous outsiders amongst South Africa’s refugee population. Whereas accent, particularly for Francophone Africans, dress and facial features may be used (sometimes incorrectly)³⁵⁵ to mark out foreigners from the local population, Somalis are more racially and culturally marked as ‘other’ compared to Black Africans of Southern Africa. This instinct to other polygyny in this way is also notionally cradled by the dominant Western narrative of polygyny as a foreign-culture emanating practice, primarily associated with Islam. In a comparative international study on polygamy, which attempts to advocate for comity-based recognition of, rather than criminalization of legally formed foreign polygynous marriages, Bailey and Kaufman identify the proportion of a nation’s Muslim population as one of the first descriptors of national polygamy-prevalence and practices

³⁵⁴ Macklin, *supra* note 67 at 265.

³⁵⁵ There have been reports of police harassing darker skinned Africans, including darker skinned locals as well as mischaracterized South African citizens being caught up in xenophobic violence. I am personally aware of a darker Venda colleague (one of South Africa’s smaller domestic, ethnic and linguistic groups) who experienced police harassment, having been pulled out of a taxi and questioned about her documents by police who were obviously unfamiliar with the Venda language and did not recognize it as South African (South Africa has 11 official languages). In another instance, a young Congolese client who was staying in one of South Africa’s impromptu refugee camps (which sprung up with UNHCR assistance in 2008 following a wave of xenophobic violence which displaced many persons perceived as foreigners, including refugees) was denied food rations. These rations were dispensed by country-of-origin based leader-groups, my client was denied rations on the basis that his compatriots had incorrectly thought his angular facial features marked him as Rwandan. Bigotry is, unsurprisingly, not necessarily accurate in its targets, nor well-informed.

in each country surveyed. This implies a direct connection between Muslims and polygyny even where the subsequent statistics on Muslim population and the prevalence of polygamy obviously show no relationship. The authors use this same approach, beginning their discussion with reference to the percentage of the population which is Muslim, for the many Southern African states where polygamy is an African cultural practice rather than a religious Islamic practice.³⁵⁶

Having demonstrated some of the narratives of cultural difference and the stereotypes surrounding refugees in polygynous families, the next section excavates why these family forms might matter in a refugee law context.

4.4 Unsettling Others

I first happened upon reference to a polygynous family and began to ponder the position of polygynous women myself, when I found a letter in a miscellaneous file of a refugee law clinic addressed to the Refugee Status Determination Officer. The letter apologised to the officer for misleading them and requested a correction to the refugee's file such that the woman previously listed as his wife should be re-characterized as his second wife. The letter seemed to request that this second wife be deported, as she should not have derivative refugee status, and the putative first wife facilitated entry.

Although often considered inconsequential to the services offered, polygyny does impact upon refugee status, particularly for the wives in polygynous families. However, the predominant focus on the man in a polygynous relationship, whether marking him out for moral reprobation

³⁵⁶ Bailey & Kaufman, *supra* note 141.

or fixating on his finances, means that the systemic difficulties faced by their wives can be overlooked. The South African refugee legislation which grants refugee status, as a separate ground, to dependants of refugees means that the definition of ‘dependant’ becomes critical to the refugee status of individual family members.³⁵⁷ The definition of refugee dependants, who through their relationship derive refugee status themselves, was originally governed by Regulations to the Refugees Act which used a classic ‘one man and one woman’ formation of the definition of spouse.³⁵⁸ As discussed in Chapter 3.2 above, subsequent Amendments in 2008 and 2011 updated this aspect of the Refugees Act to include a broad framing of ‘spouse’ with reference to foreign laws and is capable of including both polygynous and same-sex spouses.³⁵⁹ Unfortunately, these amendments to the Refugees Act were enacted but never promulgated (apparently lacking their own necessary Regulations) at the time of my fieldwork, leaving much confusion on this issue. This was especially so as the old, standing definition of spouse could not be Constitutionally upheld, given the explicit anti-discrimination protections for sexual orientation in the Constitution of South Africa and supported by court judgments as regards references to ‘marriage’ and ‘spouse’.³⁶⁰

³⁵⁷ The Refugees Act, Government Gazette, *supra* note 33. Section 3(c),: “a person qualifies for refugee status for the purposes of this Act if that person – [...] is a dependant of a person contemplated in paragraph (a) or (b)”. Paragraph (a) and (b) provide the UN Refugee Convention and AU Refugee Convention definitions of a Refugee, respectively.

³⁵⁸ The Regulations, Department of Home Affairs, *supra* note 256. Schedule 1(1): “spouse, with respect to any person, means the party of the opposite sex to whom that person is joined in marriage”.

³⁵⁹ Department of Home Affairs, *supra* note 35.; see Chap 3.2 above.

³⁶⁰ The High Court engages in a summary of the ‘reading in’ work done by the South African courts in relation to Muslim and religious marriages in *Women’s Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others, supra* note 351. at paras [7]-[16] and a similar summary of the judicial work done in relation to same-sex life partnerships, prior to their legislation, can be found in *Minister of Home Affairs and Another v Fourie and Another, supra* note 263. at paras [51]-[58]. The courts have thus read the term ‘spouse’ and ‘marriage’ in a wide variety of legislation to include religious, Muslim and same-sex partnerships.

Of the refugee lawyers interviewed, one was de facto referencing the amended but unimplemented broader definition of spouse on the basis that the original definition would be unconstitutional.³⁶¹ Another worked under the assumption that references to ‘spouse’ should be read in terms of the common law work of the courts to standardise the definition across legislation, particularly as regards ‘reading in’ same-sex unions.³⁶² A third, only referenced the legislation as in effect.³⁶³ Another refugee lawyer felt that the definitional work on spouse remained to be done in the ongoing debates on the latest amendment attempt.³⁶⁴

It’s hard to keep it all straight. One of the presenters in parliament, a Congolese refugee, the other day just said: ‘how can you have an amendment of an amendment of an amendment? How is that possible? I don’t even know that’s legal’. And I don’t know if he’s got any point, but I mean it’s very difficult to read the latest Amendment Bill. How it, you know.. Ugh. One of the presenters yesterday, I don’t know if he said it in his presentation, but he said it to me. He said ‘I think it’s just too complicated for them. And now they’re making it more complicated. Maybe they should simplify’.³⁶⁵

If astute legal minds who work in the refugee field struggle with the state of the legislation affecting refugees in the country, it is most unlikely that the refugees themselves or even the officials supposedly implementing the legislation have much better understanding. Due to the lag between enacting important amendments to the Refugees Act and actually bringing them into force, this research has thus provided a snapshot from within a decade of legislative confusion.

Several substantial hurdles thus faced the prospective polygynous refugee family in South Africa including the problematic definition of spouse and the legal confusion which surrounded which definition should be used. This is exacerbated by the knock-on effects of a strict reliance

³⁶¹ Cote, *supra* note 32.

³⁶² Raymond, *supra* note 181.

³⁶³ de la Hunt, *supra* note 199.

³⁶⁴ Johnson, *supra* note 193.

³⁶⁵ *Ibid.*

on a refugee's original statement on family composition in their Eligibility Determination Form for Asylum Seekers (BI1590).³⁶⁶ Inaccuracies on this form are frequent and have multiple causes:

Sometimes they think that their family members are dead, sometimes they don't list them at all just because they don't understand the process. Like I said, it is extremely hectic when you get to the Refugee Reception Office. You now have 5 days to get from the border to an office and have everything done and offices only allow nationalities one day per week. So you effectively have one day to make an application and there are touts and interpreters and a huge long form that's really difficult to read and often you pay an interpreter and they will put down the story that they put down for everyone else, and then it's done and you're ... so details get missed out, and they say that if you didn't declare them [your family members] then that's it, you haven't got a chance. So there's really one chance to do everything 100% correctly or else.³⁶⁷

A lack of appropriate translators, a lack of attention to detail by the overworked and under-resourced translators that are available, errors from the rushed nature of the application due to the very limited time granted to asylum seekers to make their refugee claim and lack of assistance with the form, the fact that refugees, particularly those fleeing conflict situations may not know the whereabouts of their loved ones (including whether they are already in South Africa or not) or even be unsure whether they are alive, the possibility that some refugees may use pseudonyms out of security fears unbeknownst to their family members, the problem that which family members are listed and which left off the form is impacted by differing understandings of 'family', and even errors in spelling and not using full names on the form can each prove decisive in a subsequent attempt to join files and result in the refusal of derivative status to dependents.

In an interview with a female service provider who was herself a refugee, Tendai Bhiza revealed:

³⁶⁶ Legal Resources Centre, *How an Application for Asylum is Made* (LRC, Coram Children's Legal Centre, the Scalabrini Centre of Cape Town and the European Union, 2015) at 2.

³⁶⁷ Cote, *supra* note 32.

In 2009 when my son came, I declared him; that he is my son, but when he came...also when I came to South Africa I didn't use my real name from Zimbabwe because, for safety reasons...I know my government. So I had to change my name. So when he came, also it was not easy for him to join me. And this is when I also wanted...that was the time I was also supposed to tell why I had to change my name into another name. And it was not easy. And even up till now, he went back home. Because we decided it was better for him to go back home because it's not easy for him to be joining, to do family joining. Also maybe if I want my mom, because my mom was also my dependent, it's also not easy for that to happen.³⁶⁸

Advocate Leanne De la Hunt remarked during her interview: "Always when I have clients I say, when you say 'brother', who is this person? Tell me, who is the mother, who is the father?"³⁶⁹ Refugee lawyer, Corey Johnson explained: "there's one case for the husband. The husband is a guy named Roger, and she [the wife with refugee status] declared him, but they [the translator] only wrote 'Roger' in. And they [the Department of Home Affairs] said 'look I don't know who this Roger is. You only listed his first name, and obviously, it's an error'".³⁷⁰

As regards spouses, marriages subsequent to the initial asylum application, which in South Africa's broken asylum system can take years to finalise, as well as children born subsequent to the initial application have proved difficult to get joinder due to their obvious absence on the BI1590 form. This flawed system of recording families then haunts refugees indefinitely as an immutable, comprehensive account of their family members with any variation considered *prima facie* fraudulent.

Another lawyer, David Cote, explained:

File joinder is almost impossible. It is very very difficult to do here. So what the rules say is that when you first arrive, you have to declare all of your family members and then when you declare them, theoretically as they arrive, they should be put onto your file. The

³⁶⁸ Bhiza, *supra* note 341.

³⁶⁹ de la Hunt, *supra* note 199.

³⁷⁰ Johnson, *supra* note 193.

problem is that if you come, for example, and make your own claim and then want to join the file of somebody else, it is extremely difficult to do so and what they often are told is that you then have to be rejected first, and once you're rejected then we can add you to the other person. But then once you're rejected, you're assumed to be trying to cheat the system and so they also put up barriers to doing that as well. So file joinders are extremely difficult.³⁷¹

A refugee family then faces a further barrage courtesy of a troubled joinder process which is so arbitrary that refugee advocates brought a court case to try and compel some predictable systemization to the process. Two refugee advocacy NGOs, the Scalabrini Centre of Cape Town, with the assistance of the University of Cape Town Refugee Rights Clinic, brought a High Court action, along with a client family, against the Minister and the Director General of Home Affairs and the chain of Home Affairs employees responsible for taking and overseeing the joinder decision, involving the applicant family: *Scalabrini Centre of Cape Town and Others v Minister of Home Affairs and Others*³⁷². The High Court held, in a 2017 decision, that whether a refugee had declared all family members when first applying for asylum, and when and where the refugee's dependents were married or born were irrelevant with regard to their right to refugee status as dependents of a refugee. Furthermore, the High Court granted an injunction that the Department of Home Affairs be made to draft, and make available, a policy on the file joinder process, the relevant administrative procedures and staff training required to properly assess the dependents of refugees.³⁷³ The DHA subsequently submitted a revised Standard Operating

³⁷¹ Cote, *supra* note 32. See also a brief on similar hardships imposed by a "lifelong sponsorship ban on family members who were not examined at the time of the sponsor's immigration to Canada.", a regulation which was implemented "to combat fraud and misrepresentation based on the presumption that non-disclosure is motivated by the deliberate intention to deceive; Canadian Council for Refugees, "Excluded Family Members: Brief on R. 117(9)(d)", (May 2016), online: Refworld <<https://www.refworld.org/docid/58b04cf14.html>>.

³⁷² *Scalabrini Centre of Cape Town and Others v Minister of Home Affairs and Others* Western Cape High Court, Cape Town, South Africa (1 December 2017) unreported, on file with the author.

³⁷³ *Ibid.*

Procedure on family joinder, in 2018, which removed the automated refusals of family members not declared upon, or married or born subsequent to a refugee's initial asylum application.³⁷⁴

All separated refugee families are distressed by these cumulative obstacles to reunification and refugee status, as a family, in the South African asylum system. Polygynous families, owing to their additional complications, larger numbers and so greater chance of separation, their more unexpected and unusual structure, increasing the likelihood of cultural misunderstandings and family members becoming 'lost in translation', are especially likely to be burdened by these systemic shortcomings to the principle of the centrality and importance of the family unit, protected under international law.³⁷⁵

Another legal sphere in which polygyny critically effects refugee status and services, lies in the area of resettlement. As mentioned above, the only refugee service provider who had actually come across polygynous clients was a lawyer whose clients were facing resettlement difficulties, due to their polygynous family form.

So we had some Somali refugees who were going to be resettled, they were in the resettlement process in the US and it had gotten to the point ... Immigration from US came and interviewed them. And this was a polygynous marriage. The gentleman had three wives. They all lived in the same house. And in fact, they lived there with another polygynous family. And so, the immigration officer was not very...he believed that they were still in a polygynous marriage and it very well could have been that they were. They said that they were not. But it was hard for them to prove that, they had some papers from

³⁷⁴ Mkuseli Apleni, Director General of Home Affairs, "Respondent's Affidavit" in *re Scalabrini Centre of Cape Town and Others v Minister of Home Affairs and Others*, dated 3 April 2018. See the *Draft Standard Operating Procedure: Refugee Family Reunification*, found at page 15-20 of the "Respondent's Affidavit" in response to the Court Order in the above case in Appendix C hereof.

³⁷⁵ The Universal Declaration of Human Rights states at Art 16(3): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State", G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). This Declaration has now been described as having attained, at least in part, customary law status and is akin to a constitutional instrument in the field of international human rights see Mary Robinson, "The Declaration of Human Rights: A Living Document", (27 January 1998), online: *United Nations University* <<http://archive.unu.edu/unupress/Mrobinson.html>>, Symposium on Human Rights in the Asia-Pacific Region.

the mosque saying they had divorced. But they were still living together. And therefore the immigration officer thought they were lying. And said ... look, you know, you'd be breaking the law in the US, I don't find you credible here.³⁷⁶

Stuck between a rock and a hard place, polygynous refugee families in need of resettlement have limited options of countries which will accept them as a polygynous family unit, yet face credibility challenges if they choose to sacrifice their family unity for safety in a polygyny-hostile resettlement country.

I don't know how they got together on the same application for resettlement. Or even if they were. They might have been ... like two were on one application, and another...but because of all the children, they were all connected. They figured it out eventually. To counter that the family said 'look we are happy to be separated in the US. We'll go to different states.'³⁷⁷ I mean that's what they told me anyway. We wrote them a little request for review. Which is still pending. I don't know the chances of success, I don't think they're very high.

The problem was essentially the US officer thought they were lying to him. He didn't find them to be credible. Because they were living together in the same house. Which is a bit suspicious, I suppose. But you'd also have to consider the fact there was about, I want to say sixteen kids between them. Sixteen children, so finding a new place would be difficult. And even to find a place as a refugee in Cape Town, any way it's hard. So that's what they said. They said look you know we've been living together, we have the children, it makes sense, it's hard to find a new place. And our landlord is very understanding. And they brought pictures in to show, it's a big house and it was kind of divided into different units. So we tried, we put forward a solution for them, but...so if you were in a polygynous marriage and let's say you were going into the resettlement process, and you're up front with UNHCR about it right away, I believe that they're

³⁷⁶ Johnson, *supra* note 193.

³⁷⁷ The UNHCR Resettlement Handbook makes provision for separate but cross-referenced files in the case of polygynous families to be resettled in a state which does not legally recognize more than one wife, although it calls for families to be resettled to the same community:

"In order to maintain family unity and to ensure that the non-legally recognized spouses and their children do not become more vulnerable to protection risks, UNHCR may consider separating a polygamous family into two or more cases and submitting them as cross-referenced cases to suit certain resettlement country requirements.

Where UNHCR determines that one case should not be accepted without the other, it is important to reinforce with resettlement countries the need to resettle non-legally recognized spouses and their children to the same country (and preferably the same municipality or community) as the partner and the legally recognized spouse. To avoid children being separated from one parent, a Best Interests Determination (BID) could be undertaken to advocate for the right of the children to remain with both parents."

UN High Commissioner for Refugees, "UNHCR Resettlement Handbook, 2011", online: *Refworld* <<https://www.refworld.org/docid/4ecb973c2.html>> at 208.

supposed to take that into consideration and then if they feel that you still meet all the resettlement requirements or needs, they would say: ok we can send you to this country but we can't send you to the US because the US doesn't allow polygyny. But there are some that do, I think. But they were just pretty much thought to be lying about it. And if you are thought to be not credible at all during that process, it's over. They're very stringent. I think especially with Somali refugees in the current climate, it's very difficult. But they fulfilled all the criteria, for sure, for resettlement, so it was unfortunate that they were rejected like that.

... there's actually two families that have been rejected like that.³⁷⁸

Resettlement, discussed further below, is an extremely rigorous process with additional layers of requirements, security checks and other processes implemented by the third country to which the refugee(s) in question are to be resettled and which do not apply to the standard processing of asylum applicants presented at the border. Resettlement numbers are at the discretion of the limited number of states that choose to take part in the resettlement program and are extremely scarce.³⁷⁹ This means that only special circumstances and severe cases of urgency tend to succeed at having their resettlement needs met. To have reached the point of meeting the additional stringent resettlement criteria and be in the process, only to be denied safety based on an outdated colonial concept of repugnancy focusing on an undesirable family formation is abhorrent to an asylum system designed to save lives. Yet, that is precisely the stance of most states involved in the resettlement program, as noted by the UNHCR:

Most resettlement States have national laws that prohibit such marriages and therefore refuse to admit such cases for resettlement. However, States may recognize a person engaged in polygamy (the “partner”) as having only one legal spouse (the “legally recognized spouse”). Such resettlement country legislation frequently has led to families

³⁷⁸ Johnson, *supra* note 193.

³⁷⁹ Betsy L Fisher, “Refugee Resettlement: A Protection Tool for LGBTI Refugees” in Arzu Güler, Maryna Shevtsova & Denise Venturi, eds, *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (Cham: Springer International Publishing, 2019) 275 at 283.: “While a 20-year high represented 125,800 refugees moving to safety, global resettlement needs in 2017 were 1.19 million. This means that only 10% of the world’s refugees in need of resettlement were resettled—that is to say, 90% of refugees who were unlikely to be able to live in safety in their countries of asylum were not resettled.”

choosing to separate for purposes of admission to the resettlement country. In cases where the spouses are dependent on the partner, this requirement can result in the subsequent separation or abandonment of dependent family members for purposes of resettlement, which contravenes the right to family unity and the rights of the child. ... the spouse(s) and their children remaining behind in the asylum country are rendered more vulnerable to protection risks³⁸⁰

It should be noted that in the quote above, the UNHCR uses gender neutral terms, as can similarly be found in the relevant resettlement state exclusionary legislation: “In cases where the **spouses** are dependent on the partner, ... the **spouse(s)** and their children remaining behind in the asylum country are rendered more vulnerable to protection risks,”³⁸¹ my emphasis.³⁸² The reference to ‘spouse’ in this case is unnecessary and disingenuous as it in fact works to conceal the gendered nature of the exclusion. As the near universal expression of polygamy, as prohibited in these circumstances of resettled refugee families, takes the form of polygyny, this means only wives, that is, only the plural women partners will be deemed not to be a “legally recognized spouse” and thus abandoned surplus, since there is only ever one man – who will thus, in contrast, always be a legally recognized spouse. Furthermore, the dependency in question, especially in a patriarchal society wherein polygyny is practiced, would generally be the women, upon the man. The abandoned ‘spouse’ who is rendered more vulnerable by a resettlement-driven desertion is thus only and always an abandoned, vulnerable wife.

³⁸⁰ UN High Commissioner for Refugees, *supra* note 377 at 207–208.

³⁸¹ *Ibid.*

³⁸² See for example the European Union refugee spouse terminology and prohibition of polygynous family reunification in Council Directive 2003/86/EC of 22 September 2003 *On the right to family reunification* in Article 4(4) which prohibits family reunification of a “further spouse” if a sponsor already has a spouse “living with **him** in the territory of a Member State” [my emphasis]. Were the family unification prohibitions to be appropriately and completely gendered, it would highlight the absurdity of a policy which visits harms upon the women in a polygynous family, under the auspices of the rights of women; see at paragraph 11 of the Preamble to the Directive: “The right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households.” European Council, “Council Directive 2003/86/EC (Family Reunification Directive)”, (22 September 2003), online: *European Migration Network* <<https://emnbelgium.be/publication/council-directive-200386ec-family-reunification-directive>>.

The usual practice of recognizing foreign marriages as valid and the status of people so married, as married for domestic purposes, is an instance of comity; the mutual respect granted by states to one another under international conflicts of laws rules, as regards state sovereignty and the ability to legislate domestically.³⁸³ Contrarily, the exceptional refusal to grant recognition to a foreign marriage, legitimately formed at the place of celebration, is made by states in cases where the foreign practice in question is deemed contrary to public policy to the point that it is deemed repugnant or fundamentally, morally offensive.³⁸⁴

[M]arriage and the family are the fundamental institutions of all societies, and the roots of a country's culture and social order are frequently touched by disputes concerning marriage and the conflict of laws. Thus public policy raises its fickle head more frequently here than in other areas, creating exceptions to otherwise clear and certain rules.³⁸⁵

In the case of resettlement, where a family group fleeing persecution requires movement from one place of refuge to another, the refusal to permit family groups which take the form of polygynous families or the exclusion of women within these families, evidences a clash of culturally specific notions of 'family'; where serial monogamy is normalized but concurrent polygyny demonized, taken to its most extreme.

Yet the sentiment underlying such a stringent approach to foreign family forms even in the case of refugee families seeking protection from persecution, has a broader support base than just a conservative recoil to different marriages. States which criminalize polygamy such that they also exclude the immigration of polygynous families, justify doing so by referring to the call to abolish the practice of polygyny, as a violation of women's rights, by the Committee on the

³⁸³ Minor et al, *Conflict of Laws; or, Private International Law* (1901) at 5.

³⁸⁴ C F Forsyth, *Private international law: the modern Roman-Dutch law including the jurisdiction of the High Courts*, 4th ed (Lansdowne: Juta, 2003) at 271.

³⁸⁵ *Ibid* at 261.

Elimination of Discrimination against Women.³⁸⁶ Polygyny is considered a violation of both women's right to equality and the requirement that States Parties to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) take all appropriate measures to eradicate practices which are based on assumptions of superiority and inferiority amongst the sexes and stereotyped roles.³⁸⁷ This same women's rights-justification is used even in those countries which specifically work to exclude the 'supernumerary spouse' in their immigration policies targeting polygynous families. That is, those countries, such as Canada, the USA and most of the EU which allow the immigration of only *a couple, singular*, from within a polygynous family structure and thus effectively exclude, and encourage the abandonment of, only a woman, or women (not the singular husband).³⁸⁸ Whilst the exclusion of women in

³⁸⁶ The equality argument against the protection of the polygamous family can be found in Point 14 of General Recommendation No. 21 of the Committee on the Elimination of Discrimination against Women:

"States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions' guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention [on the Elimination of All Forms of Discrimination against Women (CEDAW)]."

Committee on the, Elimination of Discrimination against Women & UN Women, "General recommendations made by the Committee on the Elimination of Discrimination against Women", (1994), online: *UN Women* <<https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>>, General Recommendation No. 21 (13th session, 1994).

³⁸⁷ CEDAW, Article 5(a), United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW 29th Session, 1979).

³⁸⁸ See the European Council, *supra* note 382.; see also the Canadian *Immigration Refugee Protection Regulations* (SOR/2002-227), R117(9)(c)(i) and the explanation on polygamy provided at the Government of Canada site (accessed 21 May 2019), which, in this case, does in fact refer expressly to it being the subsequent wives who are excluded:

"A spouse is not a member of the family class if the spouse or sponsor was already married to another person at the time of the subsequent marriage [R117(9)(c)(i)]. This regulation prohibits a second (or third, etc.) wife from being recognized as a spouse within the family class and provides that only the first marriage may be recognized for immigration purposes"

Immigration IRCC Refugees and Citizenship Canada, "Processing spouses and common-law partners: Assessing the legality of a marriage", (12 March 2018), online: *aem* <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes/family-class-determining-spouse/legality.html#polygamy>>, Last Modified: 2020-01-10.; the United States will not recognise the subsequent wife (or wives) of a foreign polygynous marriage as a spouse for immigration purposes, including for refugee relatives, even when the husband later divorced the first wife, based on the

foreign polygynous families from family reunification is arguably a measure to eradicate the continued practice of polygyny, as it occurs in that family, in the state of resettlement, it falls abysmally short of being an appropriate measure. The hypocrisy of such a reference by states to the CEDAW, becomes clear where these countries appear to focus on women's rights without focusing on the women impacted by their exclusionary actions.

Some thinkers, who may self-identify as liberal feminists, support the argument that separating a polygynous family, even by duress, is ultimately to the benefit of women in the family due to the harms of the practice.³⁸⁹ However, this colonially inspired narrative of liberation through forced separation of polygynous families, in the oft forgotten specific circumstances of refugees, becomes formulated as 'we'll save them, even if it kills them'. It is not a solution to seek to protect women by punishing them. This approach, however, is shockingly evidenced by historical examples of denying polygynous women the vote, withholding their rations, annuity payments or forcibly separating subsequent wives from their families in order to enforce a monogamous standard.³⁹⁰ The harms visited upon marginalized and racialized foreign

repugnancy principle, see *Matter of H-*, 9 I&N Dec. 640 (BIA 1962), Executive Office for Immigration Review, "Alphabetical Listing by Name F - J", (13 January 2015), online: *The United States Department of Justice* <<https://www.justice.gov/eoir/precedent-decision-alpha-f-j>>.

³⁸⁹ See Michèle Alexandre, "The new faces of feminism: Feminism-in-action and organic feminists in a post-feminist era" in Martha Albertson Fineman, ed, *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (Routledge-Cavendish, 2010) 97 at 103–107.

³⁹⁰ Aspects of a disturbing history of targeting women in combating polygyny, are outlined in the case known as the 'Bountiful Judgment': *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BC Supreme Court., the most comprehensive decision relating to polygamy in Canada; in Utah polygynous women were literally disenfranchised because they were voting 'wrong' (at paras 292-293). The Department of Indian Affairs is reported as "withholding of rations and the placement of second wives in residential schools under new compulsory attendance legislation" and withholding "annuity payments from the wives who were living "immorally" with the men" (at paras 367 and 371). The judgment references Sarah Carter's *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008) at p.210, at para 375:

"Carter comments on the irony that in all the correspondence regarding the suppression of polygamy, supposedly for the benefit of the wives and children of polygamous unions, officials expressed almost no concern about the devastating consequences that would be visited upon them by the dissolution of those unions. As she writes, "[a] central rationale for eradicating polygamy was that women were to be saved

polygynous women in situations in which they or their family members are fleeing persecution, by the current national resettlement and immigration systems, should be viewed with similar dismay.

An alternative approach, specifically attuned to the circumstances of extreme peril applicable to refugees and the principle of humanity which underlies the international refugee law system, is proffered by the UNHCR. Acknowledging that international human rights law defines polygyny as a violation of equality, women's dignity and imperils the emotional and financial well-being of women and their dependents, the UNHCR Resettlement Handbook looks to the protection-purposes of its mandate in determining the appropriate course of action with respect to polygynous refugee families:

However, UNHCR aims to respect the culturally diverse interpretations of family membership and ensure the protection of members of polygamous families, and recognizes polygamy in its criteria for eligible unions. Therefore, where a polygamous marriage is contractually valid, all family members are eligible for UNHCR assistance, including consideration for resettlement. Where a relationship of dependency exists, particularly when children are concerned and when the marriage has been validly contracted according to the laws of the country of origin or asylum, UNHCR respects and promotes the unity of the family during resettlement.³⁹¹

The above arguments work to demonstrate that whilst polygyny may appear to be a private, family affair and a side-issue to refugee services, it does indeed have significant consequences, moreover, significant gendered consequences in cases of family file joinder, family reunification, derivative refugee status for dependents as well as for resettlement opportunities. The most exclusionary consequences are borne by the women in these families. The "blind approach" by service providers who assume polygynous family forms are not present or relevant to their

from unhappy lives, yet if the initiatives were successful, the 'semi-widows' or 'supernumerary wives' and children were to be abandoned".

³⁹¹ UN High Commissioner for Refugees, *supra* note 377 at 208.

work, reinforces the inability of vulnerable women to draw attention to their family forms, or for men to cue their specific family unity needs, and contributes to the continued invisibility of these families in the asylum system.³⁹²

The stereotypes which inform service providers' assumptions as to the presence or absence of polygynous refugees in the South African asylum system identified here include an assumption of nationality –of a Somali prevalence of polygyny – of single, male refugee poverty and of polygyny as a wealthy man's practice. These stereotypes work to occlude the likely presence of polygynous refugee families of different nationalities, sustain a lack of awareness of the complexities faced by cross-border polygynous families and, through a male-centric approach to the refugee figure exacerbated by the polygynous patriarchy, specifically work to exclude an identification of polygynous women refugees within South Africa.

The invisibility of polygynous women refugees in the South African asylum landscape, an African country with domestically legal polygyny, contiguous neighbour to many of its refugees' countries of origin with their own domestically legalized polygyny, points to the comparable impossibility of attempting to understand these families or conceptualize the needs of these refugee women from a West-as-host perspective.

The very narrow vision of refugee law produced through the study of its application in select, Western host countries, which dangerously purport to be representative or robust international studies, at once creates and masks vast gaps in our understanding of refugee law as actually applied to the majority of refugee lives. We must expect that we cannot, within this paradigm,

³⁹² A "blind approach" is described and critiqued in the Grungras & Hughes, *supra* note 110 at 20.; that is, an assumption that an issue - in the case of the ORAM report: sexual orientation and gender identity -is, by way of formal equality recognitions and privacy concerns, irrelevant to service providers' work. The consequences is that the service provider believes the proper, pro-equality approach is to not consider these issues.

know what it is we do not know or who is being left out; what in psychology is termed the illusion of explanatory depth.³⁹³ As 86% of refugees are within the Global South and most of the 14% who have been able to move into Western countries tend to have transited through host countries of the Global South, the failure to study the refugee laws and their application and effect within the hosts of the Global South amounts to a failure to consider refugee law as applied to, and the principal experiences of, almost all of the world's refugees. Through asserting the particularity and discriminatory effect of refugee law scholarship focused only on select Western states, yet presented as general, the positive takeaway is that through the exposure of these shortcomings, we can re-invest focus on the more robust data set waiting to be explored.

