

WE HAVE ALWAYS BEEN A PART OF IT:
CENTERING THE TRANSFORMATIVE POTENTIAL OF SOGIE REFUGEE
CLAIMANTS' NARRATIVE IN CANADA

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*ABSTRACT**We Have Always Been a Part of It:**Centering the Transformative Potential of SOGIE Claimants' Narratives in Canada**Saeid Safari*

SOGIE refugee scholarship examines intersecting power relations, including race, ethnicity, gender, class, citizenship, and geopolitical location. A key intersection is how SOGIE claimants navigate the homonationalist apparatus of the Canadian refugee system, which constructs the identity category of an "authentic" SOGIE refugee as characterized by pure victimhood and passivity, based on a Western-exceptionalist notion of sexuality. Through a comprehensive literature review and Thematic Analysis of 30 publicly available SOGIE refugee decisions in Canada, this study identifies three primary assumptions about the "authentic" SOGIE refugee claimant: the Public/Private Discourse of LGBT Rights, the Linear, Progressive Narrative of SOGIE, and the Homocolonial Inclusion of LGBT Rights. Recognizing the limitations of "adaptive agency," this analysis centers the transformative potential of SOGIE refugee claimants' narratives in interrogating these assumptions through their "discursive agency," transcending the limitations of liberal notions of agency that operate within a dichotomy of resistance and compliance.

Keywords: SOGIE refugee claims, LGBT Refugees, Queer migration, Homonationalism, Homocolonialism, Canadian refugee system.

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Introduction: My Point of Entry to the Study

This thesis explores the narratives of individuals who left their home countries due to persecution based on their non-conforming sexual orientation and their engagements with the normative assumptions of the Canadian refugee system regarding an "authentic" sexual orientation, gender identity, and expression (SOGIE)¹ refugee claimant. The catalyst for this research originated from a pivotal moment in May 2018, when I was still residing in my home country and conducting an interview with a participant in my study on the stigmatization of people living with HIV who identified as a gay individual living with HIV. When I asked him if he felt comfortable sharing his story of how he was infected with HIV, he said his transmission mood was unprotected sex with his roommate. I then asked him what the reason was for not using a condom during sex. He explained that one day, while wandering in Daneshjoo Park, a popular hangout and dating spot for the LGBT² community in Tehran, the capital city of Iran, he was beaten up and arrested by the police because of his "gayish" appearance, which was further highlighted by the presence of a condom in his watch pocket. Since then, he had never carried a condom with him when dating someone. This interview was a reminder that I lived in a country where being a member of the LGBT community could lead to the death penalty.

The harsh reality for LGBT folk living in Iran is illustrated in Darwin Serink's short film "Aban and Khorshid" (2014) , which was inspired by the true story of Mahmoud Asgari and Ayaz Marhoni, a gay couple hanged in 2005 in Mashad (my hometown), Iran. This tragic story has been documented by Amnesty International (2005), which reported their executions

¹ The SOGIE acronym, utilized by the Canadian federal government, refers to individuals who seek asylum based on their sexual orientation, gender identity, or expression.

² LGBT is an acronym that stands for Lesbian, Gay, Bisexual, and Transgender. It is an umbrella term used to refer to a diverse group of individuals whose sexual orientation, gender identity, or gender expression differs from the heteronormative and cisgender norms. Although there are numerous other acronyms and terms used to describe various aspects of the community, such as LGBTQIA+ and queer, the term LGBT remains extensively employed within academic scholarship.

for "the 'crime' of being gay" and noted that the Iranian government often charges individuals with vague offences such as "crimes against God" or "crimes against nature" to justify punishment for consensual same-sex relations.

The film's depiction of the persecution of LGBT individuals in Iran aligns with reports from various sources. For example, Benjamin Weinthal's (2020) article discusses cases of public executions and a "high number" of gays being executed in Iran, while Amnesty International's report (2016) emphasizes the country's disregard for international law in its treatment of LGBT individuals. In this context, Mai Sato, UN Special Rapporteur on the Islamic Republic of Iran, and Christopher Alexander's (2021) research on state-sanctioned violence against sexual minorities reveals that from 2004 to 2020, Iran carried out at least 79 executions for same-sex sexual offences, including the executions of two children and six juvenile offenders³. Additionally, Iran's honour killing laws and state-sponsored conversion practices contribute to numerous homicides motivated by the victim's sexual orientation (p. 18).

As a social researcher, I have been influenced by Hannah Arendt's (1958) distinction between the "contemplative life" and the "active life" in her "The Human Condition." Arendt argues that the active life interacts with the world and other people, while the contemplative life only interacts with abstract objects of the mind. In other words, the active life turns outward, while the contemplative life turns inward (pp. 226–278). Therefore, I have been actively engaged with the world by conducting research that aims to bring about a change for the better, creating a more free, just, and peaceful environment for everyone, regardless of their race, ethnicity, gender, class, or citizenship status. However, there have been moments when I wondered how I can participate in LGBT activism in countries like Iran, where being queer

³ 'Juvenile offenders' refers to individuals convicted of crimes allegedly committed as minors but executed as adults. For further information, see Mai Sato and Christopher Alexander's "State-Sanctioned Killing of Sexual Minorities: Looking Beyond the Death Penalty" (Eleos Justice and Capital Punishment Justice Project, Monash University, August 10, 2021): 18

can be brutally punished by execution. Drawing on my experience of studying the lived experience of cohabiting couples in Iran,⁴ I came to the realization that one way to support the LGBT population would be to emphasize that, like cohabiting couples, LGBT individuals have always been an integral part of our society, both in Iran and elsewhere, and should be recognized and respected, as expressed in Samra Habib's (2019) "We Have Always Been Here: A Queer Muslim Memoir."

As a citizen and social researcher with personal experience of living under state-sanctioned homophobia, I harboured a vague hope that migrating to an ostensibly "LGBT-friendly" country like Canada would significantly improve the circumstances for individuals with non-conforming SOGIE. However, upon engaging with scholarship on LGBT migration, it became evident that the struggle for recognition extends beyond the borders of overtly "LGBT-hostile" countries, such as Iran. Even for those who flee their home countries in pursuit of refuge, the quest for acceptance and safety remains an ongoing challenge in "LGBT-receiving" countries. Many LGBT individuals face challenges in being recognized as "authentic" SOGIE refugees in Western countries (Buffington et al., 2014; Fobear, 2013; Rachel, 2014), particularly in Canada (D'Angelo, 2020; Dawson & Gerber, 2017; Kahn & Alessi, 2018; D. A. B. Murray, 2017), which enjoys a global reputation for LGBT-friendly policies. Referring back to the turning point that inspired this study, I became acutely aware of my own heteronormative assumptions during an interview with one of my participants, as well as my internalized Western-exceptionalist belief that migration was the ultimate solution for those with non-conforming SOGIE living in countries with widespread homophobia at both societal and governmental levels. These experiences led me to question the complexities surrounding SOGIE refugee migration scholarship, particularly the challenges that persist in

⁴ Although cohabitation is both illegal and considered illegitimate in Iran, this type of relationship has been increasingly prevalent over the past few decades. See: Kameel Ahmady, "Changing the Attitude of Young People towards Marriage with a Focus on Law and Environmental Conditions such as Religion and Custom," *Psychology and Education* 58.4 (2021): 5233-5244.

countries perceived as safe havens, such as Canada. An initial research question began to take shape: Why do SOGIE refugee claimants continue to face difficulties when seeking refuge in Western countries like Canada, despite their general reputation for LGBTQ+ inclusivity and support? To address this question, I first delve into the SOGIE refugee scholarship that examines the understanding and treatment of SOGIE refugees within Western refugee systems.

