Death Zones, Comfort Zones: Queering the Refugee Question

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1 Introduction

> In the context of contemporary projects of security and state violence, lesbian and gay rights discourse occupies a recuperative role for institutions and practices long contested by anti-racist, anti-colonial, feminist and queer intellectual traditions and social movements.[1]

Ten years ago, in 2010, the UK Supreme Court rendered a watershed decision in HT & HJ v. Secretary of State for the Home Office, eliminating what has been described as the "discretion test"[2] for gay and lesbian refugees and calling attention to the challenges that had been faced by claimants applying

[1]Dean Spade, "Under the Cover of Gay Rights", 37 *New York University Review of Law and Social Change* (2013) 97.

[2]This refers to the guiding principle in UK asylum law jurisprudence, overturned by *HT & HJ*, that would require the deportation of applicants claiming persecution on the basis of sexuality if it was shown that they could be discreet about their sexuality upon return, so as to avoid persecution. See *HJ (Iran) and HT (Cameroon)* v. *Secretary of State for the Home Department* [2010] UKSC 31.

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for sexuality-based asylum in the UK. Alongside this decision, and for years prior to it, scholars and practitioners had been documenting and theorising some of the particular challenges facing gay and lesbian asylum seekers in Europe, Commonwealth countries and elsewhere.[3]

In the intervening years, there have been important judgments on sexual-orientation-based asylum handed down at the European level, including the Joined Cases of X, Y and Z[4] and A, B and C[5] at the Court of Justice of the European Union and the case of ME v. Sweden at the European Court of Human Rights in Strasbourg.[6] Discussing sexual rights among international lawyers, migration lawyers and activists, by virtue of the material necessity to provide and rely on country reports and context-based evidence from claimants' countries of origin, has shuttled between sexual rights and refugee rights, and in the years since the HT and HJ judgment, this tension has been teased out before a wide and attentive public. The liberal or leftist approach has been mainly to view expansion of the scope of protection of gay and lesbian refugees as a step in the right direction, towards protection of basic human rights and, in the case of HT and HJ, a more appropriate way to conceive of persecution on the basis of sexuality than the so-called "discretion" test had been. The decision effectively offers protection not only to those who lived openly as gay, lesbian or bisexual in their countries of origin, but also to those who concealed this part of their public lives for fear of persecution. In LC (Albania) v SSHD,[7] the UN High Commissioner for Refugees submitted that the HT and HJ decision should imply a legal presumption

[3] See e.g., Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations", *International Journal of Refugee Law* 21, no 1 (2009): 1–33.

[4] *Joined Cases C-199/12, C-200/12 and C-201/12 (X, Y and Z) v. Minister voor Immigratie en Asiel* [2014] 2 CMLR 16 (ruling that the existence of criminal laws "which specifically target homosexuals supports the finding that those persons must be regarded as forming a particular social group", that criminal laws per se do no constitute persecution, and that applicants cannot be expected to be discreet about their sexuality in their respective countries of origin). For a detailed analysis of the judgment and its implications, see *X, Y and Z: A Glass Half Full for "Rainbow Refugees?"* June 3, 2014, International Commission of Jurists, Briefing.

[5] *Joined Cases C-148/13, C149/13 and C-150/13 (A, B and C)* [2015] 2 CMLR 5.

[6] *M.E.* v. *Sweden* (ECtHR, 26 June 2014). In this judgment, the Court accepted that the Libyan asylum applicant was in a relationship with N (a transsexual woman), but did not accept that he would face a risk of persecution if returned to Libya to make his family reunification application (required by Swedish law) because the level of violence was not seen as credible and he had presented N as a woman to his family over skype, which ostensibly indicated that he was choosing to live discreetly. Setting the credibility issue aside, this judgment relies to a large extent on the notion that LGBTIQ people should be required to be discreet in certain situations, without questioning whether the discretion is for fear of persecution. *Cf. HT and HJ* case, *supra* note 2.

[7] *LC (Albania) v. Secretary of State for the Home Department and the United Nations High Commissioner for Refugees* [2017] ECWA Civ 351.

that those LGBTQ people living in countries where they would face persecution if they were to live openly, conceal their sexual identities at least partially in fear of persecution.[8]

However, while the HT and HJ judgment has been regarded as mainly a positive advancement for protecting individuals fleeing sexuality-based persecution, aspects of such asylum claims reveal ways in which these advancements serve to reinforce and discipline not only sex, sexuality and gender norms, but also cultural stereotypes, as well as our core assumptions about the goals and limitations of the refugee law system. Such advancements are shifts in the legal regulation of refugee status that, just below the surface, reinstantiate professional and disciplinary expectations not to address certain issues that are critical to understanding sexuality both in the context of defining persecution as well as in articulating the global justice aims of the international refugee law system. The HT and HJ moment, then, marks an appropriate time to ask what it would mean to "queer" refugee law.

By "queer", I am referring partly to what James Hathaway and Jason Pobjoy discuss in their important article on HT and HJ, "Queer Cases Make Bad Law", wherein the term "queer" recalls an "overtly political challenge" to the assimilationist politics inherent in expectations of refugee claimants' narratives of sexual selfhood and gender identity.[9] I agree with Hathaway and Pobjoy that cases such as HT and HJ, while they seem to protect asylum applicants more completely, force applicants to couch their claims in conventional culturally specific western terminology (e.g., through use of the terms "homosexual" and "gay" to describe sexuality) and do not challenge normative conceptions of sexuality.[10] However, on a more fundamental level, I depart from Hathaway and Pobjoy and contend that cases like HT and HJ are not "queer" cases with regard to critically conceptualising refugee law. Such cases reproduce language and legal ideologies that engender a strict Western view not only of sexuality and gender, but also of culture, race, history and the geopolitics of violence. While Hathaway and Pobjoy do not set out to

[8]UN High Commissioner for Refugees (UNHCR), *L.C. (Albania) v. Secretary of State for the Home Department: Case for the Intervener*, 22 March 2017, C5/2014/2641, available at https://www.refworld.org/docid/58de68dd4.html [accessed 26 June 2020], The UNHCR, as intervener, poses the rhetorical question "in what circumstances may it be said that the concealment will be entirely unrelated to the objective reality that if their protected identity became known, the individual would be persecuted?" The UK Lesbian and Gay Immigration Group, which supports LGBTI asylum applicants and advocates for policy and legal reform of asylum processes, supports the paradigm of protection that the UNHCR suggests. See UKLGIG Briefing: Applying HJ (Iran) and HT (Cameroon) to asylum claims based on sexual orientation (June 2018) 16. Available online at https://uklgig.org.uk/wp-content/uploads/2019/11/UKLGIG-on-HJ-Iran.pdf [Last accessed 26 June 2020].

[9]James Hathaway and Jason Pobjoy, "Queer Cases Make Bad Law", *New York University Journal of International Law and Politics* 44, no 2 (2012): 315–389.

[10]Ibid.

engage with the term "queer" in their article in this way, I would like to take up the analytic lens that the deployment of such a term can provide.

The other aspect of "queer" that I am referring to is what Jack Halberstam proposes with the idea of a queer methodology. Halberstam notes:

> A queer methodology, in a way, is a scavenger methodology that uses different methods to collect and produce information on subjects who have been deliberately or accidentally excluded from traditional studies of human behavior. The queer methodology attempts to combine methods that are often cast as being at odds with each other, and it refuses the academic compulsion toward disciplinary coherence.[11]

While Halberstam deploys the idea of a queer methodology as it relates to the study of human behaviour, I apply it in considering refugee law, both in theory and in practice. As theoreticians, we are disciplined to regard refugee law as the best solution for those fleeing persecution. Given the current geopolitical order, it represents the best of many evils, or, given the near impossibility of the devolution of borders and states, the possible among impossibilities. As practitioners we realise that, whatever critiques of the refugee law system we may advance outside of court, when before a tribunal and navigating the straight-laced gauntlet of legal techniques necessary to achieve a positive refugee status determination for a client, it is at best impractical to mention the critical perspective one might otherwise have towards refugee law. It would be disorienting and, some will certainly argue, unrealistic to reject disciplinary coherence, particularly in the case of legal advocacy—one will not win a case if one blatantly ignores the mechanics of the legal claim. The present analysis is meant as a provocation to reassess the desired outcome of refugee law by unsettling some of its core assumptions.