Through a focused analysis on the framing and challenges of a sidelined group of refugees within a Southern-host setting, this chapter has argued that the already-gendered access discrepancies to Western host states in combination with the purposeful exclusion of polygynous refugee women through prohibitive resettlement and family reunification immigration policies mean the human stories necessary to an understanding of the application and impact of refugee law upon polygynous refugees are obscured from a Western vantage point. Furthermore, this is but one group of vulnerable refugees who cannot really be appreciable by West-as-host studies. As is demonstrated in the chapter below, queer refugees are another such group which, when viewed from a West-as-host perspective lose much of the real import of their vulnerability. The challenges they face as refugees are lost in translation in the extraction and abbreviation required by the West-as-host construction.

³⁹³ Adam Waytz, "2017 : WHAT SCIENTIFIC TERM OR CONCEPT OUGHT TO BE MORE WIDELY KNOWN? - The Illusion of Explanatory Depth", (2017), online: *Edge.org* <<https://www.edge.org/response-detail/27117>>.

An element of the West-as-host presumption demonstrated in greater force below, is how the assumption that a host is beneficent and morally superior to countries of refugee-origin, has harmful consequences for those experiencing globally pervasive persecution, including women & queer refugees.

Chapter 5: Not for Love or Money

Editing refugee lives is a violence frequently visited upon refugees at various interactions with the asylum administrative and determination processes. Using discourse analysis to examine Canadian refugee case law, Barsky tracks the movement in the asylum claim process from human being to claimant, and from claimant to Other. A very narrow aspect of the claimant's experience is deemed relevant and asylum seekers are expected to fit their experience into a very particular yet generic construction.³⁹⁴ This chapter examines that editing-out process; from the refugee's expected relationship with their supposedly beneficent host, to the conscription of their experiences of non-economic persecution, to the restrictions placed upon understandings of lived experiences by narrow constructions of persecuted identity.

This chapter will highlight some of the ideologies and assumptions which serve to make individuals in need of refuge unidentifiable within the South African asylum system and within the broader international refugee law setting. This chapter speaks to a fundamental limitation of refugee law which is premised on a determination of status, reliant upon a fixed identity marker, at a singular, static moment in time which clashes with a changing and changeable queer identity. Analysing the data from interviews with service providers working with queer refugees and from a group of queer refugees themselves, this chapter thus turns to examine the substantial depth of experiences and variety of individuals who find no foothold in the South African asylum system and, indeed, are illegible in the predominant framing of the international refugee law regime.

³⁹⁴ Barsky, *supra* note 192.

The presumption that a host state is benevolent, discussed in the preceding chapter, underlies the tendency of refugee status determination adjudicators to flinch from acknowledging the persecution of persons whose experiences may seem locally familiar, akin to experiences of their own citizens. The benevolent host presumption also works to obscure the occurrence of continuing persecution of refugees; faced by some refugees who experience ongoing persecution in their country of supposed asylum. That is, the sombre reality of the persecutory host. This is most starkly brought to light by queer refugees who, having fled sexual-orientation based persecution in their country of origin, continue to be harassed, excluded, threatened, fear for their safety and live closeted lives for reasons of their sexual orientation, in their *host* country.

This chapter is structured around themes which reveal lived experiences of continuing persecution, including the role of economics within that experience, which are more prevalent for queer refugees in the Global South and thus less tangible within West-as-host studies. The chapter moves onto an analysis of the normative and biased constructions of queer refugee-identity within South Africa which have parallels in and are influenced by Western refugee law applications.

Section 5.1 discusses the phenomenon of host-country persecution and the prevalence of this experience for queer refugees in South Africa, particularly drawing attention to the conceptual stumbling blocks of unrealistic constructions of ‘hosts’ and of ‘refugees’. Section 5.2 builds upon the incomplete constructions revealed in the previous section to demonstrate the practical impediments to the imagined solution of resettlement. Section 5.3 revisits the role of economics in refugee status determination, attempting to mend the logical rupture of place, safety and money; demonstrating the necessity of an understanding of the economic-geography of persecution, particularly for queer refugees, from the perspective of continuing, host-based

vulnerability to persecution. Finally, having destabilized expectations of where persecution happens and what persecution is; demonstrating the unfeasibility of parsing persecution from economics, section 5.4 critiques the coalescence of expectations around who is persecuted; examining the role of identity groups in the construction of the refugee figure. The formation in the literature and case law of a sexual orientation PSG and group terminology are dissected with respect to those this thesis terms ‘queer refugees’; how the group is described by different people and who is actually envisioned as a member of the ‘group’. The problem with fixed identity politics informing listed grounds and PSG assessments of asylum cases is emphasised as being especially problematic for varying and variable experiences and identities.

This thesis argues that intersectional vulnerability interacts with mobility disadvantages such that those most burdened by an identity-politics reductionism are less likely to be represented in the refugee populace of the West-as-host studies of refugee law. This chapter explores what it is about identity categories that creates hollow molds – wherein so much of a person’s life and, in the case of asylum, so many lives, are left out – and the systemic implications for refugee law.

5.1 Inhospitable Hosts

This chapter, analysing qualitative data on vulnerable minority refugees within a refugee host country which is often sidelined in the study of (international) refugee law, is an exercise in deconstructing labels on the strength of these othered perspectives. Taking up Spijkerboer’s call to those engaged in the refugee system to “ask whether the identities we create are actually

inhabitable by the people we create them for”,³⁹⁵ this chapter starts with some of the broadest labels in use in refugee law studies and works towards some of the most specific. To begin with, I examine the challenge posed by continuing persecution for the ‘host’ label and specifically for South Africa as host to the queer refugees interviewed. I turn then to investigate the ‘refugee’ label, as used in this thesis to refer to persons, specifically here, queer persons, who *de facto* meet the UN and AU Refugee Convention definitions of a refugee yet are largely without refugee status in South Africa.

5.1.1 Unwelcome

For many queer refugees, seeking refuge in their neighbouring countries, their sexual orientation or gender identity continue to be ostracized and subject to socially embedded or even legalized persecution within the countries to which they flee. Writing on gender and sexual orientation in relation to refugee status, Buscher states that: “the LGBT refugees interviewed in Kampala were among the most isolated, marginalised, fearful group of refugees this author has met in more than 20 years of international refugee work.”³⁹⁶ The prevalence and enduring effects of continuing persecution, experienced by refugees in their host countries is masked by studies focusing on the application of refugee law only within the wealthiest, best equipped states, generally dealing with the most manageable numbers of asylum seekers, with much social dissimilarity between countries of origin and host counties of study.

³⁹⁵ Spijkerboer, *supra* note 27 at 7.

³⁹⁶ Buscher, *supra* note 88 at 97.

Although South Africa has strong Constitutional protections against sexual orientation discrimination and, unique to the continent, recognises same-sex unions and recognises sexual orientation-based persecution as grounds for refugee status, South Africa has proven a false haven for many queer Africans. Many of the queer refugees interviewed expressed their continuing security concerns, experiences of continued harassment and described their fearfulness and forced closeted lifestyles in their new homes.

“Aiden” explained that there was a lot of crime in the area in which he lived and that being both foreign and queer meant he considered his home to be “very risky”.³⁹⁷ “Lucas” also spoke of the cumulative effect of homophobia and xenophobia and said that “as a foreigner, and LGBTI you can’t walk with a fellow partner, you have to hide … even though the laws are accommodating. … I’m concerned for my safety as a foreigner. I don’t have a problem with opportunity. I have a problem with safety.”³⁹⁸ “Noah” spoke of seeing violence around him on a daily basis and the harassment and taunting he faced both as a foreigner: “you’re coming here to take our jobs” and as a gay man: “they think you run away from your country and you start doing it here. They don’t understand you were just born like that. So they’ll be like: ‘yeah you run away from your country so that you do those shameful things here’. That’s how they are. They do everything there. So it’s not really safe.”³⁹⁹ Tiwonge Chimbalanga spoke of how she had been beaten in her own home the day before she met with me, using makeup to try and cover the bruises.

A Needs Assessment Report for the queer refugee community in South Africa states that:

Nearly all those interviewed left their home countries due to various forms of dangers and persecution. They find it hard to believe that the country they thought would be a safe

³⁹⁷ Aiden, *Interview with Anonymous Refugee: pseudonym “Aiden”* (2016), Cape Town.

³⁹⁸ Lucas, *Interview with Anonymous Refugee: pseudonym “Lucas”* (2016), Cape Town.

³⁹⁹ Noah, *supra* note 31.

haven turned into another country in which they feel unsafe due to their sexual orientation and gender identity. Those living in townships and similar locations are often in greater danger than any other community.⁴⁰⁰

Fears of violence targeting their sexual orientation or gender expression, often exacerbated by their foreignness in an environment that is both homophobic and xenophobic, these refugees are not experiencing the oft imagined bright line division between persecutory experiences in their country of origin and safety in their host country. Moreover, South Africa fails to offer these queer refugees protection on two fronts: physical safety and asylum documentation. These refugees continue to be fearful of persecution based on their sexual orientation within their host and are also largely unrecognised as refugees, discussed hereunder, thus lacking official acknowledgment of the persecution from which they have fled. A lack of recognition means a lack of documentary protection and lack of access to rights and resources which are normally granted to recognised refugees.

5.1.2 Unrecognized

The majority of queer persons interviewed, having fled their countries of origin due to their experiences or fear of persecution for reasons of their sexual orientation, that is, persons who in their discussions with the author were unquestionably within the definition of a ‘refugee’, had no refugee status. This was confirmed by multiple service providers who said they knew of no queer refugees with refugee status or knew that the majority were either undocumented – without any asylum or immigration papers – or living on indefinitely ‘temporary’ and sometimes expired

⁴⁰⁰ *Report on an Investigation of the LGBTIQ Advocacy Welfare Crisis*, by Victor Chikalogwe (PASSOP LGBTIQ Advocacy Programme) at 19.

asylum seeker permits (see the discussion in Chapter 3.2 on ‘section 22’ asylum seeker permits, supposedly issued pending the 6-month finalisation of an asylum-claim).

One service provider interviewed commented that every single member of the queer community he engaged with, as a refugee service provider, had fled persecution targeted at their sexual orientation and that not a single one had refugee status: “so I can tell you, without doubt, I don’t know any member of the LGBTI that has got their refugee status. I’m not saying in South Africa they don’t have, but the ones that I know: they don’t have refugee status. They’re sitting on asylum seeker permits”.⁴⁰¹ Another social worker revealed that of the few queer refugee cases she had assisted with, only those who had received refugee status on other grounds and prior to ‘coming out’ had official refugee status; others had only asylum seeker permits.⁴⁰² Service providers grappled to even come up with a working vocabulary to describe their queer refugee clientele who were without refugee status. A leader of a queer support group stated: “I have mostly received asylum seekers. A few I’ve seen have permits, and quite a substantial number do not have papers yet. So, I call them just refugees, illegal refugees.”⁴⁰³

Disorder, inefficiency and corruption are standout features of the asylum system in South Africa. For queer refugees, sometimes forced to ‘out’ themselves in front of hostile queues of their countrymen to gain entry to a Refugee Reception Office (RRO), then expected to tell their personal stories in 10 minutes in crowded spaces to a sceptical, sometimes offensive officer via an interpreter who shames them, nothing about the asylum system is conducive to properly

⁴⁰¹ Khosa, *supra* note 334.

⁴⁰² Anonymous, *supra* note 222.

⁴⁰³ Dube, *supra* note 285.

sharing their stories of sexual orientation-based persecution.⁴⁰⁴ For most of those interviewed, however, these powerfully dissuasive factors were not even in play, they simply did not have the know-how, resources, time and money to travel and attend on the RROs the multiple times the system required of them. It is thus possible that the majority of queer persons fleeing persecution may therefore be entirely outside of the asylum system in South Africa.

In a study on queer women refugees in Kenya, where larger numbers of queer refugees are present and documented, via UNHCR, compared to the South African asylum system, it appeared that even amongst this greater volume of queer asylum claims, cisgendered queer women were still less likely to be accounted for in the refugee system.⁴⁰⁵ Gendered security concerns and gendered access to information, particularly as relates to queer services, may mean that an absence of asylum applications amongst queer refugees could be even more marked amongst sexual minority women.⁴⁰⁶

Of the seven queer refugees interviewed for this project, only one had official refugee status; a (trans)woman affectionately known as Aunty Tiwonge, whose case had attracted international attention and which had provoked extremely high level intervention from then UN General Secretary, Ban Ki Moon, and the Malawian President. She had been assisted by multiple NGOs and received legal representation during her refugee application.⁴⁰⁷ Yet it must be noted, in spite of the tremendous and unusual support she received in escaping Malawi and making her asylum case in South Africa, Tiwonge Chimalanga's refugee status was granted on the basis of sexual orientation, whereas it arguably should have been made on gender identity. The presentation of

⁴⁰⁴ Cote, *supra* note 32; Johnson, *supra* note 193; Shelver, *supra* note 216. See also the discussion on the impact of country of origin-arranged intake days in Chapter 3.2 above.

⁴⁰⁵ Moore, *supra* note 120 at 326–333.

⁴⁰⁶ *Ibid* at 331–334; Shelver, *supra* note 216.

⁴⁰⁷ Chimalanga, *supra* note 189.

this case in the media has been understood to represent transphobia and criticised as a sidelining of trans issues for the benefit of a same-sex marriage equality agenda.⁴⁰⁸ In this instance the persecuted marriage between a (trans)woman and a man was taken up internationally as a gay marriage rights issue.⁴⁰⁹

One other queer refugee, “Lucas”, an astute businessman, had asylum seeker status, which he was struggling to repeatedly renew:

Yes, I’m still an asylum seeker. [When I] first applied I was given six months [over two years ago]. But I came here [to Cape Town] so I travelled several miles to get my asylum, so every time I get six months, I have to go back to Home Affairs, [to] the same border. It’s about 1500, not 1500, almost 2000 km from here because the Zimbabwe border; it’s Musina. So I go there, get my papers. ... but it’s not guaranteed because if I go back, say, they give me a reject. Let’s say they find I have no reason to be a refugee in their country; I would lose everything. I would lose a job, I cannot have a bank account. Even now I’m struggling to have a bank account, the bank rules; they stop and close my account every six months with my asylum. Every six months it expires, I have to go to the Home Affairs, get a new paper, come back to activate my account. If not that, they deactivate it and I don’t get the money. I have always to do that, every six months I do that. If I get a reject, that is my worry, because I’m going to lose a job. I don’t know how I’ll manage because I don’t have permanent status or anything like that. I can also not travel with that paper, I can’t do anything. You are totally blocked. You are stranded. ... It’s very difficult with these temporary asylum papers. You don’t know where exactly you’re standing. You don’t know whether they will give you a reject or if they’re going to accept you.⁴¹⁰

The other five refugees interviewed were without asylum or immigration documentation and had not been able to apply for refugee status due to financial and circumstantial restrictions, despite all being in the country for at least two years. The refugee who had been in the country longest (over seven years), “Jackson”, had arrived as an unaccompanied 17 year old and did not have

⁴⁰⁸ Camminga, *supra* note 30 at 105–106.

⁴⁰⁹ Audacia Ray, “In The Interest of ‘Equality,’ Malawian Woman’s Identity Is Erased”, (21 May 2010), online: *International Women’s Health Coalition* <<https://iwhc.org/2010/05/in-the-interest-of-equality-malawian-womans-identity-is-erased/>>.

⁴¹⁰ Lucas, *supra* note 398..

knowledge of the asylum process. When asked about his refugee status, Jackson replied he had “no idea about visas” and that asylum was a long process which would require him to travel to Pretoria every few months, which was too difficult and expensive a trip from Cape Town, where he was living.⁴¹¹ “Liam”, who had been in the country over two years, similarly cited the problem with having to travel to Pretoria, following the closure of the Cape Town Refugee Reception Office, as the reason he had not applied for asylum.⁴¹² As did “Aiden”⁴¹³, who had been in the country over three years and “Noah”, who had also been in the country over two years:

I have never actually tried to [apply for asylum]. I think I’m probably going to try to apply for next year, 2017. For now I haven’t. … It is the effort and also it is expensive. Because, as you know, we don’t have any Home Office here in Cape Town. So … now you have to go to Pretoria and I don’t have any work [...] I don’t have any income, and I don’t know anyone in Pretoria; where am I going to stay for those days? So that’s why I’m…so I want to, but due to the circumstances I actually can’t.⁴¹⁴

“Mason” who was based in Johannesburg and so closer to Pretoria, though still an expensive journey for an impoverished person, had similarly never made an asylum claim although he had been in the country over five years and had been attempting to access the RRO over the last two-to-three years. He had unsuccessfully paid bribes multiple times in attempting to make headway in the queue: “I’ve been bribing for more than four times. And I even went there, I still…because they didn’t allow us to get it there. [It’s] so difficult. I don’t know what’s going on with this Home Affairs stuff.”⁴¹⁵ As discussed in Chapter 3.2 above, a Lawyers for Human Rights

⁴¹¹ Jackson, *Interview with Anonymous Refugee: pseudonym “Jackson”* (2016), Cape Town.

⁴¹² Liam, *Interview with Anonymous Refugee: pseudonym “Liam”* (2016), Cape Town.

⁴¹³ Aiden, *supra* note 397.

⁴¹⁴ Noah, *supra* note 31.

⁴¹⁵ Mason, *Interview with Anonymous Refugee: pseudonym “Mason”* (2016), Johannesburg.

investigation found that 50 percent of those attending on the RRO in Pretoria had been asked to pay bribes.⁴¹⁶

A needs assessment report conducted by Victor Chikalogwe, the LGBTI Project Coordinator at PASSOP (People Against Suffering, Oppression and Poverty) in 2016 which garnered data through interviews, questionnaires and focus group discussions with 90 queer refugees in both Johannesburg and Cape Town, found that only about ten percent of participants had formal refugee status, the majority had temporary asylum seeker status and a sizable number were completely without asylum documentation.⁴¹⁷ A resettlement officer who had previously conducted his own study on sexual orientation and gender identity asylum claims in South Africa in 2015 said that: “what we found out is that a vast majority of LGBTI asylum seekers had been rejected by Home Affairs.”⁴¹⁸ Carrie Shelver, for CAL, referred to previously, speculated that the rhetoric around South Africa’s acceptance of sexual orientation and gender identity refugees and attempts to engage with the queer community and improve training for refugee case decision-makers, contrasted with the Department of Home Affairs anti-refugee stance and minimal acceptance of claims generally, was a case of ‘pink-washing’:

Is this because there’s some person in the department that’s queer, obviously, or an ally, who has been really relentless in pushing this, is that what’s happened? Or, in my case I am a bit more cynical, one says: ‘is this a way for the department to be able to say look how progressive we are and look at what great work we’re doing and here’s the illustration of that’.⁴¹⁹

⁴¹⁶ Cote, *supra* note 32.; referencing a report *Queue Here for Corruption: Measuring Irregularities in South Africa’s Asylum System*, SSRN Scholarly Paper, by Roni Amit, papers.ssrn.com, SSRN Scholarly Paper ID 3274014 (Rochester, NY: Social Science Research Network, 2015).

⁴¹⁷ Chikalogwe, *supra* note 400 at 21.

⁴¹⁸ Okisai, *supra* note 65.

⁴¹⁹ Shelver, *supra* note 216.

Collating these various personal experiences and research reports, the picture emerges of a queer refugee populace that is largely struggling through a punitively ineffectual system, inappropriately rejected from that system or blocked from entering the asylum system at all. The data discussed in these subsections thus demonstrates relationships which are unexpected in the predominant, West-as-host refugee law scholarship; persecution is not just a danger from which queer refugees have fled but one which they often continue to face in their host country, and the queer refugee is not just a sexual orientation-based asylum claim in the system, awaiting analysis but a refugee largely outside of the official asylum system altogether.

A cognitively defensive instinct in which South Africa can be dismissed as not a host and these queer refugees as not refugees is no answer to the complex challenges these realities pose for refugee law. The following section examines the interplay of the regularly posed solution to the problem of persecutory host experiences – a secondary uprooting to a ‘proper’ host – with attendant understandings of ‘host’ and of ‘refugee’ labels; highlighting the practical difficulties of this already very limited ‘solution’ where unsafe host states play host to unrecognised refugees.

5.2 Options for unwanted guests

There is one sphere in which refugee law operates, which caters for those who remain unsafe in their country of asylum and thus indirectly acknowledges the problem of the persecutory host: resettlement. Discussed briefly in the previous chapter, resettlement is the site of tensions in refugee law and a disruption of the expected stories around both the ‘host’ and ‘refugee’ constructions since it can represent a failure of the ‘good host’ construction. Here I analyse the

consequences of the evidence discussed immediately above on the lack of official refugee status recognition of queer refugees in South Africa, for a hypothetical resettlement ‘solution’.

Resettlement is an element of the original call to recognise the inequitable burdens shouldered by certain countries in addressing the needs of refugees.⁴²⁰ Yet, rather than burden-sharing, it has come to signify hope and a possible solution for those experiencing continuing persecution.⁴²¹ It mostly functions as a band-aid, albeit an insufficient and problematic one, in cases of host-state failure. It is, however, also emblematic of the construction of West-as-host, given that countries voluntarily participating in the UNHCR resettlement programme are exclusively Western, and thus saves the notion of the ‘good host’ as the failure to provide permanent appropriate protection is deemed a failure of a non-Western, not-a-host. The geo-political aspect of the West-as-host assumption therefore works to redeem the associated beneficent host construction, reducing the disruptive potential of the resettlement regime.

Traditionally, a refugee is resettled, generally through the agency of the UNHCR, where such person has already been recognised as a refugee in a host country but, for special reasons of vulnerability, cannot enjoy the necessary protection from persecution in that host country. Although the original UN Refugee Convention recognised the problem of disequilibrium of refugee influx amongst host states and the Global Compact on Refugees⁴²² has more recently

⁴²⁰ United Nations, *supra* note 21 at 11. IV “The Conference adopted unanimously the following recommendations ... D: ... **recommends** that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement.”

⁴²¹ See for instance the Chapter by Fisher, *supra* note 379.

⁴²² While, for instance Gilbert seeks to work with the stated objective “to operationalize the principles of burden-and responsibility-sharing to better protect and assist refugees and support host countries and communities” within the Global Compact on Refugees by providing recommendations for concrete indicators of such operationalization, Aleinikoff is skeptical: “In a time of unprecedented numbers of forcibly displaced persons, the global North has responded primarily with pushbacks, interdiction, detention, and other strategies of deterrence. Even the call for additional resources for host States must be understood as part of a broader strategy of stopping

acknowledged this problem, there is no legal requirement on states to take in resettled refugees, unlike the binding international law requirement to take in asylum seekers who present at their borders. The numbers and classes of resettled refugees taken on by certain countries are therefore rather random and politically infused. This is particularly apparent in the case of queer refugees, where select Western countries, as an element of their self-image as progressive and rights-affirming, have made it known that they will accept gay refugees; cognisable under a Western-reading of LGBT; where ‘bisexual’ has been shown by studies to be understood by decision-makers as ‘insufficiently gay /lesbian’ for either plausible persecution or for recognition under a PSG category.⁴²³ Thus, refugees facing the most extreme vulnerabilities such that even the country in which they seek refuge is no safe haven, find their lives and safety subject to the political whims and fancies of a small number of states participating in the UNHCR resettlement program.

Resettlement is contemplated where a recognised refugee is considered a person of concern by the UNHCR.⁴²⁴ However, when examined from the perspective of the original asylum system upon which the resettlement programme is overlaid, substantial problems are encountered at that very first identifier: ‘*recognised* refugee’; resettlement relies on the refugee having been recognised as such in the first place by the host country, from which resettlement is required. In South Africa’s deeply flawed and too oft inaccessible asylum system, queer refugees face many barriers to recognition of their status as refugees and specifically to recognition of their status as

onward movement of refugees and migrants.” See Geoff Gilbert, “Indicators for the Global Compact on Refugees” (2018) 30:4 International Journal of Refugee Law, online: <<https://www.dipublico.org/111988/international-journal-of-refugee-law-volume-30-issue-4-december-2018/>>; T Alexander Aleinikoff, “The Unfinished Work of the Global Compact on Refugees” (2018) 30:4 International Journal of Refugee Law, online:

<<https://www.dipublico.org/111988/international-journal-of-refugee-law-volume-30-issue-4-december-2018/>>.

⁴²³ See Rehaag, *supra* note 84.

⁴²⁴ Okisai, *supra* note 65; Moore, *supra* note 120 at 335.

refugees persecuted for reasons of their sexual and/or gender orientation. The failure to recognise a *de facto* refugee's status may be central to the reason a refugee has to seek protection elsewhere. However, prior to this adjudicative moment of status determination, which is most often the focus of Western-based refugee law studies, a more prevalent problem in South Africa proved to be that most queer refugees may never make the claim to refugee status at all, despite having fled their country for their fear of persecution based on their sexual orientation and seeking refuge in South Africa as a result.

A business-as-usual resettlement function for the UNHCR would involve the identification of vulnerable persons, so-called 'persons of concern', who had been recognised as having refugee status and are in need of resettlement. In the case of queer persons, their vulnerability by virtue of their sexual orientation would ideally be brought to UNHCR's attention when their refugee status is recognised on those grounds. In many countries of the Global South, the UNHCR is responsible for refugee status determination for refugees generally.⁴²⁵ In a valuable contribution to the field, Fisher examines the ongoing protection needs of LGBTI refugees in Jordan, Lebanon and Turkey as well as an analysis of the limitations of the global resettlement system. The refugee resettlement process is described as: "UNHCR refugee status determination, UNHCR resettlement processing, and processing from the country of possible resettlement."⁴²⁶ However, there is increasing variation in the interaction and order of processes between refugee

⁴²⁵ The UNHCR reports on its website that "In any given year, UNHCR conducts RSD under its mandate in between 50-60 countries, depending on where the applications are received. In 2017, UNHCR registered 252,100 new individual asylum applications, making it the second largest RSD body in the world. In approximately 20 countries UNHCR conducts RSD jointly with the government pending the state assuming full responsibility for RSD, while in many more countries UNHCR conducts a range of capacity development activities." See UNHCR, *supra* note 26. The countries in which the UNHCR conducts mandate RSD can be gleaned from Table 9 of the latest "Statistical Yearbook" by comparing the first two columns of total number of applications and the number "of whom: UNHCR assisted", see "Senior Statistician Field Information and Coordination Support Section UNHCR, *UNHCR Statistical Yearbook 2016, 16th edition* (UNHCR, 2018) at 48–51.

⁴²⁶ Fisher, *supra* note 379 at 285.

status determination and identification of refugees for resettlement. Fisher discusses three alternative approaches: firstly, a previously standard approach whereby the UNHCR conducted individual refugee status determinations and then refugees identified as having special protection needs may be considered for resettlement by the UNHCR.⁴²⁷ Secondly, an approach is evident in some countries and contexts where the UNHCR *prima facie* recognises whole nationalities as refugees. In this circumstance, refugees are registered with the UNHCR and then, at this point of minimal interaction or subsequent thereto, if it emerges a *prima facie* refugee has particular protection needs, their need for resettlement may flag an individualized status determination. Thirdly, where the host country takes a larger role in refugee status determination, they may refer refugees in need of resettlement to the UNHCR and the UNHCR then confirms their refugee status prior to processing for resettlement.⁴²⁸ In the ‘traditional’ sequence of processing (the first approach), UNHCR conducts individualised status determination for all refugees; so-called mandate status determination. The UNHCR therefore has access to the full population of asylum claimants and, ideally, can identify from this group those vulnerable queer refugees who may require resettlement and then proceed to resettlement processing, all done in-house, as it were. It then becomes a matter of appropriate training and communications within the UNHCR to facilitate queer refugees’ identification and resettlement. Where the UNHCR either has a perfunctory *prima facie* registration process or relies on the general population refugee status processing of the host state (the second and third approaches), an individual’s special protection needs must be brought to the UNHCR’s attention externally.

The UNHCR does not have a refugee status determination function in South Africa. South Africa determines the status of its own refugees through its Department of Home Affairs and

⁴²⁷ *Ibid* at 286–287.

⁴²⁸ *Ibid* at 287.

government officiates. The third approach outlined above, therefore applies whereby, ideally, the host state, having recognised a refugee, refers them to the UNHCR for resettlement consideration. Speaking in his personal capacity, a UNHCR resettlement officer outlined the difficulties the program faces with regard to queer refugees in South Africa:

We have had problems with identification of sexual minorities, until I did that small research [project]. Until that time we weren't really able to map this population and establish a proper referral mechanism; until we had some more informal arrangements with organisations such as PASSOP, and the Legal Resources Centre. Even then, what we found out is that a vast majority of LGBTI asylum seekers had been rejected by Home Affairs. Now, this resettlement, what we usually do as a condition for resettlement is that you should be recognized as a refugee by the state, by the South African government. Now with most of them being rejected, the only alternative would be for UNHCR to conduct mandate status determination, and after that (the mandate status determination), those recognized as refugees would then be consider[ed] for resettlement, based on the fact that they are rejected by the state ... the chances of appeal are not really clear at this stage.⁴²⁹

Those working and researching the position of queer refugees in South Africa commonly find that decisions, especially at the first level, are very poor, lack nuance and regularly, wrongfully fail to recognize sexual orientation-based persecution as grounds for refugee status.⁴³⁰ The Refugee Appeal Board which received specialized training on sexual orientation claims lost this knowledge when the contracts of the majority of board members were not renewed in 2012 and, at least since 2015 the Appeal Board has in fact been unconstituted – having only two members when a minimum of three is required – and is thus non-functional.⁴³¹ Given the evidently poor quality of decisions, particularly as relates to queer claims, and the lack of a working appeal body to address that deficit of properly adjudicated claims, the UNHCR must frequently face the

⁴²⁹ Okisai, *supra* note 65.

⁴³⁰ *Ibid*; Cote, *supra* note 32; Shervier, *supra* note 216; Middleton, *supra* note 177; Anonymous, *supra* note 214. – as discussed above.

⁴³¹ Cote, *supra* note 32; *A v Chairperson of the Refugee Appeal Board and Others*, *supra* note 200. At para. [42]. See further the discussion in Chapter 3.2 above.

conclusion that queer refugees are being denied protective status, as well as often continuing to face personal security threats. In light of the government's failure to grant refugee status to *de facto* refugees, it becomes a necessary step for the UNHCR to then conduct 'mandate status determination' to establish a refugee's status as such, prior to initiating resettlement processes. This is, however, politically awkward. The South African state theoretically has a functioning refugee status determination process which means the UNHCR is now in the position of 'second-guessing' the state's decisions and thus the UNHCR also faces its own mandate limitations.

The resettlement officer quoted above essentially outlined the entire queer refugee population (as the term 'refugee' is used in this research; to denote a person who meets the UN or AU Refugee Convention definition, irrespective of official status within South Africa), as being 'persons of concern'. However, there are substantial difficulties in actually identifying the individuals that make up this population of concern. As mentioned, in South Africa, the UNHCR is not responsible for the original determination themselves, resettlement officers thus do not know which failed refugee applicants are queer, unless queer refugees approach the UNHCR offices themselves or are referred by other social or advocacy groups. Even in countries where the UNHCR does have a status determination function, familiar problems have arisen with staff asking inappropriate questions and displaying insufficient knowledge of both refugee law as relates to sexual orientation-based claims or appropriate standards of proof.⁴³² The UNHCR issued a Guidance Note on "Refugee Claims Relating to Sexual Orientation and Gender Identity" in 2008 and Guidelines on these claims in 2012 in an attempt to improve both UNHCR and state decision making on queer claims.⁴³³ A study of queer refugees in Turkey conducted in 2009 and

⁴³² Arf et al, *supra* note 109 at 14.