LGBT/SOGIE refugee migration is a multifaceted phenomenon that entails the interplay of multiple factors, including but not limited to sexual orientation, gender identity, desire, emotions, rejection, financial necessities, social class, political climate, and safety concerns. This interplay of factors creates distinct and individual experiences for refugees. However, one of the initial and pervasive challenges faced by SOGIE asylum seekers is the exclusionary and repressive immigration control systems, which can impact them before, during, and after their migration. As noted by Eithne Luibhéid (2014), the origin of migration control systems in nation-states can be traced back to historical practices such as capitalism, colonialism, imperialism, slavery, forced transportation of prisoners overseas, the expulsion of minorities and conquered peoples, and regulation of the movement of the impoverished. The evolution of the international system of nation-states during the nineteenth and twentieth centuries was a direct result of these processes (p. 119). Despite the theoretical equality of each nation-state within the international system, certain nation-states continue to dominate others in practice. Nation-states employed migration control strategies to sustain these inequalities, although they seldom acknowledged immigration control as a means to reinforce such disparities (p. 120).

SOGIE asylum seekers who seek refuge in Global North countries are required to negotiate an immigration control system that excludes certain groups based on a new form of racism, which only accepts vulnerable refugees who do not pose a threat to the sense of shared identity and strong social connections within the national "imagined community" (Anderson,

2006, p. 113; Binnie, 2004, p. 68; Jacob & Oswin, 2022). In the Canadian context, individuals who seek protection based on their SOGIE are asked to prove that 1) their sexual orientation or gendered identity is “authentic” and 2) they have been persecuted based on their membership in this particular social category (D. A. B. Murray, 2014b, p. 22). Being an “authentic” SOGIE refugee claimant and being considered a worthy candidate for asylum refer to the expectations of conforming to Western stereotypes of male homosexual behaviour, which are based on visibility, consumption, and identity in the public sphere (Koçak, 2020, p. 39). For instance, in "Real Queer: 'Authentic' LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System" (2014), David A.B. Murray shows that an “authentic” SOGI refugee within the Canadian refugee system is characterized as a "delimited LGBTQ identity" (p. 22), an "immutable essence" (p. 22), and constructed based on "specific assumptions about sexuality as fixed, discoverable, and progressing from a position of closeted to “coming out,” in which disclosure serves as the culmination of this narrative" (p. 26). Jasmine Dawson and Paula Gerber (2017) also argue that during the process of asylum adjudication, the criteria sought after are heavily influenced by Western conceptions of the linear and progressive formation of sexual identity, characterized by an innate and occasionally pathological understanding of sexuality that "manifests as a coherent identity" (p. 303-304). Moreover, Rahman (2020) highlights the emergence of SOGIE rights in the West during a period marked by individualist social and political forms tied to neoliberalism and Western capitalism. Individualist consumerism capitalizes on the public emergence of sexuality as a key social identity aspect to promote goods, services, and lifestyles, making sexuality a prominent indicator of lifestyle identity in contemporary consumer culture (p. 8).

The primary objective of this section is to establish the groundwork for a more in-depth analysis of the theoretical and methodological framework that underpins this study, as elaborated in Chapters Two and Three. In a broader context, this thesis aims to historicize the

engagement of SOGIE refugee claimants with the Canadian refugee system. By "historicize," I refer to the process of examining the SOGIE refugee claimant's interactions with the Canadian refugee system as a contingent and mutually constituted process. One might question the significance of adopting such a perspective when analyzing the SOGIE refugee claimant's efforts to be recognized as an "authentic" refugee. The importance of highlighting the contingent aspects of SOGIE refugee claimants' engagement with the Canadian refugee system lies in creating space for discourse on the potential of claimants to transform a system primarily designed to reject the majority of asylum claims.

Building upon and contributing to the existing SOGIE refugee scholarship that focuses on the claimant's struggle to be recognized as "authentic," this research acknowledges the increasingly debated and contested nature of refugee determination in Canada in recent years. Questions surrounding the identification of "genuine" refugees, "bogus" claimants, and appropriate determination methods have been prevalent (Fobear, 2015; Murray, 2014; Rinaldi & Fernando, 2019). In this context, the research explores how claimants are often expected to "produce a successful refugee image" during hearings while recounting their experiences of persecution, an image founded on essentialized notions of gender, race, sexuality, and ability, among other factors (Bond & Wiseman, 2020; Murray, 2016b). Scholarship in this area has also emphasized the significant impact that Western-centric, preconceived notions regarding racialized and orientalized performances of gender and fear within claimants' persecution narratives can have on the adjudication of their claims (Aberman, 2013, p. 57). In this context, Murray (2017) argues that bureaucratic refugee care systems, alongside their archived understanding of sexuality, collectively shape a dominant discourse endorsing a narrowly defined concept of sexual orientation and gendered identity. This construct, rooted in neoliberal, class-based, and racialized perspectives, intertwines with the nation-state's narratives on the "good immigrant" and "proper citizen." Concurrently, it creates a contrasting

figure: the "bad" immigrant and nonconforming citizen. The emergence of this normative framework offers a novel perspective on the dynamic between sexual citizenship and the nation-state, where the formerly ostracized and criminalized individual gives way to a grateful homosexual or transgender person who, having suffered under a foreign oppressive regime's homophobic or transphobic laws and attitudes, is granted the opportunity of citizenship in a nation-state perceived as progressive and democratic, such as Canada (p. 523). In this context, Fobear (2016) observes that scholarship in this area has primarily focused on the legal processes involved in making and adjudicating asylum claims. In Canada, for example, the Immigration and Refugee Board's (IRB) processes have been criticized for utilizing narrow cultural conceptions of gender and sexuality, necessitating the disclosure of trauma, and pressuring claimants to present a falsely linear and singular narrative of escape from "backwards" and oppressive countries in search of freedom and acceptance in Canada (p. 25). Fobear contends that the construction of the "sexual minority refugee" is characterized by "constitutive overdetermination," where established socio-sexual-political classifications of the destination state result in the erasure of these individuals' previous identities (ibid).