This chapter builds upon my earlier work to examine why the UK serves as a suitable point of departure to unsettle core assumptions of refugee law both within its doctrinal underpinnings and from outside the scope of its application. This chapter is meant to be self-reflective, considering both activist and academic entry into the issue of refugee law and its relationship to activism around decriminalisation of same-sex sexual activity. The UK plays a central role in global discussions on decriminalisation, given its prominence as the administrative and political head of the Commonwealth. In the particular context of repression of sexual diversity, the UK has, as Kay Lalor makes clear in the previous chapter, left behind a trail of criminal legal provisions,

[11] Jack Halberstam, *Female Masculinity* (Durham: Duke University Press, 1998) 13.

outlawing same-sex sexual activity in former colonial territories. These provisions are still in play, existing as valid law or being litigated actively in courts by way of local initiative. Section 377 of the Indian Penal Code was, after decades of litigation, declared unconstitutional by the Indian Supreme Court as recently as 2018,[12] and a ruling in Trinidad and Tobago has declared the relevant criminal provision unconstitutional.[13] Meanwhile similar provisions have been expanded into harsher ones by the parliament of Uganda.[14] Additionally, due to the publicity of recent UK case law regarding sexuality and gender-based refugee claims, most notably the HT and HJ decision,[15] the UK has become a locus for discussing LGBTIQ[16] refugee issues in Europe and beyond.

2 Sexuality-Based Asylum and Decriminalisation of Same-Sex Activity

While refugee law is concerned essentially with helping individuals gain residency rights in a foreign territory in order to escape state-sponsored or state-complicit persecution,[17] the international promotion of human rights law is primarily concerned with securing constitutional human rights protection within individual nation-states. In the case of the rights of LGBTIQ claimants, refugee protection and international efforts to increase human rights-based protection in national constitutional settings are carried out with largely different processes, but share a common set of discourses, challenges and dangers.[18] It is important to reflect upon the two strands of work with a common frame of reference in order to best understand the contingencies that undergird them both.

[12] *Navtej Singh Johar & Others v. Union of India*, Supreme Court of India, 6 September 2018.

[13] "Trinidad and Tobago Judge Rules Homophobic Laws Unconstitutional", *The Guardian*, April 13, 2018, accessed July 29, 2019, https://www.theguardian.com/world/2018/apr/13/trinidad-and-tobago-sexual-offences-act-ruled-unconstitutional.

[14] Amy Fallon and Owen Bowcott, "Uganda Politicians Celebrate Passing of Anti-Gay Laws", *The Guardian*, February 24, 2014, accessed March 17, 2020, www.theguardian.com/world/2014/feb/24/uganda-president-signs-anti-gay-laws.

[15] *HT and HJ* case, *supra* note 2.

[16] Lesbian, gay, bisexual, trans, intersex and queer.

[17] 1951 Convention Relating to the Status of Refugees' (United Nations, 1951); 1967 Protocol Relating to the Status of Refugees (United Nations, 1967).

[18] It is important to note here that the abbreviation LGBTIQ is perhaps not as deeply entrenched in the particular approach to and understanding of sexual politics that LGBT is. However, neither term is necessarily applicable to all contexts. They both suffer from some of the same shortcomings as the language of universality with regards to human rights, notably the difficulty in coordinating local meaning with such global vernacular.

Asylum lawyers in immigration tribunals are primarily concerned with securing refugee status for individual applicants in receiving countries, rather than with attempting to change the conditions in applicants' countries of origin, although the persecution is often immediately related to these conditions. The most direct reason for this is that refugee cases, like other cases, are scripted for answering certain legal questions to the exclusion of other potentially related questions. The presumption is that, within the set of human rights-based remedies available to refugees, determining the official refugee status of an applicant is largely independent of related social change activism that seeks to alter the conditions that make protection necessary in the first place—or at least such discussions are not thought to be appropriate in the courtroom.

The concern of the refugee lawyers advocating for increased protections for LGBTIQ refugees is to prove that claimants are being persecuted on the basis of sexuality, as defined and understood by applicable case law or, alternatively, to change the way the case law is interpreted to the same effect. Meanwhile, queer theorists and those concerned with the limited sense in which sexuality is discussed in both these contexts remind us that sexuality, in many people's lived experience, is not limited to binary self-identification in terms of sex, gender and sexuality.[19] Numerous advocates and academics are active in both international decriminalisation of same-sex sexual activity and LGBTIQ refugee claims advocacy, though perhaps in different capacities and fora.

There is a professional expectation that these two strands of advocacy be kept separate. A refugee status determination hearing or immigration tribunal is not a receptive venue for debating the limits of geopolitics as a conceptual framework for considering violence, as this lies outside of the framework categories familiar to the judiciary. The framework used in refugee claims is, as discussed, firmly rooted in the logic of politically defined borders, jurisdictions and corresponding cultural and social attitudes. However, the discourses related to decriminalisation and refugee protection share common terms,

[19]This discussion is not only limited to academia. For example, the UK Lesbian and Gay Immigration Group published a 2018 report assessing Home Office decision making on LGBTI claims, which identifies the persistent expectation by Home Office agents that LGBT people would have a particular type of coming out experience. See UKLGIG, *Still Falling Short: The Standard of Home Office Decision-Making in Asylum Claims Based on Sexual Orientation and Gender Identity*, 2018, accessed July 22, 2019, https://uklgig.org.uk/wp-content/uploads/2018/07/Still-Falling-Short.pdf. The report claims that "[i]n many cases this expectation of sophistication is erroneous as it relies on stereotypes of LGBTQI + people, which in addition to being sexual stereotypes are culturally misaligned. Not everyone will have gone through introspective soul-searching and retrospective interpretation of their experiences, so as to be able to offer a narrative identifying their own emotions as central to their identity. or containing milestones which might be recognisable in some Western contexts" (p. 23).

including "culture", "human rights" and "safety", as well as various ideological renderings of Europe as a benevolent safe haven for new (non-European)[20] migrants. Paying careful attention to the global dynamics of "racism" in the sense to which Ramon Grosfoguel[21] refers (particularly in respect of those in the zones of non-being) and conditions that echo colonial and other divides (beyond simply the North–South divide or the West–Rest divide) will enable one to view the connections between racism and migration and to be wary of the types of interventions that exacerbate the conditions in these spaces of precariousness rather than catalyse an empowering set of tools, logics and frameworks.

There are also challenges that accompany the specialised nature of advocacy and rights-based social change activism. The activist working on decriminalisation may lobby national government, liaise with NGOs where same-sex sexual activity is criminalised, lend financial support, initiate educational campaigns and demonstrate solidarity with local groups and individual activists. The legal practitioner (also an activist—the distinction is arbitrary to some degree, but it is important to note that different discursive and professional expectations govern different types of practice) may, among other things, create legal historiography, lend specialised assistance to local organisations and even strategically litigate through constitutional challenge, in partnership with local organisations. None of these are straightforward strategies and they each approach social change in different, sometimes competing ways. Regardless of strategy, it remains that human rights law reform considers the law in a broad context, while refugee law considers local laws and their contexts to a relatively limited extent.

3 Comfort Zones and Death Zones

There is a dual aesthetic that shapes both the study and practice of refugee law which can be summarised as a self-reinforcing polarity of comfort and death. This polarity refers mainly to how we regard the ideological and material substance of refugee claims, but it also describes how we view ourselves in

[20] An exception to this is the relatively recent case of Russia having implemented harsh laws against sexual minorities, which has increased the number of LGBTIQ refugees fleeing from Russia to other parts of Europe.