⁴³³ United Nations High Commissioner for UNHCR, "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity", (21 November 2008), online: *Refworld*

again in 2011 found a substantial improvement in sexual orientation and gender identity claims determined by the UNHCR in the interim of the study. Yet this also displays the take-up lag between policy and training changes, and change on the ground, as experienced by asylum seekers in that policy initiatives published in 2008 were only felt by refugees sometime after 2009.⁴³⁴

It is especially difficult to access and to provide services to the queer refugees who have never attempted to make an asylum claim. This hurdle speaks to a broader concern in assisting the unidentifiable. Both the state refugee status determination system and the UNHCR resettlement programme are reliant on queer persons coming out themselves, even in an environment of continuing insecurity and hostility and in circumstances where, for so many, everything in their personal experience has taught them to hide their sexual orientation at all cost.

In terms of the population that's known to us, [...] so we're talking about, you know, 130 persons with the vast majority of them in South Africa. But I can promise you, I mean the numbers should be much, much higher than that. We don't really have a mechanism, whether through Home Affairs or other partners, apart from PASSOP, that we can get a more accurate, or closer to accurate figure.⁴³⁵

Studying the cases of resettled refugees from a Western-host endpoint reduces the enquiry to only already identified and recognised refugees, rendering this critical problem with identifying unrecognised refugees in need of resettlement unknowable. The unremarked stand-in of the West-as-host for a fuller concept of 'host country', cripples our understanding of refugee law, its application as it effects the majority of refugees in the world and, indeed, limits the potential for

<<https://www.refworld.org/docid/48abd5660.html>>; United Nations High Commissioner for UNHCR, "Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees", (23 October 2012), online: *Refworld* <<https://www.refworld.org/docid/50348afc2.html>>.

⁴³⁴ Arf et al, *supra* note 109 at 14.

⁴³⁵ Okisai, *supra* note 65.

better understanding the interaction of refugees with asylum and integration systems even within their Western hosts. For countries with significant intake of resettled refugees, concern with their social and economic integration requires attention be paid to the challenges, exclusions and vulnerabilities faced by these refugees in their first country of asylum. Statistics tend to focus on the country of origin of resettled refugees.⁴³⁶ Whilst their country of origin is entwined with their personal histories of persecution and their original reasons for flight, the country to which they first flee is similarly significant in their stories of continuing vulnerability and, often, continuing persecution. The entire basis for a refugee requiring resettlement, as opposed to a first instance recognition of their refugee status at a border, is to be found within the first country of asylum, that ‘temporary’/ ‘transitory’ home, in which they may have lived for a substantial period of their lives but is neglected in a legal asylum system focused only on constructing a point A country of origin and point B final country of resettlement.

In-transit stories of continuing persecution would also provide a fuller story for refugees presenting their first asylum claim for the large number of hosts in the Global South, including South Africa, which, as in the West, receive many of their refugees following long journeys through different countries. Understanding the pervasiveness of this excluding, persecutory experience *from within their host countries*, for queer refugees who flee to their most accessible neighbour, can better help decision makers within the Global South and further afield understand how unwilling and even totally inexperienced an asylum applicant or resettled refugee may be in discussing their sexual orientation with anyone, particularly an official. One service provider

⁴³⁶ See for instance the IRCC datasets which characterize claimants by country of citizenship Treasury Board of Canada Secretariat, “Asylum Claimants – Monthly IRCC Updates - Open Government Portal”, online: *Government of Canada* <<https://open.canada.ca/data/en/dataset/b6cbcfd4d-f763-4924-a2fb-8cc4a06e3de4>>, as does the UNHCR dataset on the “Mediterranean situation” available at UNHCR data, “Situation Mediterranean Situation”, online: *Operational Portal, Refugee Situations* <<https://data2.unhcr.org/en/situations/mediterranean>>.

interviewed who ran a project aimed at queer refugees who himself had fled sexual orientation-based persecution but had had the resources to acquire a work permit, rather than resorting to refugee status, described how a young Somali woman who had been referred to him said: “this is my first time expressing myself about my sexual orientation. I’ve never done this”.⁴³⁷

In sum then, queer refugees in South Africa are both highly unlikely to have refugee status and most likely to need protective onward resettlement, posing a substantial challenge to the usual functioning of the resettlement regime. Moreover, the configuration of this problem: that out-of-country, unrecognised refugees require protection elsewhere, is likely to be a problem facing many if not most queer refugees in the Global South. These refugees, outside of their country of origin for reasons of their fear of persecution, may be unable to make a claim based on their real reasons for flight as their host country may not recognise sexual orientation-based persecution as grounds for refugee status, or their host country’s social milieu may discourage coming out to make such a claim, or their hosts may even facilitate home-grown sexual orientation-based persecution.

To label South Africa as somehow not a host to the refugees it fails to recognise would be counterintuitive. Just as these persons outside of their country of origin, fleeing persecution for reasons of their sexual orientation are blatantly refugees, South Africa, the country to which they have fled, in the hopes of finding protection from this persecution, is factually hosting (however poorly) these refugees. It would similarly be nonsensical to label South Africa a country of transit when such minimal numbers of refugees travel onwards. An improper application of refugee law requires further study and advocacy rather than nullifying the host as not being indicative of the ‘host’ label. Simply put, ‘bad’ hosts are still hosts and unrecognised refugees

⁴³⁷ Chikalogwe, *supra* note 282.

are still refugees. Reinvigorating these labels with the variability of ‘hosts’ and ‘refugees’ which should be included therein places greater emphasis on the need to study the asylum systems of hosts which may themselves be persecutory and of the interaction (or failure to interact) with asylum systems of refugees who do not receive official refugee status. In turn, a proper view of the variability of hosts and of refugees exposes the limitations and challenges of more narrowly conceived ‘solutions’ such as resettlement.

5.3 Locating the Money-less Refugee

Having destabilized assumptions of where persecution occurs; that persecution does not oblige a borderline between host and country of origin but may indeed follow refugees out of their country of origin, the following section takes a more detailed look at the spatiality of persecution and interrogates conceptual binaries of what persecution is and is not.

The difficulties queer refugees face in having their claim recognized is but one point in the continuum of particular and exacerbated harms they must face in their country of origin, negotiating the journey from point of flight to (supposed) safe haven and establishing themselves in their host country and/or once again facing the asylum system in order to resettle, as has been outlined above. Yet to begin by focusing on this suspended, much examined adjudicative moment; of all the experiences, and indeed human beings, who become elided in the (Western) construction of ‘a refugee’, one pivotal aspect of lived experiences of persecution is uniformly excluded from all refugees’ stories, in every locale. In an assessment of a claim to asylum, wherein an adjudicator focuses on the grounds for flight and the existence of a reasonable fear of persecution “for reasons of race, religion, nationality, political opinion or membership in a

particular social group,’⁴³⁸ where the issue of economics comes up, this is instantly a red flag for decision-makers. Economic concerns are taken as indicating that the claimant is potentially not a refugee but an ‘economic migrant’ and so not entitled to protection or admission as a refugee.

Contrasted with the already-privileged, eligible ('skilled') alien, in immigration terms the world's poor are undesirable, have no special circumstances compelling their humane reception, as refugees do, and no recognized right to freedom of movement beyond the national borders in which they are born. They are thus classed as ‘illegal immigrants’ should they defy international economic segregation. It consequently becomes important, in an effort to salvage any refugee rights, to distinguish refugees from this, albeit similar, group of undesirables.

In South Africa, any evidence that suggests an asylum applicant is in the country for economic reasons, results in a ‘manifestly unfounded’ finding. That is, a shorter-form rejection, finding that the applicant is patently ineligible for asylum and which sends them down a written-only review system as opposed to an appealable decision. Using economic concerns or ambitions as an automated cue for rejection is, at best, an inept application of refugee laws designed to provide protection for persons fleeing persecution. This section specifically details how an exclusionary approach towards economics in refugee law has particular consequences for queer refugees. This section begins with an account of the traditional understanding of economics in relation to refugee status and refugee law, underlining its limitations. It asserts an alternative, thoroughly interwoven account of economics and persecution through the examination of the lived experiences of queer refugees in South Africa, concluding with an assessment of what this means for refugee law studies.

⁴³⁸ United Nations, *supra* note 21., Article I.

5.3.1 Economics in international refugee law

There is some recognition that the reasons a refugee chooses to flee to a specific country, may be influenced by their prospects of a better life, including their economic prospects. This has come to be termed “mixed-motives”⁴³⁹ and decision-makers are urged not to automatically reject asylum seekers who make reference to economic concerns because they may *also* have a real fear of persecution. In a world where asylum applicants are assumed to be irregular migrants abusing the system and refugee determination officials are encouraged to ‘turn back the tide’, all too often any mention by an asylum seeker of money, business or employment, equates to a rubber-stamp refusal. It is in these circumstances that ‘mixed-motives’ language seeks to make headway.

This approach, however, is additive rather than integrative of economic issues. An attempt at a more intersectional approach has been hinted at in the literature; this approach advises that what may appear to be economic disadvantage may in fact be the manifestation of listed-grounds-based persecution. For example, the violent exclusion of an individual from the workforce may be a result of discrimination for reasons of their race or ethnicity, amounting to persecution.⁴⁴⁰ This is an important advancement yet still insufficient in understanding the centrality of economics to the lived experience of persecution in some refugees’ lives.

Foster, in a book particularly focused on violations of economic rights as grounds for refugees status, asserts that “claims based on economic and social deprivation present the most difficult challenge to some key conceptual assumptions regarding the nature of persecution, and most

⁴³⁹ Hathaway & Foster, *supra* note 23 at 139.

⁴⁴⁰ *Ibid* at 176.

directly and acutely challenge the distinction between economic migrants and refugees.”⁴⁴¹ Her project is focused on investigating economic deprivation as a rights violation amounting to persecution. She seeks to solidify the proper placement and assessment of economic deprivation as akin to other civil and political rights violations with which refugee status determination processes seem more comfortable. However, the nature of refugee status determination procedures, and indeed the nature of law generally and of bureaucracies, make it very difficult to escape a tick-box approach to understanding refugee status adjudication and Foster’s work does not necessarily disrupt this tendency. Lists and categories are familiar and comforting tools for assessment and the UN Refugee Convention definition prompts the use of so-called ‘listed grounds’ as individual, distinct and circumscribed characteristics.

Thus we can trace the idea amongst refugee advocates and authors that refugees may have both economic and persecution-based motivations, and that economic concerns can be the result of other more commonly recognized kinds of persecution as well as the idea of economic rights violations as also amounting to persecution themselves. These ideas seek to bravely fight against a dominant, presumptive dismissal of all experiences which can be viewed as economic. Yet the cognitive problem which prohibits a fuller understanding of the integration of economics and persecution is the reflexive use of categories and lists, jarring against intersectional realities. The experiential reality may not be that economic deprivation is a cue to the underlying persecution, or that economic deprivation is itself the persecution, but rather both of these approaches in combination with the experience that economic status is integral to the vulnerability of a person to persecution. This is better highlighted by Foster in her question: “how do we apply the accepted notion that the particular vulnerabilities of an individual applicant are relevant to

⁴⁴¹ Foster, *supra* note 127 at 88.

assessing the risk of being persecuted, where those vulnerabilities are of an economic or social nature?”⁴⁴² The following subsection illustrates how safety and persecution have particular relationships with physical spaces and how central economic security is to facilitating access to safer places, or indeed how economic insecurity places queer refugees in persecutory environments.

5.3.2 Buying a safe space

Refugee law, and the identification of persons as refugees, is always about physical space and borders. The UN Refugee Convention definitional clause “outside of his country of origin” necessitates the crossing of national borders and this geo-political line-crossing similarly forms the distinguishing line between refugees and internally displaced persons (IDPs), as reflected by the UNHCR mandate.⁴⁴³ As discussed above, this line does not necessarily represent a borderline between experiences of persecution and of safety. This research project is influenced by a blatant Law and Geography interrelationship, as are all refugee studies, both in terms of the imagined geographies of the West-as-host and signifying geographies of West and Global South, as well as the notions of full and empty spaces, critiqued by Chimni, which embolden host and not-a-host labels contested here by drawing on a Southern host study.⁴⁴⁴ In refugee law, demarcations of physical landscapes as safe or unsafe impact upon the ‘Internal Flight Alternative’ concept whereby persons fleeing persecution may be expected to flee elsewhere within their country,

⁴⁴² *Ibid* at 89.

⁴⁴³ See United Nations High Commissioner for Division of International Protection, *NOTE ON THE MANDATE OF THE HIGH COMMISSIONER FOR REFUGEES AND HIS OFFICE* (UNHCR, 2013); Haddad, *supra* note 58 at 196–198.

⁴⁴⁴ Chimni, “The Geopolitics of Refugee Studies”, *supra* note 61 at 359.

rather than across a national border and may be punished for fleeing across the wrong geopolitical spaces through the denial of refugee status.⁴⁴⁵

Yet there are smaller-scale geographies of place which profoundly affect both the available choices and risks for refugees and the application of refugee law. Variance between safe and unsafe spaces for queer persons, in particular, has been studied as running along urban-rural geographical divisions.⁴⁴⁶ Moreover, different pieces of urban land may be identified as ‘friendly-cities’. In this regard, Cape Town has an international reputation as a ‘pink tourism’ destination and is locally considered the most gay-friendly city in South Africa. In the course of my fieldwork it became clear that there were more queer-oriented service providers in Cape Town, despite Johannesburg being a larger, wealthier city and part of a megalopolis with its proximity to Pretoria (Tshwane). One lawyer commented that: “A lot of people migrate towards Cape Town because it’s seen as a safe place for gay and lesbian people. And so [service providers] will see more people there, especially living openly, than Gauteng because it’s somewhat dangerous at times. … I do think it’s easier to live an open lifestyle there so people do gravitate towards that”.⁴⁴⁷ Another service provider explained that for some queer refugees, Cape Town was like a domestic resettlement area.⁴⁴⁸

Urban geographies on a yet smaller scale; those of suburban areas as opposed to those satellite areas known as ‘Locations’ (discussed further below), are experienced by queer refugees as spatial demarcations of areas of freedom and refuge and of areas carrying a risk of continuing

⁴⁴⁵ See the explanation of an internal protection alternative as reason to deny refugee status in Hathaway & Foster, *supra* note 23 at 332–333.

⁴⁴⁶ Stychin, *supra* note 148 at 603; Carl Wittman, *The Gay Manifesto: out of the closets and into the streets* (Red Butterfly Publication: New York, 1970) at 3.

⁴⁴⁷ Cote, *supra* note 32.

⁴⁴⁸ Khosa, *supra* note 334.

persecution. As a resettlement officer remarked: “we all think that Cape Town is tolerant but I think it depends on where you are. If you’re living in those upmarket areas, you’re fine, but not many of these refugees are able to afford that at all.”⁴⁴⁹

For the queer refugees interviewed in my project, their financial resources and employment situation or employment prospects directly influenced where they were able to find accommodation. A stark divide was evident between those who were able to find a place to stay in the wealthier suburbs and those who had to live ‘on Location’; in ‘townships’, or informal settlements, which experience extremely high levels of violence.

In my own ultra-privileged, post-apartheid schooling, I was taught the appropriate word for these spaces was “informal settlements”, as preferable to “black townships”. I was not familiar with the term “Location”. Yet, through the course of my fieldwork, both refugees themselves, living in these areas, and the service providers who worked with refugees, uniformly referred to these areas as Locations and so I shall do the same.

One young queer refugee, “Jackson” who was staying in a suburban home in Cape Town, South Africa, said he felt safe and secure: a “free bird, I can fly”.⁴⁵⁰ Another queer refugee, “Noah”, of similar age, in the same city but staying on Location said:

I think I see people beaten in front of me each and every day. In these Locations. ... I have seen a lot, a lot since I came here. Being alive till now is just the grace of God, I would say. Because it’s not even safe out there. Especially if you are a gay person. Some people ... also beat me up, the other day, just because I’m gay.⁴⁵¹

⁴⁴⁹ Okisai, *supra* note 65.

⁴⁵⁰ Jackson, *supra* note 411.

⁴⁵¹ Noah, *supra* note 31.

“Jackson”, who was staying in a suburb, felt welcomed, safe and secure. He felt the suburb gave him accessibility to work and travel and did not have crime, whereas he felt it would be unsafe as a gay foreigner to live in a Location, as he would be a target.⁴⁵² The other refugees interviewed who spoke about their accommodation, were all living ‘on Location’ and all expressed concern for their safety. “Aiden” expressed his additional difficulty with cultural shock; having fled his accustomed lifestyle with his parents in a brick house to living in a shack in a crime-ridden area. He also identified the difference in experience between the suburbs and Locations: “in the suburbs no one will ask you: ‘what are you doing?’ or whatever, it is different from Location”.⁴⁵³ All of the refugee-interview discussions relating to continuing insecurity and fear of persecution based on sexual orientation, discussed above, related to those refugees’ experiences in their homes, ‘on Location’. “Noah” explained his situation of dependency which linked these refugees’ place-centric security concerns with their inability to afford safer spaces:

When I arrived here, I was actually seeing someone who was a married man, he was doing everything for me. He was a married man, he’s bisexual, he’s married, two kids, and he’s the guy who has been actually paying the rent and also giving me food, and that’s how I actually survive.

The thing is I was actually staying in the Location there. That’s where he kept me and [where] he could afford as well. ‘Cause he stays there but his side is a little bit nicer than mine. But that was then, because now he’s not actually paying, we are not in good books together. Due to communications and stuff.⁴⁵⁴

Queer refugees face substantial hurdles to finding employment. South Africa has tragic unemployment levels and, whereas most refugees may seek to make their way within the

⁴⁵² Jackson, *supra* note 411.

⁴⁵³ Aiden, *supra* note 397.

⁴⁵⁴ Noah, *supra* note 31.

informal sector, this, less regulated sector, is the site of greater discrimination for queer persons.⁴⁵⁵

Most of the people are failing to get jobs because of sexual orientation and gender identity. Some of them got a job and maybe the employers or colleagues realise that the person is gay or lesbian in the course of working. Some of them have lost their jobs after they got it, after people discovered their sexual orientation. So that's another thing in South Africa, especially for [the] LGBT community. Sexual orientation is contributing to most of [their] unemployment.⁴⁵⁶

A lack of employment feeds into an inability to afford safe accommodation. This is exacerbated by the spatial-economic divide between more expensive, safer, suburbs and cheaper, dangerous locations. This is further amplified by discriminatory extortion by landlords, explained by Victor Chikalogwe in relation to his research study with queer refugees:

We also have a problem with accommodation. Very few...only 32% have a decent home whereby they can sit and relax without anyone bothering them. But 57%; they're still struggling to get a home and five or six percent, they're homeless. So these people are struggling to get a home; they get a home this month, the landlord realises 'no, you're gay': they put them out. If they're not put out, the rent was R3000, then he goes: 'ah you're gay? The rent is R5000'. So it's up to you [to] stay at that place or go to move to another place because of the exorbitant price.⁴⁵⁷

The Needs Assessment Report states that almost half of the queer refugees interviewed for that project were living in shacks.⁴⁵⁸ These refugees face ongoing discrimination by their neighbours, targeting their sexual orientation or gender identity. "This results in frequent relocations in the

⁴⁵⁵ Okisai, *supra* note 65.: "You have labour issues, employers, and you know for the most part refugees and asylum seekers rely on private informal forms of employment, so while perhaps the bigger corporate bodies might be aware of the laws, but the refugees are looking at these smaller employers who are not necessarily tolerant towards sexual minorities or don't care about the law".

⁴⁵⁶ Chikalogwe, *supra* note 282.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ Chikalogwe, *supra* note 400 at 6.

search of a safe living environment.”⁴⁵⁹ The distinction between hazardous and safe places for queer refugees, runs along socio-economic divisions, thus the ability to move between them is dependent upon financial resources which may be unobtainable for the majority, for compounded reasons of disadvantage. This informs the resettlement needs of this population:

Many of my [LGBT] clients have already been resettled because they were found to be particularly vulnerable in South Africa. So one of the interesting things here is that once you’re already granted refugee status, everybody thinks you should be fine. I’m sure you’ve heard of this idea of ‘corrective rape’ … and so because of the high levels of xenophobia, it’s very difficult for foreigners to get jobs, even if they have refugee permits, and so you are forced to live in lower income areas, often in townships, which means that you are in danger of continuous attack. So people feel obliged to live in wealthier areas in order to at least protect themselves and I’ve used that as grounds to advocate for resettlement in the past. That it’s just too dangerous, particularly for women.

The point here is not just that South Africa is dangerous for queer persons but more specifically, that it is dangerous for poor, queer persons. Furthermore, their circumstances may be irretrievably dangerous where they cannot afford to buy their safety. This following subsection further explicates some of the particularities of South African geographies of safe and unsafe spaces as applicable to the intersecting identities and experiences of queer refugees.

5.3.3 Intersecting silences

In South Africa there is a complicated correlating racial divide to the economic-geography of the country. Explicitly included in the definition of “crimes against humanity” in the Rome Statute of the International Criminal Court, the purposeful, formal and legislated system of apartheid in South Africa thoroughly racially segregated the physical geography of the country, consistently

⁴⁵⁹ *Ibid* at 14.

working to oppress and impoverish the majority of the population to create overlaying borders of space, race and economies.⁴⁶⁰

Particularly stark and startlingly proximal lines of racialized wealth and impoverishment lain upon adjacent physical spaces can still be found in the geography of white suburbs and their satellite underdeveloped, under-serviced and overcrowded areas reserved for the apartheid-demarcated: Black, Coloured and Indian populations, who were excluded from living in the white cities, yet served them.⁴⁶¹ Writing towards the end of apartheid, Robinson stated that:

In South Africa, 'native Locations' have a long and ignominious history. From their beginnings in the first half of the nineteenth century, they continue to exist today under the guise of independent, bankrupt, 'black' municipalities, excised from the wealthy 'white' cities. Uncovering the past history of the Locations is of considerably more than antiquarian interest though, because, if spatial relations and built environments do 'matter', then these physical spaces built under the apartheid system, and even before it, have been providing the context for black urban life for generations, and will more than likely continue to do so, even beyond the life of apartheid.⁴⁶²

In a footnote, she explains the use of the term "Location":

'Location' is a term which had currency in the South African context from the early nineteenth century until at least the mid-twentieth century. It refers to the segregated

⁴⁶⁰ Article 7(1)(j), UN General Assembly, "Rome Statute of the International Criminal Court (last amended 2010)", (17 July 1998), online: *Refworld* <<https://www.refworld.org/docid/3ae6b3a84.html>>.

⁴⁶¹ South Africa's system of racial segregation made use of 'white' and 'non-white' categories with the latter divided into black, coloured and Indian. The latter two categories may be confusing for North American readers: 'coloured' refers to mixed race but within a long history of segregation such that it is identifiable as its own racial group with cultural and linguistic specificities, (and was in fact subdivided into 'Cape Malay', 'Griqua', and 'Cape Coloured' with Indian and Chinese sometimes also identified as 'coloured' subdivisions under apartheid). It is thus more akin to the fulsomess of the term 'Metis' in the Canadian context than with the way 'mixed-race' is often used to infer parents of different races. 'Indian', on the other hand refers to South Africans whose ancestors arrived from the Indian subcontinent, often over a century ago. See Padraig O'Malley "1950. Population Registration Act No 30" Padraig O'Malley, "1950. Population Registration Act No 30 - The O'Malley Archives", online: *The O'Malley Archives, Nelson Mandela Centre of Memory* <<https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01838.htm>>.

⁴⁶² J Robinson, "'A Perfect System of Control'? State Power and 'Native Locations' in South Africa" (1990) 8:2 Environ Plan D 135–162 at 135.

areas in which African people have been compelled to live, often (but not always) in formally provided state housing. I use this term advisedly and despite its unpleasant connotations. This is because the word itself conveys the continuity of the practices with which it has been associated, as well as symbolising the racism inherent in the [apartheid] government.⁴⁶³

These Locations, with a history of structural and systemic impoverishment, have aggravated levels of xenophobia with fits of extreme xenophobic violence having hit townships countrywide with spikes in 2008, 2015 and most recently in 2019.⁴⁶⁴ This violence saw the first ever refugee camps being temporarily erected and managed by UNHCR in South Africa in 2008, a country with an integrative asylum system. The South African government and particular politicians therein have been criticised for using foreigners as scapegoats and encouraging xenophobia as a means of deflecting increasing unhappiness with the lack of improvements and services in the lives of the country's Black⁴⁶⁵ poor, post-apartheid.⁴⁶⁶ In this regard the Department responsible for refugees has a particular role to play: "the concentration of institutional xenophobia is the Department of Home Affairs".⁴⁶⁷

Furthermore, the Locations have a reputation for deadly homophobia.⁴⁶⁸ Amnesty International has commented on the "apparent disconnect between South Africa's progressive laws on LGBTI issues, and practical access to justice for LGBTI individuals who are victims of hate crimes. This

⁴⁶³ *Ibid.*

⁴⁶⁴ Simon Bekker, "Violent xenophobic episodes in South Africa, 2008 and 2015" (2015) 1:3 AHMR (Special Issue) 229–252. See also a graph based on data composed by Xenowatch, African Centre for Migration and Society in Reality Check team, "Are attacks on foreigners rising in South Africa?", *BBC News* (2 October 2019), online: <<https://www.bbc.com/news/world-africa-47800718>>.

⁴⁶⁵ The capitalized term 'Black' is used here to refer to a broader array of races, skin hues and cultures, inspired by the Black Consciousness movement and found in the definitional section of the South African legislation on Black Economic Empowerment: section 1 Broad-Based Black Economic Empowerment Act, 2003, Act 53 of 2003.

⁴⁶⁶ See Jean Pierre Misago, "Linking governance and xenophobic violence in contemporary South Africa" 2019:1 ACCORD, AJCR, online: <<https://www.accord.org.za/ajcr-issues/linking-governance-and-xenophobic-violence-in-contemporary-south-africa/>>.

⁴⁶⁷ Ekambaran, *supra* note 215.

⁴⁶⁸ "We'll Show You You're a Woman": Violence and Discrimination against Black Lesbians and Transgender Men in South Africa, by Human Rights Watch (Human Rights Watch, 2011) at 2.

is evident in ... the continuing climate of fear they endure, especially in townships and rural areas".⁴⁶⁹ A Human Rights Watch Report, based on a six month, nation-wide study which focuses on local, black, sexual minority women and transgender men in South Africa states:

The economic and social position of lesbian, gay, bisexual, or transgender people in South Africa has a significant impact on their experience. Those who are able to afford a middleclass lifestyle may not experience the same degree of prejudice and discrimination on the basis of sexual orientation. But for those who are socially and economically vulnerable, the picture is often grim. Lack of access to such things as secure housing and transport options greatly increases people's vulnerability to violence

... reports of violence documented by LGBT rights organizations over the last two decades suggest that, for historical reasons, black lesbians and transgender men living in townships, peri-urban and rural areas, and informal settlements are among the most marginalized and vulnerable members of South Africa's LGBT population.⁴⁷⁰

The difference between finding oneself in a danger zone as opposed to a safe zone is thus a function of economic resources and opportunity. The accumulation of xenophobia and homophobia faced by poor, queer refugees puts them in a fragile, frightening and potentially fatal position in their new homes. In this way, the economic position of the queer refugees interviewed was absolutely integral to whether or not they lived in continuing fear of persecution in their *host* country, their likelihood of experiencing persecution, and whether or not they felt they had to live closeted lives.

It is presumably for this reason that, at the close of her interview, Tiwonge Chimalanga's final request, the story she wants heard, beyond her thanks for the assistance in her escape,⁴⁷¹ is about

⁴⁶⁹ Amnesty International, "Activists worldwide target homophobia in Jamaica, Ukraine and South Africa", (17 May 2013), online: <<https://www.amnesty.org/en/latest/news/2013/05/activists-worldwide-target-homophobia-jamaica-ukraine-and-south-africa/>>.

⁴⁷⁰ Human Rights Watch, *supra* note 468 at 11.

⁴⁷¹ Tiwonge had prepared a description of her story, including a full list of all the organisations and individuals who had helped her flee Malawi whom she wanted to thank, Chimalanga, *supra* note 189.: "I want to take this opportunity to thank the following countries and organizations who helped me get out of prison. England, Canada,

employment opportunities: “please [let people know] … here, [there are] a lot of challenges in Africa. So it’s better people help … it is very, very difficult to find a job in Africa.”⁴⁷² Yet in a refugee status determination setting, expressing economic concerns can be as taboo as expressing sexual orientation and so queer refugees may find themselves unable to convey any salient aspects of their claim.

In one interview I conducted with a queer refugee, “Liam”, when asked to tell a little about himself, his story and how he came to South Africa, he said: “’Cause there were some problems at home. My parents didn’t accept the way I am. So they were not happy. … So I said, just to give them space … like, our country, they don’t accept us. That’s why I’m here now.” In a context in which he was already identified as someone seeking support from a queer refugees service provider, it was clear that he had left his home and his country for fear of persecution based on his sexual orientation, though without using the words queer, gay or homosexual, his understandable, learnt prevarication along with the vagueness of his reference to unhappiness and problems, could mean the real reasons for his flight could easily be overlooked or ignored by a refugee status determination officer. In contrast, when asked what his reasons for applying for asylum would be, he said: “I just want to stay here with no fear. I hope to find a better job, something like that. Because sometimes when I go to the interview, they will ask: do you have [a] work permit? So yeah, I can’t work without that.”⁴⁷³ Although “Liam” used the word ‘fear’ in his answer, given the context of the following explanation, this fear could be interpreted as a fear of being undocumented, rather than a fear of persecution. His answer makes sense; his reasons

South Africa, Amnesty International, CADP Malawi, CHRR, Gender Dynamix, Passop, Irant, Global Fund, DHL, the Scottish parliament, Joe Fitzpatrick, Dundee West MPS, Timothy Wood from Canada, I also wanted to thank the people who came to see me and support me during that difficult time. As people, we must all help each other during difficult times, like I was helped”.

⁴⁷² *Ibid.*

⁴⁷³ Liam, *supra* note 412.

for fleeing are deeply personal whereas his reasons for seeking to become documented, as opposed to remaining undocumented, are practical. However, depending on which way a refugee status determination officer were to ask the question, he could be abruptly denied protective status by an official keen to jump on signs of an ‘unfounded’ economic incentive to come to South Africa.

The advocate for the Coalition of African Lesbians (CAL), a feminist organisation with an intersectional approach to differently vulnerable women, highlighted the frustrations of many who work with refugees, and queer refugees in particular, stating that of course economic status and security are connected; it is ridiculous to think otherwise.⁴⁷⁴

People now also have to edit the reality of their lives. Because they know that if they [discuss economic conditions] they’re not going to be eligible [for refugee status recognition]. So I think that’s also another tragedy. And it’s totally understandable that people do feel like they need to edit it out but I mean as long as it gets edited out, and as long as the law continues to behave as if these things are completely separate from each other, things are never going to change. But they’re totally connected.