Existing research has been instrumental in critically examining credibility assessment within restrictive refugee determination contexts (Sari, 2023, p. 81). A common thread among this scholarship is the exposure of the multifaceted economic, emotional, and symbolic violence inflicted upon refugees' lives by Western refugee systems (ibid., p. 82). However, the narrative often overlooks the ways in which SOGIE refugee claimants strive to lead authentic lives and convey their truths, even when faced with opposition from asylum authorities or denial of humanitarian aid (ibid). In Nyers' (2013) account, refugees are often depicted as lacking political agency, in contrast to citizens who are endowed with voice and influence within political communities. This viewpoint exposes the suppression of refugees' political subjectivities and highlights how "voiceless" refugees can be consumed to present receiving

countries as agentic, sources of action and meaning. To challenge this erasure, this thesis adopts a twofold approach. Firstly, it conceptualizes, archives, and categorizes instances where the Canadian refugee system operates based on normative and delimited assumptions of an "authentic" SOGIE refugee claimant. Secondly, it centers on SOGIE refugee claimant narratives possessing disruptive and interrogative potential against these assumptions. This historicized and concretized account of SOGIE refugee claimants' engagement with the Canadian refugee system addresses a gap in the existing scholarship, which neglects refugee political agency. Concurrently, it contests dominant portrayals of refugees as "voiceless" and "vulnerable," thereby challenging hegemonic victimhood narratives. The subsequent chapter presents a historical analysis of the transformation of LGBT refugee rights in Canada. This historical context is interconnected with the remainder of the thesis, which aims to examine SOGIE refugee claimants' interactions with the Canadian refugee system and the impact of their narratives on transforming the normative underlying assumptions within the Canadian refugee system for SOGIE refugee determination. By highlighting claimants' political agency, this analysis disrupts the victimhood narrative frequently imposed on SOGIE refugees.

Chapter 1: The Historical Transformation of Sexual Orientation and Gender Identity

Refugee Rights

To commence a historicized and contingent narrative of SOGIE refugee claimants, this chapter initially delves into the role of LGBT advocacy groups in the historical transformation of LGBT refugee rights, which was influenced by and influenced the evolution of LGBT refugee rights in Canada. This evolution transitioned from viewing LGBT individuals as "immoral" and potentially threatening to "national security," to perceiving them as "curable ill" individuals, and eventually recognizing them as members of "a particular social group." This exploration offers a deeper understanding of the underlying power relations influencing SOGIE refugees' interactions with the Canadian refugee system. Subsequent sections examine international human rights regarding SOGIE refugee protection and advocacy organizations for LGBT individuals facing persecution in their countries of origin. These sections provide a more comprehensive view of the diverse forces and factors impacting the field of SOGIE refugees' interactions with the Canadian refugee system. Finally, the chapter concludes by addressing the process of making a SOGIE refugee claim in Canada, aiming to clarify the resettlement process and narrow the scope of this study to a specific stage within the SOGIE refugee claim-making process in Canada. The central argument of this chapter posits that any transformation in LGBT rights can be predominantly attributed to advocates' pivotal role in reshaping public perception and influencing policymakers' understanding of individuals with non-conforming sexual orientations. While this shift in perspective has contributed to the recognition of SOGIE refugees as members of a "particular social group," the transformation of LGBT rights remains an ongoing process. Despite offering some level of protection, the categorization based on belonging to a particular social group still imposes limitations on the broader understanding and acceptance of diverse sexual and gender identities due to its essentialist approach to SOGIE.

1.1 Legal and Social Transformations of SOGIE Refugee Rights in Canada

This section examines the historical transformation of LGBT refugee rights, from being perceived as "immoral" individuals posing a potential risk to "national security," to being viewed as "curable ill" individuals, and eventually, to being recognized as members of "a particular social group." This section also explores the ways in which the emergence of discourses on homosexuality in the nineteenth century led to social controls but also sparked a counter-discourse advocating for the legitimacy of LGBT individuals. Furthermore, this section discusses the transformation of Canada's Immigration Acts and discourses during the 20th century, highlighting the ways in which the refugee system struggled with delimited and stereotypical narratives of acceptable SOGIE refugees.

1.1.1 The Emergence of Homosexuality as a Distinct Category: A Cultural and Historical Analysis

At the dawn of the seventeenth century, sexual practices were openly discussed and engaged in without much secrecy or restraint. However, during the monotonous nights of the Victorian bourgeoisie, sexuality was carefully confined and became the exclusive domain of the conjugal family. The legitimate and procreative couple laid down the law, imposing their norms and reserving the right to speak while maintaining a culture of secrecy. Any deviation from these norms, such as extramarital relations, adultery, rape, spiritual or carnal incest, and sodomy, was met with equal condemnation (Foucault, 1990, p. 3). In the nineteenth century, the emergence of discourses on homosexuality, inversion, pederasty, and "psychic hermaphroditism" in psychiatry, jurisprudence, and literature led to a significant advance of social controls in this area (ibid., 101). Building on the "moral panic" model developed by British sociologist Stanley Cohen, Estelle Freedman (1987) and George Chauncey (1993) have convincingly argued that the first decade of the Cold War was marked by increased regulation and rigidity of sex and gender norms, and the concomitant popularization of the "sexual deviant," a character

constructed from psychiatric and psychological ideas about sexual behavior, who was perceived as a threat to both personal and political security and stability (Chenier, 2003, p. 77). The criminal sexual psychopath legislation represents the apex of the 20th-century marriage of psychiatry and law, the apogee of a century-long movement away from retribution and toward reformation, from classical to positivist criminology, and from punishment to therapeutic confinement. As Chenier (2003, p. 77) noted, this legislation marks the culmination of a century-long effort to regulate and control sexual behaviour and to pathologize those who fail to conform to societal norms.

World War II and the military draft brought together thousands of men from rural prairie states and seaside cities, exposing them to a range of new sexual experiences and possibilities, including sexual relations with other men. This period also provided opportunities for women to live and work in all-women's environments outside the purview of their families and communities. Efforts to police against "mannish" women in the Women's Army Corps, and to enforce standards of white, middle-class feminine respectability among the ranks, reflected anxieties over shifting gender hierarchies, as these intersected with racial and class inequalities in the context of rapid social change (Buffington et al., 2014, p. 33). After World War II, economic prosperity returned to the United States and interest in sexuality research was revived. At the forefront of this postwar revival was a team of researchers headed by Dr. Alfred Kinsey, a sexologist at Indiana University, who wrote the famous Kinsey Reports on Sexual Behavior in the Human Male (1948) and Sexual Behavior in the Human Female (1954). Kinsey's analysis, supported by his unprecedented dataset, reinforced the contention of earlier sexologists that same-sex attraction was common (and thus "natural") in human populations, sometimes manifesting as a youthful phase and at other times as a lifetime trait. As Kinsey et al. (1948, p. 615) explained, "males do not represent two discrete populations, heterosexual

and homosexual. The world is not to be divided into sheep and goats . . . the living world is a continuum in each and every one of its aspects.”