[21] I am referring here to Grosfoguel's elaboration of zones of being and non-being in his lecture series on Decoloniality in Berlin as well as a recorded lecture he gave at the Islamic Human Rights Commission in the UK on December 11, 2012 called "Is Islamophobia Racism?" Grosfoguel traces the intellectual history of "racism" in broad terms to mean the exclusion of certain groups from the "zones of being" and relegation into the "zones of non-being" wherein their lives are much more precarious and characterised by violence.

light of the total predicament of the refugee system, including the conditions that necessitate such a system. I will begin with a reflection on the concept of "comfort".

The type of comfort that I mean is two-fold. First, there is the comfort that many advocates and scholars have in the assumption that legal logics adequately describe social realities. For example, there is comfort with human rights discourse that arranges the world into geopolitical realms of safety and danger. In the case of the rights of LGBTIQ individuals this cartography is, at its most overt, expressed with the evolution narrative that extends from criminalisation of gay sex to recognition of same-sex marriage, entrenching a linear rights model within the familiar civilising discourse of social "progress". Beyond the problematic use of an evolutionary schema, what is presumed to be the furthest point of progression in the schema is recognition of same-sex marriage, which can also be critiqued as an unimaginative, violent institution, advocacy for which has relegated other issues affecting a broad range of queer people and people of colour to the political margins.[22] This advances a flat, impoverished picture of society—using the parameters of rights and rights-granting national jurisdictions, rather than a lived reality full of contingencies and power relations that shape not only experiences of sexuality, but experiences of location at the junctions of law, politics, gender, sexuality, race, class, etc. Comfort with this language of rights also allows what Nadine El-Enany has referred to as "legal idolatry"[23] or the belief that where rights exist, justice is bound to follow, rather than viewing a myriad of other exclusionary administrative measures that exist alongside rights as technologies for curtailing material or substantive benefits for disenfranchised people on the other end.

The other type of comfort that I mean is the comfort that accompanies adherence to disciplinary or professional discourses by practitioners and advocates. The advocate for LGBTIQ refugees in this scenario, whether lawyer, activist or policy champion, attempts to widen the scope of protection for LGBTIQ refugees by identifying gaps in coverage, or advocating for one particular person to gain asylum, while generally maintaining the legitimacy of the refugee system.[24] While practitioners in the courtroom advocate for

[22] For examples of such critiques, see Jeffrey Redding, "Dignity, Legal Pluralism and Same-Sex Marriage", *Brooklyn Law Review* 75, no 3 (2010) 791; Dean Spade, "Under the Cover of Gay Rights", *N.Y.U. Review of Law and Social Change* 37, no 1 (2013): 79.

[23] Nadine El-Enany, "On Pragmatism and Legal Idolatry: 'Fortress Europe' and the Desertion of the Refugee", *International Journal of Minority and Group Rights* 22, no 1 (2015): 7–38.

[24] See Guglielmo Verdirame, "A Friendly Act of Socio-Cultural Contestation: Asylum and the Big Cultural Divide", *International Law and Politics* 44 (2012): 559–572. It is important to note that refugee claims advance human rights discourse in prominent ways, though filtered through the propositions regarding torture and contextual assumptions regarding persecution as per the Geneva Convention rather than the transposition of international norms to national constitutions.

singular clients, some cases, such as HT and HJ, can result in significant shifts in jurisprudence.[25] However, the situations that prompted the persecution are met with the decriminalisation strategy taken by other lawyers and activists, many of whom know one another, are active in the same circles, or occasionally also do refugee work. Even in the context of this strategy, refugee law is regarded as better than nothing, though essentially a superficial quick-fix solution that can and should be made obsolete by a more sustainable transformation of the conditions that enable persecution. However, does thinking of a unique local source already oversimplify the contingencies of structural violence faced by people owing to their sexuality, gender or any other grounds? Does thinking in accordance with the professional disciplinary expectations of refugee law or constitutional revision regarding sexual activity or identity commit us to the tunnel vision of single-issue provincialism and risk compounding problems in other areas of social life? There is comfort in not answering or, better, not asking these questions. This comfort allows us to focus on the "positive"—the refugee system allows those privileged enough to cross a border, and often the sea, to ask for protection and get it.[26] It allows us as academics, activists and practitioners, to defer to the current system, as it unarguably saves lives while broad alternatives are curtailed by a deeply entrenched global infrastructure for policing movement. It is with the discomfort posed by these questions that I shift to discuss the concept of death.

If the promise of comfort is central to the refugee law system, then the spectre of death is the other atrium of the system's discordant heart. The title of this chapter is borrowed from Etienne Balibar's idea of "death zones".[27] With this concept, Balibar reminds us that spaces defined by extreme violence exist within Europe, not only outside of it. This is to be seen as a corollary to the assumption that Europe is a zone of safety and that refugees abroad will flee persecution over there to enjoy a haven right here. In "Outlines of a Topography of Cruelty", Balibar inverts the typical narrative of Europe as the place synonymous with human rights and safety by pointing to the extreme violence that occurs within Europe against those without European

[25] *HT and HJ* case, *supra* note 2. The decision rejected what had been commonly known as the "discretion test" for lesbian and gay asylum applicants, with the effect that claimants are no longer expected to return to their countries of origin to live discreetly if they would only do so for fear of persecution were they to live as openly gay or lesbian.

[26] I am referring mainly to the regime set out by the 1951 UN Convention on the Status of Refugees (the "Geneva Convention").

[27] Etienne Balibar, "Outlines of a Topography of Cruelty: Citizenship and Civility in the Era of Global Violence", *Constellations* 8, no 1 (2001): 15–29.

citizenship and, thus, without the full protection of a European state.[28] In describing these zones, he argues:

> In the end it would be my suggestion that the 'g[l]obalization' of various kinds of extreme violence has produced a tendential division of the 'globalized' world into life-zones and death zones. Between these zones (which indeed are intricate, frequently reproduced within the boundaries of single country or city), there exists a decisive and fragile superborder, which raises fears and concerns about the unity and division of mankind – something like a global and local 'enmity line,' like the 'amity line' which existed in the beginning of the modern European seizure of the world. It is this superborder, this enmity line, that becomes at the same time an object of permanent show and a hot place for intervention. But also for nonintervention.[29]

Here, Balibar describes "extreme violence" as "without borders or beyond borders" rather than "violence of the border". This is important, as it suggests that locating the violence of refugee law at the border (and we are familiar with the trope of border violence that frames a great deal of refugee work in Europe—illustrative phrases like "the guarded gate", "the treacherous sea", "Fortress Europe" easily come to mind) limits more thorough consideration of violence as it obscures the widespread violence within the borders and beyond the borderline. The superborder framework for identifying violence considers extreme violence to be something that is not shaped solely by the policing of the political boundaries of the state, but also inter-subjective and inter-institutional domains that can exist within the nation and even within cities and localities.[30]

Public discourse with regard to threateningly large refugee "flows" into Europe and the parallel vernacular of "saving" the refugees regularly deployed in media discourse does not mirror the lived reality of many refugees and asylum seekers. For those without European citizenship, the obstacles to accessing a better life in Europe can be another hell with different wallpaper. We know from the experiences shared by many refugees of the perils in Europe, from drowning on the high seas[31] to suffering abuse by private

[28] Ibid.

[29] Ibid., p. 24.

[30] Ibid.