We know that money protects queer people, for all kinds of reasons. When you are earning money your family may still tolerate your queerness because you’re contributing to the family unit. Your community may still think ‘oh well, hands off’ [...]. There’s all kinds of things beyond the fact that you might have access to information, and possible services and all kinds of other things that can somehow create a buffer. Or if you’ve experienced violation, you can then pursue some kind of redress. But it is, of course, it is poor, and working poor people who are then left really defenseless in countries. So, I think it’s intersectionality in that sense, in terms of economics and sexual orientation, gender identity, but I think just generally the extent to which the law really understands intersectionality, and the extent to which the officials understand intersectionality is a big problem. So people seem unable to grapple with those complexities. They sort of want you to pick one thing. You must be a lesbian and that’s what the issue is. So, if you’re a lesbian but you’re also experiencing problems because you’re actually a woman, and because you’re also unemployed, or whatever, their ability to understand how all those

⁴⁷⁴ Shelver, *supra* note 216.

things (perhaps one on their own doesn't seem to qualify or add up) ... but when you add all those things together, that's when you begin to see a story of exclusion and risk.⁴⁷⁵

Contrasted to the perspective of more traditional refugee status determination procedures and processes wherein economics signifies the divide between migrant and refugee, it is the obviousness, the widely and well-known, long established nature of these intertwined facts of place, money and insecurity that stand out: "We know that money protects queer people".⁴⁷⁶

5.3.4 The economic refugee

Hathaway has stated: "Many, if not most, refugee movements can be traced to economic difficulties, either directly, as in the case of famine, or indirectly, as when a particular refugee group belonging to a minority is made the scapegoat of a lack of economic opportunity."⁴⁷⁷ Yet the idea of an 'economic refugee' is unthinkable in refugee law, it is a misnomer, an abhorrent conglomeration of opposites considered to be a threat to the refugee protection regime. A paragraph in the UNHCR publication: "A guide to international refugee protection and building state asylum systems: Handbook for Parliamentarians N° 27, 2017", references both the fact that the majority of refugees flee to their neighbouring countries and eludes to economic challenges by stating that these countries regularly face "developmental challenges" and that refugees may move on due to "lack of prospects, and inadequate support".⁴⁷⁸ In this same paragraph, however, the Handbook restates the classically supported

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*

⁴⁷⁷ James C Hathaway, "A reconsideration of the underlying premise of refugee law" (1990) 31:1 Harvard International Law Journal 129 at 183.

⁴⁷⁸ Frances Nicholson & Judith Kumin, *Refugee Protection: A Guide to International Refugee Law (Handbook for Parliamentarians)* (UNHCR, Inter-Parliamentary Union, 2017) at 7.

importance of a bright line between migrants; “people moving for a broad range of reasons including economic opportunity” and refugees:

More than 80% of those fleeing their countries as refugees find protection in neighbouring ones, whose people and governments are often struggling to manage the impact of a nearby conflict and to address their own development challenges. [...] Fewer than one in five refugees move further afield; when they do so, it is often due to a lack of prospects, and inadequate support, including for the countries and communities hosting them. Those who move generally do so as part of irregular migratory flows, encompassing people moving for a broad range of reasons including economic opportunity. It is important to maintain a clear distinction between refugees and migrants, with refugees holding a particular status in international law as they are unable to return home because of conflict and persecution – albeit that both groups encounter many of the same risks, often perishing or exposed to physical harm on risky overland and sea voyages.⁴⁷⁹

However, the artificial siloing of economic realities and persecution represent a thorough misunderstanding of the interconnectedness of economic hardship and a national increase in minority or group-based persecution, of economic vulnerability and the experience of persecution, and of economic isolation and continuing protection needs in a host country as well as the intersectional nature of vulnerability itself.⁴⁸⁰ Predictive models on genocide refer to data on economic stability as an important indicator of risk.⁴⁸¹ As a crime defined as the purposeful targeting of a specific group of persons for extermination, genocide is arguably the ultimate crime of large scale persecution that would qualify fleeing persons for refugee status and so its connection to widespread economic hardships is, or should be, significant to refugee law.⁴⁸² That

⁴⁷⁹ *Ibid.*

⁴⁸⁰ On the linkages between economics and an increase in minority or population-specific persecution, see the collection of research essays in Charles H Anderton & Jurgen Brauer, eds, *Economic Aspects of Genocides, Other Mass Atrocities, and Their Preventions* (Oxford University Press, 2016).

⁴⁸¹ See the Socioeconomic dataset used for statistical risk assessment of the Early Warning Project: “Methodology: Risk Factor Sources - Early Warning Project”, online: <<https://earlywarningproject.ushmm.org/methodology-risk-factors>>.

⁴⁸² The Rome Statute, UN General Assembly, *supra* note 460. Article 6, p.3 defines genocide as any of a number of acts targeting family unity or fertility, causing mental or physical harm or deliberately inflicting conditions of life

differently positioned outsider groups are often the target of political scapegoating in times of pressure, including economic pressure, is well recognised. Similarly, intersectional studies and approaches are not new and have long highlighted the limitations of singular, identity politics – upon which refugee law and its status determination functioning have become reliant – for capturing the lived experiences of differently positioned people, particularly those whose interactions with their contexts are impacted by multiple points of disadvantage or bigotry such as poor, racialized women.⁴⁸³

Economic insecurity thus becomes significant in the lives of refugees at multiple points: in their exposure to persecution, both at the national and personal level, economics has impact. In their ability to seek redress as well as their ability to flee, how they flee and where they flee to, economics has impact. Poor people are less mobile; mobility relies on resources and reaching wealthy developed countries, especially those geographically isolated, requires even greater resources. This is compounded by the fact that citizens of poor countries face stringent, non-entrée Visa regimes. Finally, and based on similar reasoning to the differentiated country-based Visa regimes, refugees from poor countries are subject to additional burdens of proof because poor people are assumed to have greater desperation to escape their circumstances and so are perceived as more inclined to ‘invade’ the WEIRD countries.⁴⁸⁴ This assumption of poverty-as-desperate-invader is accompanied by a string of improbable, bigoted assumptions: that impoverished people will lie more, will have less connection or desire to return to their families, homes, and countries of nationality, less desire to live within the legal system (with proper

calculated to cause physical destruction “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

⁴⁸³ Kimberle Williams Crenshaw, “Mapping the margins: intersectionality, identity politics, and violence against women of color” in *The feminist philosophy reader* (Toronto;Boston; McGraw-Hill, 2008); Moreton-Robinson, *supra* note 3.

⁴⁸⁴ Henrich, Heine & Norenzayan, *supra* note 308.

documentation and protections) and, ultimately, that poor people will only be a burden upon their new country.⁴⁸⁵

This discussion in no way implies that relatively wealthier or better socio-economically resourced persons are not also subject to persecution or do not also have legitimate claims to asylum. It is perverse that in refugee status determination decisions which, as a collective, and not in small part as a function of our current understanding of refugee law, commonly fail to take into account the implications of economic insecurity for vulnerability to persecution, adjudicators nonetheless occasionally use relative economic security as a means to ground their disbelief in an asylum seeker's claim.⁴⁸⁶

The larger point demonstrated here, that economic realities and the experience of persecution are so fused for queer refugees, means that an international legal framework dedicated to attending to the persecuted in flight *must* engage with this pertinent issue of persecution. The South African experience shows that queer refugees may face economic exclusion, both from the workplace and through withdrawal of family support, in their countries of origin due to their sexual orientation. This economic exclusion, which may be seen as an element of, a symptom of, or a signifier of persecution for reasons of their sexual orientation, also puts these refugees at a disadvantage when entering their host country and seeking safety. What is also amply visible in the South African setting is that these same economic exclusions, for reasons of their sexual orientation, continue to be faced by refugees within South Africa. Moreover, starting their asylum journey with fewer resources and finding fewer resources available to them in their host, queer refugees are precariously placed to afford safe places. Persecution for reasons of their

⁴⁸⁵ See Foster's exposition and critique of a higher standard of harm applied to socio-economic based claims to asylum Foster, *supra* note 127 at 125–132.

⁴⁸⁶ Dauvergne & Millbank, *supra* note 81 at 961.

sexual orientation creates economic hardships for many of these refugees, and economic hardship creates vulnerability to persecution for reasons of their sexual orientation.

The ability to perceive the full importance and implications of this issue, is, however, blunted without a more holistic approach within refugee legal studies which is required both in relation to the individual refugee's history and experiences and in relation to the location of the application of refugee law in the world. Refugee law scholarship on queer refugees focuses predominantly on various approaches and encumbrances of queer as a PSG. This decision-maker's allocation of a refugee as belonging to a PSG occurs at a very particular frozen moment in time, one which the majority of queer refugees may never reach, full of legalities and abstracted from any one refugee's actual story. Furthermore, the focus on this moment from within only select Western states further removes a refugee from their context and, once again, is a space most refugees, especially most queer refugees, will never reach. The study and understanding of refugee law thus need to be fortified by more people, in more places.

5.4 Abbreviating Minorities

The use of unnecessary, circular and bizarrely elaborate descriptions of a 'particular social group' evident in refugee status decisions, has been critiqued by many refugee scholars, particularly those with an interest in gender or 'women as a social group' (see the discussion in Chapter 3.1 above).⁴⁸⁷ In delineating the PSG applicable to women's asylum claims, decision makers are shown to have tried to use the group description itself to narrow down the number of potential asylum applicants (such as defining the PSG in question as 'particularly vulnerable

⁴⁸⁷ Arbel et al, *supra* note 87; Arbel, *supra* note 91; Middleton, *supra* note 177; Spijkerboer, *supra* note 27.

married women in danger of stove burnings').⁴⁸⁸ This oftentimes leads to impermissibly referencing the persecution of the group within a circular descriptor of the group in question, whereas such decision makers may shun broader group descriptors such as simply ‘women’.

However, decision-makers intent on a restrictive interpretation of ‘the group’ in question need not rely only on detailed descriptions of a sub-sub-sub group. Seemingly broad or inclusive group descriptors are regularly read by decision-makers, in practice, as to only include the narrowest, most stereotypical examples or the most obvious cases according to the decision-maker’s world-view. This subsection will unpack some of the instances and consequences of an approach to refugee law, suspended in an identity-politics conundrum, which comes to view the few as the whole and the now as the always, with reference to queer refugees. A prevailing conception emerges of a refugee, fleeing persecution targeting their sexual orientation, which bears resemblance to Da Vinci’s Vitruvian Man; a male figure, isolated from context or background, alone and unrelated to other figures, with two static poses.

The following discussion analyzes the purportedly inclusive terminology commonly used to refer to the group identity of persons fleeing sexual orientation and gender identity-based persecution, including the initialism: LGBTI, contrasted with the actual construction of the expected queer refugee both with reference to the existing Western-focused literature and in the South African context. This is discussed with reflection on the consequences in refugee law for those who become excluded from the imaginings of the ‘group’. This discussion is informed by qualitative data analysis of interviews with both refugees and refugee service providers on the terminology and approaches used, creating a rich source of both contrasts as well as similarities to the existing West-as-host approach to these concerns.

⁴⁸⁸ See the discussion in Chapter 2.2, referencing Foster, *supra* note 73 at 30. citing Khawar 2002, [129].

5.4.1 The always male, queer refugee

This work uses the term ‘queer’ for its practicality as both a simple and inclusive term as well as for its political commitment to destabilizing a rigid heteronormative patriarchy. The term ‘queer’ does, however, have its detractions including both a charge of insensitivity to those from a place and generation in which this term was used pejoratively and who have not felt empowered by its reclamation and, especially pertinent to this subsection, for its lack of uptake beyond political and academic circles.⁴⁸⁹

The UNHCR in its guidelines and contributions on sexual orientation-based persecution use the term LGBTI and, as discussed below, some form of this initialism was most commonly used by service providers and refugees, for this reason, this initialism forms the focal point of the discussion to follow.⁴⁹⁰

The use of an increasingly expanded initialism in place of ‘LGBT’ is demonstrative of an attempted, comprehensive inclusivity amongst a variable and changeable queer community. Although there is no agreement on or standardized usage of any particular version of the initialism, one of the longest is described below:

At full throttle, the letters wind up something like LGBTQQIP2SAA – Lesbian, Gay, Bisexual, Transgender,

- *Two Q’s to cover both bases (queer and questioning);*
- *I for Intersex, people with two sets of genitalia or various chromosomal differences;*

⁴⁸⁹ UC Davis LGBTQIA Resource Center, “LGBTQIA Resource Center Glossary”, (1 January 2020), online: *LGBTQIA Resource Center* <<https://lgbtqia.ucdavis.edu/educated/glossary>>.

⁴⁹⁰ See for instance the usage of LGBTI in: UNHCR, *supra* note 433.; UNHCR, *The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees*, 22 September 2010; UNHCR *Working with Lesbian, Gay, Bisexual, Transgender & Intersex Persons in Forced Displacement*, 2011.

- *P for Pansexual, people who refuse to be pinned down on the Kinsey scale;*
- *2S for Two-Spirit, a tradition in many First Nations that considers sexual minorities to have both male and female spirits;*
- *A for Asexual, people who do not identify with any orientation; and*
- *A for Allies, recognizing that the community thrives best with loving supporters, although they are not really part of the community itself.*⁴⁹¹

The initialism is also increasingly used, in differing forms, with a ‘+’ at the end to indicate it is not a closed list.

The terms used to describe a group are never neutral and, in a field as contested as sexual orientation, fraught with many tensions. The Western dominance and origin of much sexual orientation and gender identity terminology is one point of contestation, particularly implicated in the lives of queer persons far afield. Spruill describes how the politics of sexuality in South Africa are caught up in and dominated by “the post-colonial imperative to locate and resuscitate pre-colonial tradition”, or indeed language, in production of “cultural authenticity” and consequently “inventions of authentic presents”.⁴⁹² This project affects those participating in the same-sex rights debate on both sides; it is the source of the “importation thesis” – that homosexuality is foreign to Africa – as well as the response thereto which insists on the presence of homosexuality throughout African history. Another South African author, Phillips, writing for the same collection, titled “*Sexuality in the legal arena*”, identifies the real ‘import’ in his chapter as that of a categorical fixity of definition in relation to sex and sexuality. The effect of utilizing Western ‘naming’ of sexualities is described by Spruill as having both negative and

⁴⁹¹ Robert Hulshoff-Schmidt, “What’s in an acronym? Parsing the LGBTQQIP2SAA community”, (11 July 2012), online: *Social Justice For All* <<https://hulshofschmidt.wordpress.com/2012/07/11/whats-in-an-acronym-parsing-the-lgbtqqip2saa-community/>>.

⁴⁹² Spruill, *supra* note 29 at 5.

positive potential; possibly impeding family acceptance when contrasted to the un-named living of same-sex loving, but also as having a freeing effect as described by some queer individuals themselves.⁴⁹³ Phillips, whilst being careful to note the voluntary adoption of such terms ‘from below’, similarly refers to the globalizing, and homogenizing, of ‘gay’ and ‘lesbian’ identities and the “distinctly Western European psychoanalytic polarization of erotic desire as homo/hetero”.⁴⁹⁴ The use of different terminologies by interviewees in the course of fieldwork, both refugee service providers and refugees, is analyzed below with particular reflection on what impact queer identity categories have on refugee law and its application in different contexts.

Prior to my interviews with both refugee service providers and refugees, interviewees were provided with a letter of initial contact, briefly outlining my project. This letter and the consent form made reference to sexual minorities, with emphasis on: “women in atypical relationships (ie. not heterosexual or monogamous) in the asylum process”.⁴⁹⁵ During the course of interviews, I generally attempted to use whatever terminology the interviewee chose.

The queer refugees themselves used different terms, sometimes interchangeably and sometimes with a fluid sense of number; to describe both the group and themselves or individuals. For example: “as a foreigner, and LGBTI you can’t walk with a fellow partner”.⁴⁹⁶ Terms used included ‘gay’, ‘LGBTI’, ‘sexuality’ and ‘sexual orientation’.⁴⁹⁷ “Noah” initially used the interesting term “sexual gender”. On the way to our seats, “Noah”, who seems to identify as a gay man, and subsequently used the term ‘gay’ as a self-descriptor in his interview, had offered

⁴⁹³ *Ibid* at 14.

⁴⁹⁴ Phillips, *supra* note 28 at 18.

⁴⁹⁵ See the BREB approved sample Letter of Initial Contact, in appendix A.

⁴⁹⁶ Lucas, *supra* note 398.

⁴⁹⁷ “Jackson” used the term ‘gay’; Jackson, *supra* note 411. “Aiden” used the term ‘LGBTI’; Aiden, *supra* note 397. “Lucas” used the terms ‘sexual orientation’, ‘gay’, and ‘LGBTI’; Lucas, *supra* note 398. “Mason” used the vaguer terms ‘status’ and ‘sexuality’; Mason, *supra* note 415.

the throw away comment “I am also a woman”, in reference to my topic's focus on women. Tiwonge Chimalanga self-described as a “woman, transgendered”. However, unbeknownst to me at the time, this was a substantial change in her own nomenclature as Camminga reports “she never used the word ‘transgender’. Even while in prison, when asked—as it seems she was—by representatives from transnational organisations and media houses, she continued to identify simply as a woman.”⁴⁹⁸ One year prior to my fieldwork, Camminga had observed: “Indeed, after five years of being in South Africa, after having come into contact with ‘transgender’, Chimalanga has continued to state, “I am a woman”.”⁴⁹⁹

As well as a subsequent mention of sexuality, “Mason” predominantly referred to his “status” as the reason he feared for his safety in his country of origin. One refugee, “Liam”, never once made reference to any sexual orientation-based term. “Liam” used phrases such as “our country, they don't accept us” and “Like, to be open, to tell them: I'm like this”, to discuss his problems with his membership of a targeted group whilst consistently avoiding naming the group. Tiwonge and “Noah” made reference to the offensive slurs used by South Africans and, in Tiwonge's case also by her compatriots in South Africa in their own language, to refer to their perceived sexuality. In both cases these refugees understood the terminology was offensive and described it as abusive rather than adopting it as a self-reference.

An expectation prevalent across jurisdictions that queer refugees presenting sexual orientation or gender identity-based grounds for fear of persecution not only ‘come out’ but also name their group in a way the adjudicator expects can thus be seen as a potential hurdle both for Tiwonge Chimalanga – identifying as a woman without a ‘trans’ prefix was perceived as insufficient –

⁴⁹⁸ Camminga, *supra* note 30 at 106.

⁴⁹⁹ *Ibid* at 10.

and for “Liam” who might fail to cue his group identity. This has been identified by Western refugee law literature where Western adjudicators fail to take cognisance of culturally specific ways of being and naming and is a shortfall evident in South Africa too.⁵⁰⁰ This perhaps speaks to the compounded effects not just of adjudicator-claimant cultural differences but the failings of imagination and empathy of predominantly straight adjudicators making determinations in relation to queer refugees.

In the case of service providers, to draw interviewees back to the topic, on a few occasions, I would sometimes prompt them with a query about “LGBT” clients as apparently the most familiar term, discussed below.⁵⁰¹ Service providers used a variety of terms, sometimes using several different terms within one interview, to refer to queer clientele, queer asylum cases or these client’s typical concerns. Most service provider interviewees used some form of queer initialism, with ‘LGBTI’ the most common form, followed by LGBT, then LGBTIQ and with one use of LBT.⁵⁰² Sexual orientation was also a frequently used term as was reference to ‘gay’ or ‘lesbian’ individuals.⁵⁰³ Only a few interviewees made reference to bisexual persons, gender identity or transgender persons.⁵⁰⁴ The terms ‘sexual minorities’ and ‘queer’ were used by only one interviewee each.⁵⁰⁵

⁵⁰⁰ See Alex Powell, “Normative understandings: sexual identity, stereotypes, and asylum seeking” in Chris Ashford & Alexander Maine, eds, *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar Publishing, 2020) 149; Laurie Berg & Jenni Millbank, “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants” (2009) 22:2 *J Refug Stud* 195–223.

⁵⁰¹ Based on the interview transcripts, it appears I made such prompts with 7 of the 18 service providers interviewed. Interestingly, the majority of those I prompted: 5 of the 7, chose not to use the same term I had used immediately prior.

⁵⁰² Six service provider interviewees used the LGBTI form, four used LGBT, two used LGBTIQ and one used LGB.

⁵⁰³ Nine interviewees made reference to sexual orientation, six interviewees mentioned ‘gay’ and seven ‘lesbian’ (possibly due to my explicit focus on women).

⁵⁰⁴ Bisexual was a term used in full by three interviewees, two referred to gender identity and one to transgender persons.

⁵⁰⁵ Okisai, *supra* note 65; Shelves, *supra* note 216.

Half⁵⁰⁶ of the service providers used an initialism including the ‘I’ for intersex, however, not a single person spoke of intersex individuals and their asylum cases are likely to be extremely rare. Identifying intersex individuals as such, much less processing an appropriate gender identity asylum claim (and/or possible sexual orientation persecution based claim) is unlikely given the evident lack of nuanced understanding around transpersons, compounded by the knowledge-production and normative role of Western practices of medically unnecessary surgical violence on intersex infants.⁵⁰⁷ This super-minority amongst queer persons is particularly likely to have their unique concerns and cases eclipsed by a purportedly inclusive initialism which alludes to their existence without focusing on them. Although conversations around intersex persons have experienced an uptake in South Africa largely due to the profile of South African Olympic and World Champion Mokgadi Caster Semenya, there is a dearth of information on intersex refugees locally and globally and intersex asylum claimants are in need of dedicated study in refugee law generally.

Although service provider interviewees typically used inclusive language to describe queer clientele, most revealed they predominantly or exclusively saw men with the exception of two lawyers whose practice was not specifically targeted towards queer persons but who reported

⁵⁰⁶ Eight of 17 service provider interviewees used an initialism including the ‘I’ for intersex although, even in those interviews where I had provided a term prior to their first addressing the topic, I only used the term “LGBT”; seven interviewees used the form ‘LGBTI’ and two used the form ‘LGBTIQ’, with one interviewee consistently using both in the form of: “LGBTI or LGBTIQ” – Khosa, *supra* note 334.

⁵⁰⁷ Cheryl Chase, “Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism” (1998) 4:2 GLQ 189–211 at 189–190. Changes in approaches to intersex rights are isolated and very recent. A 2015 Council of Europe, Commissioner of Human Rights Issue Paper on “Human rights and intersex people” states as the first point under Commissioner’s recommendations:

“Member states should end medically unnecessary “normalising” treatment of intersex persons, including irreversible genital surgery and sterilisation, when it is enforced or administered without the free and fully informed consent of the person concerned. Sex assignment treatment should be available to intersex individuals at an age when they can express their free and fully informed consent. Intersex persons’ right not to undergo sex assignment treatment must be respected” Commissioner for Human Rights Council of Europe & Silvan Agius, *Human rights and intersex people* (2015) at 9.

they had seen more queer women than men, and an advocate whose organisation specifically targeted women. Of the various terminologies used by service provider interviewees to describe queer clientele, one that stuck out as particularly indicative of the suppressing nature of purportedly inclusive labels was a reference to ‘the eljeez’.⁵⁰⁸ This sometimes occurred in an expanded form used in a way which implied a single individual could be ‘LGBTI’.⁵⁰⁹ What I have transcribed as ‘the eljeez’ was used to refer, almost exclusively, to gay (or perhaps bi) men. One service provider, who coordinated an HIV program at a refugee organisation and asked to remain anonymous, stated “I deal a lot with lg” and upon questioning, went on to clarify that “we haven’t come across women. It’s been men that we’ve seen” and spoke candidly of her own struggles with transphobia, though she did not name it as such, made no reference to a ‘T’ for trans and evidently included a transwoman in her understanding of the clientele grouping as a male grouping:

Ok let me be honest, other than TV, it was my first time, Tuesday. It was my very first time in life seeing a man dressed like a woman. Everything like a woman. To top it off, she comes to me and says ‘here is my husband’. For me that was cultural shock. Then you know the whole counsellor persona of mine stepped aside, but the traditional persona stepped in where I was like, “hay! You can never”. No really, but you look at her like, yoh! I have never seen something like this. But then you have to take your counsellor coat again and you wear it, and you’re like ‘oh, ok’. But deep inside you’re like ‘nooo, mm mmm, this does not happen’. But I don’t want to lie, the two days I spent with the LGBs was a great teaching for me also personally. ... So it made me understand. You know, when you watch something from afar. You can be like ‘no you must accept them etcetera’ until you actually experience it, and it’s in your face, and it’s like, mm-mmm. Now you start understanding the questions that people ask themselves when they are faced with these kinds of situations. Because here I am, I’m a pure Christian. I’m a practicing Christian. And then after that I was raised traditionally. Now I have to accept this. And every time when I was sitting here. And I was teaching and I saw them, something happened in me and I was like ‘this is not normal’. ... So, obviously, I’m a

⁵⁰⁸ Anonymous, *supra* note 190. “I deal a lot with lg”.

⁵⁰⁹ Examples include “if you are an LGBTI” and “I didn’t want to be like most of the LGBTs” from different interviewees.

professional, I have to learn how to quickly go around it. But, uh-uh. But you know what, it's things that we have to accept. It's their right, it's their...I believe in human rights. I believe that every human being must be treated with respect. I believe every human being must be protected. I might not agree with what you're doing. And I might deeply, deeply disagree. But I have to respect it. It is not my place. I believe in that.⁵¹⁰

South Africa has a high proportion of practising religious Christians and this service provider's account of her struggle in a professional setting with her own socio-religious conservative reaction to a transgender person's gender presentation, is not unusual. Samuel Samson Khosa of the JRS also described the heated debates that had attended a conscious effort to make their religiously based refugee organisation approachable for queer clientele.⁵¹¹ However, the fact that the relatively senior service provider quoted above, who worked specifically in the realm of health service provisions for refugees, had only the week of our interview had her very first encounter with a trans person, is significant. This indicates how persons with varying gender expression likely only approach service providers who they already know to be safe for trans people. As a consequence, many service providers may never have such a moment of conflicting self-realisation and learning, such as that described by this service provider.

Usage of an apparently multi-gendered label with single-gender meaning is more than a simple reflection of male-predominant clientele but likely has a mutually reinforcing impact upon who is 'seen'.⁵¹² The history of the term 'gay' as well as the adaptive and growing initialism: 'LGBT', demonstrates an ongoing struggle with sexual-orientation (and gender identity) identity politics and the inexorable tendency to conceive of the default queer person as a gay man. Despite laudable attempts at inclusive and welcoming terminology, there is a high level of intra-group tension, particularly as regards the political interfacing and direction of groups attempting

⁵¹⁰ Anonymous, *supra* note 190.

⁵¹¹ Khosa, *supra* note 334.

⁵¹² See the discussion on a 'blind approach' in Grungras & Hughes, *supra* note 110.

to fight for ‘gay rights’ and aiming to better the position of queer persons in society. Who sets the agenda and has the loudest voice is often the most privileged amongst any particular grouping and thus their world-view and priorities are reflected. The least privileged, commonly those with intersecting vulnerabilities, often find their concerns deemed external to ‘core’ concerns, and are largely silenced.⁵¹³ This reality is reflected in the long running, queer rights affirmative criticism of the same-sex marriage debate where a right to same-sex marriage is regularly presented as synonymous with the entirety of same-sex rights. These critiques argue same-sex marriage is an issue reflective of wealthy, healthy white men’s concerns, and deflective of energies required to address the socio-economic concerns of people of colour, women and of poor, queer persons and trans persons generally.⁵¹⁴ It is also for this reason that the advocacy head of a queer, feminist organisation could describe the dynamics within LGBT groups as “often very hostile spaces for lesbians”.⁵¹⁵ This is a point central to the intersectionality criticism of identity politics in general; that the artificial conglomeration of different, full human lives into a supposedly aligned grouping, based upon a single identity marker, inevitably comes to represent only the most privileged persons amongst that group as if they and their interests and agendas were reflective of the group as a whole.⁵¹⁶ Persons whose lived experiences are too complicated to have their primary concerns fit a single identity marker are deemed to be outside the realm of the ‘proper’ group concern. This inherent weakness to identity categories is carried forward, to life-threatening effect, in the realm of refugee law. Here, persons challenged to fit

⁵¹³ Hollibaugh & Weiss, *supra* note 130.

⁵¹⁴ *Ibid* at 19; Boyd, *supra* note 139; Ruthann Robson, “Compulsory Matrimony”, (15 April 2016), online: *Feminist and Queer Legal Theory* <<http://www.taylorfrancis.com/>>. It must be mentioned, however, that in this research project, the only queer married refugee couple which service providers spoke of was an African lesbian couple.

⁵¹⁵ Shelves, *supra* note 216.

⁵¹⁶ See generally Crenshaw, *supra* note 483; Moreton-Robinson, *supra* note 3.

their life stories into an identity-politics based categorisation of persecution ‘types’, risk losing their chance at safety.

This patriarchal approach to sexual orientation is in many respects amplified by an approach to ‘gender’ as a stand-in for ‘women’. The understanding of the term ‘gender’ as ‘women’s issues’ in international law, particularly in the United Nations system has been robustly criticised by Dianne Otto who demonstrates it denudes the term ‘gender’ of its revolutionary capability and, contrary to ‘gender-mainstreaming’, relegates the issues to not-of-concern to a male dominated and oriented system.⁵¹⁷ A feminized construction of ‘gender’ has also been shown to be detrimental to understandings of sexual violence against men as well as violence against men who are perceived as performing their gender ‘wrong’.⁵¹⁸ This has been shown to have particularly negative repercussions for addressing alternative lines of vulnerability amongst refugees, including queer refugees, wherein a ‘women and children’ approach is used as a stand-in for more comprehensive understandings of vulnerability and differentiated service needs. Buscher explains that: “As we assess opportunity and the social, human and financial assets refugees possess or have access to, we are likely to find that those most marginalised are not women and children at large but rather adolescent boys, married girls, the elderly, those with disabilities and LGBT refugees.”⁵¹⁹

Thus a fuller conception of queer persons is hindered by parsing the LGBT grouping as predominantly male, without ‘gender’, and the women therein as ‘gendered’ but not queer. A

⁵¹⁷ See Otto, *supra* note 134 at 11. Davina Cooper raised a new reading of ‘gender’ which is gaining traction in the UK and Canada wherein it is becoming read as referring to (only) transgender concerns; still an issue not engaging a cisgendered male audience; Cooper, *supra* note 129.

⁵¹⁸ Butler, Judith, *supra* note 85 at 99; Will Storr, “The rape of men: the darkest secret of war”, *The Observer* (16 July 2011), online: <<https://www.theguardian.com/society/2011/jul/17/the-rape-of-men>>.

⁵¹⁹ Buscher, *supra* note 88 at 98.

refugee service provider who used the fuller initialism, LGBTIQ and who said with regard to his full service mandate that his organisation primarily served women said, with regard specifically to the queer population they served, they saw mostly men.⁵²⁰ Another queer advocate commented that in a research project she had been involved in:

...that looked at ... LGBT persons' experiences of the refugee and asylum seeking process in South Africa ... who was interviewed for that project; [it was] heavily dominated by men. I think one or two transwomen and I think maybe one or two lesbians came. Very heavily dominated by gay men and bisexual men. So, there's definitely a question around why that is and around what's going on.⁵²¹

It is in this milieu that the co-ordinator of the broadest-reaching, arguably most effective queer-refugee service program, whose predominantly male clientele informs the UNHCR's local access to and understanding of the queer community, was uncertain how to address my query as to accessing queer women for my interview project, without a current, women-focused project within the organisation.⁵²²

Identity politics reductionism thus infects refugee law, with particular consequences for queer refugees as regards both the ostensibly inclusive 'LGBT' and 'gender' labels. Furthermore, structural patriarchy in the history of international refugee law, its organisations and its domestic implementation, as well as within the history of academic studies, which support the growth and understanding of the field, create a strong presumption that the subject under study is an individualised male.⁵²³ The pervasiveness of this assumption in academia is gaining criticism

⁵²⁰ Khosa, *supra* note 334.

⁵²¹ Shelver, *supra* note 216.