1.1.2 The Transformation of Canada's Immigration Acts and Discourses on SOGIE

Refugees

Although scientific and popular understanding of human sexuality had shifted in the post-World War II era, the American and Canadian preoccupation with homosexuality remained unchanged. Kinsey's report on “Sexual Behavior in the Human Male” was published when Canada was introducing sexual psychopath laws into its criminal code in 1948, and by 1953, twenty-four American states had adopted some version of the law (Chenier, 2003, p. 75). The decision to revise the Immigration Act had been made in the fall of 1948, and an interdepartmental committee was struck to draw up proposals. The first draft called for the exclusion of “prosecution, homosexuals, lesbians, and persons coming to Canada for an immoral purpose” (G. W. Kinsman, 1996, p. 170). Later, in 1951, the proposal to include “lesbians” was dropped, and a clause that included “living on the avails of prostitution or homosexuality” was added (ibid). The first act of the Canadian Parliament to consider homosexuals as a “status or type of person” was the Canadian Immigration Act of 1952 (Shaw, 2017, p. 16). Under this new immigration policy, inspired by the American and British communist witch-hunts that had long conflated homosexuality with radical politics and susceptibility to blackmail, homosexuals were given a “status” only to be labelled subversives; thus, people who had been convicted of “gross indecency” or “buggery” (two examples of Canadian legal terms revealing their British parentage) were not admitted to the country (ibid., pp. 16-17). When the bill came up in the House of Commons in June 1952, there was no debate on the section on homosexuality, and it was quickly passed. Like American provisions, based on the 1952 Immigration Act, gay men and lesbians could not enter Canada as visitors; they could not come to Canada as immigrants seeking permanent residence; and gay men and

lesbians who managed to enter Canada were subject to deportation if they were found to have “practiced, assisted in the practice of, or shared in the avails of homosexuality” (Girard, 1986, p. 973).

The exclusion of homosexuals from entering Canada was not solely due to the Immigration Act but was also influenced by Cold War hostilities toward homosexuality that persisted into the 1970s. During this period, homosexuals were often associated with communism and spying for the USSR, or perceived as vulnerable targets for blackmail, thereby posing a threat to "national security" (G. W. Kinsman, 1996, p. 171). Consequently, they faced surveillance, denial of basic human, civil, and citizenship rights, and social isolation. Canadians have long held the belief that their country navigated the Cold War with less paranoia and negative consequences than the United States, distinguishing their Cold War culture from McCarthyism's extremes (Iacovetta, 2006, p. 18). Nevertheless, recent histories such as Gary Marcuse and Reginald Whitaker's *Cold War Canada: The Making of a National Insecurity State, 1945-1957* (1994) have significantly revised this image, revealing that Canada was engaged in a largely covert but frequently dirty Cold War, one that often infringed on civil rights in the name of safeguarding liberal rights and domestic freedom. Canada's domestic Cold War involved imposing new limitations on free speech and other civil liberties, intensifying the criminalization of homosexuality and other forms of "immorality," and denouncing political dissent as a treasonous act against the nation and an indication of allegiance to the Soviet empire (ibid). For instance, a Ukrainian immigrant newly arrived in Canada was deported in 1955 upon being discovered wearing women's clothing and makeup. The judges' rationale for deportation was that "he was either a dangerous criminal, a homosexual pervert, or a lunatic and was a dangerous person to be wandering about in the city" (Martin, 2022, p. 29). There was no evidence that the Ukrainian was gay, but his clothing qualified him as a psychopathic personality from the judges' perspective.

Around this time, in late 1955 and early 1956, there were reports of violent sex crimes in southern Ontario. Several cases of violent rape and sexual assault took place in Hamilton, and a number of young girls were murdered in London and Toronto. These crimes became a major media event and led to demands for both tougher laws and more stringent enforcement of the existing law (G. W. Kinsman, 1996, p. 194). Sexual assault and murders were often presented in the media through the frames already articulated in relation to sex deviates and criminal sexual psychopaths. This method was heightened when a series of sex-related child murders and assaults occurred in Toronto (ibid). What is noteworthy in the media and societal reactions to these incidents was a shift in the language used in the media coverage of these incidents. The notion of sex perversion was replaced with those of sexual deviation, and sexual deviation was defined by Dr. Kenneth Gray, the Toronto Psychiatric Hospital and chief consultant to the Parent Action League (PAL)⁵, as "an act performed for sexual gratification other than sexual intercourse with an adult of the opposite sex" (G. W. Kinsman, 1996, p. 197). Emerging psychological and psychiatric approaches toward homosexuality, doctors, and psychiatrists started to regulate the lives of gay men and introduce homosexuality to society as an illness in a way that Mohr and Turner argued could be treated in individual cases, sometimes by the use of aversion therapy (ibid., 199). As Foucault (1990, p. 101) suggests, the new psychiatric and medical definitions of homosexuality enabled a "reverse" discourse, where homosexuality could speak on its own behalf and demand recognition of its legitimacy or "naturalness." This often occurred using the same vocabulary and categories that had previously been used to medically disqualify it.

The rise in "homosexual offences," particularly among men in positions of trust and responsibility, was deemed a significant concern (G. W. Kinsman, 1996, p. 215). This issue

⁵ The founding of PAL was a response to a specific historical context. In the post-war period, Canadian society was characterized by a growing awareness of sexuality and sexual deviance, as well as a mounting concern about crime and disorder. Against this backdrop, PAL emerged as a voice for women's rights and a force for change.

challenged the notion of homosexuality as an illness since there was no apparent cause or cure. Consequently, the capitalist public/private distinction became the basis for classifications within official discourse and practice, aiming to police and regulate homosexuality (ibid). In this context, state intervention in the private sphere was seen as justified only to prevent harm to others (ibid). These discussions on regulating homosexuality contributed to the decriminalization of adult male homosexuality in the private sphere. The gradual public discourse on homosexuality and recommendations for decriminalizing adult homosexual sex opened up social spaces for the growth of gay networks and cultures (ibid). Various regulatory approaches proposed by the Wolfenden Report provided a foundation for the 1969 Canadian Criminal Code reform, decriminalizing adult homosexuality in private (ibid., pp.182-224). Coincidentally, 1969 was also the year when Canada announced its decision to accede to the Convention on the Status of Refugees (Dirks, 1977, p. 182). This announcement was a crucial turning point, as it opened the door for asylum seekers and refugees, including those from the LGBTQ+ community, to seek protection in Canada. However, it was not until 1977 that the Immigration Act's provisions regarding homosexuals were changed, following a series of protests from lesbian and gay activists (G. W. Kinsman, 1996, p. 170). During this period, social movements advocating for LGBTQ+ rights began to take shape and gather momentum. These movements provided cultural and physical spaces for political action within neighbourhoods, cities, provinces, and nations. They served as a foundation for the formation and growth of gay villages and queer communities, fostering a sense of belonging and solidarity among LGBTQ+ individuals (Nash, 2013). This growth in social movements and queer communities played a crucial role in the transformation of Western polities and nation-states, leading to the emergence of "homonationalism" (J. Puar, 2013). While immigration control also evolved in response to these societal shifts, the framing of these changes remained centred around the non-national other.