[31] Consider the case of a ship of Eritrean and Sudanese refugees capsizing off the coast of the Italian island of Lampedusa in October 2013, in which an estimated 300 people drowned. Such tragedies are considered, by some, to represent structural policy failures which do not assist refugees in their journeys across the treacherous sea. See e.g., Hans Jurgen Schlamp, "Europe's Failure: Bad Policies Caused the Lampedusa Tragedy" *Der Spiegel Online,* October 4, 2013, accessed November 2, 2014, www.spiegel.de/international/europe/lampedusa-tragedy-is-proof-of-failed-european-refugee-policy-a-926081.html; Anna Dolidze, "Lampeduza and Beyond: Recognition, Implementation and

enforcement agents,[32] to living in destitution if one's claim is rejected.[33] Both the journey and the destination are zones of danger for the precarious condition of entering Europe as a refugee.[34] The lived reality of these death zones exist within the shadows of the refugee law Leitmotif of rescue that, in my account, constitutes the comfort zone in which we imagine ourselves, as advocates working from within the United Kingdom and elsewhere. In the context of refugee law, the concept of the "death zone" requires us to look critically at the supposed "location" of human rights, the violence from within Europe, but also the violence of citizenship in general, and specifically, the violence done in the name of policing access to European citizenship.[35]

What might be gained from reorienting our framing of refugee law with a queer perspective, rejecting for a moment the "compulsion towards disciplinary coherence"?[36] What creative potential might we unlock by thinking about this cartography of safety and danger, using Balibar's notion of the "death zone"[37] and reflecting on the concepts of "zones of being and non-being", as articulated by Fanon[38] and interpreted by Ramón Grosfoguel and others? It may help us to identify shortcomings of refugee law, as well as

Justiciability of Stateless Persons' Rights Under International Law", *Interdisciplinary Journal of Human Rights Law* 6 (2011–2012): 123. For an overview of documented refugee deaths at European borders over the last two decades, see *List of 17306 Documented Refugee Deaths through Fortress Europe*, 1 November 2012, UNITED for Intercultural Action, accessed November 2, 2014, www.unitedagainstracism.org/pdfs/listofdeaths.pdf.

[32]Consider, for example, the death of asylum applicant Jimmy Mubenga during his forced removal from the UK by the privately contracted security service G4S. See Matthew Taylor and Robert Booth, "Jimmy Mubenga Death: G4s Guards Will Not Face Charges", *The Guardian,* July 17, 2012, accessed November 2, 2014, www.theguardian.com/uk/2012/jul/17/jimmy-mubenga-guards-no-charges.

[33] *Between a Rock and a Hard Place: The Dilemma Facing Refused Asylum Seekers*, *The Refugee Council*, December 1, 2012, accessed November 2, 2014, www.refugeecouncil.org.uk/assets/0000/1368/Refugee_Council_Between_a_Rock_and_a_Hard_Place_10.12.12.pdf.

[34]Nina Perkowski, "A Normative Assessment of the Aims and Practices of the European Border Management Agency Frontex", *Working Paper Series No. 81* (Refugee Studies Centre, Oxford, 2012). See also Judith Sunderland, "Europe Failing to Tackle Boat Tragedies in Mediterranean", Human Rights Watch, 12 September 2012, accessed November 2, 2014, www.hrw.org/news/2012/09/12/europe-failing-tackle-boat-tragedies-mediterranean.

[35]For example, the European Union agreement with Libya on the interception of refugees at sea has been cited as knowingly placing refugees in peril. See Charles Heller, Lorenzo Pezzani, Itamar Mann, Violeta Moreno-Lax and Eyal Weizman, "Opinion: 'It's an Act of Murder': How Europe Outsources Suffering as Migrants Drown", *New York Times*, December 26, 2018, accessed June 1, 2019, https://www.nytimes.com/interactive/2018/12/26/opinion/europe-migrant-crisis-mediterranean-libya.html.

[36]Halberstam, *supra* note 11, p. 13.

[37]Balibar, *supra* note 27, p. 24.

[38]Frantz Fanon, *The Wretched of the Earth*, translated by C. Farrington (London: Penguin Books, 1963).

dangers of a silo-approach to sexuality rights as a form of "homonationalism"[39] in the context of refugee law.

Jasbir Puar, in Terrorist Assemblages, introduces the concept of homonationalism as the "imbrications of American exceptionalism […] increasingly marked through or aided by certain homosexual bodies".[40] This concept has been applied outside of the context of American exceptionalism to other contexts in which states have bolstered their own particular forms of exceptionalism through the instrumentalisation of gay rights.[41] I would like to suggest that the refugee context provides fertile ground for examining this concept as it relates to the maintenance of a commitment to geographical organisation of spaces of violence and salvation. The refugee context also provides a window for viewing the appropriation of refugee stories in an effort to instrumentalise a narrative that "violence that occurs over there" as a politics of renewed and legitimated violence against countries imputed to be persecutory.

4 First Rupture: The Problem with Mapping

Both efforts to globally decriminalise same-sex sexual activity, as well as refugee law advocacy, attempt to know the subject and to locate the subject in a schema of relative violence or safety, comfort or death. This "knowing" involves a process of mapping, both in terms of a corporeal and psychological mapping of the refugee subject as well as a global geopolitical mapping of culture and society.

4.1 Anti-Queer Knowing

The structure of rights-based remedies, whether constitutional reform or refugee protection, force us as advocates to reckon with the "paradox of rights" as discussed by Wendy Brown, by which she refers to our frustration with rights-based approaches as we observe and criticise the systems of structural power in which rights are articulated and executed.[42] In describing

[39] Jasbir Puar, *Terrorist Assemblages. Homonationalism in Queer Times* (Durham: Duke University Press, 2007) 335. While Puar examines the concept of homonationalism in the context of the "war on terror", I apply it here to human rights strategies that place certain interests into hierarchies of importance.

[40] Ibid., p. 4.

[41] Ibid.; Spade, *supra* note 22.

[42] Wendy Brown and Janet Halley (eds.), *Left Legalism/Left Critique* (Durham: Duke University Press, 2002).

one aspect of the "paradox of rights", in relation to contemplating remedies to gender violence, Brown argues:

> Rights function to articulate a need, a condition of lack or injury, that cannot be fully redressed or transformed by rights, yet within existing political discourse can be signified in no other way. Thus rights for the systematically subordinated tend to rewrite injuries, inequalities, and impediments to freedom that are consequent to social stratification as matters of individual violations and rarely articulate the conditions producing or fomenting that violation. Yet the absence of rights in these domains leaves fully intact these same conditions.[43]

Brown describes the basic dilemma of rights for people in positions of relative disempowerment as both freeing from and constitutive of systematic gender oppression. One aspect of this is that rights, as a framework for identifying remedies, define injuries (and, by extension, allow what is beyond the scope of such definition to fall outside of the coverage of the right). Rights are also constructed in relation to a predetermined beneficiary. In her example of women's rights, Brown considers various constructions of "woman" that are produced in order to secure certain rights, but notes that relying on women's equality to men may further entrench the subordination of women by relying on a fictional subject position (women, who are granted the "rights of men") and by fragmenting women, as a group, along the lines that divide their lives in other ways, including "racial, class, sexual and gendered power".[44]

This type of rights dilemma or "paradox" also describes the situation of LGBTIQ people claiming refugee status, in Europe, for example. Protection of trans and gender non-binary applicants does not typically feature as such in the judgments on claims brought by LGB applicants, due to the differences in how they are expected to establish their membership in a particular social group (PSG), though many applicants may be affected by common modes or tactics of oppression. In order to gain asylum as an LGB claimant, one must convince a judge that one is being persecuted on the basis of her sexuality, which may mean articulating one's story in a way that conforms to the expectations of the judge, including what the judge understands by sexuality. This may express itself by way of an essentialised understanding of how a lesbian, gay man or bisexual person is "supposed" to act, speak or behave.[45]

[43]Ibid., p. 432.

[44]Ibid., pp. 430–431. *See also* Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color", *Stanford Law Review* 43, 6 (1991): 1241–1299.

[45]Millbank, *supra* note 3.

This essentialising produces a stereotype that erases potentially decisive differences among those from different contexts who might be applying for asylum. For example, the fact of having had sex with a person of the opposite sex or having been involved in a heterosexual relationship neither precludes being gay or lesbian (or bisexual or otherwise not exclusively heterosexual), nor does it necessarily safeguard an applicant from being perceived as gay or lesbian.[46] However, such an assumption that heteronormative gender roles and same-sex sexual desire are somehow mutually exclusive still exists among adjudicators.