⁵²² Victor Chikalogwe, *Re: RESEARCH PARTICIPANTS* (2016).: "Let me remind you that I am the LGBT coordinator. I can only help you with LGBT guys for your interview. If you ask me about refugees in general or women as indicated in your email I think that will be beyond my capacity now".

⁵²³ Spijkerboer, *supra* note 27 at 1.

from medical to economics studies.⁵²⁴ It appears to be a disturbing cue to the robustness and spread of a male-centric world-view that it even infiltrates conceptions of persons whose subject grouping is specifically listed as multi-gendered; ‘LGBTI’. Thus, through the course of my fieldwork, non-male queer refugees appeared less cognisable than male (or assigned male at birth) persons. Gendered approaches to ‘queer’ render queer women and transmen extra-invisible where ‘eljeebeez’ or ‘eljeez’ is coded for gay men+standout transwomen, and ‘gender’ is coded for women. In a study on what they term ‘gender refugees’ in South Africa, that is persons cognizable as trans, gender non-binary or gender-queer, Camminga argues that transmen are less visible in the asylum system because persons read as female or feminine are more exposed to violence whereas transmen are “overall less visible, find it easier to pass as men, and find wider social acceptance”⁵²⁵ although a contrary view is raised by the Human Rights Watch report discussed above. The raised profile of transwomen may also be the absurd ‘benefit’ of a system which fails to acknowledge or respect their, persecuted, self-identity. This misapplied and ultimately silencing ‘privilege’ can be deduced in the criminalization, persecution and even the public outcry which accompanied Aunty Tiwonge’s marriage – between a transwoman and a cisman – as a supposedly ‘gay marriage’. This mischaracterization was further carried through to and concretised by her albeit successful refugee status recognition, which was granted on the basis of sexual orientation-based persecution. Camminga argues that on a queer reading of

⁵²⁴ Katrine Marçal | How Economics Forgot about Women | TEDxYouth@Manchester; Caroline Criado-Perez, “Default-male medicine”, (2 March 2019), online: <<https://members.tortoisemedia.com/2019/03/02/invisible-women/content.html>>. an edited extract from *Invisible Women: Exposing Data Bias in a World Designed for Men* by Caroline Criado Perez, published by Chatto & Windus on 7 March 2019.

⁵²⁵ Camminga, *supra* note 30 at 16. Note the difference in understanding of the term ‘gender refugees’ as used by Camminga as compared with the discussion of ‘gender-related persecution’ in, for instance, Arbel, *supra* note 91 at 731. Wherein the term ‘gender’ signifies persecution targeting women in what is understood to be gender-specific forms.

‘sexual orientation’, this term does not necessarily refer to a fixed group called ‘homosexuals’ but to a relatedness and marking as other and shared experiences of oppression;⁵²⁶

[W]hile noting that transgender as a politics or identity may exist or be emergent, being/claiming/identifying as transgender is not necessary in relation to asylum. Rather it is the perception of a person’s orientation, both at the level of their own sex and towards other sexes, in combination with their gender and the assumptions made in relation to this, that presumably have led to their persecution and subsequent claim.⁵²⁷

In combination with the well established refugee law acceptance of persecution for reasons of an imputed identity, it is arguably regularly the case that transgender individuals are persecuted based on a misunderstanding of their gender identity which is perceived as a minority sexual orientation, even as this term can be understood on a more reductionist reading. Tiwonge was prosecuted, and persecuted, for being perceived as gay, not trans. Therefore a sexual orientation-based claim could be understood either on a queer reading of ‘sexual orientation’ or on a more limited reading of imputed sexual orientation as the correct PSG.

Tiwonge did not understand the crime she was accused of in Malawi; when asked if she was gay she said it was a nonsense question and protested that as it is legal for a woman to marry a man in Malawi, she had broken no laws: “I am a woman, I can do what a woman can do”.⁵²⁸ It was an aspect of the harm experienced by Tiwonge that she was misread as gay, and yet her exposure to violence was for reasons of her gender identity. This is one of the reasons behind those writing on sexual violence and discrimination preferring the term SOGI – sexual orientation and gender identity – rather than an inclusively read ‘sexual orientation’ term to distinguish the conditions of persecuted gender identities. Given the reporting and gay marriage furore that swept up political

⁵²⁶ Camminga, *supra* note 30 at 109.

⁵²⁷ *Ibid* at 110.

⁵²⁸ *Ibid* at 104–106.

support for Tiwonge as well as the lack of nuanced understanding on sexuality based refugee claims across multiple jurisdictions, including South Africa, it is unlikely that Tiwonge's asylum decision reflected either a post-colonial rebuttal of essentialized 'sexual orientation' or even an understanding of her identity as imputed, and more likely to reflect legal ineptitude and misunderstandings on the part of decision makers harmfully reinforcing the mischaracterization of her persecuted gender identity.

In the case of bisexual individuals, although it is easier to assume bisexual men may be included in the most commonly understood, and recognised, representatives of 'the eljeez', this may only be the case when a bisexual man is able to 'pass' as a gay man. A collection of stories of queer refugees in Cape Town includes the story of a bisexual man who explains his sense of exclusion from both the heterosexual and homosexual communities;

In this [homosexual] community, they accept you but once you mention marrying a woman, then the problem starts. They start treating you like a confused person who does not know who he is and what he wants. They even make you feel like you do not belong to them. The heterosexuals make it seem as if you have different struggles. At the end, you start living a lie pretending to conform to both sides.⁵²⁹

In the refugee adjudication process, a study of Canadian refugee determinations demonstrated that whilst sexual orientation-based claims have similar success rates to claims on other bases, bisexual claimants have substantially lower acceptance rates; half that of queer applicants who were not identified as bisexual or 'confused', and female bisexual claimants especially appear to be predominantly rejected.⁵³⁰ The author of the study, Rehaag, contributes this significant

⁵²⁹ Blessing, "#My Life #My Struggles" in *My Home, My Body and My Dreams: Reflections by LGBTQI Refugees in South Africa* (PASSOP, Friedrich Naumann Stiftung, 2019) 18 at 20.

⁵³⁰ Rehaag, *supra* note 84 at 67.

disparity in success rates to “the dominant understanding of sexual orientation as an innate and immutable personal characteristic”.⁵³¹

All too often, in the refugee law setting, the decision-maker’s understanding of ‘LGBT’ and sexual orientation and gender identity markers sees the colourful variety of people and lived experiences whittled down to nothing, until these categories become meaningless. These constricted categories, wrung dry of all experiences beyond a select, racialized and gendered, Westernized stereotype applied even within South Africa, despite countermanding domestic experiences are, for many applicants, uninhabitable. This endangers their possibility of making a successful asylum claim. In this instance, the broader international law and international refugee law setting inform and are compounded by a domestic male-prevalence approach to queer identity such that parallel exclusions are evident both in West-as-host and this South African host study. South Africa’s refugee population is, like Western hosts, predominantly male and, in this sense, serves more as a bridge to understanding what is likely missing from male-prevalent host studies than actually filling the gap. This, once again, emphasises the urgent need to study the application of refugee law from within a broader array of host countries, particularly those in conflict-neighbouring zones identified as hosting more women, such as those in Central Africa and the Great Lakes region, in order to attune to and counter the gendered effects of a West-as-host approach.⁵³²

⁵³¹ *Ibid* at 59.

⁵³² Martin, *supra* note 108 at 74.

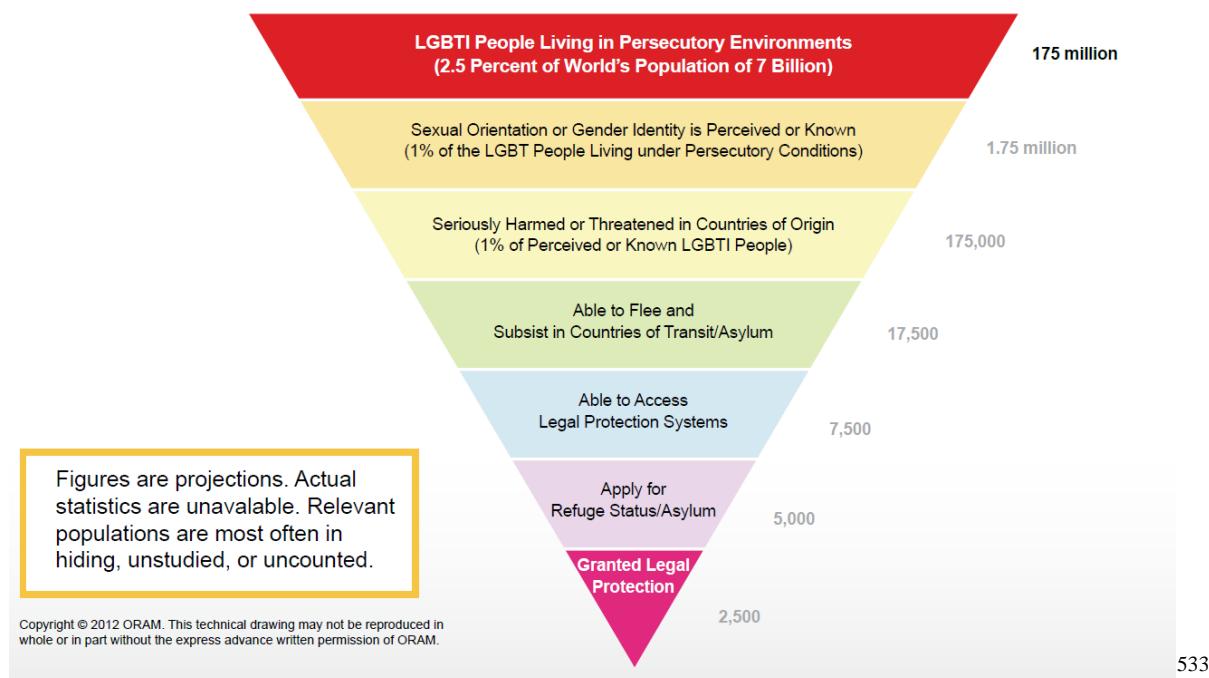
5.4.2 The always queer refugee

The meagre success rates that queer applicants appear to have within the South African asylum system, a system with abysmal approval rates incommensurate with the real need for refuge of many applicants, point towards those with refugee status, granted in recognition of sexual orientation-based persecution being an exception. However, this research has also described how those queer persons who even make an asylum claim and proceed through the system such that they receive a result at all, may also only represent a small portion of queer refugees in the country; that is, the universe of persons in the country having fled sexual orientation-based persecution. The majority of such persons may never make a claim to asylum or may never proceed through the process to a result. In attempting to describe the relationship between the application of refugee law within the South African asylum system and persons having fled sexual orientation-based persecution, that is, ‘queer refugees’ what thus emerges is: i) a significant number of persons who have negligible interaction with the asylum system; having never made a claim, ii) a high proportion of those who do engage with the asylum system subsequently drop out of the system, being unable or unwilling to renew expensive and short-lived temporary asylum permits, iii) a significant number who attempt to see through the process but who are caught in limbo in the system, awaiting appeals or decisions that are never forthcoming and, iv) in increasingly smaller numbers: those who proceed ‘normally’ through the system; make a claim, receive a final response, either negative or, even more rarely, positive.

Official data on asylum claims and recognition rates are not available on a grounds-of-claim breakdown, and refugee law clinics which do gather data as well as the UNHCR to whom aggregated data is passed on, do not share such data (see the discussion about data above in Chapter 3.2). Thus the above understanding of where most queer refugees fit into the asylum

system is based on anecdotal evidence from those who work with and research the asylum process. Under similar circumstances of a paucity of hard data, ORAM created a diagram of estimated interaction amongst persecuted queer persons with the global refugee processes reproduced in Figure 1 below.

Figure 1 – Flow of LGBTI People through the International Protection System



We turn here to further examine the varied and difficult interactions amongst the apparently more exceptional group of queer persons, those at the tip of the triangle, who engage with the asylum system as would be expected; from claim to result. The finding, however, is that even amongst this sub-group, the interactions between queer persons fleeing persecution and the

⁵³³ Grungras & Hughes, *supra* note 110 at 7. Figure 1 – Reproduced here with express permission; Anna Fontanini, ORAM Programme Officer; Anna Fontanini, *Re: Request for permission for use of ORAM publication figure in doctoral dissertation* (2020).

asylum system as well as the challenges they face, are not fully captured by a traditional case law analysis.

Amongst persons who have fled sexual orientation-based persecution who do in fact make a claim to asylum, that claim may or may not in fact reflect their true reasons for flight. Queer refugees may be discouraged from making a sexual orientation-based claim by translators, by status determination officers, or be hindered by their own personal, negative experiences with officials or a lack of understanding as to the possibility of even making such a sexual orientation-based claim to asylum. An inability to voice their true reasons for fearing persecution has been shown to regularly result in a negative outcome and is often grounds for an appeal.⁵³⁴

One of the service providers spoke of her frustration and helplessness in trying to assist a queer client who felt unable to raise his experience of persecution targeting his sexual orientation. The story she presented of her client was that, after applying for asylum, he had been rejected, though he had not disclosed his sexuality. Upon being deported back to Zimbabwe he experienced attacks for reasons of his sexual orientation and effeminate presentation. This client had once again fled to South Africa and, this time, started opening up about his sexual orientation and his case went on appeal. Yet in the appeal hearing, the client would again not disclose his sexual orientation and was again told to return to his country of origin: “it was a tough one, but we couldn’t just go there and say: ‘this guy is this’, unless he then said it himself. … when he’s talking to us, you can hear that he has a valid claim, but then he goes there; I don’t know whether he was not comfortable talking to the officials or what …”⁵³⁵.

⁵³⁴ See the case discussed below of *Esnat Maureen Makumba v. The Minister of Home Affairs and others*, *supra* note 200.

⁵³⁵ Anonymous, *supra* note 222.

The advocate interviewed, Adv Leanne De la Hunt was, at the time of the interview, preparing a case for review, requesting a rehearing based on the fact that her queer client had not had an appropriate opportunity to raise his true grounds for asylum. He had originally had a translator who didn't speak his language and so did not declare his sexual orientation-based persecution on his asylum form. Her client had subsequently been discouraged by a translator at his refugee status hearing from raising his experience; claiming it was unnecessary and 'shameful' and had received a similar reaction from a refugee volunteer at the Standing Committee review of his case.⁵³⁶

In the South African High Court case of *Esnat Maureen Makumba v. The Minister of Home Affairs and Others* (2014)⁵³⁷ the applicant in the High Court case was a Malawian national who had suffered persecution for reasons of her sexual orientation. Though she had made an asylum claim shortly after arrival in South Africa, she did not raise her experience of persecution:

She sets out in her founding affidavit that at the time she was unaware that she could claim refugee status on the basis that she had been persecuted in Malawi because of her sexual orientation. She was also unsure whether it was acceptable to be openly lesbian in South Africa, and was afraid of how the officials at the Refugee Reception Office would react. When she attended her first interview, she completed her application form, accompanied and assisted by a friend of a friend who was also from Malawi. Given the attitudes to homosexuality in her experience she feared revealing her status as her friends may have stopped giving her assistance. For these reasons, when she filled in her application form, she did not state the true reasons for her flight from Malawi. Instead, she told the Department [of Home Affairs] that she had fled for economic reasons; that she had lost her job and hoped to make money in South Africa. When she returned for her status determination interview with the RSDO [Refugee Status Determination Officer] on 2 May 2013, she again did not inform the RSDO that she had fled Malawi because of her sexual orientation. Instead, she kept up the pretence that she had come to South Africa for economic reasons. The Applicant explains that she had been informed by other people waiting in the queue that she should not change her story. She also did not want the

⁵³⁶ de la Hunt, *supra* note 199.

⁵³⁷ *Esnat Maureen Makumba v. The Minister of Home Affairs and others*, *supra* note 200.

RSDO to think that she was deceptive. She claims that she was only trying to protect herself from further homophobic persecution. The interview was short and upon its conclusion, the RSDO handed the Applicant a rejection letter.⁵³⁸

The above fears, misunderstandings and self-defensive concealment are common to many queer refugees' interactions with asylum systems. The High Court Judge in the above case nevertheless managed to intervene to offer an alternative to the detrimental clash between fearful, secretive asylum seekers and a bureaucratic asylum system which demands open identification of grounds. This opportunity for reconsideration was proposed founded on the principle of non-refoulement:

In my view when new facts come to the attention of the [Department of Home Affairs] after an application for refugee status has been rejected – even if that rejection was correct on the facts originally presented – there will in some cases be an obligation on the Department to reconsider that application. This would be the case where the following criteria are met: (a) there is a plausible explanation why the true facts were not originally placed before the RSDO; (b) the new facts are credible and are supported by objective evidence or confirmed by witnesses; (c) if the new facts are true. The principle of non-refoulement is binding on our country and is codified in Section 2(a) of the Refugees Act. It imposes an obligation on South Africa not to surrender persons, whether by way of extradition or deportation, where there are substantial grounds for believing that the persons would be subjected to cruel and inhuman treatment or punishment or would face persecution in the receiving state.⁵³⁹

An asylum system which does not emphasise safe, secure, tolerant and informed conditions for asylum seekers to present their cases, in a way which can capture the appropriate 'moment of arousal',⁵⁴⁰ for open presentations of harrowing stories by traumatised individuals is detrimental to the ability of most refugees to present their case. It is particularly detrimental to the ability of queer persons, who may not anticipate any reprieve from homophobia in their encounters with officials, to present a cognisable asylum story. This failure to enable the proper presentation of

⁵³⁸ *Ibid.* at para.[3].

⁵³⁹ *Ibid.* at para.[20].

⁵⁴⁰ Cohn, *supra* note 202.

queer refugee's asylum cases thus leads to rejections tantamount to a failure to uphold a host state's protective duties under international law.

As illustrated by the case of Tiwonge Chimalanga, even a positive result, granting status recognition to a refugee, properly fitting the description of a refugee, is not necessarily a factually correct decision. Whilst Tiwonge had indeed fled persecution and was a refugee, the manner in which her status was recognised was problematic. Camminga provides the startling fact that: "no known asylum seeker in South Africa identifying as transgender—or who expresses gender in a way that organisations would call transgender— has ever received or applied for asylum other than on the grounds of sexual orientation."⁵⁴¹

Similarly, queer refugees who present stories excluding their sexual orientation may nonetheless be granted refugee status. These persons, outside of their country of origin and fearing persecution may thus be correctly recognised as refugees yet the decision maker's underlying understanding of their reasons for fearing persecution may not reflect their lived experiences, the positive result thus being a happy coincidence. A narrow, legalistic view of the asylum process may only deem this kind of error significant for future cases, where, ultimately, refugee status is 'The Result' of a story of status adjudication. However, in the case of queer refugees, especially the majority of under-studied queer refugees in the Global South, where refugee status does not translate into suitable and sustainable refuge from persecution, this missing aspect of their refugee status 'success story' can make identifying their needs more complex, including for resettlement purposes (discussed above). This reality of queer refugees who have recognised refugee status but without recognition as queer, would be of different and important significance in a situation of mass influx, deserving of further study.

⁵⁴¹ Camminga, *supra* note 30 at 109.

In refugee case law studies, which form the backbone to most refugee law studies, the judicial moment of analysis and the interpreted story presented therein, hone in on the status determination adjudication. Canonical refugee law authors largely focus on why a decision was made, based on the story presented for decision-making purposes, and whether or not it legally correct. As well as sidelining the experiences of those outside of the asylum system, missing much of the story preceding the adjudicative moment for those who do make a claim and receive a result, inevitably missing almost all of their ‘transitory story’, a focus on this moment will always miss everything that comes after. This speaks to a fundamental limitation in refugee law application which is premised on a determination of status, reliant upon an identity marker, at a singular, static moment in time which clashes with the realities of a changing and changeable queer identity. This moment in which refugee law is applied by a decision-maker represents a classical application of refugee law. This, ostensibly, is when refugee law becomes alive. Yet this adjudicative moment casts a shadow both on what comes before and what comes after refugee status determination; its narrowness is incommensurate with the *de facto* status of refugees which, as a factual condition of meeting the refugee definition predates and postdates the official determination of status.

My field research unveiled an unexpected addition to the recognised-but-not-as-queer, queer refugee populace broached in the discussion above, and one which poses a compelling challenge to the way refugee law and its application is conceived. One service provider identified that amongst the few queer refugees she had attended to, those who had recognised refugee status, had been granted status prior to ‘coming out’. The service provider in question worked for a social services NGO which assisted clients with social assistance for basic needs and had a more recent, dedicated refugee, asylum seeker and stateless persons project which had been running

for 2 years at the time of our interview. Some queer clientele had approached the service provider but she described them as rare:

LGBTI; we don't have a lot. And I think the other reason, is that normally on intake days, you get a lot of refugees sitting outside. So, if they know you from the community already...just sitting there also it's not comfortable, because there might be people who knows this person is LGBTI, because most of the refugee community, they still find it as...they put it as like you're possessed, or there's something wrong with you. So then they don't actually feel safe, so that's why if maybe we come across one, referred by the other partners, we make a different date for that person to come. Not when everybody is there, because they feel exposed and they feel like so many people will know that they are LGBTI.⁵⁴²

The service provider described both queer clientele who were asylum seekers and those who were recognised refugees. The queer individuals she spoke of who had recognised refugee status had their claims accepted based upon their flight from war-torn countries: Ethiopia and Somalia. However, this was not an error on the part of the decision-maker or a failure on the part of the refugee to express a sexual orientation-based claim. Rather, through life events and the process of growing up, these refugees, subsequent to their recognition as such, in South Africa, had come to realise a different orientation. That is, these refugees fled persecution for other reasons and had no sexual orientation-based claim at the time they were recognised as refugees. Once settled and granted protective status in South Africa, however, their self-understanding of their sexual orientation changed and they faced severe challenges and persecution on this basis, in their host country.

Below are the accounts of the stories of three of these recognised-but-not-as-queer, queer refugees whose sexual orientation is entwined with their fear of persecution from within their host, but was not a concern at the time of their original (or first) asylum case. The first is a story

⁵⁴² Anonymous, *supra* note 222.

provided by the anonymous social service provider regarding an Ethiopian man. The second story of such a client is provided both by her and echoed by an advocate who was working from a different organisation in collaboration, on the difficult case of a young Somali woman. The third story is given by a Burundian man, with the pseudonym here as “Lucas”, himself. I discuss the import and consequences of a country-based identification, raised in Chapter 3.2 (on data), in relation to these refugees and their cases further below and in Chapter 6.1.

The Ethiopian refugee

The anonymous service provider gave a brief account of a recognised refugee who was suffering persecution anew, within his host country, South Africa, for reasons of his sexual orientation. Furthermore his sexual orientation had not been a consideration at the time of his asylum case as his self-identification had changed subsequent to his receiving asylum:

... the one guy is actually moving from one Province to the other. Running from people. He's Ethiopian. So, it's very difficult to just trace him because one day he's in Pretoria, the next he's in Cape Town. If things go bad in Cape Town, then he goes to Durban. Something like that. He just goes around running, because he's mostly attacked.

... the Ethiopian guy has refugee status... the Ethiopian guy, he didn't [make a claim to asylum on sexual orientation-based grounds] because he only said the one time he was just walking in Joburg and two South African men and one Ethiopian man sort of abducted him, and then they raped him. And after that rape he said he didn't want to be with a woman. Then he felt comfortable with men. So even when he walks he's more feminine. So I think that confusion to say but why were they attracted to me, what attracted them to come to rape me, but then now he just said I don't feel comfortable with women now so I want men instead of women. So, that also, you know, he told one person and the one [person] went and told the whole community, so now they said: “no this

person cannot be doing that, it's wrong", so there's been threats. He's been to the police stations and he's also been attacked several times, but he manages to escape.⁵⁴³

The Somali refugee

A young Somali woman was identified both by the anonymous service provider above and a lawyer for Lawyers for Human Rights as experiencing sexual orientation-based persecution in South Africa at the time of my fieldwork yet subsequent to having received recognised refugee status as a dependant child refugee. The anonymous service provider clarified: "... the Somalian lady also has refugee status, ... it was not because of her sexuality, because they only knew about it when they were here in South Africa".⁵⁴⁴

None of the service providers discussed their clients by name, yet the facts given with regard to this case of the Somali teenager and also of a Burundian lesbian couple, were particular enough that I assumed they were discussing the same case. I felt confident in this assumption particularly given that these women appeared to be engaging with multiple service providers, with many of the service providers knowingly working in collaboration with one another.

This young Somali woman had been recognised as a refugee along with her family, who had then become her persecutors.

... the other one that we had recently, it's a very young Somalian lady; 19. Ok the story that she told us is that the parents, the mother, wanted her to marry some old guy because, apparently, the guy was rich and he could bring sustainability to the family. So while they were preparing her for that, she disclosed to the mother that: 'I am not sexually attracted to men but to women'. Then I think because of the Muslim culture; you are not

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.*

allowed to say that, you don't say that at all. So because of threats and things like that, she had to move out of her home, and then we provided a place for her to stay. So she's staying there currently. She even had to stop going to school because she's been attacked and [is] getting different threats from the family and the community as well. So I think [there is still] a very serious issue, with them, because if they can find you, they'll make sure that they kill you, because you are wrong, according to them.

I think her case was submitted [for resettlement]. By the other partners that are also working with her. So, she is there, ... I don't know if it will be soon, because we're not exactly [...] it takes a long time. So, we are hoping for the best because she cannot just be sitting locked in the place and not going to school.⁵⁴⁵

A lawyer active on a pilot project in collaboration with Lawyers for Human Rights, the UNHCR and the Centre for the Study of Violence and Reconciliation (“CSVR”) which is geared towards more holistically addressing the mental health needs of refugees, also raised this case:⁵⁴⁶

At present the Project is assisting an 18 year old Somali girl who came out with her mother and was disowned as a consequence; she was then attacked in Mayfair by family friends who accused her of having dishonoured the family and threatened to be killed; we had to move the client urgently to Pretoria; at the moment she is under close suicide monitoring by CSVR because she developed major depression.⁵⁴⁷

The involvement of an anti-violence centre in the case of a persecuted queer woman supports a theory, expanded upon further in Chapter 6.1.2 below that queer women are perhaps more likely to find themselves in anti-violence programmes than in LGBT support programmes.

The Burundian refugee: “Lucas”

⁵⁴⁵ *Ibid.*

⁵⁴⁶ Micoli Federica, “Bridging the gap in mental health | Lawyers for Human Rights”, (24 October 2019), online: *Lawyers for Human Rights* <<https://web.archive.org/web/20191024171537/https://www.lhr.org.za/news/2013/bridging-gap-mental-health>>.

⁵⁴⁷ Micoli, *supra* note 284.

Similarly, I interviewed a queer refugee who, whilst only having temporary asylum status in South Africa had been a recognised refugee within Tanzania. He had fled his war-ravaged country of origin, Burundi, as a child, together with his family. Only later as a young adult did he ‘discover himself’ and out of his fear of persecution for reasons of his sexual orientation he then relocated once more to South Africa, which he hoped would be a safer place, with legal protections for different sexual orientations:

So I've been here for two years now, in South Africa. What first brought me, what made me flee from my country was not my sexual orientation. But war. For me to get political stability in the country. So back in 1990- 1995, I had to flee, I went to live as a refugee in Tanzania. In a refugee camp, with my family. And then I went home, and I came to discover myself, my sexual orientation. I was not straight. I became ... I'm gay, I'm attracted to guys more than women. So I thought that the environment is not so conducive; you cannot come out, you cannot speak of these things. So you just have to hide. We live in our closets. So then from there, I began doing small business around different places, around here in southern Africa. Till one day, I came to South Africa; I used to come here and go back and then I was told about the [sexual orientation equality] laws and stuff.⁵⁴⁸

It was clear from his discussion that “Lucas’s” reasons for seeking asylum in South Africa were based on his fear of persecution targeting his sexual orientation and he had chosen South Africa as a destination for this same reason. I did not establish, however, whether his asylum claim, still in process after two years, had been made on sexual orientation-based grounds. “Lucas’s” story is demonstrative of a complex and evolving relationship with the asylum system(s); one where he was recognised as a refugee, possibly voluntarily repatriated and then felt unsafe once again following an evolving self-understanding such that he sought asylum once more, yet for different reasons. In this way “Lucas” appears to have reversed down what is presumptively considered a one-way road; going from recognised refugee to asylum seeker. His is a story of the very human

⁵⁴⁸ Lucas, *supra* note 398.

reality of change; his self-understanding of his identity had changed, his experiences of persecution had changed, his recognised status as refugee had changed, his host country had changed and his protection needs had changed over the course of the protracted experiences of refuge faced by many in the Global South and particularly by child refugees. Through all these changes, “Lucas” was, on a properly constructed definition, a refugee.

These three stories presented above are only unexpected in light of the static approach we take to the identity categories upon which understandings of refugee status-related persecution is grounded and the construction of ‘refugee status’ itself. These experiences are significant because they vividly demonstrate that refugee status is not the end of the story, even when the story is constructed upon limited refugee law terms. Refugee status may not equate to actual protection as required by international law, it may not represent the end to persecution, and it may not represent the final assessment of a refugee’s case for asylum where resettlement is required or where cessation becomes an issue. Whereas the identity category to which a refugee’s fear of persecution becomes attached, as a grounds for asylum (ie. ‘persecution for reasons of...’) is often classified as one amongst a list of similarly ‘immutable characteristics’, this may in fact change and new identities may be targeted for persecution.

The three stories presented above trace the conditions of a group of refugees whose experience and interactions with the asylum system, have no foothold in the way refugee law is predominantly studied and understood. Their status was granted not based upon their sexual orientation-based membership, but as war-refugees, specifically, two of the stories relate to child refugees. Their needs and the challenges their stories pose to the asylum system is particularly difficult to grasp where refugee law is studied from the perspective of a Western host, with no cognisance of interluding host experiences. The question ‘who is a refugee’ seeks an answer in a

static moment: does the person being assessed for status determination – that is, recognition of their *de facto* identity as a refugee – have a real fear of persecution if they were to return. What makes a ‘refugee’ and thus the definitional concerns of refugee law are fixed upon the answer at that moment. The complexities of an individual who flees their country for one reason and then faces persecution anew for a different reason do not fit the expected linear progression of refugee-ness the law is capable of contemplating; persecuted person flees country of origin; applies for asylum; is acknowledged as a refugee; settles with the possibility of permanent residence or voluntary return.

The law is uncomfortable with malleable and intersectional identities; they complicate classification. The judicial and academic attempt to capture the grounds of persecution found in the UN Refugee Convention as a list fitting to a type, which can then be predictably extrapolated to matching targets of persecution; the statutory interpretation rule of *Eiusdem generis*, has included the idea that the list: race, religion, nationality, membership of a particular social group or political opinion, represents core, fixed or immutable identities worthy of protection.⁵⁴⁹ Although this approach has been criticised, particularly with reference to political opinion as a changeable identity, it is illustrative of the common assumption in the field of refugee law that the fixed-ness of an identity is a marker of its importance.

As well as the significance of the fundamental challenge to our foundational constructions of ‘refugee’ and ‘host’ and the category approach to persecution these recognised-but-not-as-queer refugees pose, considering their stories is becoming more urgent in light of the rising country-based approach to refugee status. In the stories presented above, they are titled and identified with reference to the refugees’ countries of origin; the Ethiopian refugee, the Somali refugee and

⁵⁴⁹ Hathaway & Pobjoy, *supra* note 64; Foster, *supra* note 73; Aleinikoff, *supra* note 62.

the Burundian refugee. Country of origin served as a crutch for remembering and identifying stories where names could not be used, for both me and the service providers I interviewed. We also organised files by country of origin in the refugee clinic I worked at and the Department of Home Affairs organises its intake days at Refugee Reception Offices by country of origin. As alluded to above, country of origin is the primary aggregator of refugee status data across different jurisdictions and South African official statistics break down asylum numbers based on country of origin.