1.1.3 Time for Recognition: From Being Represented as Sexual Perverts and Deviants to a Member of a Particular Social Group

In 1977, Canada repealed discriminatory provisions that prevented gay and lesbian individuals from entering the country. The country began accepting some of the first sexual SOGIE refugee claims in the 1980s (Türk, 2013, p. 5). One of the first refugee claims based on SOGIE was the case of Jorge Alberto Inaudi, a 28-year-old Argentinean man who experienced extensive harassment by police and military officers over an eight-year period. Inaudi made a refugee claim in 1992, and the court found that his experiences amounted to persecution (Goldberg, 1993, p. 622). The court reasoned that homosexuals, regardless of their gender identity, are members of a particular social group and are capable of being associated or united (Vagelos, 1993, pp. 231–233). Despite this development, Canadian immigration law continued to allow only heterosexual Canadians to sponsor their spouses as family class immigrants (G. W. Kinsman, 1996, p. 170). The exclusion of gay men and lesbians from the family class of immigration laws was brought to the attention of the Canadian public in a highly publicized case in 1992. Two gay men, Todd Layland, an American, and Pierre Beaulne, his Canadian partner, wanted to stay together in Canada, but immigration law prohibited Beaulne from sponsoring Layland as his spouse. They applied for a marriage licence at Ottawa City Hall but were denied (LaViolette, 2003, p. 974). In response to this issue, a community of 23 individuals formed the Lesbian and Gay Immigration Task Force (LEGIT) in 1991 to lobby against the family-class exclusion of same-sex spouses. LEGIT launched legal challenges to their partners' exclusion under the legislation starting in 1992, and the department used a similar approach to settle the cases and avoid a precedent-setting verdict (Colwell, 2018, p. 8). In 1993, the minister of immigration delegated the power to overseas program officers, and in 1994, the department officially recognized that the separation of same-sex couples and heterosexual common-law partners may cause undue hardship and therefore constitute grounds for exercising the broad

and discretionary humanitarian and compassionate decision-making criterion if the foreign partner was not independently eligible to immigrate (LaViolette, 2003, p. 974). By 1995, over sixty same-sex couples had benefited from the new policy, many with LEGIT's help (ibid). It was not until 1999 that changes were officially proposed allowing same-sex partners sponsorships under the "family class" route. When the immigration minister proposed changes to the Immigration Act in early 1999, the inclusion of "lesbian and gay partners in the family class provisions" was among the promised amendments (Colwell, 2018, p. 9).

The 1990s was also a significant period for the IRB in Canada in that it addressed some of its first claims by individuals seeking protection from persecution related to their sexual orientation. During this time, Canada had become obligated under the Geneva Convention Relating to the Status of Refugees to offer protection to individuals who are outside their country of origin and have a well-founded fear of persecution due to their "membership in a particular social group" (among other characteristics) and are unable or unwilling to return to their home country or avail themselves of its protection (Colwell, 2018, pp. 9–10). Notably, 1992 marked the first time the IRB granted a refugee claimant asylum in Canada based on their sexual orientation (ibid., p. 10). In 1993, the Supreme Court of Canada defined the term "particular social group" in a landmark case. Justice La Forest noted that the particular social-group category involves a distinction between "what one is [and] what one does, at a particular time" (Rehaag, 2008, p. 67). Viewing this distinction through the lens of "human rights and antidiscrimination [themes] that form the basis for the international refugee protection initiative," Justice La Forest identified three types of particular social groups:

1. Groups defined by an innate or unchangeable characteristic.
2. Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association.

3. Groups associated with a former voluntary status, unalterable due to their historical permanence (ibid).

La Forest provided specific examples of each type of group, including gender, linguistic background, and sexual orientation as part of the first category (ibid., 68). The Minister of Citizenship and Immigration introduced Bill C-11 in the House of Commons on February 21, 2001. The proposed legislation sought to modify the Immigration and Refugee Protection Act, which governs immigration to Canada and the provision of refugee protection for individuals who are displaced, persecuted, or at risk. As framework legislation, Bill C-11, which became the IRPA, outlined the principles and components of the immigration system, while the procedures, exceptions, and other administrative details were to be provided for in regulations (LaViolette, 2003, p. 980). The proposed bill maintained the immigration policy of family reunification, allowing a "Canadian citizen or permanent resident [to] sponsor a foreign national who is a member of the family class" (ibid.). Although the minister made it clear that same-sex couples were to be recognized as "common-law partners" under the new act, the actual definition of "common-law partner" was set out in the proposed regulations presented on December 15, 2001 (ibid.). Following public consultations and specific recommendations from the House of Commons Standing Committee on Citizenship and Immigration, the minister amended the regulations. The new regulations were finalized and published in a special edition of the Canada Gazette on June 14, 2002. The Regulatory Impact Analysis explicitly states that the proposed regulations "enable the sponsorship of a common-law partner or a conjugal partner, which may include sponsorship of a partner of the same-sex" and that "the Regulations are sensitive to the reality that in some countries same-sex couples are not able to live together" (ibid., 984).

Despite several transformations in the Canadian immigration and refugee system addressing SOGIE refugees, the system has historically operated with a narrow and limited

understanding of acceptable SOGIE refugees. These transformations began with the 1952 Canadian Immigration Act that labelled homosexuals as perverts. They continued with the 1969 Canadian Criminal Code reform that decriminalized adult homosexuality. In 1977, Canada repealed discriminatory provisions preventing gay or lesbian individuals from entering the country. This progression ultimately led to the first instance of the IRB granting a refugee claimant asylum in Canada based on their sexual orientation in 1992. Even as laws and regulations have changed, the underlying assumptions about sexual identity have remained largely consistent, reflecting a medical model of sexuality. This model centers on sexual attractions framed in terms of sexual orientation, defined as "an internal mechanism that directs a person's sexual and romantic disposition toward females, males, or both, to varying degrees" (Smith & Yost, 2023, p. 236). It assumes that sexual interests and behaviours result from an enduring erotic orientation towards persons of a particular sex, reflecting a binary understanding of sexual attraction that positions homosexuality as a distinct, non-overlapping category opposite from heterosexuality (ibid). Therefore, while legal and regulatory changes have been implemented, the system continues to operate within a framework that privileges specific types of SOGIE refugees while marginalizing others.