The applicant's body is inspected in visceral ways in the course of mapping out sexuality. In some of the more extreme cases in Europe, "evidence" of sexual desire has been procured by way of plethysmography (an attempt to scientifically measure sexual arousal through visual stimuli and attaching electrodes to the genitals).[47] More routinely, at least in the UK until relatively recently, asylum applicants have felt pressured to prove their sexuality according to sex-act-based criteria, sometimes submitting videos and photographs into evidence to prove their identities through sex acts.[48] Some indications show that there have been positive improvements in Home Office interrogation procedures to reduce this pressure.[49] Other applicants have felt compelled to render verbal accounts of their sexual encounters or participation in same-sex relationships. One cannot help but to imagine these various forms of bodily inspection as a part of the economy of morality and sexual politics that shapes other aspects of the allocation of human rights—it is one that assigns value to a certain type of subject, a certain form of story, particular forms of evidence and a certain narrative of (the body's relation to) danger. Of course, this is not peculiar to the LGBTIQ refugee, though

[46] *See* Joseph Landau, "'Soft Immutability' and 'Imputed Gay Identity': Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law", *Fordham Urban Law Journal* 32, 2 (2004).

[47] *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings*, February 2011, Organisation for Refuge Asylum And Migration, accessed November 2, 2014, http://www.oraminternational.org/images/stories/PDFs/testing%20sexual%20orientation%20feb%202011%20download.pdf.

[48] Videos and photographs are used in certain asylum status determination hearings; *See* Dan Hodges, "Getting Gay Asylum Seekers to Prove Their Sexuality Is Perverse—But How Do You 'Codify' Love?", *The Telegraph,* February 27, 2013, blogs.telegraph.co.uk/news/danhodges/100204483/getting-gay-asylum-seekers-to-prove-their-sexuality-is-perverse-but-how-do-you-codify-love/. See also a US account of having to shape sexuality to fit a certain stereotypical expectation, Dan Bilefsky, "For Gays Seeking Asylum in U.S. Encounter a New Hurdle", *New York Times,* January 11, 2011, accessed March 17, 2020, www.nytimes.com/2011/01/29/nyregion/29asylum.html?pagewanted=all&_r=0. The use of photographic and video evidence was also addressed in a recent Advisory Opinion of the Court of Justice of the European Union. AG Sharpston, *supra* note 6.

[49] See *Still Falling Short*, supra note 19.

in the LGBTIQ narrative, the body and its sexual potentialities take on an undeniable centrality.

In reading the body in this way, through the mechanics of refugee rights provision, for its sexual potentiality, its relationship to a legible narrative and to an imagined space, the body is positioned not only sexually but racially, culturally and politically. The act of reading and assessing the body, aside from reconstructing a colonial scene where resources and bodies are carefully balanced in an economy of labour, fear and desire, also constructs the world and power through the lens of empire. In other words, the gaze of knowing cast upon the body is a colonial gaze, invested in policing the body as much as policing resources and geopolitical integrity.[50]

4.2 Failures of Geopolitical Logics

Global efforts to repeal various countries' national laws criminalising same-sex sexual activity are often invested in a related mapping project around human rights—one that slices the world into domains of protection and violence. "Decriminalisation" as a global co-ordination of political and legal reform efforts is also, like any other such project, a discursive one. Focus on criminal laws, then, as a central mode of social change starts down a path with a particular ideological trajectory and scope. This can be posited as a naming-and-shaming project, or as a legal tool for mapping the current state of the law in every country.[51] While maps emphasise a way of thinking about legal and political battles regarding repressive laws as fought along the borders of states, which can itself be problematic in the ways that Balibar suggests with the idea of the superborder, it is not only the graphic representation that creates the danger of retrenchment of organising violence around geopolitical borders.[52] One danger of thinking of violence as a function of state assemblage rather than in accordance with what Fanon refers to as "zones of being" and "zones of non-being"[53] is that it reproduces a public civilising discourse, one that uses states' laws as a proxy for the composite repression within the state. Of course, repressive laws have a violent effect, and one should not ignore these

[50]For an analysis of the racialised transformation of gender in the context of colonialism, which speaks to this type of corporeal scrutiny, see Steven Pierce and Anupama Rao, *Discipline and the Other Body: Correction, Corporeality, Colonialism* (Durham: Duke University Press, 2006) 11–14.

[51]See e.g., Lucas Paoli Itaborahy and Jingshu Zhu, "2013 State-Sponsored Homophobia Report" (International Lesbian, Gay, Bisexual, Trans- and Intersex Association, 2013).

[52]Balibar, *supra* note 27, p. 24.

[53]Frantz Fanon, *Black Skin, White Masks*, translated by C. L. Markmann (New York: Grove Press, 1967) 8.

laws as instruments of social repression. Also, it is useful for refugee practitioners to understand what countries will, at least partly by virtue of their laws, serve as willing recipient countries for refugees. However, one should be critical of using law as a proxy for the possibility of violence for a few reasons.

First, and very practically, focusing on the laws as a proxy for violence highlights the violence done by the State and risks trivialising other forms of violence. This is especially true in the context of the decriminalisation project. For example, violence against women is legally prohibited in South Africa, but it is nonetheless commonplace.[54] As it happened, certain refugee cases in the UK had relied on a map published by ILGA in order to either affirm or negate the likelihood that persecution was taking place in particular countries based on whether the state had criminalised same-sex sexual activity or provided protections for LGBTIQ people.[55] Although it is currently being discussed, criminalisation of same-sex sexual activity has not often been interpreted to constitute per se persecution. Conversely, a lack of criminal prohibition of gay sex does not negate the presence of persecution, not least of all because persecution can be perpetrated by non-state actors.[56] This is an important distinction, and although any refugee law practitioner should know this, it can be taken advantage of in the battle to persuade the presiding judge of the likelihood of state complicity or inability to protect. For this reason, ILGA included a section addressed to refugee practitioners in

[54]David Smith, "Teenage Lesbian Is Latest Victim of 'Corrective Rape' in South Africa", *The Guardian*, May 9, 2011, accessed March 17, 2020, www.theguardian.com/world/2011/may/09/lesbian-corrective-rape-south-africa. See also E. P. Motswapong, "Surviving Behind the Mask: Lesbians and Gays in Botswana", in *Queering Paradigms,* edited by B. Scherer (New York: Peter Lang, 2010) 350.

[55]This was reported to ILGA by a UK-based advocate who had witnessed such reliance.

[56]See S. Chelvan, "From Sodomy to Safety? The Case for Defining Persecution to Include Unenforced Criminalisation of Same-Sex Conduct" *VU University Amsterdam, Fleeing Homophobia Conference*, 5–6 September 2011; Laurynas Biekša, "The Refugee Qualification Problems in LGBT Asylum Cases", *Jurisprudence* 18, no 4 (2011): 1559. Chelvan points to Italian practice and cites the Fleeing Homophobia report that states "Criminalisation reinforces a general climate of homophobia (presumably accompanied by transphobia), which enables State agents as well as non-State agents to persecute or harm LGBTIQs with impunity. In short, criminalization makes LGBs into outlaws, at risk of persecution or serious harm at any time". He and the report cite Italy and Austria as having best practice. Italy, for example, sees the laws as persecutory per se because they prevent the realisation of a basic human right. One must go through the process of proving credibility, however, which is where the claims seem to fail. He also notes that art. 9 of the 2004 Qualification Directive provides that persecution under the Geneva Convention must be sufficiently serious by nature or repetition as to constitute a violation of Human Rights as per ECHR or be an accumulation of various measures, and can take the form of "legal, administrative, police and/or judicial measures, which are in themselves discriminatory or which are implemented in a discriminatory manner", 2004 Qualification Directive, European Council (European Community, 2004). See also 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", *International Law and Politics* 44 (2012): 496–527. Millbank notes that the UK in particular has been reluctant to view criminal laws as persecutory per se.

the forward of the most recent reports on State-Sponsored Homophobia to make this distinction clear.[57]

The second problem of using the law as a proxy for the existence of anti-gay and anti-trans violence is when this lens is used to view Europe, where various far-reaching protections exist in many countries. Here, it is not that the violence in Europe therefore goes unaddressed when it occurs, but rather that violence elsewhere is depicted on the map and in the imagination as a socio-cultural problem that others have but that Europe does not. This re-instantiates fears that fuel stereotypes about Africa and Islam. It also orients ways of being in one's sexuality in a Eurocentric way, drawing quite a flat picture of sexuality.[58] In the process of essentialising postcolonial societies, mapping along political borders can also oversimplify and misrepresent other patterns of violence, for example, regional or localised violence owing to regional instability that leads to what migration scholars refer to as internal displacement.[59]

The cartography of spaces and taxonomies of people and culture in the spirit of knowing for the purpose of disseminating rights in a moral, political and material economy is anti-queer. It reifies Eurocentric ideas of sexuality and culture and supports the saviour narrative of human rights, subtly re-inscribing borders and the legitimacy of brutal restrictions on movement. It also masks systems of power responsible for violence within and beyond the borders.