Furthermore this data makes clear that certain nationals have significantly higher acceptance rates than others. This is not surprising given the state-centric approach to persecution in refugee law. It is the state which is unable or unwilling to protect their residents, thus resulting in those who flee persecution, becoming identified as refugees. This state-centric approach also sits easily with the good host / bad country of origin binary discussed in Chapter 4 above.

Article 3 of the UN Refugee Convention states that: “The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.” Contrary to the prohibition against discrimination based upon country of origin which is contained as a fundamental principle within the UN Refugee Convention itself, country of origin is frequently used as a stand-in for refugee entitlement, both negatively and positively. In Western hosts the growth of lists of ‘safe countries’ which cue an expedited determination process is indicative of a wider presumptive tactic of assuming asylum seekers hailing from certain countries cannot genuinely be refugees, in line with the primary cognitive assumption that culturally or socioeconomically similar-to-host ‘good’ countries do not produce refugees. Domestic legal provisions relating to a situation of mass influx of asylum seekers, found in the Refugee legislation of a small number of countries across the globe, including South Africa,

usually hone in on the country of origin of a group of refugees as a signifier of their need for refugee protection.⁵⁵⁰

Complaints of poor quality first instance refugee status determinations in South Africa frequently cite the use of standardised ‘country of origin information’ paragraphs (compiled by the Department of Home Affairs), used in a cut-and-paste, non-individualised style in the reasons given for a decision. Within the Global South, where an expanded definition of a refugee is widely influential, if not indeed legally binding, country of origin influences refugee status wherever variously identified conflicts or “events seriously disturbing public order” has resulted in a person fleeing their home country (See further the discussion in Chapter 3.2.1). ‘War refugees’ are thus refugees without needing to demonstrate special or targeted persecution and a country’s domestic stability (is it a ‘bad’, unstable, refugee producing country?) becomes an indicator of whether a foreign asylum seeker should be recognised as a refugee.

One of the service providers interviewed stated that queer refugees who may be uncomfortable with discussing their sexual orientation, particularly those still in the closet, typically do not raise their sexual orientation when seeking refugee status but instead rely on the political and economic situation of the country they have come from.⁵⁵¹ This is understandably a less threatening or difficult reason to give for fleeing ones home than the intricacies of embarking on an explanation of sexual orientation-based fears of persecution. Yet it also points to the additional burden faced by presumably 'safe country' queer refugees, who are forced to come out or be undocumented. The relative safety or political stability of a country plays an important role

⁵⁵⁰ Matthew Albert, “Governance and Prima Facie Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx” (2010) 29:1 Refugee Survey Quarterly 61–91 at 84–85.

⁵⁵¹ Dube, *supra* note 285.

in relation to the vulnerability of persons to persecution but is an incompetent indicator of protection needs, particularly for queer refugees.

The valuable insight that these recognized-but-not-as-queer refugees provide, is just how much a fixed approach to identity categories compounded by a country-reliant shorthand for refugee status can miss. These refugees turn on its head the gay-persecuting country of origin assumptions, presenting host and country of origin role reversals which accompany fluid human lives, facing persecution which is at least as mobile as they are.

5.4.3 The unrelated, queer refugee

The absurdity of the static, gendered, queer refugee construction that emerges from the study of the application of refugee law includes an uncalled-for assumption of isolation. Although sexual minority groupings rely on relationships (desired, imagined, or existent) and relativity as an element of the identity collation, ‘queer’ is most commonly read not only as male but as single and extracted from both relations and relationships. As is common amongst refugees generally, many of the queer refugees interviewed spoke candidly of the hard decisions that had to be made in leaving their homes and families and were wistful for their support, both financial and psychological. Two of the queer refugees interviewed who were teenagers at their time of arrival in South Africa particularly spoke of the difficulties of having to make hard decisions without support; “Jackson” said: “It is not easy, being foreign, growing up without family”.⁵⁵² “Aiden” also emphasised: “it is very difficult to stay as a foreigner or as a refugee in a country where you don’t have family or guidance” and candidly discussed the lure of crime or sex work for a young

⁵⁵² Jackson, *supra* note 411.

person struggling to make ends meet.⁵⁵³ The assumption of queer unrelatedness works to once again whittle away at the experiences and contexts of queer refugees in the course of the othering, asylum process. Contributing to an attempt to complicate and repopulate identity categories, this section turns to consider the highly variable and sometimes contradictory idea of family in relation to queer refugees.

That understandings of family are culturally specific is acknowledged in various international instruments on the family.⁵⁵⁴ However, this lack of universality has significant implications for refugees; a host country's definition of family delimits opportunities for reunification and has important effects for their integration in their new home. The further, geographically, that a refugee has traveled to seek refuge, the more likely they are to have transited through and possibly stayed long-term in different countries, the more removed they are from their social context and the more likely they are to be separated from their family. It is difficult from this isolated West-as-host end-point to understand the differentiated significance of family, particularly for refugees who have sparse presence in the West, and especially for those for

⁵⁵³ Aiden, *supra* note 397.

⁵⁵⁴ Article 5 of the Convention of the Rights of the Child ("CRC"), 1989, UNGA A/RES/44/25, requires states to "respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom." The CRC is inconsistent in the terms used to refer to responsible family members, using the term 'parents' exclusively or in combination with reference to 'legal guardians' and/or 'individuals legally responsible for the child' or 'persons who care for the child' or are financially responsible for the child. It has been argued that Article 5 is the "umbrella article" in this regard with the intention to capture persons "primarily responsible for the child, whatever the nature of their exact legal relationship with to child", see Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 1999) at 121. Another example of a lack of universal agreement on family formation types is illustrated by the reservations with regard to attempts to require monogamy; 24 countries have made reservations to CEDAW, often in the form of a general reservation asserting the primacy of Shari'ah law in the case of a conflict between this divine law and the implementation of CEDAW. A few such examples are Saudi Arabia, Bahrain, Libya, Bangladesh, Egypt and Iraq, see Khin Maung Seng & Abdul Ghafur Hamid, "Reservations to CEDAW and the implementation of Islamic family law: issues and challenges" (2009) 3:1 Malaysian Journal of Human Rights 69–94 at 137–138. See Gerassimos Fourlanos, *Sovereignty and the ingress of aliens: with special focus on family unity and refugee law* (Stockholm: Almqvist & Wiksell, 1986) at 88.: Fourlanos states: "a universally accepted concept of family can hardly be said to exist," see further at p.93.

whom ‘family’ might differ from a Western-constructed, patriarchal, monogamous and heteronormative understanding of the norm.

The Westernized heterosexual family norm, which becomes the benchmark for the expected family construction, works to create a barely understood cut-out homosexual figure in contrast to this norm; such that neither nuclear families which bear more resemblance to the norm, nor families which divert from the norm are recognised in the presumed queer refugee story. As discussed above, bisexual refugees face additional burdens to the recognition of their stories given the challenge they pose to both the superficial dichotomous understanding of sexuality and its presumed immutability, which limits the understandings of sexuality for many refugee decision makers. For similar reasons, queer refugees with children may find their families constructed as proofs against their sexuality. Thus even those more firmly on a same-sex only side of the sexuality spectrum are denied recognition of their refugee status where they have/have had opposite-sex spouses and children as are those who don’t fit to a stereotypical Western assumption of what it means to demonstrate ‘gayness’, in physicality or through supposed gay-specific ‘general-knowledge’.⁵⁵⁵

Several service providers discussed a lesbian couple they had come into contact with. One of the women had apparently entered a marriage in their country of origin, Burundi, in an effort to conceal their sexuality. She had two children from this marriage which the lesbian couple, who got married in South Africa, later brought over to join them. Their gender, the existence of a heterosexual marriage and children are all likely to have hindered their claim to asylum and they were repeatedly given very short-term asylum permits which prompted them to ultimately leave the country in search of a more stable home, once more. However, whilst one service provider

⁵⁵⁵ Powell, *supra* note 500 at 151.

felt they must have raised sexual orientation-based persecution, another reported they had been forced to make a political opinion claim by a bigoted interpreter.⁵⁵⁶

Outside of the privileged queer families with children facilitated by adoption, surrogacy or fertility treatment, queer refugees may have children for a variety of reasons; from a forced marriage or marriage of convenience, as a result of rape, from a relationship predating a changed understanding of their own sexuality or simply as an aspect of their bisexual or fluid experience of sexuality. Another more ‘traditional’ heterosexual and nuclear family dynamic which is largely absent from the literature on queer refugees is that of continuing relationships with opposite-sex spouses. This stands in contrast to the claim of one service provider, with perhaps the greatest access to the queer refugee community in South Africa, that gay refugees with a wife and children in their country of origin are very common. Presumably for some this relationship may be experienced as a form of persecution itself, where they were under duress to marry to save family or community homophobia.⁵⁵⁷ For others, the dissolution of such a relationship may expose them to persecution. However, the stories which the service provider chose to share were of men who had apparently amicable arrangements with their wives and who had fled the larger community rather than their family:

Two days ago I was talking to this other guy, [...] he told me he’s 44. He has two kids. From Zimbabwe. But he had to come to South Africa - the wife knew about the sexual orientation in the course of their marriage, but they had to talk over it, and they had to live happily. But when the other community members realised that this guy is bisexual, they had to take it seriously and the best thing was for that person to leave the country for South Africa. [...] I met also the other one, from Cameroon, West Africa. Saying he has a wife at home, and he still supports the wife at home. But here he is staying with a

⁵⁵⁶ Dube, *supra* note 285; Anonymous, *supra* note 222; Micoli, *supra* note 284. Interviews with DD, Anon social sp and email correspondence with Federica

⁵⁵⁷ Dauvergne & Millbank, *supra* note 81 at 73–74.

boyfriend; a white person. He left the country just because of [his] sexual orientation. The wife is still supportive, that's why he is able to support the family back home.

For queer refugees, ‘family’ signifies a complex and often contradictory set of relationships. Family is recognised as integral to a refugee’s ability to settle in a new host country and to their well-being and aptitude for resilience.⁵⁵⁸ However, family may be the source of persecution for many queer refugees.⁵⁵⁹ Discussing the ‘homonormalization’ of queer couples in the immigration context, Seuffert reminds us that ‘home’ is a place of danger, surveillance and exclusion for many queer youth the world over.⁵⁶⁰ Of the refugees interviewed and others whose stories were told by service providers, several explained how it had been a family member, for most, a parent, who had ‘outed’ them, threatened them or reported them to the police. Yet for others, family had been a source of comfort and support and for some, a complex combination of the two; where they had felt driven from their homes by one family member but were still in regular contact with other family members, often a sibling.

Two queer refugees interviewed had been pressured by parents to flee for fear of community reactions to their sexual orientation. “Jackson” explained that although it is technically legal to be gay in Malawi, his Mum is a pastor, a single mother, and it is important to her to live by example as a Christian. He said this left her no choice but to abandon her gay son so that he could “be independent and free somewhere else”.⁵⁶¹ He had left home as a teenager and his loneliness was palpable; using the word “abandon” to describe his fractured relationship with his mother. He said he missed his mother though they sometimes said hi and he still felt like he had a mother and that she loved and cared for him. “Lucas” said his parents first started asking

⁵⁵⁸ Williams, *supra* note 95 at 141–142.

⁵⁵⁹ Seuffert, *supra* note 150 at 184–185.

⁵⁶⁰ *Ibid* at 184.

⁵⁶¹ Jackson, *supra* note 411.

questions when they noticed he had Facebook friends with rainbow flag profile pictures. He initially avoided discussing his own sexuality; “so I finally told them that I’m getting involved with these people. They said if others found out it would be a bad situation; cause a fuss in our community and in our clan. So then I had different threats from people and all those who were discovering about me bit by bit”.⁵⁶²

Another queer refugee, “Liam” had fled because “there were some problems at home”, his parents were “not happy” and did not accept his sexuality.⁵⁶³ Others gave more detailed stories of conflict with their parents over sexuality. The service providers who discussed the case of the young Somali woman explained that whilst she had come out to her mother, presumably in what was a private mother-daughter moment, her scandalized mother had then outing her to her family and community, exposing her to death threats.⁵⁶⁴ One refugee, “Noah”, had been reported to the police by his father upon discovering his sexuality when “Noah’s” partner had leaked a sex video online which became national news: “he put it online and it was all over the news, that’s when my family found out. They called the police and they were afraid of I’m going to rape their young kids. They actually said that to me”.⁵⁶⁵ “Noah” was arrested in his country of origin, and had to rely on a gay support organisation who bribed police and lawyers to allow him to escape:

The thing is actually my parents found out that I was actually gay, so you know mostly our African countries, they actually don’t agree with that and they say it’s a taboo. So they are actually the ones that called the police for me and I was actually arrested. ... Actually it was my father. It was my father who did it. We’re actually not in touch till

⁵⁶² Lucas, *supra* note 398.

⁵⁶³ Liam, *supra* note 412.

⁵⁶⁴ Anonymous, *supra* note 222; Micoli, *supra* note 284.

⁵⁶⁵ Noah, *supra* note 31.

now [November 2016]. Since 2014 to now, he doesn't want even to talk to me or to see me. And I really miss them now. I miss home.⁵⁶⁶

Yet two of the above gay men, “Jackson” and “Noah”, who experienced problematic breakdowns of their relationship with parents, spoke daily with their sisters, who were still in their country of origin. The (trans)woman interviewed who had been arrested subsequent to her marriage to a man, spoke gratefully of the family support she had received whilst in prison. In conducting fieldwork which preceded my own interviews, for their study on gender refugees in South Africa, B Camminga more comprehensively canvassed Aunty Tiwonge’s story which reveals the extent of her family’s support: “Chimbalanga, assigned male at birth, had been raised by her uncle—the village chief—and accepted as female since she was a child: *My uncle and family accepted me as a girl. ... When people insulted me, my family made a complaint, and the culprits were taken to traditional court and fined some chickens.*”⁵⁶⁷

Other queer refugees had to contend with family who were already in South Africa at the time they arrived. For some, this family posed an additional threat, for others, an opportunity. For “Liam”, having family already in South Africa had been a reason to leave the city where his family members were living: “In Joburg there were some family and friends [an uncle and a half-brother], so yeah. They weren’t comfortable about me. So I just decided to come to Cape Town because there is no liberty there.”⁵⁶⁸ For “Noah”, however, having family based in Cape Town – two brothers, one a half-brother – was a pull factor to join his family members in the city they were located: “... they didn’t know I was coming, so I thought it’s going to be a little bit easier

⁵⁶⁶ *Ibid.*

⁵⁶⁷ Camminga, *supra* note 30 at 105. Quote taken from Mark Gevisser, “Love in exile”, *The Guardian* (27 November 2014), online: <<https://www.theguardian.com/news/2014/nov/27/-sp-transgender-relationship-jail-exile-tiwonge-chimbalanga>>.

⁵⁶⁸ Liam, *supra* note 412.

‘cos they won’t throw me under the bus.” He explained that being able to have conversations with his brothers outside of the context of their home country had led to more understanding on their part:

...they actually don’t hate me but they haven’t accepted. I think one thing also with our country, especially Zambia, because of lack of knowledge, they actually don’t know how it is [...] so talking to my brothers who are here now, at least I think that they do have a little bit of knowledge, how these things...they do actually understand that I’m also a human being like everyone else.⁵⁶⁹

“Mason” was living in Johannesburg as was his mother, whilst his father and other siblings were in their country of origin, Zimbabwe. Although he did not elaborate on his family dynamics, part of his rationale for coming to South Africa was not only to find a safe place as a gay man but also to be able “to provide for myself and my family”.⁵⁷⁰ The well-documented linkages of support networks between immigrants generally, including refugees, and their families ‘back home’ are less recognized in relation to queer refugees. As discussed above, a service provider told the stories of two men from different countries whom he had worked with, who had fled in fear of community reactions to their sexual orientation but who still had supportive relationships with their wives in their country of origin, one of whom continued to send financial support to his wife.⁵⁷¹ Furthermore, queer refugees may provide financial support to friends in their country of origin. The service provider, himself an immigrant having fled sexual orientation-based persecution explained:

Most of the people, they get worried, to say: ‘at the moment I’m here, but I always pray for my friends and my family’. Some of them even send support to them, financial support, material support to support these people. Because they know the opportunity they have, regardless of them struggling here with government issues, but at least they

⁵⁶⁹ Noah, *supra* note 31.

⁵⁷⁰ Mason, *supra* note 415.

⁵⁷¹ Chikalogwe, *supra* note 282.

have support and other stuff [compared to] those who are in other countries, where they are coming from.⁵⁷²

It is widely acknowledged that people who move country with their family have better outcomes, play a more contributive part in their community and have better mental health and economic outcomes.⁵⁷³ This, together with the humanist recognition of the dignity and importance of the family, underlies both the efforts in immigration policy to facilitate the immigration of families together and the refugee law obligation to maintain family unity and reunify families.⁵⁷⁴ However, who counts as family in an immigration or family reunification context is left to a more arbitrary administrative definition, one that societies recognise does not reflect their own, more complicated, domestic family compositions and one that does not necessarily fulfill the supportive functions which underlie the emphasis on family unity.

There is little support for sibling unity in refugee reunification or immigration initiatives, even for ‘unaccompanied minors’ who may not have a surviving adult caregiver. This is the case

⁵⁷² *Ibid.*

⁵⁷³ The social and cultural benefits of family reunification is stated in the program objective for Canada’s family reunification program – Immigration Refugees and Citizenship Canada IRCC, “Evaluation of the Family Reunification Program”, (3 February 2015), online: *aem* <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/evaluations/family-reunification-program.html#a1.2.1>>, Last Modified: 2015-02-03. at para.1.2.1; see also with reference to refugee families Williams, *supra* note 95 at 141–142.

⁵⁷⁴ The UN Refugee Convention includes a unanimously adopted recommendation B:

“The Conference,
considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and
noting with satisfaction that, according to the official commentary of the *ad hoc* Committee on Statelessness and Related Problems (E/1618, p. 40), the rights granted to a refugee are extended to members of his family,
recommends Governments to take the necessary measures for the protection of the refugee’s family especially with a view to:

(1) Ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,
(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.”
United Nations, *supra* note 21 at 10–11.

across different jurisdictions and contexts in spite of approaches evident in some countries which cater for a more extended, rather than Western ‘nuclear’ family form, as a ‘family head’ is often still the signifier of the extended family group, with less cognisance of dependents’ inter-relationship.⁵⁷⁵ Furthermore, there may be no possibility at any stage for a refugee to reunite with adult siblings even though these relationships may often be the most significant during a person’s lifetime. A restrictive nuclear model conception of a family unit with two adult, opposite-sex parents and minor, dependent children not only fails to represent host-state domestic family structure variety but is often unkind in a field where many refugees have had their family and personal relationships ravaged by the persecution they flee. The influence of a Western, restrictive, nuclear family form is bolstered not just by the political and socio-economic clout of Western countries in the international sphere but also by the ease with which this form becomes conceptualised as a universal lowest common denominator of family and, in the refugee context, its utility in the widespread national projects of limiting refugee numbers.

Queer refugees face an additional restriction on their ability to rebuild their familial support base in that even nuclear model families are denied to them. A service provider, who had conducted a research study amongst several hundred queer refugees in South Africa, reported that about 30% of gay refugees had a wife and/or children back in their country of origin.⁵⁷⁶ Yet for queer refugees, the existence of heterosexual relations and children (often an aspect of their enforced closeted living) is considered to negate their sexual orientation-based claim.⁵⁷⁷

⁵⁷⁵ See for instance Abuya’s comments on the evolution of Kenyan refugee family recognition legislation; Odhiambo Abuya, *supra* note 101 at 79.

⁵⁷⁶ Chikalogwe, *supra* note 282.

⁵⁷⁷ Berg & Millbank, *supra* note 500 at 212–213; Shelves, *supra* note 216.

As for same sex partners, a variety of factors make it apparently uncommon in the South African context for a queer refugee to have travelled with or intend to reunite with a partner from their country of origin. The youth of many queer refugees in South Africa makes it unlikely that they had serious or long-term relationships prior to fleeing their homes, as described by Samson Samuel Khosa of the JRS:

Of all the people that I've interviewed, I don't remember any that travelled with their partner. Most of them will tell you: 'my partner was killed'. Or: 'got separated from my partner because my partner came to South Africa or went to a different place, I don't know where that place is'. Or: 'my partner is in prison because they were caught'. And some of them you find that they are still quite young, they will just like having boyfriends or girlfriends, not like having serious relationships. Some of them end up having stable friends in the country, South Africa.⁵⁷⁸

Growing in awareness of their sexuality in a homophobic context where closeted living is mandatory and where acting upon their desires is dangerous, some queer refugees may flee their homes without ever having a sexual relationship. "Jackson" had commented that he did not know anyone else who was gay in Malawi; he explained that he had lived a conservative life, largely at home with his mother and whilst he knew that he had feelings for other men, he did not know what to do about it.⁵⁷⁹ For those who do have partners in their country of origin, the effects of the stress of persecution may destroy those relationships prior to fleeing their country of origin. "Noah's" ex had breached his trust by videoing them together and then putting the video online, this had exposed both partners to threats of criminal sanctions and persecution. Although they had both had to flee Zambia, separately and at different times and "Noah" had heard through the grapevine that his ex had also made his way to South Africa, he had no intention of reconnecting

⁵⁷⁸ Khosa, *supra* note 334.

⁵⁷⁹ Jackson, *supra* note 411.

with him.⁵⁸⁰ Tiwonge's marriage had precipitated her and her husband's incarceration. NGOs had supplied a safe house for both partners but her husband, Steven Mongeza, had chosen to separate and stay in Malawi whilst she fled to South Africa:

And after two days, my partner told me: 'it's better to separate'. Why separate? 'I'm tired now. And I'm suffering too much in prison'. Because, you know Malawian prison is very, very difficult. Example: prison guards beating us once a day, and guards beating prisoners at night example: actually, a lot of challenges in prison; prisoners beating me, like so. So from there, coming to South Africa, I chose to come here alone. And my partner separate.

Her family had called her the previous year to let her know that Steven had passed away.

One service provider discussed how not having a relationship or sense of community could be the driving factor which finally pushed queer women to seek refuge elsewhere: "because things have broken down to a certain point in their home countries where they feel isolated or alienated, alone etcetera".⁵⁸¹ This may in turn make it more likely that those who take the drastic step of fleeing their homes are alone. Others who do have continuing relationships may hide the existence of their relationships even when in their host country for fear of their own or their partner's safety, as discussed in the subsection above in relation to closeted claims to asylum. Yet there are still stories of couples traveling together or reuniting in their host countries of the Global South. In ORAM's updated edition of "Unsafe Haven" on the security challenges facing LGBT asylum seekers and refugees in Turkey, several of the stories canvassed in the interview-based report revealed LGBT asylum seekers who had arrived with or were awaiting resettlement together with a partner.⁵⁸² Similarly the lesbian Burundian couple whom several service providers spoke of is a standout example of a couple fleeing together and seeking asylum

⁵⁸⁰ Noah, *supra* note 31.

⁵⁸¹ Shelves, *supra* note 216.

⁵⁸² Arf et al, *supra* note 109 at 15, 24, 27–28.

together, as a couple. It is in light of the enforced silence some refugees may adopt in relation to their partnerships, and in the interests of the couples who, in spite of the immense hurdles, do travel with their partners or hope to reunite that it remains vital not to discount these odds-defying families in need of support or unification. If these families are not envisioned as a possibility, they are all the more likely to remain unseen by service providers. A resettlement officer reported that in his four years of working with queer refugees that he had not seen any family groups. Only one resettled refugee had mentioned, subsequent to his resettlement, that he had left a partner behind.⁵⁸³

Another common experience of ‘family’ for queer refugees, which finds no support in refugee or immigration contexts, is families of choice, that is, those persons who are not necessarily biologically related but whom queer persons choose, often as a consequence of the failings, discrimination and abuse encountered with their biological families, as their supportive familial base.⁵⁸⁴

Most of the people are a bit worried; not only [about] their partners but maybe their friends. Because they say, listen, I’m coming from Uganda. In Uganda if you are gay then, if people realise you are gay, the payment is death. Then you think of your friends, your close friends, you share, you laugh for just a moment together; they are prosecuted, or their home ... anything can happen to them.⁵⁸⁵

Networks of support which queer refugees manage to salvage are not necessarily reliant on biological or sexual relations. Whilst compatriot communities in their host country are often the first place many refugees will go for support, and support organisations are often country-of-

⁵⁸³ Okisai, *supra* note 65.

⁵⁸⁴ Valerie Lehr, *Queer family values: debunking the myth of the nuclear family* (Philadelphia, PA: Temple University Press, 1999) at 10. See further *Ibid* at 68.: “Whereas conservatives, including gay conservatives, assume that marriage and family life are the ideal way to satisfy multiple human needs for love, sex, friendship, parenting, and caring for the elderly, many gays and lesbians (among others) create and continue to create multiple structures to perform these many functions”.

⁵⁸⁵ Chikalogwe, *supra* note 282.

origin based in leadership and membership, many queer refugees find themselves isolated from their fellow countrymen in South Africa, for fear of homophobic attitudes which follow them from their country of origin.⁵⁸⁶ As discussed above, many queer refugees are isolated from their biological families through distance or, because their families become a source of homophobic threat. A service provider explained that when he first started a program for queer refugees he had been galvanized by the fact that many clients had not a single family member to turn to.⁵⁸⁷ Queer refugees also find themselves isolated from the domestic queer culture through a combination of xenophobia and socio-economic exclusion. An interview-based report from 2012 on the LGBTI refugee community in Cape Town revealed that there was a general lack of integration within Cape Town's LGBTI community and that “[a]t least half of those interviewed reported that they were not even aware of the existence of a gay community in Cape Town”. Cape Town is touted as South Africa's (and Africa's) gay capital and ‘pink tourist destination’ yet for refugees, although a:

...portion of those who were aware of Cape Town's gay community reported feeling welcomed by this subset of the South African population, while others felt excluded due to their nationality. Aside from the explicit exclusion they felt, others noted the indirect measures which prevent them from gaining access to Cape Town's gay community. A number of interviewees mentioned the restrictive cost of access into many of Cape Town's gay institutions such as bars or nightclubs, which led to feelings of exclusion as well.⁵⁸⁸

In these difficult and lonely circumstances, locating existent queer immigrant groups or supporting the entry of foreign, queer individuals is often their best chance at establishing

⁵⁸⁶ B Camminga, “‘Gender Refugees’ in South Africa: The ‘Common-Sense’ Paradox” (2018) 53:1 Africa Spectrum 89–112 at 92–94; Institute for Social Development University of the Western Cape, Scalabrin & Institute for Human Mobility in Africa, *REFUGEE AND ASYLUM SEEKING REPRESENTATIVE STRUCTURES AND THEIR COMMUNITIES IN SOUTH AFRICA* (UNHCR, 2018).

⁵⁸⁷ Chikalogwe, *supra* note 282.

⁵⁸⁸ PASSOP, “A Dream Deferred - Is the Equality Clause in the South African Constitution's Bill of Rights just a far-off hope for LGBTI Asylum Seekers and Refugees?”, (June 2012), online: <<https://www.passop.co.za/news/featured/a-dream-deferred-lgbtqi-report-launch>> at 15.

meaningful social support.⁵⁸⁹ Queer refugee service provider, Victor Chikalogwe, gave an example citing his observations amongst the Zimbabwean gay community:

I'm saying I'm here, and I got a job [...] and I can send someone that I know who's also struggling. Then that person would come here and start a relationship, that's how it goes. Like Zimbabweans. Zimbabweans are very good at having relationships. Most of them are staying together. You find that a Zimbabwean stays with their partners more than...like most of the Zimbabweans. Even when I was in Joburg - I thought it was [only a phenomenon in Cape Town] - but even in Joburg I found that Zimbabweans look after each other. [...] it can be that they met from home, and maybe this person supported that other person to come here, or else they met here in South Africa and they got along.⁵⁹⁰

Presumptions of who has a family, what a family looks like and whether ‘family’ is a source of threat or support make it very difficult to recognise, and facilitate in rebuilding, positive social units. The further removed from a refugee’s context and experiences en route, the more challenging it is to understand these relationships. Whereas for most refugees, family is seen as an important and desirable positive, it is important to remember that for many queer refugees, as for refugees suffering domestic violence or in-family persecution, family can be a negative factor in their lives. This is, however, not a universal experience and not an experience universal to all family members. For some queer refugees, some family is still important and differently conceptualised families may be important. “Jackson”, left alone as a teenager to manage, undocumented, in a strange place in the face of xenophobia and homophobia concluded our interview with a smile: “what I like about myself: I am strong and independent.”⁵⁹¹ It is necessary to complicate superficial and universalised assumptions of family and relatedness; queer persons have to navigate these contradictory experiences with family themselves and those involved in both the administration affecting their lives as well as refugee advocates can only

⁵⁸⁹ Camminga, *supra* note 586; PASSOP, *supra* note 588.

⁵⁹⁰ Chikalogwe, *supra* note 282.

⁵⁹¹ Jackson, *supra* note 411.

facilitate their most empowering interactions by first being cognisant of these complexities and variances.

A sensible and humanistic approach to the composition of who counts as 'family' as well as the only definition which indeed supports the psycho-social and economic well-being of immigrants and refugees does exist and is in use by the Red Cross Family Links program, a program which has grown from one of the earliest functions of the International Committee of the Red Cross (ICRC). This approach, cross-culturally universal in its flexibility, would also be supportive of the unique and complex cases of queer refugees as well as those having faced domestic violence, child refugees, and those from families decimated through war or persecution, or the HIV/Aids epidemic. Derived from the principle of humanity in terms of which the ICRC conceives of family connection as an element of human resilience following conflict or instability, and guided by the principle of impartiality, the approach used is simply to rely on the consensual conception of family, as understood by the person(s) trying to regain contact with their family member(s).⁵⁹²

The first step to facilitating more complex, thorough and appropriate understandings of refugees is to amplify the data. Relying on the study of the minority experiences of Western-placed refugees is insufficient statistically and the effects of distance and reliance on stereotype are amplified, cementing a more distorted picture as the norm. As evident in the South African asylum system, these stereotypes reverberate in non-Western contexts too. Similar to Western hosts, South Africa has a majority male refugee population, although this is slowly feminizing,

⁵⁹² See International Committee of the Red Cross ICRC, "ICRC Report: The Missing and their families - Conclusions arising from Events held prior to the International Conference of Governmental and Non-Governmental Experts (19-21 February 2003).", (21 February 2003), online: </eng/resources/documents/report/5jahr8.htm>. Point II General Principles, 1.1 thereof states: "The term *family* and *relatives* must be understood in their broadest sense, including family members and close friends, and taking into account the cultural environment."

the latest statistics show that in 2017 close on 26% of registered asylum seekers were female.⁵⁹³

It is unsurprising therefore that a male-centric approach to the refugee figure is evident, as in West-as-host studies. The nagging question as to where, then, the women of this study are perceived to be is analyzed in the following chapter. More surprising, perhaps, is the replication of stereotypes, critiqued by Western studies, as relates to constructions of binary and fixed sexual identities as well as accommodation for only nuclear family forms in the South African context. However, both of these restrictive approaches to understanding sexuality and family are attractive to asylum regimes purposefully geared towards minimizing the numbers of recognized refugees and these stereotypes are thus both influential and attractive in these conditions, beyond the West-as-host.