Several major studies since the 2000s, including the works of Miller (2005), Jordan (2009), Kahn & Alessi (2018), Fobear (2019), and Jacob & Oswin (2022), have examined the struggles faced by SOGIE refugee claimants in Canada against Western cultural narratives of SOGIE. According to these studies, claimants are expected to conform to Western constructs of gender and sexuality; failure to do so risks being labelled "inauthentic" or "fake" refugee claimants. This research centers on the delimited criteria for SOGIE refugee status determination within the Canadian refugee system and explores how SOGIE refugees engage with and challenge these normative criteria. It is important to acknowledge that the inclusion of sexual orientation and gender identity as grounds for refugee status results from both

national and international pressures to incorporate or amend legislation that directly protects these individuals. In the following sections, I will delve deeper into the international aspects of including SOGIE as a ground for seeking asylum, investigating the broader context and implications of these advancements in refugee rights.

1.2 International Human Rights and SOGIE Refugee Protection

The transformation of SOGIE refugee rights and regulations was not only a byproduct of the improvement of LGBT rights within national borders but also the result of a mutually constituted negotiation between international human rights and national immigration and refugee laws. For instance, when the IRB granted a refugee claimant asylum for the first time in 1992, it was based on an interpretation of the Geneva Convention Relating to the Status of Refugees of 1951 (Refugee Convention) and the United Nations High Commissioner for Refugees (UNHCR) (Colwell, 2018, p. 9). The Refugee Convention serves as the foundation of the asylum system, providing that a person can seek asylum if they are outside their country of origin and have a well-founded fear of persecution based on their ethnicity, nationality, religion, particular social group, or political opinion (UN General Assembly, 1951, Section Article 1 A (2)). Notably, SOGIE was not explicitly included in this provision, which is unsurprising given its drafting period and the perceived beneficiaries at the time. However, in 1992, the IRB recognized sexual orientation as constituting membership in "a particular social group" for the purposes of the Geneva Convention (Colwell, 2018, p. 10).

An important site of tension within this legal scholarship revolves around how sexual orientation can be included in the 1951 Refugee Convention, as the Convention does not provide a definition for "particular social group," and the term received little attention in the first few decades following the adoption of the 1951 Convention (Lieberman, 2013, p. 458). Canadian refugee law recognized SOGIE refugees as members of a particular social group for Geneva Convention purposes on the basis that this population is defined by an innate or

unchangeable characteristic, as first considered by the Supreme Court of Canada in 1993 when it considered refugee claims based on gender, linguistic background, and sexual orientation to be the first category of three types of particular social groups (Adjin-Tettey, 1997, p. 22; Storey, 2003, pp. 424–425). This interpretation of sexual orientation within Canadian refugee law has been criticized from the perspective that SOGIE refugee claims would be better situated under a fundamental human dignity approach, thereby acknowledging the fluid and contextual nature of sexual and gender identity (Lee & Brotman, 2011, p. 248; Rehaag, 2008, p. 98). It is crucial to note that including SOGIE refugee claims as "Groups defined by an innate or unchangeable characteristic" under the Geneva Convention is highly imbued with dominant Western conceptions of innate and linear sexual identity formation. This is problematic because it reinforces a narrow and delimited understanding of sexual identity that does not account for the diverse experiences and complexities of sexual and gender identity (Lee & Brotman, 2011, p. 249). In this context, LaViolette (2003, pp. 193–198, 2010, p. 192) found evidence of IRB adjudicator confusion and inconsistent ruling with gender-nonconforming sexual minority refugee claimants, with masculine-looking men not being believed to be gay, while feminine-looking women have not been believed to be lesbian. The following section will delve into the international transformation of SOGIE refugee rights and regulations and finally highlight the limitations of these changes.

Despite numerous challenges, including the inception of refugee claims based on sexual orientation and gender identity in the early 1990s, it was only in November 2008 that the United Nations High Commissioner for Refugees (UNHCR) directly addressed this issue by releasing the 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity'⁶ (LaViolette, 2010, p. 175). Significantly, this report marked the UNHCR's

⁶ It is worth noting that this guidance note possesses a lower level of authority compared to a handbook or guidelines.

acknowledgment of the specific difficulties faced by sexual minorities when applying the refugee definition to their claims (ibid., 176). Under the 1951 Convention relating to the Status of Refugees, the UNHCR oversees the treaty's application by member states, providing interpretations of the legal norms outlined in the international refugee protection regime (UN High Commissioner for Refugees, 1992). The UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, released in 2008, aimed to elucidate the legal standards and norms applicable to sexual minority refugee claimants. This document marked the UNHCR's first comprehensive analysis of sexual orientation and gender identity within the context of refugee protection, and it also represented a rare legal examination of the situation of sexual minorities by a United Nations agency (O'Flaherty & Fisher, 2008, p. 232). The 2008 UNHCR Guidance Note was a response to the limited understanding of gender identity issues, resulting in diverse approaches and inconsistencies among states and mechanisms. For instance, some states and mechanisms referred to transsexuality as a "sexual orientation," while others openly admitted their lack of comprehension of the term (ibid). Against the backdrop of these inconsistencies and gaps, the Yogyakarta Principles on the application of international human rights law concerning sexual orientation and gender identity emerged (Thoreson, 2009, p. 323). From November 6 to 9, 2006, a group of independent experts finalized the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, aiming to inform official UN bodies. The Principles have received acclaim for enshrining the rights of individuals with diverse sexual orientations and gender identities (O'Flaherty, 2015, p. 280). The Yogyakarta Principles were designed to serve a tripartite function. Firstly, they aimed to provide a comprehensive 'mapping' of human rights violations experienced by individuals with diverse sexual orientations and gender identities, taking into account the distinct ways in which these violations are experienced across different regions of the world. Second, they sought to

articulate the application of international human rights laws to these experiences in a clear and precise manner. Finally, the Principles were intended to delineate the nature of the obligations of states for the effective implementation of each human rights obligation in detail (International Commission of Jurists, 2007, pp. 3–19; O’Flaherty & Fisher, 2008, p. 233).

The UNHCR's decision to release its first Guidance Note specifically dealing with refugee claims relating to sexual orientation and gender identity in 2008 was certainly promising, as it recognized that sexual minorities had encountered a specific set of problems when having the refugee definition applied to their claims. For example, the UNHCR begins the substantive analysis with the following statements: "Although freedom of sexual orientation is not explicitly recognized as an international human right, it is now well established that LGBT persons are entitled to all human rights on an equal basis with others"; and "Sexual orientation is a fundamental part of human identity, as are those five characteristics of human identity that form the basis of the refugee definition: race, religion, nationality, membership of a particular social group and political opinion" (UN High Commissioner for Refugees (UNHCR), 2008, Notes 8 & 9). International bodies have been slow to recognize the human rights of sexual minorities, and it is encouraging to see that the UNHCR takes an unequivocal stance on the human rights of LGBT individuals (LaViolette, 2010, p. 180). However, the Guidance Note did not fully explore all aspects of LGBT refugee claims, including state protection, convention grounds, bisexuality, intersexuality, objective documentation, and the distinction between discrimination and persecution. Additionally, the significance of a gender analysis was primarily discussed in relation to lesbian claimants, despite its relevance to other LGBT cases (ibid., p. 208).