5 Second Rupture: The Problem with Human Rights

Frantz Fanon dislocates violence from geopolitics and instead describes zones of "being and non-being", which can be present anywhere and are contingent on power relations beyond state repression.[60] Fanon is explicit in his description of this zone of nonbeing as a type of hell, a space for the non-human.[61]

[57] See *ILGA 2012 State-Sponsored Homophobia Report*, May 2012, ILGA, L. Itaborahy.

[58] Rahul Rao, "On 'Gay Conditionality', Imperial Power and Queer Liberation", *Kafila*, January 1, 2012.

[59] See Patricia Tuitt, "The Territorialization of Violence", in *Critical Beings: Law, Nation, and the Global Subject*, edited by Peter Fitzpatrick and Patricia Tuitt (Farnham: Ashgate, 2004) 226.

[60] Fanon, Black Skin, White Masks, *supra* note 52, p. 8.

[61] Ibid. He notes here: "the black man is not a man". On the same page he continues, "The black is a black man; that is, as the result of a series of aberrations of affect, he is rooted at the core of a universe from which he must be extricated. The problem is important. I propose nothing short of the liberation of the man of color from himself. We shall go very slowly, for there are two camps; the white and the black". Fanon, in *Black Skin, White Masks*, looks at colonialism, and settler colonialism

Though in "Black Skin, White Masks" Fanon limits his observations to the French Antilles,[62] he makes observations about the structural continuities among colonial societies and extends those observations in "The Wretched of the Earth". In this volume, Fanon notes that the violence of colonialism is violence that continues to regulate the actions and resistance of colonized people, and he insists that this persists even after geopolitical colonialism has ended. He notes that "[t]o break up the colonial world does not mean that after the frontiers have been abolished lines of communication will be set up between the two zones". He also notes that there are some colonized elites who politically purchase their ways into positions of power between settler colonials and natives, in the case of settler colonialism in Africa.[63]

The intent focus on political power, coloniality and racism inherent in Fanon's framing of violence in "zones of being and nonbeing" provides a way to look at refugee law that goes in a different direction from the national-cultural framework typically used to assess country situations for refugees.[64] Verdirame rightly argues that refugee law is an area of immense political contestation because "implicit in any grant of asylum is a censure of the country of origin of the refugee".[65] He notes the slippage that is apparent in the process of granting asylum, from offering a "place of refuge" to advancing values that are, in the tradition of human rights, steeped in the language of "culture", and as a function of nation-state thinking, reliant on a basic geopolitics of cultural or social morality.

The latter point, along with its allusion to a more profound critique of sovereignty (not addressed in this chapter) sets the backdrop for a more careful approach to viewing oppression and repression. First, those in political power should not be seen as representative of culture in such a way that allows nation to be conflated with culture, nor culture to be conflated with violence. It is enough that culture is a word that is virtually impossible to define and depends on its context for meaning, certainly when it sits in conjunction

in particular, to trace the line between the two camps. This line may be what Balibar might describe an "enmity line". However, Fanon also applies the framework of being and non-being to other forms of slavery, epidermal schema of oppression, etc., as implicit in his term "man of color".

[62] Ibid., p. 14.

[63] Fanon, *The Wretched of the Earth*, *supra* note 38, pp. 34–35.

[64] *See* Ramon Grosfoguel, "The Epistemic Decolonial Turn", *Cultural Studies* 21, nos 2–3 (2007): 220. Grosfoguel refers not only to "classical" colonialism, but also to what he calls "colonial situation" including "the cultural, political, sexual, spiritual, epistemic and economic oppression/exploitation of subordinate racialized/ethnic groups by dominant racialized/ethnic groups with or without the existence of colonial administrations".

[65] Verdirame, *supra* note 24.

with legal logics.[66] Madhavi Sunder suggests that, in certain legal contests, "culture" is a system of power that produces content articulated by those in political power on behalf of the greater "culture". She uses various case examples from the US context to illustrate tension created within the structure of legal argument when one occupies the voice of cultural representative while being at the margins of power with respect to perceived cultural authenticity and representational legitimacy.[67] This tends to further marginalise those disenfranchised subsets of potentially already disenfranchised groups.

Balibar's "death zones" concept, as well as Fanon's "zones of being" and "non-being", help us to reorient ourselves in relation to the assumptions of spaces of safety and violence with respect to refugee law in two ways. The concepts help us to reconfigure spatial violence into violence that follows particular people and subject positions from one place to another, which in turn draws our attention to shortcomings built into the refugee law system. Secondly, the concepts launch a more fundamental critique of refugee law in general, pointing to historical contingencies that call into question the moral basis for restrictions on free movement, particularly given the fact that refugee law is only available to a select and privileged few—those with the necessary material or political resources.[68]

5.1 The Recurring Problem of "Culture"

As the state-centred apparatuses of refugee law, international human rights and domestic constitutional reform are all contingent upon a rights framework of some sort, it is important to also critically assess the role of rights-based approaches in dealing with sex-, sexuality- and gender-based violence. Until refugees are given official asylum status or other similar residency allowance, they do not have the rights of citizens and, even then, they may need to wait some years before acquiring full political rights. This negates the drawing of full rights and protections along national borders and supports Balibar's idea of the enmity line—there are people living in the same space under very different conditions. Extreme forms of violence are found within most states and are organised around relations of power, including race, gender, citizenship status, religion and other separations between the "zones of being and non-being".

[66] See Peter Fitzpatrick, "The Damned Word: Culture and Its (in)Compatibility with Law", *Law, Culture and the Humanities* 1, no 1 (2005): 2–13.

[67] Madhaver Sunder, "Cultural Dissent", *Stanford Law Review* 54 (2001): 495–567.

[68] See Satvinder Juss, *International Migration and Global Justice* (Hampshire: Ashgate, 2007); Balibar, *supra* note 27.

In a certain way, refugee law can be seen as bringing human rights imperialism full circle. The project of strengthening human rights standards through constitutional reform is concerned with a slightly but crucially different set of discursive practices than refugee protection. This difference compounds the paradox of rights. The logic of refugee protection is that the state is unable or unwilling to protect its citizen within its political borders, which sets into motion the narrative of saving the citizen-subject from her state of origin. This narrative locates human rights as existing within the receiving state, enabling and empowering logics of providing refuge to a defector at a cost. The refugee is often described as having escaped from a dangerous culture or condition into a better one. For many, this is the central function of refugee law,[69] regulated of course by strict political and economic interests in the receiving countries.[70,71]

The logic of global decriminalisation of same-sex sexual activity is, in general, seen as a struggle for equality on the basis of sexual orientation and gender identity. This struggle is pitched mainly as one in favour of universal human rights, with the underlying logic that rights protection in countries outside of Europe will mean fewer refugees will need to cross borders to gain protection within Europe. This logic predominates despite the relatively small number of refugees that enter Europe each year, given the global migration of refugees. However, the focus on inequality tends to take specific form and the type of equality that is prioritised is quite specific—both specific to the type of rights that should be afforded as well as the lesser prioritisation of other interests. This approach is marked by a familiar discourse within LGBTIQ activist groups, one that suggests that countries can be envisioned to exist along a continuum of rights protections for LGBTIQ people, from criminal sanctions to marriage.