Furthermore, focusing on status adjudication and sexual orientation as a PSG exclusively from within Western hosts, curtails necessary criticism of the understanding of identities and of the role of intersectionality in lived experiences of persecution, including host persecution, by excluding so many experiences from the scope of study. Those with intersecting vulnerabilities are also those least likely to have the resources for seeking asylum in a Western host. As discussed, the resettlement regime is so limited and has such significant access barriers itself that especially vulnerable, resettled refugees alone cannot be expected to address this data gap amongst West-as-host studies. Thus the same refugees whose lived experience of persecution most challenges an identity-politics conceptualisation of ‘listed grounds’ and ‘particular social group’ formations and who are most disadvantaged by the predominant understandings of these groups are those likely to have the least presence within West-as-host studies.

⁵⁹³ Asylum Seeker Management, Immigration Services, *supra* note 19 at 22.

This chapter has brought to light apparent anomalies to the typical construction of the concepts which buttress notions of both ‘host’ and of ‘refugee’. When further examined, these ‘anomalies’ demonstrate fundamental flaws in the functioning of these tropes with systemic implications for refugee law. The assumption that a host state is Western and beneficent is shattered by the reality of the persecutory host encountered by many queer refugees and defied by real experiences of persecution which entail continuing persecution. That resettlement of refugees is a logical solution to intra-host vulnerability is challenged by the reliance on formal refugee status recognition in a context in which many queer refugees are outside of the asylum system or rejected by it. This exclusionary reality is, however, only really appreciable if the asylum systems of the original host are considered in depth, whereas to only approach this problem from the resettlement, end-host perspective limits the case studies to minority success cases.

The norms used in refugee determination processes to assume an identifiable refugee figure are brought into question by the multitude of *de facto* but not *de jure* refugees apparent in South Africa. Constructions of who is not a refugee: ‘economic migrants’, demonstrate a near wholesale failure to appropriately take account of the role of economics in experiences of persecution, for refugees. In politically persecutory environments, certain political affiliations translate to reduced economic opportunity, in racist regimes, certain races or ethnicities are deprived of economic opportunities, in patriarchal regimes women &queer persons are often excluded from economic life. This disadvantage, an integral part of many refugees’ experiences of persecution, renders these refugees both less mobile, where mobility is resource dependent, and their asylum claims less cognisable in a system in which economics is understood as representing the division between migrant and refugee and thus as oppositional to persecution, not inherent to it.

This study illustrates that whilst a reductionist and exclusionary view of economics within refugee determination processes is common across the existing West-as-host literature as well as within the South African asylum determination processes, an understanding of just how inappropriate this approach is to understanding actual experiences of persecution is more vivid from Southern hosts and can be expected to be exponentially more evident in Southern hosts immediately neighbouring conflict zones. Different and deeper research is required to demonstrate the logical hypothesis that the shorter the distances refugees travel from their countries of origin and the comparatively fewer resources required to flee to these neighbouring locales, the more probable it is that those with the starker economic-persecutory experiences could be present in greater numbers. This requires a thorough destabilization of the notion that economic motivations signify someone who is not a refugee.

Dominant formulations of who is a refugee, on the other hand, are revealed to be reliant on insufficient and inappropriately fixed notions of identity categories, incoherent with intersectional and fluid experiences of queer identity. Unlike the unnecessarily restrictive understandings of group identity revealed by existing literature and evident in much asylum case-law of Western hosts, the insidious, restrictive conceptions of human groupings and identities outlined in this chapter are often hidden in seemingly fuller group-identity terminology. In the hasty and poor quality decisions of the South African refugee status determination process, lacking individuation, elaborate ‘group’ identifications are unlikely whereas stereotypical and restrictive approaches to notionally broad categories is a more useful tool of discrimination. Thus we see, as in the case of polygynous refugee women, where polygyny was imagined, almost exclusively, as populated by wealthy, male, Muslim, Somalis, the very limited imaginings of queer refugees as inevitably male, fully and always homosexual,

single and without family, work to erase the presence of other experiences and severely limit our ability to better serve and protect those in need. This requires reflection on what impact queer identity categories, and the use of identity categories generally have on refugee law and its application, taken up in the Conclusion below. This South African research study makes no claim to representivity as a Global South host country study. On the contrary, South Africa is atypical in many respects as a highly developed, developing country with an integrative, independent refugee determination system. This study has illustrated both familiar themes to those robustly canvassed and critiqued in existing Western-focused literature as well as some systemic shortcomings less evident from a Western perspective. In this combination of the familiar and the strange, this study of the conceptualization and application of refugee laws and systems in South Africa, as a host country, serves to hint at what may remain unknown, the people yet unseen and new perspectives that require attention.

Chapter 6: Come Out, Come Out, Wherever You Are!

A nagging question which remains from the previous chapters' data analysis is: what about the women featured in this dissertation's title; sexual minority and polygynous refugee women? As has been alluded to throughout this thesis, this research began with the expectation of a lack of data findings on these women. Instead the analysis has been focused on excavating the 'meaningful silences' which serve to make these women invisible from the view of service providers and asylum systems and, indeed, researchers. In conclusion, some of the theories and themes on where these women are situated and why they are not 'seen' are addressed more directly. Finally, the broader implications of this dissertation's work for identifying systemic exclusions and conceptual faults in the construction of refugee law in refugee law studies are expounded upon.

6.1 Women with Water in Their Mouths

This subsection synthesises what, and who, is missing from the previous central chapters' data analysis, focusing on the way in which certain women appear, disappear and fail to have presence in the asylum system. In analysing discussions with service providers and their theories on why polygynous and queer women are often absent amongst their clientele, the concept of 'coming out' both for queer refugees and polygynous families, and the continuing closetness of both, particularly of queer women and polygynous women within these groups, is brought to the fore.

The gendered construction of both queer and polygynous refugees, portrayed in the preceding chapters work to make the women who should be included in these groupings less visible, less

considered by both service providers and decision-makers and, ultimately, is disempowering of their ability to present as members of these respective groups and make their needs known.

As discussed in Chapter 4, the refugee figure, constructed as a single male, with the expectation of economic disadvantage, together with assumptions of polygyny as the purview of wealthy, Muslim men mean that polygynous refugees are considered unlikely – a family structure the stereotypical single male refugee cannot afford to support – beyond the exceptionalized Somali refugee community, in South Africa. Already existing and separated polygynous refugee families are typically not considered by service providers and women within these families are completely decentred.

Chapter 5, in turn, demonstrated how the construction of a single, male refugee together with readings of the LGBT(+) label as male-only and as a static, ‘immutable’ identity worked to erase cisgendered queer women from both LGBT and refugee spaces and engendered a lack of regard for differently constructed queer families. This chapter also revealed how, whilst the refugee figure is typically constructed as impoverished, questions of economics are considered as exclusively within the realm of migration concerns in an immigrant/refugee bright line distinction. This has untenable repercussions for all refugees and particular consequences for understanding the vulnerability of and persecution experienced by queer refugees.

The research findings thus demonstrate that the differently positioned polygynous and queer study groups, juxtaposed in this thesis, have done different work around the same themes; relating to stereotypes, economics and the refugee figure and gendered assumptions.

6.1.1 Theories on silence

The women around whom this thesis is ostensibly centred, were markedly absent from the accounts of most service providers. The following provides a breakdown of some of the reasons proffered by service providers for these women's invisibility amongst their clientele.

Cultural expectations of a women's obligation to maintain silence, particularly as relates to keeping their family's 'private life', private were given as reasons for polygynous women not making their family form known to service providers. An anonymous service provider and her colleague, both Black women, one South African and the other Congolese, made the following observations:

We haven't really had cases where we've had to deal with a case of conflict [in a polygynous family]. Because what you need to remember, here in Africa, we are not like white people. Even white people in South Africa, they're not like white people in Europe. Where I have a fight with my husband: 'Ah the courts! Oh my mother in law!' No, we're not like that. Then if you take it out [of the family realm], it's a taboo: 'Why do you take these family things and you take them outside?' It becomes a problem. So it's hard to find issues in African families, because they are so tightly kept under the carpet. Because what is important is to protect the family image. And to protect the husband's honor, or the way people look at the husband; that he must be a respectable man, and all of this. ... even me, I'm in South Africa, but if I have a problem, I will first keep it for a very long time. Maybe by the time I talk about it, it's someone really close to me, and it's in the past. It's no longer an issue. But while it's an issue, no. Ooh no no no. Because if you are woman who easily talks, it's like you're not a good wife, or, what can I call it? ... You don't have... 'sidima'; virtue. You're not virtuous. So for us, being a virtuous woman, is knowing how to shut up.

[Congolese Colleague]: "yeah in my country they say you need to know how to put water in your mouth. For you to not speak."⁵⁹⁴

These service providers perceived that a woman revealing her polygynous family form would thus be speaking out of turn, which act of speaking would adversely impact both her and her

⁵⁹⁴ Anonymous, *supra* note 190.

husband's reputation. An apparent assumption underlying this incentive towards silence, made by these service providers, is that discussing polygyny is not made in a neutral voice, such as to mention one's marital status might be, but is rather expected to be brought up as an aspect of (taboo) familial conflict. Furthermore, these service providers clearly expect that the existence of a polygynous family form would be flagged by a wife and not by the husband in a polygynous family.

Other service providers, without speculating on the reasons for clients' unwillingness to speak about their family forms, revealed how difficult it was for service providers to be aware of instances of polygyny amongst clientele when they must rely on a client 'coming out' as polygynous. The Director of a refugee and immigrants' rights not-for-profit said: "polygyny; it is very difficult to find this issue, [there may be a] few but not willing to speak out".⁵⁹⁵ Another service provider similarly surmised the existence of polygynous refugee families but explained their unknowability to service providers without expressly divulging their family form: "it's not something that we have at the moment. But then you hear other people talking. But we haven't had a family that came out. Maybe they are there, but they're not saying it to us; to say 'we are having this kind of structure.'"⁵⁹⁶

The invisibility of polygynous families amongst clientele is thus considered an element of culturally located patriarchal expectations of silence and a function of the service provider's reliance on the 'coming out' of unwilling clients. However, another factor may be a failure to recognise polygynous families as such or stereotypical expectations which result in pertinent questions not being asked. Occasionally, those service providers who had initially denied

⁵⁹⁵ Bernard Dipo Toyambi, *Interview with Bernard Dipo Toyambi, Director, Passop* (2016), Cape Town.

⁵⁹⁶ Anonymous, *supra* note 222.

knowledge of polygynous women would offer references to polygynous families when differently prompted, as discussed in Chapter 4.3, particularly with reference to polygynous family forms pre-existing refugee movements and straddling national borders.

Other structural factors of the asylum system hinder recognition of polygynous families as family units. The broad failure of an arbitrary and dysfunctional joinder system, whereby refugee files are supposed to be joined to those of their dependents, providing a route to derivative refugee status (discussed in Chapter 4.4), means that families are routinely not presented as families within the asylum process; they may not apply as a family for refugee status, or as a family for dependent status, but rather individuals often open their own files. Some targeted services incentivize women to present at social service providers as single. Families generally do not feature in the asylum system or amongst the services which attempt to assist those navigating the system. Even when joinder is a problem, or children's status, the issue is broached and addressed on a nuclear level amongst a man and wife and/or parent(s) and child. Whether or not the family in fact runs along these closed lines of connectivity is disregarded as a personal, private matter.

Hints at polygyny also arose surprisingly as a side-note to others' stories in discussions with a queer refugee and with a service provider discussing a queer refugee's case. Advocate De la Hunt, discussing the case of a gay man involved in a property inheritance dispute who had suffered abuse at the hands of a powerful brother, who had influenced the local police in his case, said: "It was a family dispute. He's the child of a second wife. And it started as a dispute over property that [he] took to court."⁵⁹⁷ In his interview with me, "Liam" explained his decision in moving to Cape Town and the negative influence of having family in Johannesburg. Talking

⁵⁹⁷ de la Hunt, *supra* note 199.

about where the rest of his family was located, he said “And my brother from my other mother is staying in Johannesburg.” It is not clear from either of these remarks that these queer refugees have families with polygynous formations but it is a possibility, particularly as relates to customs of succession and the ranking of children in polygynous families and the convention of children in polygynous families describing their father’s other wives as mothers. In terms of the legal and customary prevalence of polygyny amongst source countries of refugees in South Africa, it would seem statistically likely that refugees with polygynous family forms or even polygynous refugee families would exist and so these passing comments indicating polygyny would not be incongruous.

It is rather the apparent invisibility of polygynous women, particularly, in the asylum system in South Africa which is incongruous with family formation norms in the region. Women refugees with polygynous relationships should be expected to be present within South Africa, there are suggestions they probably are there, and furthermore polygynous status has significant import for refugee status, especially for polygynous women, as regards family joinder and resettlement opportunities. The absence of attention towards these families and towards the women within these families, in particular, is thus unlikely to reflect an actual absence, whilst it is likely to negatively affect an understanding of their refugee protection needs.

Different yet parallel reasons for the invisibility of queer refugee women were suggested by interviewees. Concerns for personal security compel many queer persons to continue to hide their sexual orientation within host countries. “Aiden” commented: “mostly I’m alone. And I think I feel more safe here when I keep things to myself. ... So I’m always secretive. I’m always quiet. That’s how I’d describe myself. Unpredictable.”

Queer women may have additional or differentiated security concerns as women and as ‘single’ women in particular. The ORAM report on queer refugees in Turkey stated:

Lesbians reported taking great care to hide their sexual orientation from the general population to avoid harassment and abuse by local residents. Unaccompanied by males, they described feeling vulnerable to attack and reported sexual harassment and violence at the hands of male neighbors in particular. A number reported that male neighbors had attempted to gain entry into their homes late at night.⁵⁹⁸

Even LGBT spaces do not seem to provide equivalent support for men and for women. Discussing the demographics of an interview-based survey project with about 100 queer refugees in Cape Town and Johannesburg, Victor Chikalogwe said:

Maybe I can say, 60% gay men? And maybe 20% I should say, bisexual. Men or women. And 10% can be transgender and 10% can be lesbian. I find it difficult, not only here [in South Africa], when I was working with the LGBT community in my country [Malawi], I find it very difficult for lesbians to come out than gay men. I feel gay men are more flexible coming out than lesbian women. I don’t know. Maybe I should also do a research on that: Why do most of the lesbian women find it very difficult to come out? Than gay men. And even transgender are more flexible coming out than lesbian women.

One service provider, who provided broad-based social service supports but had worked hard to create an LGBT supportive space within a religious NGO, said that as many services were geared towards women, men had to ‘come out’ to gain access to targeted services whereas queer women did not need to rely on their sexual orientation to access services.⁵⁹⁹ Stereotypes, the use of gay men as a proxy for understanding queer culture and the reliance on ‘LGBT’ female-exclusionary spaces may render queer women particularly invisible to service providers. A telling finding, based on research with queer refugee women in Kenya, states: “during interviews LBQ [lesbian, bisexual and queer cisgendered women] refugees said that they struggle to feel

⁵⁹⁸ Arf et al, *supra* note 109 at 16.

⁵⁹⁹ Khosa, *supra* note 334.

heard and understood by service providers, and that their own understandings of community and self-expression differ to other groups within the LGBTIQ acronym.”⁶⁰⁰ From the perspective of service providers, the above study states: “In Nairobi, women identifying as LBQ make up around 18% of the entire LGBTIQ community registered with UNHCR. Staff at humanitarian agencies also comment that LBQ women tend to be more *invisible* than other groups of queer refugees; and that identification of LBQ refugees is an ongoing challenge.”⁶⁰¹

Queer refugee women may thus have more urgency to remain closeted, fewer safe spaces in which to come out, as well as less incentive to come out to service providers. Out of concern for the security of clientele, service providers are reliant on social networks and word-of-mouth for the identification and support of vulnerable queer persons, yet the effectiveness of this mechanism falters where no such social connections are available. This is demonstrated by the lack of cisgendered queer women in my own interview project. My research ethics plan made it clear I would only approach refugees through service providers. Almost all refugee interviews were facilitated through the support of Victor Chikalogwe, PASSOP’s LGBTI project coordinator, the same community-based service provider which the LGBTI-focused UNHCR officer reported as facilitating their (improved) access to the queer refugee community in South Africa.⁶⁰² A snowball approach to research and to accessing a population therefore also serves to snowball the effects of any population-specific access limitations.

Humanitarian agencies mostly rely on *word of mouth*, or community structures, to disseminate information concerning upcoming outreach to LGBTIQ refugees. This is largely dictated by security concerns. Outreach audiences are usually largely composed by men. The reliance on word of mouth as an information platform is predicated by the

⁶⁰⁰ Moore, *supra* note 120 at 325.

⁶⁰¹ *Ibid* at 333.

⁶⁰² Okisai, *supra* note 65.

existence of social networks through which messages can be passed. This platform will only resonate amongst communities that are connected socially. In environments where there is an absence of strong community connections, outreach conducted through these means will miss certain key groups, including LBQ refugees. Individuals belonging to these groups exist at the periphery of service provision, and by definition are the most vulnerable.⁶⁰³

The fragility of connections amongst queer women navigating the offerings of service providers was also evidenced through an interview with Dumisane Dube, head of an LGBT support group within the refugee hub of Holy Trinity Church. He related: “one woman was a member of our group, and then she brought [others] on board and I think one woman that was sitting with a position of authority within the group and then we saw the number of women that came to the group went up ... the problem was retention [when the woman then left].”

A word-of-mouth approach thus fails amongst women with ‘water in their mouths’. Gendered expectations of silence and speaking ‘out’, with particular, long histories in play for women, for whom ‘being loud’ is disparaging, influence the ability to ‘come out’ for both polygynous and queer refugee women. Service providers, and researchers for that matter, are however, reliant upon this decision to self-identify.

6.1.2 A woman’s place

Women’s lives are profoundly impacted by the characterization and status of their intimate relationships. As Spijkerboer notes, women’s refugee applications are marked by references to their relationship with men and their families in a way that is not seen in men’s applications,

⁶⁰³ Moore, *supra* note 120 at 333–334.

which are more often treated as individual-focused.⁶⁰⁴ The traces of a long and astoundingly recent world history of women being marked as the chattels of men are still found in the dependency status of women moving across borders, exacerbated by their frequent economic disadvantage, compared to their male counterparts, itself a consequence of widespread systemic patriarchy. It is for this reason that this study attempted to seek out and determine the position of women whose intimate relations are marked as ‘abnormal’ to a heterosexual monogamous norm.

Moore’s Kenyan research, focused on cisgendered queer women, is able to draw on an apparently larger queer refugee population (particularly as a proximal host for Ugandan refugees fleeing state sponsored homophobic persecution) and, due to the greater involvement of the UNHCR, certainly a better documented queer population than South Africa. She makes the following interesting point as regards the role of family for queer women and their continued invisibility and isolation:

Whereas in Nairobi most MSM [men who have sex with men] and trans* refugees have fled their countries alone and are registered as refugees on an individual basis, staff suggest that LBQ women are more likely to remain living with their families before and after flight. One argument for this is attached to the lower visibilities of LBQ women as compared to, for example, transgender women. LBQ women can more often avoid scrutiny and continue living within their families and communities without focus attracting on their sexual identities. Another argument is attached to community expectations surrounding roles of refugee women in the household. As women are generally more beholden to their families—particularly to patriarchal figures, such as fathers and brothers—it is more difficult for LBQ refugees in the asylum context to explore their independent sexual identities outside of the roles demanded of them by families and societies. This inhibits their knowledge of and access to humanitarian and local services.⁶⁰⁵

⁶⁰⁴ Spijkerboer, *supra* note 27 at 55–56, 64, 103. Spijkerboer points out how even women arriving alone will inevitably be asked about the activities of their family whereas this is seldom the case for male applicants.

⁶⁰⁵ Moore, *supra* note 120 at 333.

Moore thus identifies family as part of the invisibility of cisgender queer women and for many, of their continued persecution. The only two cisgender queer women's cases discussed in detail by service providers, during my research, were both 'familied' rather than isolated; one, a young Somali woman, was in the process of fleeing from her abusive family within South Africa, the other case was of a lesbian couple with their children. This tiny sample falls in line with a finding that family may play a greater role in queer refugee women's lives. It also serves as a poignant reminder of the importance of bearing in mind differences in who might be considered family.

The disproportionate impact on fleeing women of family unification and immigration policies has a disciplining effect and thus, the often disadvantageous straddling of refugee families over Refugee Law and Immigration Law, has gendered consequences. A tradition of male refugees fleeing first, to be followed by their families, compounded with constructions of the typical refugee as a single male as contrasted with the always-related/dependent female refugee, underscores the particularized significance of family definitions and file joinders, in the South African asylum system, for women. Furthermore, the 2017 statistics show that refugee status is most commonly granted based on '3(c)'; family joinder, an administrative process which is theoretically simpler for the RROs and has, or should have, the incentive of reducing their caseload.

Anecdotal reports that the most commonly used grounds for asylum claims in South Africa is '3(b)' – the AU refugee Convention extended definition including those who flee "events seriously disturbing public order in either part or the whole of his country of origin or nationality" – appears to be supported by the standardized use of DHA country profiles focusing on country stability and statistics on country-related acceptance rates. Both country-based

asylum claims and family joinder have particularly profound impact upon the populations I have studied. Polygynous women's more complicated family forms are impacted by definitions of spouse and of dependents, and result in compounded file joinder problems. Queer refugees meanwhile are impacted by a predominance of country-of-origin based asylum determinations which, on the one hand, may not consider sexual-orientation based persecution in the official country profiles, and, on the other hand, may contribute to the phenomenon of not-recognised-as-queer refugees. These problematic features of the South African asylum system thus have exacerbated effects for these unconventionally oriented – in terms of marriage and sexuality – women refugees and work to make them particularly invisible.

If polygynous women refugees and queer women refugees can be expected to be present within South Africa, unique in the world as having legislated protections for both polygynous and same-sex marriages, yet are largely absent from official accounts and data on the asylum system, as well as having minimal presence amongst service provider's clientele, the question then arises: where are these women and why are they not seen?

Amongst a few social service providers who saw more women refugee clients in general, compared to the albeit larger male refugee population in South Africa, one considered the female-targeted provision of services as the reason for a predominantly female clientele. Another felt it had more to do with daytime availability and women's higher level of unemployment which meant they were able to present at social services offices.⁶⁰⁶ This service provider also noted a country-of-origin, culturally based gendered consignment of information-finding duties:

If you talk about Somalia, you would see women more than men. Because men are working and they've got shops all over, they're taking care of their shops and things like

⁶⁰⁶ Khosa, *supra* note 334; Anonymous, *supra* note 190.

that. Women are taking care of the kids. If you come to Ugandans, you will also find men more than women, surprisingly. Because in Uganda, men are also the breadwinners, the information finders ... But [for] most refugees we would say women; we would say it's the women that we meet more because they are the ones who are not working during the day, 'cause they're mostly unemployed.⁶⁰⁷

Yet even these service providers had no knowledge of polygynous families amongst their clients and, when it came to queer clients, saw mostly men. A women's advocate discussed how, compared to men, women had both mobility challenges, which lay behind a male-heavy refugee populace and also differences in access to information. Thus women's access to information about available services and how to engage them may be more limited and, whereas information about women-targeted social services may spread via the grapevine, queer women, without safe community connections are less likely to hear of queer-targeted social services. This may be one explanation for the fact that the UNHCR resettlement officer who specifically worked on queer refugee resettlement had not seen any sexual minority women for resettlement.⁶⁰⁸

Carrie Shelver, advocacy manager for the Coalition of African Lesbians explained that the dynamics within LGBT groups are often very hostile spaces for lesbians.⁶⁰⁹ Moore's research includes an interview with a lesbian woman who describes the atmosphere in mixed gender queer spaces as oppressive.⁶¹⁰ In discussing the case of a queer Zimbabwean woman refugee who had been gang raped whilst fleeing to South Africa, Shelver went on to theorise whether, rather than LGBT spaces, queer women were perhaps finding themselves in women's anti-violence spaces.

⁶⁰⁷ Anonymous, *supra* note 190.

⁶⁰⁸ Okisai, *supra* note 65. The views expressed were the personal views of the interviewee and not attributable to the UNHCR.

⁶⁰⁹ Shelver, *supra* note 216.

⁶¹⁰ Moore, *supra* note 120 at 331.

We met her at one of these crisis shelters that had been set up in Musina. And she had been helped by MSF because they had detected in their system that she had been raped, so she was assisted around rape, and she was given access to PEP. She felt so unsafe, and I think this is really important and I don't know if this has changed at all, it's going back a few years, but the shelter and the organisational support that was available to her in Musina as that first sort of landing point, were largely Christian run institutions, and so they did not feel safe for her to disclose her sexual orientation. And so she was actually hiding that. And was really terrified of being found out, because she thought that then she would be exposed to further violence.

... I wonder if that isn't part of the story. If in fact what's happening is that lesbians, bisexual women or women with non-normative sexual orientations, are not actually ending up in violence against women organisations, or women's rights organisations rather than LGBT groups. [...] I think there may be some element of these women just, fall into the crack basically. And so, they're helped in as far as they've experienced violence, but, this is the sad reality, apart from very specialized organisations that are dealing with refugee issues, I mean, which LGBT organisations even have programmes that deal with this?

This theory would pair with the Jesuit Refugee Services social worker, Samson Samuel Khosa, who commented that queer women perhaps did not 'come out' to service providers because they could access (women-targeted) services without having to.⁶¹¹ This theory that queer women land up in sexual orientation non-specific antiviolence spaces is also supported by the fact that Tiwonge Chimalanga, the only female-identified queer refugee interviewed, had initially been housed in an anti domestic-violence safe space. She commented that upon first arriving in South Africa she was placed in "Saartjie Baartman Women and Children Centre in Manenberg: the place for people struggling, beating, husband beating wife...so I was put there. Gender Dynamix [a trans and gender diverse human rights non-profit] supported me for everything."⁶¹²

⁶¹¹ Khosa, *supra* note 334.

⁶¹² Chimalanga, *supra* note 189.

Determining where women are in the system could contribute towards access to services as well as better coordination of services. The UNHCR interviewee, Kizitos Okisai, expressing his own views remarked:

There is evidence that we have a large number of LGBTI refugees and asylum seekers in this country, but I think what is lacking is a more structured way of responding to the needs of the LGBTI. And I've been talking to a number of organisations now that are interested in working on these issues in South Africa, and think that there is really a gap; there is no coordination between a few of the organisations that are working on this area, to better respond to the different needs. Because the needs are quite different. You have their health needs, their legal and physical protection needs, and sometimes you just have basic needs. Housing for instance, providing emergency housing, ... I think there is a gap in coordinating all of these efforts that different organisations are involved in, and also establishing some sort of referral mechanism between the different organisations. I mean: this is an identified need that person has and you cannot respond to it, [but] you know who can respond to it.

Women refugees are ‘missing’ from South Africa, much like they are in Western hosts. An expectation that half of the world’s refugees are women is not reflected in South Africa’s refugee demographics which, per the 2017 statistics report: “As it has been the case in previous reporting periods, the asylum regime in South Africa is still male dominated. A total of 17 892 male applicants were registered in 2017 against 6 282 female applicants.”⁶¹³ As well as consideration of systemic disadvantages which may result in de facto women refugees, and the specific populations canvassed by this thesis, being present in the country yet disproportionately failing to apply for asylum, reflection is also required on who gets to leave their country of origin. Shervler commented that this “takes us back to that mobility question. Because mostly poor people don’t get to leave. It is people with better access who are able to leave. It’s complex terrain.” Asking who gets to leave a country of origin starts to answer part of the question which needs to be asked from the other side: who is missing? This approach enlivens the importance of

⁶¹³ Asylum Seeker Management, Immigration Services, *supra* note 19 at 22.

studying the application of refugee law elsewhere, particularly in host countries closer to countries experiencing conflict, as a manifestation of refugee law likely to be applied to those with the least mobility. For all the ‘underrepresented’ populations in an asylum system we need to be asking these questions; if they face persecution and have protection needs, why are we not seeing them and what can we do about that? Despite South Africa’s legal and cultural distinctiveness, this study has thus cued in both mobility-based physical absences of certain refugees in South Africa as well as examined a system which renders their presence almost impossible to detect and their needs unaddressed; a search for what is missing rather than a representation of missing voices, serving as a bridge to expose some of the gaps in our understanding.

Determining where women are in a host state asylum system is important, so too is determining where women are in the international asylum schema so that we might better target research to address the necessarily gendered effect of a West-as-host bias. If the world’s refugees are indeed made up of roughly equal numbers of men and women, women refugees must not be a minority of refugees, somewhere. Martin previously suggested that ‘somewhere’ may be located in Central Africa and the Great Lakes region.⁶¹⁴ Thus, whereas several South African service providers had been expecting an influx of Ugandan queer refugees fleeing state sponsored homophobic persecution, which influx never became apparent, Moore’s Kenyan study on the other hand seems to show an influx in 2015 of queer Ugandans fleeing persecution.⁶¹⁵

⁶¹⁴ Martin, *supra* note 108 at 74.

⁶¹⁵ Moore, *supra* note 120 at 325.: “around 500 LGBTIQ persons, including around 90 LBQ women, had sought asylum with United Nations High Commissioner for Refugees (UNHCR) in Nairobi by mid-2015. A study of these LBQ refugees, undertaken in Nairobi, showed that whilst MSM and trans* individuals cited more incidents of arrest and detention by national authorities, LBQ women suffered more disproportionately in Uganda from acts of persecution at the hands of private actors—predominantly from family members—than members of other queer refugee communities.” Anonymous, *supra* note 214; Raymond, *supra* note 181; Okisai, *supra* note 65.

According to the UNHCR Statistical Yearbook, published in 2019, the top five countries hosting the largest numbers of refugees were Turkey, Pakistan, Uganda, Sudan and Germany.⁶¹⁶ Although the data relates to persons of concern generally, rather than recognized refugees, the UNHCR's population statistics for 2018, filtered for these five countries and for total numbers of male and female persons of concern, show that Uganda and Sudan have significant populations of refugees or displaced persons where women appear in greater numbers than men, whereas the statistics for Turkey, Pakistan and Germany show that women are outnumbered by men.⁶¹⁷ Building a demographic consciousness of refugee populations in different host countries, again serves to highlight the need for more and deeper refugee law studies in different host states, so as to build a three-dimensional understanding of how vulnerable groups interact with international refugee law; where they are, where they are not and why. The necessary first step in this approach is to acknowledge that other refugee host countries, outside of the West, also count as hosts and their asylum systems and refugee laws are worthy of study.

6.2 There's Nowt so Queer as Folk: Bringing Intersectionality into Refugee Law

Similar to Hilary Charlesworth's critique of international law, my position is not that the underlying ethos of refugee law is not applicable or valued in different 'cultures' or places, but rather that the construction of a system phrased as 'international' as well as the prominent scholarship on refugee law, is reflective of certain experiences and not others.

⁶¹⁶ United Nations High Commissioner for UNHCR, "Figures at a Glance", (19 June 2019), online: *UNHCR* <<https://www.unhcr.org/figures-at-a-glance.html>> at 1.

⁶¹⁷ stats@unhcr.org UNHCR data, "UNHCR Population Statistics - Data - Demographics", (10 October 2019), online: <<http://popstats.unhcr.org/en/demographics>>.