The 2012 UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity (UNHCR Guidelines) aimed to address these shortcomings. The UNHCR Guidelines provide a comprehensive framework for

understanding how to apply the refugee definition to sexual minority claimants, and offer valuable guidance on issues such as discrimination, persecution, and the importance of a gender analysis. One significant improvement in the UNHCR Guidelines is the recognition that discrimination based on someone's sexual orientation and gender identity can be a form of persecution (UN High Commissioner for Refugees (UNHCR), 2012, para. 17). According to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention, a claimant must establish a well-founded fear of persecution to be granted refugee status (UN General Assembly, 1951, Note 2). The definition of persecution requires that the harm feared be serious and inflicted in a persistent, repetitive, or systematic way (LaViolette, 2007, p. 172). In previous UNHCR guidelines, discrimination may constitute a violation of human rights, but it may not necessarily amount to persecution (UN High Commissioner for Refugees, 1992, Note 54). However, the 2012 UNHCR Guidelines suggest that discrimination is a common element in the experiences of many LGBT individuals and that it can amount to persecution when it leads to consequences of a substantially prejudicial nature for the person concerned (UN High Commissioner for Refugees (UNHCR), 2012, Notes 6 & 17).

Another important improvement in the UNHCR Guidelines is the rejection of the expectation or requirement that sexual minorities be "discreet" about their sexual orientation (Dawson & Gerber, 2017, p. 295). Discretion reasoning obligated sexual minority applicants, unable to prove their open identification in their home country, to demonstrate that their discretion stemmed from a genuine fear of persecution rather than a voluntary decision to be discreet (Rachel, 2014, pp. 691–692). The UNHCR Guidelines clearly state that a person should not be denied refugee status due to the requirement of changing or concealing their identity, opinions, or characteristics to avoid persecution. Additionally, there is no obligation to be discreet or to take certain steps to avoid persecution, such as living a life of isolation or

abstaining from intimate relationships (UN High Commissioner for Refugees (UNHCR), 2012, Notes 26 & 31). It is worth mentioning that the Federal Court of Canada was the first national court to clearly dismiss such a discretion requirement in SOGIE refugee claims. The court set aside a decision that denied refugee status to a Ghanaian gay man, rejecting the RPD's "finding which requires the claimant to deny or hide the innate characteristic which forms the basis of his claim of persecution"(Canada: Federal Court, 2008, Note 17; Dawson & Gerber, 2017, p. 308). This ruling signifies that being compelled to forsake or conceal one's sexual orientation and gender identity may, in and of itself, constitute persecution (LaViolette, 2010, p. 187).

It is crucial to keep in mind that the recent changes in national and international LGBT refugee rights and conventions should not be interpreted within a Western progressive narrative. As Rahman (2020) noted, the Western governments' claims of promoting LGBT rights internationally and across many Global North countries must be understood through the lens of the assumptions of social and political organization contained within this progress narrative(p. 2). Rahman also suggests that LGBT identities have been shaped by Western forms of organizing and understanding gender and sexuality, and thus, we must exercise caution when applying these understandings in cross-cultural contexts (p. 3). Rahman further argues that the struggle for SOGIE rights is not merely about challenging homophobic attitudes, practices, and policies of individuals and institutions but also about challenging the dominant organization of gender identities, which is characterized by rigid, binary divisions between men and women and rigid, binary expectations of their respective sexual behaviours as heterosexually oriented (p. 4). Reviewing international human guidelines and notes regarding the statutes of SOGIE refugees from this viewpoint, the 2012 UNHCR Guidelines still recognize LGBT refugees as members of particular social groups defined by an innate or unchangeable characteristic (UN High Commissioner for Refugees (UNHCR), 2012, Notes 44 & 47), which is based on Western and heteronormative binaries of gender and sexuality. The UNHCR guidelines are also highly

informed by an essentialized notion of sexual identity that assumes heterosexuality and homosexuality as mutually exclusive notions and takes for granted that the stereotypical 'Western, white, middle-class gay men's experience of sexual identity formation is a universal experience (Diamond & Savin-Williams, 2000, p. 297; Winer, 2023, pp. 2983–2984). However, the UNHCR Guidelines also provide refugee board members with the possibility of moving beyond the limitations of this Western heteronormative notion of gender identity and sexual orientation. The UNHCR Guidelines suggest that self-identification as an LGBT person should be taken as an indication of the applicant's sexual orientation and/or gender identity, and that the social and cultural background of the applicant may affect how the person self-identifies (UN High Commissioner for Refugees (UNHCR), 2012, Note 63). Additionally, the UNHCR underlines the importance of avoiding stereotypical perceptions of sexual minorities in determining a claimant's membership in a particular social group, such as expecting a particular flamboyant or feminine demeanour in gay men or a butch or masculine appearance in lesbian women (ibid., n. 4). The Guideline's statements on stereotyping could have been further reinforced by explaining that there are no universal characteristics or qualities that typify sexual minorities. This is another aspect of the problematic that this research aims to explore, specifically, the ways in which SOGIE refugee claimants challenge and transform the limitations of existing identity categories in capturing the complex ways in which SOGIE refugee claimants understand and express their sexual and gender identities.

1.3 Advocacy Organizations and the Transformation of SOGIE Refugee Rights

The transformation of SOGIE refugee rights were not a natural consequence of the post-World War overhaul in human rights but rather a result of the LGBT movement's long-standing history of advocating for equal rights and non-discrimination policies for its members. For example, the recognition of discrimination based on sexual orientation and gender identity as a form of persecution and violation of human rights and dignity in the UNHCR Guidelines was

unimaginable without the organization of law-reform discussions on the Criminal Code sex offenses in Canada during the 1960s. The following sections will first provide a brief historical review of the role of LGBT advocacy groups in SOGIE refugee law reforms and then delve into the support provided by Rainbow Railroad in Canada, one of the most significant volunteer-run organizations that assists LGBT people in escaping persecution and violence by helping them travel to safe third countries.

1.3.1 The Impact of LGBT Advocacy Organizations on SOGIE-Based Refugee Law

Reform in Canada

The expansion of gay/lesbian cultures during the 1950s and 1960s laid the foundation for lesbian and gay self-organization in Canada. This period also saw the contribution of leftist and progressive individuals to various persuasions in gay and lesbian organizing in Canada (G. W. Kinsman, 1996, p. 230). Following these radical beginnings, homophile groups in the 1950s and early 1960s relied heavily on medical, psychiatric, and serological experts to educate the public and legitimize homosexuality (ibid). However, this approach began to shift in the 1960s, influenced by various social and political movements, including the Black Civil Rights, Black Power, student, and anti-Vietnam war movements, as well as the New Left. Despite the distance between gay activists and young radicals, protests in the 1960s had a profound impact on homosexuals and lesbians. Each of the separate strands of the "Movement" resonated with gay women and men in a unique way (D'Emilio, 1998, p. 224). One of the significant homophile organizations that emerged on the west coast of Canada during this period was the Association for Social Knowledge (ASK), which was officially formed in Vancouver in April 1964 (G. W. Kinsman, 1996, p. 230). Among the ASK's initial quintuplet objectives was to propose and support reforms of laws dealing with sex variants to ensure that the laws protected the integrity of individuals and the community (ibid., p. 231).