[69] *Cf.* Ibid., p. 201. Juss critically assesses the narrowness of refugee law by positing that refugee law today constitutes "an attempt by the international community to reconcile two irreconcilables: humanitarian need on the one hand and sovereign state control on the other". Such critique seeks to address a need greater than the scope permitted by the mechanisms of refugee law. A politics of recognising this mismatch is the difference between Juss' critique and conventional legitimations of the scope of refugee law and policy.

[70] This includes for example persecution, which is a specific type of violence, that must be extreme, involve state action or unwillingness or inability to act, and be proven rigorously. See Matthew E Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009) 279.

[71] One politically contentious and often-used phrase for describing migration policy is the "opening of the floodgates". This language is meant to emphasise the sheer volume of people crossing the border into Europe, for example, drowning its citizens. This image is completed with another phrase, "swamping", which is meant to describe cultural depletion through immigration. For examples, see Sajid Qureshi, "Opening the Floodgates?: Eligibility for Asylum in the USA and the UK", *Anglo-American Law Review* 17 (1988): 83–107.

Critiques of this evolutionary continuum model, which posits LGBTIQ rights as a discrete issue by which one can assess the relative social sophistication of a given country, are numerous. One significant critique is that it is at best disingenuous and likely impossible to disentangle the politics of sexuality from other forms of oppression, and similarly impossible to distinguish between local forms of oppression from transnational and historically contingent ones. Indeed, Fanon would likely argue that racial power relations in colonial societies create zones regulated by violence, which exacerbates other forms of oppression within those zones.

The use of rights remedies for sexuality and gender identity-related discrimination and violence evokes discussion regarding the role of the international community, particularly as regards the contested role of colonialism for many countries, including members of the Commonwealth. LGBTIQ people from within different local contexts are not necessarily approaching the issues in the same ways as certain human rights advocates from outside of those contexts for various reasons. One reason may be a question of strategy. For example, in the autumn of 2011, the United States of America and the United Kingdom indicated that treatment of local gay and lesbian people would be taken into account when determining future allocation of foreign aid to Malawi. This approach was criticised by a significant number of African-based NGOs, which argued that sexual minorities would experience violent backlash in the country as a result. This type of aid-conditioning measure was also subsequently warned against in the case of Uganda, where a Ugandan based human rights organisation implored Western activists not to call for aid-conditionality.[72]

Another key difference in approach from local actors when confronted with a global agenda for a particular type of right for sexual and gender minorities is that some local movements are rooted in a different understanding of sexuality and gender norms, and actors within those movements may find it difficult to articulate the local politics of sexuality through the framework of "LGBTIQ rights" as such.[73] The types of dissent from

[72]Rao, *supra* note 58; G. Ogwaro, "Press Release: Guidelines for Supporting the Ugandan LGBTI Effort to Advocate against the Anti-Homosexuality Bill", in *Civil Society Coalition on Human Rights & Constitutional Law* (Refugee Law Project, Makerere University School of Law, 2012). See also Hakan Seckinelgin, "Same-sex Lives Between the Language of International LGBT Rights, International Aid and Anti-Homosexuality", *Global Social Policy* 2 (2018).

[73]For examples, see Stephen Murray and Will Roscoe, *Boy-Wives and Female Husbands: Studies in African Homosexualities* (New York: St. Martin's Press, 1998); Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (Calcutta and New York: Seagull Books, 2007); Sylvia Tamale, *African Sexualities: A Reader* (Oxford: Pambazuka Press, 2011); Brian Whitaker, *Unspeakable Love: Gay and Lesbian Life in the Middle East* (Berkeley: University of California Press, 2006).

within different cultural systems are differently contingent. This relates to the different local sexual and gender politics, and attempting to alter the relative position of those in a given local setting by pressing hard for universal human rights irrespective of the complex entanglement of sexuality with other issues is potentially to enact more violence upon not only sexual minorities, but all of those in the "zones of non-being".

5.2 The Spectre of Colonialism

At both academic and activist conferences on LGBTIQ refugees, country conditions are inevitably discussed, and while in the courtroom there is no space for deep discussion about local historical and political contingencies, colonialism features centrally in discussions among activists, advocates and academics outside of court. Former Justice of the High Court of Australia and member of the Commonwealth's Eminent Persons Group, Michael Kirby, views the legal criminalisation of gay sex through the historical lens of British colonial expansion.[74] He notes that the relevant section of the Indian Penal Code recently declared unconstitutional, written by Lord Thomas Macaulay, was the most copied code. Article 377 on Unnatural Offences had been copied in many British territories including Zambia, Malaysia, Singapore and Fiji.[75] Consensual same-sex sexual activity is, in these contexts, "linked and equated to the conduct of violent sexual criminal offences".[76] The Griffith Penal Code written for Queensland was used in a great deal of Australia but copied in Papua New Guinea, Nigeria, Kenya, Uganda and Tanzania, among other places.[77] As we know, similar laws exist in Botswana, Cameroon, The Gambia, Ghana, Mauritius, Jamaica and other territories.[78]

Verdirame warns us not to view western export or colonial imposition of criminal sanctions against lesbians and gay men as the sole reason that homophobia exists in colonized areas.[79] I agree with this when, as Verdirame suggests, the issue is one of blame or support for the proposition of pre-colonial societies being sexual utopias. While these laws developed in locally

[74]This figure is from the human rights organisation, Erasing 76 Crimes, which is an information and campaigning platform to repeal anti-gay laws. See *Erasing 76 Crimes website,* accessed August 30, 2019, https://76crimes.com/39-commonwealth-nations-still-have-anti-lgbti-laws/.

[75]Ibid, p. 67.

[76]Ibid.

[77]Ibid.

[78]Ibid., p. 76.

[79]Verdirame, *supra* note 24.

specific ways out of a common set of principles connected to colonial practices, to change the framing of "exportation of homophobia" to more of a synthesis of a common legal framework across over forty countries over a few centuries is surely more concrete and more accurate. Perhaps one can speak instead of the colonial transfer of particular forms or expressions of anti-queer bigotry. This suggests that one should not envision pre-colonial societies as free from sexual and gender oppression, but it acknowledges that we continue today to grapple with the mechanisms of pernicious colonial laws, and this fact tends to complicate the discussion around specific forms of oppression faced by those in colonial societies.

6 Conclusion: The Refugee Project Reconsidered

So, what does a queer and decolonial analysis have to do with refugee claims? Perhaps these lenses have less to do with individual refugee claims and more to do with rethinking refugee law generally, and with it, freedom of movement, conceptions of extreme violence and nation-state thinking. If the conventional understanding of refugee law's purpose is to help victims of persecution to escape violence in one state by admitting them into another state, albeit through a very rigorous set of bureaucratic barriers and a potentially treacherous journey to new shores, we need to seriously consider in what ways this conception of violence artificially circumscribes, prioritises and describes certain notions of extreme violence (that which is construed as persecution) and not others.