Moreton-Robinson discusses the failings of a feminist ‘invitation to inclusion’ approach which implicitly signals ownership and control, sets the terms for inclusion and fails to decentre white women. She discusses a heated debate between an Indigenous woman activist and a white feminist on the issue of intra-race rape (the Bell-Huggins debate); the question of ‘speaking for’ and whether this was ‘everyone’s business’. She concludes that by failing to “own her whiteness and her social authority” the white feminist (Bell) failed to realize the power disparity involved and the way in which her ‘speaking up’ from a position of power, silenced others. She suggests that women objects of study be asked to articulate their own agendas themselves and to suggest how feminist scholars might lend themselves to the task. I cannot claim to speak for any of the women whom this dissertation seeks out, and a reading of this work as representing their concerns would indeed serve to further silence these ostracized groups of women, whose voices are markedly absent, even in (mis)represented form, from this dissertation. Rather this work draws attention to the reasonable expectation that these groups of women should be present within the South African asylum system and attempts to disentangle some of the systemic reasons as to why they have such minimal, recognised presence. This work therefore makes no claim to provide voice, only to point to silence.

As to determining who is being left out of the asylum system and missing from the application of refugee law, why they are being left out and how we can learn to ‘see’ them, this dissertation has presented a two-part answer as to causes of apparent absence (or disproportionate presence) and suggested a coupled solution: taking assumptions of who is a ‘host’ and who is a ‘refugee’ beyond the linear and into a network framing.

6.2.1 Moving Out-Side

The UN Refugee Convention includes in the definition of a refugee the requirement that a person be “outside of their country of origin”. There is a contentious debate amongst refugee law and other migration scholars as to the defensibility of a distinction between IDPs and refugees (see for instance Hadad, Hathaway and Gibney).⁶¹⁸ Murray states that:

Queer migration studies is generally critical of the various distinctions made between ‘legal immigrants, refugees, asylum seekers or undocumented immigrants’, as these terms are less reflections of empirically verifiable differences among queer migrants (who often shift from one category to another) than techniques of the nation-state’s power.⁶¹⁹

This discussion is largely beyond the scope of this dissertation; suffice to say that there is a need to consider the workings of these unempirical distinctions with life-changing, even life-threatening effect, within refugee law. However, related to the forces which impact upon individual choices to stay or to leave, and upon inability or compulsion to leave, are the forces which determine where a person, who does make it outside of their country of origin, flees to.

Thus, as to why some people are missing from the asylum systems predominantly being studied in refugee law, there is a practical mobility component. Influenced by patriarchal, racist, capitalist and elitist forces, certain people have fewer resources – financial resources, social networks, access to information, different physical capabilities or vulnerabilities – required for movement. The further and more expensive the destination country, the more exacerbated these mobility discrepancies. This means a West-as-host study of refugee law is based upon data

⁶¹⁸ See for instance Haddad, *supra* note 58 at 196–198; Hathaway & Foster, *supra* note 23 at 17–21; Gibney, *supra* note 55 at 8.

⁶¹⁹ David A B Murray, “Real Queer: ‘Authentic’ LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System” (2014) 56:1 *Anthropologica* 21–32 at 23–24.

impacted by a patriarchal, racist, elitist, ablest, ageist filtering of refugees with, inter alia, gendered consequences for understanding the application of refugee law in the world.

If we only study the asylum systems of wealthy, distant and difficult to access states, our research will thus be affected by mobility discrepancies to an aggravated degree. Politically and socio-economically disadvantaged persons most especially those who face complicated intersectional vulnerabilities, are rendered less mobile. The Montreal Principles on Women's Economic, Social and Cultural Rights notes: "as a group, women are disproportionately affected by poverty, and by social and cultural marginalization. Women's poverty is a central manifestation, and a direct result of women's lesser social, economic and political power. In turn, women's poverty reinforces their subordination, and constrains their enjoyment of every other right".⁶²⁰ Women, and queer persons of all genders, face mobility challenges due to patriarchal disadvantages in accessing the financial and social resources required to travel long distances to expensive places.

The limitations of a West-as-host study of refugee law, presented as if generally applicable and representative of 'proper' refugee law obfuscates other lessons from other places. Such an approach not only disproportionately excludes people with socio-economic mobility disadvantages from study but even excludes consideration of other ways of excluding. As identified in Chapter 3, state mechanisms for precluding asylum applications vary according to the peculiarities of a country's border and resources. For less wealthy states whose borders are neither as removed from areas of conflict nor as well patrolled as the states of the West, confusion, neglect and purposeful incompetence in their asylum systems in lieu of border control

⁶²⁰ International Federation for Human Rights, "Montréal Principles on Women's Economic, Social and Cultural Rights", (December 2002), online: *Refworld* <<https://www.refworld.org/docid/46f1462e0.html>> at 2.

are differently manifested mechanisms of exclusion. As a condition likely to affect the majority of refugees in the world, this demands the attention of refugee scholars committed to resisting attempts to denude refugee law of its purpose.

Furthermore, in expanding the representivity of ‘international’ refugee law, the AU Refugee Convention and the Cartagena Declaration and Bangkok Principles require greater scholastic attention and legal advocacy. Bringing these agreements to the fore as conjoint authors of international refugee law – with combined numbers of state signatories amounting to 134 member states – the AU Refugee Convention thus represents a regionally binding embodiment of an already existing new international consensus.⁶²¹ The broader focus in these agreements on serious disturbance of public order rather than individuated ideas of persecution contains the kernels of an approach which can overcome a focus on identity categories as well as an approach already catering for concerns with ‘environmental refugees’. However, the problems in its use and application cry out for greater study such that ‘country of origin’ does not become the new category-approach of refugee status recognition, contrary to international refugee law non-discrimination obligations.

⁶²¹ The AU Refugee Convention is a binding instrument signed and ratified by 45 states, with 5 additional signatory states which have not yet ratified it, see African Union, “LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE OAU CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA”, (16 May 2019), online: *African Union* <<https://au.int/en/treaties/oau-convention-governing-specific-aspects-refugee-problems-africa>>. The Bangkok Principles are a product of the Asian-African Legal Consultative Organization (AALCO) which has 48 member states (13 overlapping with the AU Refugee Convention membership), see: AALCO, *supra* note 314. There is, however, not a full consensus on the extended definition amongst signatories. The notes and reservations which follow the Bangkok Principles include reservations to the extended definition in Article I by Bahrain, Singapore and India. The Cartagena Declaration is incorporated into binding domestic legislation in 14 states, and the follow-up Brazil Declaration of 2014 had 28 member states and 3 territories, see: Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *supra* note 314. In total, these agreements represent a binding consensus on a broadened refugee definition amongst 59 countries, with 112 states having been parties to nonbinding declarations.

We have these instruments, we have significant consensus, contrary to the naysayers who fear reviewing the UN Refugee Convention would result in lesser protections, however, the greatest lament, repeated across the three continents having engaged in a broadened refugee definition, is that implementation is the problem. Attention, analysis and advocacy by the academic community akin to that given to the UN Refugee Convention and the implementation and practices of select 'WEIRD' hosts could substantially contribute strengthened interpretation and implementation tools as well as encourage greater oversight.

Thus the international law definition of a 'refugee' cannot be described only in terms of the UN Refugee Convention. It would be incomplete without at least acknowledging that this definition alone, without the expanded definitions of the instruments discussed above, does not reflect the entirety of the definition as applicable in the lives of the majority of the world's refugees. Furthermore, the imagined 'host' cannot continue to be exemplified by only Western host states. This dissertation has clearly demonstrated the way in which the West-as-host assumption reveals itself in the predominant study of refugee law and the harmful blind spots which such an approach induces.

The inevitably missing stories from West-as-host studies are particularly detrimental to our understanding of refugee law and refugee lives where the Western bias of these studies is not acknowledged. A first, necessary solution therefore is to insist on the marking of positionality and to acknowledge the limitations; that these studies are not representative of refugee law application internationally, nor does their subject-focus reflect their reach, in that the audience for these texts is more international than their content.⁶²² Demonstrating the bias in an

⁶²² Spivak advocates for the importance of speaking to, rather than for, historically muted subjects. Spivak, *supra* note 9 at 91–92.

unacknowledged West-as-host framing of refugee law and calling out the exceptionality of Western hosts is the larger work undertaken and illustrated by this dissertation. This is also a project which I call on scholars of Western asylum systems to engage in themselves.

Secondly, refugee law scholars need to actively go in search of the underrepresented and question their disproportional lack of presence in asylum systems under study.⁶²³ One likely fruitful means of searching for the unseen is to emphasise more in-depth focus on alternative host countries' asylum systems. In this regard, the refugee host countries of the Majority World must be studied in their application of refugee law.

6.2.2 Thinking outside the box

Another reason some people are underrepresented in the asylum systems being studied, has less to do with their physical absence from a space and more to do with our inability to perceive their presence, related to how we think of the refugee figure. I started this research assuming the reasons for flight for queer refugees would be more complicated - a mix of war or instability and sexual orientation-based persecution - but the message universally was that, for queer refugees, sexual orientation-based persecution definitively framed their lives and flight.⁶²⁴ The complication that I was expecting rather took the form of queer refugees reportedly resorting to

⁶²³ Spivak outlines a formula for extracting ideologies from neutrally-presented texts by measuring silences and examining not just what a text refuses to say but also what it cannot say. *Ibid* at 81.

⁶²⁴ Every one of the refugees interviewed discussed their fear or experiences of persecution as the cause of their flight to South Africa, the service providers were similarly firm in the cause-effect of queer refugees fleeing sexual orientation-based persecution. For instance: Khosa, *supra* note 334.: "So most of them, actually I can say almost everybody of that group that came to see me, the main problem is persecution, because of their sexual orientation. Then freedom of expression." Cote, *supra* note 32.: "In the cases that I've dealt with, [sexual orientation has] been mostly the reason why they've had to move, but at the same time, the conflict makes the situation where it's more dangerous for them to ... and most people can't live openly in the rest of the continent and so a lot of the violence in the Eastern DRC, for example, is sexual violence against women and so they'll move but part of their claim is based on the fact that they also have an LGBT claim".

the catchall ‘country conditions’ in their asylum applications to avoid the difficulties of discussing and the stigma of their sexual orientation-based experiences of persecution, and as a serialised story of recognised refugees, having fled conflict, subsequently coming out and experiencing sexual orientation-based persecution in their host state. Thus for a variety of reasons, there is significant discrepancy between how refugee law is studied as applied to sexual orientation-based asylum applications, and how even recognized (but-not-as-queer) refugees may actually present in the asylum system. This is only the tip of the iceberg in a situation where the majority of queer refugees may never interact with the asylum system at all. These findings are likely to be common outside of South Africa. As noted in Chapter 5, the phenomenon of out-of-country, unrecognised refugees requiring protection elsewhere, is likely to be a problem facing many if not most queer refugees in the Global South. The condition of both unrecognized queer refugees and recognized but-not-as-queer refugees serves as an alarm for the severe limitations in common constructs of refugee law for the lives the international refugee law regime is designed to accommodate.

This dissertation has demonstrated how gendered and economic assumptions about refugees and what aspects of their lives ‘count’ for asylum determination purposes erase contrary lived experiences from the vocabulary of service providers. A category approach to asylum determination, wherein circumscribed identity categories (race, religion, nationality, variously elaborated ‘others’, or political opinion), as well as the stand-in category of country-of-origin, are used as cues for refugee status, can thus have detrimental effect. An understanding of refugee law and asylum adjudication which is reliant upon a definition of a refugee, as someone fearing persecution, for reasons the adjudicator can associate with inadequate and stereotypical

characteristics, marred by identity politics, cannot adequately cater for the identification and protection of persons fleeing persecution, as required by international and domestic laws.

In their discussion on queer precarity, Hollibaugh and Weiss state that: “old-style identity politics are not adequate to understand how the complex multiplicities of gender, race, sexuality, and class interlock and play out, changing the ways that queer people can move in the world or are vulnerable to attack”⁶²⁵ This is exactly the problem with the identity-politics based formulation of PSGs in refugee law and the exacerbated limitations on understanding created through a divorce of any mention of economics from vulnerability to persecution, in the assessment of asylum claims. It is difficult for refugee advocates to discuss the economic reality of refugees' choice-making and vulnerability because we know it weakens their claim. How then to reclaim this language of economic vulnerability as integral to a *valid* claim is an urgent question for refugee law.

The development of PSG categories and their use along with 'traditional' categories (race, religion etc) is identity politics writ large, with all its worst shortcomings, hung like a pillory around the refugee. The same people most disadvantaged by a category approach, which hinders an understanding of intersectional vulnerabilities, are those who are least likely to make it into the refugee law systems of the wealthy developed host states which form the near exclusive focus of refugee law studies. The same people who, on a predicament approach to understanding persecution, are arguably the most persecuted in the world.

In a different context yet precisely on point for this discussion, former Constitutional Court judge, Justice Sachs has remarked: “What the constitution requires is that the law and public

⁶²⁵ Hollibaugh & Weiss, *supra* note 130 at 20.

institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are.”⁶²⁶ In grappling with the variety of people and human experiences which embody actual refugee experiences, we need to move beyond categories and identity politics. What is required is an intersectional approach to contemplating vulnerability to persecution.

Others, with a focus on identifying and addressing populations in need, have suggested different ways of thinking about intersectional vulnerability. Buscher suggested, rather than a broad and yet insufficient assumption that women are always more vulnerable, that more specifically located groups, many seldom included in PSG analysis, could be considered some of the most likely to require greater and differentiated assistance. “As we assess opportunity and the social, human and financial assets refugees possess or have access to, we are likely to find that those most marginalised are not women and children at large but rather adolescent boys, married girls, the elderly, those with disabilities and LGBT refugees”. In describing CAL’s focus areas, Shelver explained:

The organisation takes an intersectional analysis … in a slightly contrived manner, in pursuit of this we have identified five groups of women that we try and work with, which helps makes sure that we don’t fall into a narrow identity-politics framing. So, we do work, of course, with LBT women, but we also see our work as being with women sex workers, young women, women living with HIV, women abortion seekers and women abortion providers.⁶²⁷

Both of these examples are not of closed, exhaustive or prioritised lists, but rather examples of focus and representative of ways of thinking. In trying to map a path for ethical queer relationships, marked by responsible interactions without reliance on oppressive and

⁶²⁶ Sachs J concurring judgment, *National Coalition for Gay and Lesbian Equality v The Minister of Justice* 1998 (12) BCLR 1517 (CC) at para 134; Camminga, *supra* note 30 at 109.

⁶²⁷ Shelver, *supra* note 216.

inappropriate norms, Lehr calls for consideration of social context and expected outcomes.⁶²⁸

The reference to a refugee having fled their country ‘owing to a well-founded fear of being persecuted for reasons of ...’ can be interpreted as being about expected outcomes and social context. The descriptors contained within the UN Refugee Convention definition would better serve not as tick-list categories in which people must be made to fit but as illustrative examples or mental springboards.

The problems illustrated here of both a West-as-host bias in refugee law studies as well as an identity category approach to the refugee figure have compounded effects for particularly vulnerable people. Scholars studying the application of refugee law in only distant wealthy host countries will have minimal access to the stories of the poorest of the persecuted. Those for whom the current identity politics approach is most problematic are thus obscured from view, remain unimagined as refugees and the true amplitude of the problem is not appreciable.

As well as serving to exacerbate the problem, the compounded effects of these notional biases in determining ‘proper’ hosts and refugees, also reinforce the need for the suggested solution: primarily, for greater research on a greater variety of host countries; their refugee law systems and application of international refugee law. Scholars who are focused on Western refugee law systems would assist this project on increasing refugee host representation, were they to acknowledge and be more mindful of their bias; demonstrating an awareness of the limitations and specificity of their work as well as of the generality of their audience; to be purposeful in ‘speaking to’ Southern scholars, advocates and bureaucrats who are indeed listening. In the angst of the limitations and dire problems of the current international refugee system, I feel my project offers not just criticism but points to an exciting opportunity to learn more and think differently.

⁶²⁸ Lehr, *supra* note 584 at 72.

The fact that every interview I had in my very modest project had some eye-opening moment of learning for me was invigorating and speaks to the depth of untapped resources awaiting researchers in some of the principal refugee host states of the world. We need substantially more information about how the refugee regime is actually working, or at least, being applied, in the world. As demonstrated by this project, the best way to more fully appreciate the problems with the current regime and to challenge our understanding and framing thereof, is also the best way to find a solution to those problems; by researching more places and asking more people.

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Appendices

Appendix A

A.1 BREB approved sample Letter of Initial Contact – Refugees

Letter of Initial Contact

Research Project - "Other" Women in Flight: Sexual minority and polygynous refugee women

Dear _____

I write to ask you to participate in a research study that examines attitudes towards, and the experiences of, women in atypical relationships (not heterosexual or monogamous) in the asylum process. This project seeks to add a South African voice to the international Refugee Law discussions on gender and sexuality, in order to understand where law is failing to respond properly to the needs of such claimants and to improve decision-making by helping to make it more equitable, consistent and more transparent.

The study is being undertaken by Siobhan Yorgun, a doctoral student, to inform her graduate dissertation, under the supervision of Professor Catherine Dauvergne from the University of British Columbia, Canada (UBC).

An important part of this research includes conducting interviews with individuals who are involved in the refugee determination process or legislation, including legal professionals and refugee applicants.

If you are a refugee or asylum seeker, you may be asked for permission to access your case file with your lawyer, this does not require you to directly participate in the project in any way.

If you have been asked for access to your case file and you live in Johannesburg or Cape Town and are able to travel to your lawyer's offices or similar safe and private location, you may also be asked if you would like to participate in an interview. This interview will take between 45 minutes and 1 hour and will take place in your lawyer's office building or at a nearby place you select. The interview will be held with you, alone, and the female Co-investigator. If you would like, we may also invite a translator and, if you would feel more comfortable and depending on their availability, we may also invite your lawyer to sit in on the interview. This interview will be about your own experience with and views on the South African asylum system. The interview will be recorded, if you agree, to allow the researcher to accurately analyze the interview in the future. You will be able to see a transcription of your interview to check it is accurate and to make any corrections.

You can cancel your consent at any time before, during or within a month after participating in the study. Participation is completely voluntary and you are not required by anyone to continue participating, even if you gave your consent in the past. If you choose to cancel your consent, any information the researcher has relating to you will be destroyed and not used for the purposes of this research. Should you choose to cancel your consent more than one month after the date of your participation, your data will be removed from the study as far as is possible provided it is not already included in a publication or report. Whether or not you cancel your consent and whether or not your data is included in any publication, your data will remain anonymous.

The study is completely confidential. Only the research team will have access to information about participants. Academic papers and articles will be submitted for publication, based on the research findings but no participants will be identified or identifiable in these publications – although professional participants may elect to be identifiable if they wish.

We will not pay you for the time you take to be in this study. However, we will pay the cost of your transport to and from your lawyer's offices (or alternative agreed on location) for discussing/signing this consent form and/or to participate in an interview, even if you do not agree to participate or choose to end the interview or cancel your consent.

Potential risks to you if you participate in this study

We do not think there is anything in this study that could harm you or be bad for you. However, we understand that you may be concerned for your safety and privacy regarding your marital arrangements or sexuality. For this reason, we will be careful to respect your privacy and keep all information and documents coded and anonymous and we will try to set up means of contact and interviews that best protect your identity. If at any point you do not feel safe participating in the study, please let one of the study staff know and/or withdraw from the study.

We understand that your path to South Africa may have been a difficult one and discussing your experiences and some of the questions we ask might upset you. Please let one of the study staff know if you feel uncomfortable or upset. We will provide you with information for accessing support services.

Some of the questions we ask may seem sensitive or personal. You do not have to answer any question if you do not want to

Benefits to participating in the study

While there are no direct benefits to participants, we hope that the project will inform the improvement of refugee protections afforded to those fleeing harm based on sexual orientation grounds and for polygynous family groups and especially women in these families. The project aims to make refugee determination and family reunification processes more fair, transparent and consistent, which is in the interests of refugee applicants, advocates and refugee lawyers.

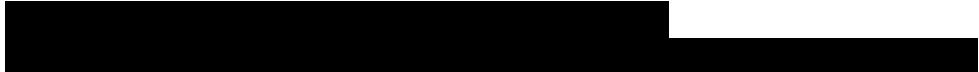
If you have any questions or would like further information about this study, you may contact [REDACTED]

If you have any concerns or complaints about your rights as a research participant and/or your experiences while participating in this study, contact the Research Participant Complaint Line in the UBC Office of Research Ethics at 604-822-8598 or if long distance e-mail RSIL@ors.ubc.ca or call toll free 1-877-822-8598 FREE.

Thank you in advance for your consideration. Your time and interest in this study are much appreciated.

Sincerely yours,

Professor Catherine Dauvergne – Trudeau Fellow
The University of British Columbia Faculty of Law at Allard Hall



A.2 BREB approved sample Letter of Initial Contact - Professionals

Letter of Initial Contact

Research Project - "Other" Women in Flight: Sexual minority and polygynous refugee

women

Dear _____

I write to ask you to participate in a research study that examines attitudes towards, and the experiences of, women in atypical relationships (ie. not heterosexual or monogamous) in the asylum process. This project seeks to add a South African voice to the international Refugee Law discussions on gender and sexuality, in order to understand where law is failing to respond properly to the needs of such claimants and to improve decision-making by helping to make it more equitable, consistent and more transparent.

The study is being undertaken by Siobhan Yorgun, a doctoral student, to inform her graduate dissertation, under the supervision of Professor Catherine Dauvergne from the University of British Columbia, Canada (UBC).

An important part of this research includes conducting interviews with individuals who are involved in the refugee determination process and the legislation thereof, including legal professionals and refugee applicants.

If you are a refugee determination official, parliamentarian, academic, refugee advocacy or legal professional ("professional"), you may be asked to participate in an interview. This interview will take between 45 minutes and 1 hour and will take place in your office building or at a nearby location you select. This interview will be about your experiences and views on working on claims involving refugee determinations related to sexual minority and polygynous women. The interview will be recorded, subject to your consent, to permit accurate analysis in the future. You will be able to see a transcription of your interview for verification and to make any corrections.

You can revoke your consent at any time before, during or within a month after participating in

the study. Participation is completely voluntary and you are not required by anyone to continue participating, even if you gave your consent in the past. If you revoke your consent any information gathered relating to you will be destroyed and not used for the purposes of this research. Should you choose to cancel your consent more than one month after the date of your participation, your data will be removed from the study as far as is possible provided it is not already included in a publication or report.

Legal professionals may also be asked to pass on our request for consent to access to a client's file and/or a request for a client's consent to participate in an interview for this study. In this case, we ask that you use your usual means of contact with your client to pass on our request, should it be safe to do so. Given the power-imbalance in the lawyer-client relationship, we also respectfully request that you emphasise the voluntary nature of participation in the study and that the request does not emanate from your office, nor do you recommend/encourage participation.

The study is completely confidential. Only the research team will have access to information about participants and information that discloses your identity will not be released without your consent, unless required by law. Academic papers and articles will be submitted for publication, based on the research findings but no participants will be identified or identifiable in these publications – although professional participants may elect to be identifiable if they wish.

We will not pay you for the time you take to be in this study.

Potential risks to you if you participate in this study

We do not think there is anything in this study that could harm you or be bad for you. Some of the questions we ask might upset you. Please let one of the study staff know if you have any concerns.

Some of the questions we ask may seem sensitive or personal. You do not have to answer any question if you do not want to

Benefits to participating in the study

While there are no direct benefits to participants, we hope that the project will inform the improvement of refugee protections afforded to those fleeing harm based on sexual orientation grounds and for polygynous family groups and especially women in these families. The project aims to make refugee determination and family reunification processes more fair, transparent and consistent, which is in the interests of refugee applicants, advocates and refugee lawyers.

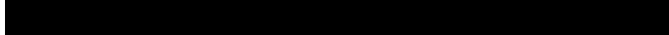
If you have any questions or would like further information about this study, you may contact [REDACTED]

If you have any concerns or complaints about your rights as a research participant and/or your experiences while participating in this study, contact the Research Participant Complaint Line in the UBC Office of Research Ethics at 604-822-8598 or if long distance e-mail RSIL@ors.ubc.ca or call toll free 1-877-822-8598 FREE.

Thank you in advance for your consideration. Your time and interest in this study are much appreciated.

Sincerely yours,

Professor Catherine Dauvergne – Trudeau Fellow
The University of British Columbia Faculty of Law at Allard Hall



Appendix B

“Nationality days for Asylum Seekers at Refugee Reception Centres” screenshot from

<http://www.dha.gov.za/index.php/contact-us/refugee-centres/29-pretoria> [6 June 2020].

Assistance to Refugees and Asylum Seekers

OPPERATIONAL HOURS:

NATIONALITY DAYS FOR ASYLUM SEEKERS AT REFUEE RECEPTION CENTRES

DAY	COUNTRY	LANGUAGE
Monday	SADC, North Africa & Asians - Angola , Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Zimbabwe, Swaziland, Egypt, Algeria, Pakistan, India and China	French, Swahili, Lingala, Tshiluba, Shona, Chichewa, Portuguese, Arabic, Bangali, Urdu, Gujarat, Punjabi, Mandarin (China), Hindi, Tsonga
Tuesday:	SADC, North Africa & Asians - Angola , Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Zimbabwe, Swaziland, Egypt, Algeria, Pakistan, India and China	French, Swahili, Lingala, Tshiluba, Shona, Chichewa, Portuguese, Arabic, Bangali, Urdu, Gujarat, Punjabi, Hindi, Ndebele
Wednesday	Ethiopia, Burundi, Rwanda, Uganda, Eritrea and Ghana	Amharic, Hadiya, Kambati, Oromo, Swahili, French, Kirundi Kinyarwanda, Tigrinya, Luganda
Thursday	Somalia, Camerron, Senegal, Eritrea and Ethiopia	French, Wolof, Swahili Lingala, Twi, Somalia, Amharic, Hadiya, Oromo, Triginya, Kambata
Friday	English only	

Appendix C

Draft Standard Operating Procedure: Refugee Family Reunification, found at page 15-20 of the “Respondent’s Affidavit” 3 April 2018 in re Scalabrin Centre of Cape Town and Others v Minister of Home Affairs and Others Western Cape High Court, Cape Town, South Africa (1 December 2017) unreported, on file with the author.

DRAFT

DEPARTMENT OF HOME AFFAIRS

**STANDARD OPERATING PROCEDURE:
REFUGEE FAMILY REUNIFICATION**

REVIEWED BY: STANDING COMMITTEE FOR REFUGEE AFFAIRS

DATE:

**CONSOLIDATED BY: STANDING COMMITTEE FOR REFUGEE
AFFAIRS**

DATE:

APPROVED BY:

DATE

PROPOSED IMPLEMENTATION

DATE

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1. BACKGROUND AND PURPOSE

Family reunification refers to the procedure which a Refugee Reception Officer must follow when a dependant as contemplated in section 3(c), read together with sections 1, 21 and 22 of the Refugees Act (no. 103 of 1998) (the Act) applies for refugee status on the basis that he or she is a dependant of a recognised refugee.

2. RELEVANT LEGISLATION

The Refugees Act, 1998 (Act No 130 of 1998) and all amendments thereto.

The Refugee Regulations (Forms and Procedures) 2000 and all amendments thereto.

The Immigration Act, 2002 (Act No 13 of 2002) and all amendments thereto.

The Immigration Regulations and all amendments thereto.

Relevant International Conventions.

3. DEFINITION/ABBREVIATIONS/ACRONYMS

"Child" means any person under the age of 18 years.

"Dependant" in relation to an asylum seeker or a refugee, means the spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of such asylum seeker or refugee.

"Spouse" means any person, who is party to a marriage or same sex union, which is solemnized and registered in terms of either a civil or customary union.

"RRO" means a Refugee Reception Officer.

"RSDO" means a Refugee Status Determination Officer.

"SOP" means Standard Operating Procedure.

4. APPLICABILITY

This SOP applies to the Centre Managers and all staff at Refugee Reception Offices as well as to the Chief Directorate: Asylum Seeker Management. All of the aforesaid

persons are required to comply with the contents of this SOP as it provides guidance on the minimum requirements and procedures for family reunification and this SOP replaces all previous SOPs relating to family reunification.

5. FORMS

All forms applicable for registering an asylum seeker:

BI Official Departmental forms

BI-1590 Eligibility Determination for Asylum Seekers

BI-1693

6. GUIDELINES AND PROCEDURES: REFUGEE FAMILY REUNIFICATION (JOINING)

Phase 1: RSDO Manager

If a dependant of a recognised refugee applies for refugee status in terms of section 3(c) of the Act (or the recognised refugee upon whom that person claims to be dependent applies on his or her behalf), the following process must be followed:

6.1 A written application for refugee status under section 3(c), read together with sections 21 and 22, of the Act, must be submitted to an RSDO Manager on Form BI 1590;

6.2 The application by a dependant contemplated in section 3(c), read together with sections 21 and 22, of the Act, must be accompanied by the following documents:

- a certified copy of the section 24 permit of the recognised refugee upon whom he or she claims to be dependent;
- as applicable, certified copies of any birth certificate of any dependant children, marriage certificate of any dependant spouse and/or other supporting documents verifying dependency (which must be translated into English);
- certified copies of documents proving dependency if the dependant is over 18 years of age, such as a medical certificate or proof of school enrolment

or any other acceptable document proving dependency (which must be translated into English).

6.3 A dependant of a recognised refugee is entitled to refugee status and asylum in South Africa irrespective of any of the following:

- whether the recognised refugee declared the existence of such dependant when making application for refugee status and asylum;
- when such dependant applied for refugee status and asylum; or
- where such dependant was married, or born, to the recognised refugee.

Phase 2-RSDO

6.4 The RRO must submit the application for refugee status contemplated in section 3(c) of the Act, including the documents mentioned above, to the RSDO, who shall make a decision in terms of section 3(c) after conducting a hearing in terms of para 6.5.1 below.

6.5 The RSDO must:

- 6.5.1 conduct a hearing with the dependant asylum seeker, together with the recognised refugee;
- 6.5.2 verify the dependant's relationship using the documents submitted by the applicant and, in appropriate cases involving children, require DNA testing;
- 6.5.3 if satisfied (each case must be assessed on its merits, taking into account, *inter alia* and where applicable, the recognised refugee's explanation for his or her failure to mention a dependant on his or her DHA-1590 Form and any documents furnished to support the claim, including affidavit evidence), grant the dependant refugee status as contemplated in section 3(c) of the Act;
- 6.5.4 inform the applicant in writing of the outcome of the application;
- 6.5.5 issue a section 24 permit to a successful applicant;

- 6.5.6 make a copy of the section 24 permit and place the same in the file of the recognised refugee;
 - 6.5.7 submit the file to the RSDO Manager for quality control.
- 6.6 The fact that a person claiming to be a dependant has made an independent application for refugee status relying upon the grounds set out in section 3(a) or 3(b) of the Act must not preclude a claim for refugee status under section 3(c) of the Act.

7. QUALITY CONTROL AND QUALITY ASSURANCE

The RSDO Manager will be responsible for quality control and assurance and to this end, he or she must ensure that:

- the request made by the applicant is placed in the file of the recognised refugee;
- all documents and interview notes relating to the application are placed in the file of the recognised refugee.

The RSDO will be responsible for ensuring that all documents and file contents are completed in accordance with departmental procedures.

8. TRAINING AND QUALIFICATIONS REQUIREMENTS FOR RSDOS

Immigration Training programmes / modules / Working Documents.

Knowledge of the Refugees Act and Regulations.

Knowledge of the Immigration Act, as amended and Regulations.

Interviewing skills.

Computer Literacy.

9. RISK MANAGEMENT GUIDELINES

In implementing this SOP there should be constant vigilance against human and more particularly, child trafficking.