The enactors of the two strategies, increased protection of LGBTIQ refugees and decriminalisation via domestic legal reform, are involved in a common discussion and, many times, are the same people. This means that a core group of advocates has two sets of strategies in mind at the same time. Such duality is nothing new to advocates and theorists who both see the limits of rights-based approaches while understanding the traction that rights can have in the context of larger social movements.[80] As advocates for refugee protection, we should be wary of the argument that the proliferation of universal human rights (e.g., sexuality-based rights as a global discourse) can or should have the "positive benefit" of curtailing refugee migration

[80]For more on this dilemma, see Wendy Brown, "Suffering the Paradoxes of Rights", in Brown and Halley, *supra* note 41. See also Dean Spade, "Their Laws Will Never Make Us Safer: An Introduction", in *Against Equality: Prisons Will Not Protect You*, edited by Ryan Conrad (Oakland: AK Press, 2012).

into Europe. This argument demonises immigration generally, and once this sentiment is mobilised as fear, the foreseeable result is an increase of repressive measures limiting immigration, including administrative and economic measures that make migrating to Europe more difficult, not to mention the process of acquiring refugee status. In the UK in recent years, the Hostile Environment Policy and the Brexit Referendum have demonstrated the reactionary link between fostering negative images of refugees with promoting more restrictive migration policies.[81] This may also mean that we, as advocates, need to resist the rhetoric of the "bogus applicant" and the heightened scrutiny around credibility by painting a realistic picture of conditions in the countries of origin. Unmitigated by a strong sense of free movement and a much broader concept of the conditions of extreme violence (not merely violence that legally qualifies as persecutory) and its multiple contingencies, we may remain stuck in the quagmire of reifying geopolitically dependent understandings of extreme violence and thinking of zones of danger along predominantly national or cultural lines.

We must also note that the reification of states as containers for violence and corresponding rights allows a bio-geo-political worldview to be instrumentalised to the misfortune of those groups who are disenfranchised or who do not inhabit positions of power within states. The concept of homonationalism in the context of refugee law makes a straightforward and crucial intervention in this regard. In a nutshell, focus on LGBTIQ violence as a cultural or geopolitical condition mutes the violence of colonialism and the "zones of being and nonbeing" that Fanon asserts organise violence in the world, and renders invisible the "superborders" or "enmity lines" that separate those who experience extreme violence from those who do not. This reinforces both perceptions of profound "cultural" difference between what is colloquially termed "the West" and "the Rest", without consideration of the richness of historical contingency and the extreme forms of violence that persist as a result. Conversely, heralding LGBTIQ rights as the pinnacle of social sophistication, as seen through the lens of human rights, may privilege certain forms of violence over others—Western homophobia over non-Western homophobia, sexual violence over racial violence, sexual liberation struggles at any cost "over there" over fighting racial, gender-based and status-based oppression "right here" in Europe. Puar's interpretation of

[81]This is most clearly evidenced by the 2012 Hostile Environment Policy (subsequently renamed the Compliant Environment Policy), which seeks to make life in the UK administratively difficult for those without proper paperwork, but in effect, it makes it difficult to migrate to the UK in general and fosters the racialized surveillance of certain groups. See e.g., UN General Assembly, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, 41st Session, 24 June–12 July 2019.

sexuality being taken up to reinforce American national exceptionalism fits well with Balibar's understanding of European citizenship as an exceptional and profoundly violent institution that serves to bolster European cultural and political privilege.

Moving forward from the reflections advanced here, we might ask in what format and amidst what constellation of praxis a queering of refugee law might be most transformative. Will thinking through a lens of radical disavowal of disciplinary rules help academics and legal practitioners reconfigure the sexual subject of migration law, and perhaps with it the legal subject in general? From within what matrix of race, migration, colonial subjectivity, sexuality, sex, religion or other situated identity might we envision a form of regulation beyond refugee law, which would do less violence upon the subject of the law while ensuring material safety? Is it possible to adhere to the spirit of the Geneva Convention without a critical focus on power, coloniality and the violence done to refugees in the receiving state?

Given the interventions discussed, the first question that occurs is—where does this leave activists doing this work? This question is both a general question of how to do the work as well as a literal question of place—where might such work be done?

One example of a variety of coalition politics and trans-political activism is the activism of the "Stansted 15". In March 2017, a group of fifteen human rights activists prevented the deportation of sixty people to West Africa by chaining themselves to the plane.[82] Some of the activists are from the group Lesbians and Gays support the Migrants, a collective with the mission of fighting against racism and anti-migrant policies as queer (LGBTIQA +) people.[83] The fifteen activists successfully prevented the deportation of the plane, which they argued was important, given the Home Office's "deport now, appeal later" approach, coupled with the real danger that many people face when forcibly removed to countries from which they fled.[84] The activists were subsequently found guilty under terrorism laws involving "endangering safety at an aerodrome"—laws drafted largely to respond to the Lockerbie

[82]Beth Perkin and Charlotte England, "Stansted 15: Activists Who Stopped Deportation Charter Flight Convicted Of Terrorism Charge," *Novara Media*, December 10, 2018, accessed July 29, 2019, https://novaramedia.com/2018/12/10/stansted-15-activists-who-stopped-deportation-charter-flight-convicted-of-terrorism-charge/.

[83]Lesbian and Gays Support the Migrants, accessed February 4, 2019 https://lgsmigrantsbristol.wordpress.com/about-us/. According to the collective's website, although the name of the organisation, "lesbians and gays", has not been changed since the 1980s, the group "is inclusive of all sexualities and gender identities."

[84]George Steer, "The UK's Prosecution of Peaceful Protesters Is Raising Fears About Anti-Terror Laws," *Time Magazine*, February 8, 2019, accessed July 29, 2019, https://time.com/5506750/stansted-15-britain-protest-court-immigration/.

Bombing of 1988. This seems to be a dubious overreach applied to this form of protest—particularly as the plane was not even moving when the activists chained themselves to it.[85] The importance of understanding anti-racist and migrant rights struggles as central to the political activism that we engage in as queer activists is that it demonstrates quite a different model of engagement queer politics than a mainstream LGBT + rights approach might suggest.

One needs to challenge the basic assumptions upon which human rights are articulated, including our understanding of where violence is located and what constitutes violence, including epistemological violence. Accordingly, one needs to examine the nature of certain rights-based solutions to violence. Using refugee law as an example, we need to ask what violence refugee law is meant to preclude, whether refugee law works, at what cost, and whether it should be radically rethought over the long term.

If we rely on human rights protections and the current refugee law regime, we could choose to do so in a way that, at the very least, acknowledges the death zones that Balibar refers to in describing violence against non-European citizens in Europe. This could potentially be done by granting full citizenship protections to those who are in the process of applying for refugee status. While this is a cosmetic fix, it does some work towards alleviating some of the state violence committed against refugees once they have landed in Europe. For example, having the right to work, full freedom of movement within the receiving state, and easy access to basic legal and medical services would be important to any person potentially fleeing persecution.

In the case of LGBTIQ people, very careful treatment of the credibility assessment around the applicant's narrative of sexuality is essential and critical thinking about not only sexuality, but intersectional identity, global geopolitical power relations and the history of colonialism should be considered. While taking one at her word may not be the most politically viable suggestion for a test of credibility, one must certainly avoid the types of exclusionary practices that some LGBTIQ people have reported encountering, from intimidating or insensitive border guards, the lack of privacy when stating their reasons for seeking asylum, and judges who are incredulous of their claims because they either have children or had been in heterosexual relationships. That said, taking claimants' stories at their word would perhaps be considered more transformative, perhaps even queer, in refusing to re-inscribe systems of power that stagnate other forms of systemic violence and colonial relations.

[85]The activists were, however, spared jail time, being given suspended sentences and community service orders.

When "the right to live freely and openly" relies on an outwardly subjective assessment of an applicant's credibility, is there not an obligation on the part of recipient states to be profoundly deferential to the stories of those claiming persecution? In the case of LGBTIQ people, could this suggest that states should consider not requiring corroborating evidence for the establishment of gay or trans identity? Or, from a different angle, does the British role in disseminating criminal laws in any way help to tip the balance in favour of viewing these laws as persecutory per se?[86] From within the comfort zone of legal rules and the traditional development of policy implementing those rules, it would be impossible and perhaps taboo to acknowledge the link on an individual basis. But should there nonetheless be a general policy of viewing these leftover laws as persecutory, given the recent history of empire and the continued existence of the Commonwealth? Could queering refugee law be one way to help us rethink migration or, at least, help externalize the costs of colonialism?

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[86]For a discussion of the prospects of recognising per se persecution on the level of the European Union, see S. Chelvan, *supra* note 56.

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