In 1966, the government issued a White Paper on immigration policy that excluded homosexuals from immigration to Canada, citing "moral or social grounds" for exclusion (Girard, 1987, p. 13). However, the influence of the gay movement on the amendment of the Canadian Immigration Act of 1976 was significant. With the rise of gay liberation in the early 1970s, the Immigration Branch faced a challenge that was previously ignored. Openly gay and lesbian individuals began to assert their sexuality through modes of dress and were more likely to be truthful about their sexual orientation when asked at the border, making political statements (Girard, 1987, pp. 14–15). Moreover, the decriminalization of private homosexual acts between consenting adults and the 1971 'We Demand' demonstration, often cited as one of the first public demonstrations for lesbian and gay rights in Canada, called for an end to the formal exclusion of 'homosexuals' in the Immigration Act, which had been in place since 1952 (Wright, 2018, p. 106). In 1975, a Special Joint Committee of the Senate and the House of Commons conducted public consultations to argue for the removal of the ban on "homosexuals" and "homosexualism" from the 1969 Immigration Act. After holding public hearings in 21 Canadian cities and receiving over 400 witness submissions and 200 briefs, the Committee presented its report to the Parliament in late 1975. Introduced in the House of Commons in 1976, the Immigration Act was finally read for the third time and passed on July 25, 1977 (Girard, 1987, p. 13). Gay/lesbian advocacy groups from all ten provinces had a significant role in hearings leading to the amendment of the 1969 immigration Act that banned "homosexuals" and "homosexualism" from immigrating to Canada (ibid., p. 15). The presentations made by gay groups emphasized shifts in attitudes toward homosexuality and pointed out parallels between anti-gay sentiment, racism, and sexism (ibid., p. 16). The Committee was impressed by the evidence that the provisions of the Act respecting homosexuals were not a dead letter but were actively enforced. The gay community's participation in the mainstream political process was successful, as the offending portions of

the Act were removed from the new legislation presented to Parliament in 1976, which came into force on April 10, 1978 (Girard, 1986, pp. 277–278; Colwell, 2018, p. 5).

Canada also repealed discriminatory laws barring entry for gay and lesbian individuals in 1977, but still excluded same-sex couples from family class sponsorship. In 1999, amendments were proposed to include "lesbian and gay partners" in the family class provisions, marking a significant step towards inclusivity (Colwell, 2018, p. 9). In 2001, the Minister of Citizenship and Immigration introduced Bill C-11, which later became the Immigration and Refugee Protection Act (IRPA), defining immigration principles. The bill upheld family reunification policies, permitting Canadian citizens or permanent residents to sponsor family class members, including same-sex couples recognized as "common-law partners" (LaViolette, 2003, p. 980). The specific definition of "common-law partner" was later outlined in regulations proposed in December 2001. Following consultations and the House of Commons recommendations, the minister amended the regulations, allowing sponsorship of same-sex partners (Colwell, 2018, p. 8). The changes in the inclusion of same-sex couples in family class sponsorship in the Canadian immigration act were also a result of the activism of a community of 23 individuals who formed the Lesbian and Gay Immigration Task Force (LEGIT) in 1991 to lobby against the family class exclusion of same-sex spouses (ibid), as well as EGALE, a national gay and lesbian rights advocacy group that was founded in 1986 by Les McAfee, to advocate for increased rights and recognition and to combat discrimination against LGBT individuals (LaViolette, 2003, pp. 981–984).

1.3.2 LGBT Refugee Advocacy Groups: Challenges and Complexities in Canada

LGBT activism in Canada operates at multiple levels, including international, federal, provincial, and municipal. The movement is composed of various social movement organizations, with a strong presence at the local level, such as New Pride of Winnipeg, which provides social support to newcomers to Canada. There are also organizations active at the

provincial level, such as Queer Ontario, and at the national level, such as Egale Canada. Moreover, Canadian LGBT social movement organizations participate in international organizations, including the International Lesbian, Gay, Bisexual, Trans, and Intersex Association, of which Rainbow Railroad was an executive board member (Tremblay, 2020, p. 515).

Rainbow Railroad, founded in 2006 by a diverse group of LGBT activists and human rights defenders, is a Toronto-based organization that aims to address the high levels of violence faced by LGBT individuals worldwide (Rainbow Railroad, 2023a). The organization offers five programs to support SOGIE refugees globally: cash assistance, partnership development, crisis response, information services, referrals, and complementary pathways (ibid). Cash assistance includes direct financial aid, accommodation, medical care, and relocation support (Rainbow Railroad, 2023a, p. 11). Partnership developments involve collaboration with local human rights defenders and grassroots organizations, providing on-the-ground insights, healthcare, shelter, and legal advocacy (ibid., p. 11). The crisis response program addresses state-sponsored persecution against LGBT individuals during political instability, detentions, and arrests (ibid., p. 12). Information services offer resources and mental health support to LGBT people facing violence (ibid., p. 13). Complementary pathways, such as private sponsorship programs in Canada, aid refugees through non-traditional avenues of resettlement (ibid). According to the Rainbow Railroad's annual report, they received almost 10,000 requests for help in 2022 and supported 4,560 people (ibid., p. 14). The existence of such organizations reflects the symbolic success of the LGBT movement in Canada, particularly since the legalization of same-sex marriage in 2005. This progress is a testament to the movement's efforts to promote equality and human rights for LGBT individuals (Abu-Laban & Nath, 2020, p. 516).

Despite the significant support provided by SOGIE refugee advocacy organizations like Rainbow Railroad, which have engaged in ongoing dialogues with Immigration, Refugees and

Citizenship Canada (IRCC) and Global Affairs Canada (GAC), their work, though significant, remains insufficient. LGBT-focused groups like Rainbow Railroad recognize that the primary challenge for asylum-seekers lies in finding a way out of countries deemed “unsafe.” Although this work is valuable, it fails to acknowledge that many individuals are unable to access these legal routes (Wright, 2018, pp. 116–117). In this context, Aryan Karimi's (2020) study on the limits of social capital for refugee integration highlights the reason why LGBT organizations like Rainbow Railroad need to have more inclusive and effective policies to support LGBT refugees. He shows that despite the existence of several Canadian LGBT-oriented organizations, such as the Rainbow Railroad and Access Alliance, which advocate for LGBT refugees' rights, only two of Karimi's participants (out of 19 gay Iranian men) had any experience with these organizations and had reached out to them for support (p. 92). This lack of participation in community activities has several overlapping reasons: mainstream LGBT communities' implicit homonormative agendas, which prioritize the demands of white middle-class members and marginalize the voices of racialized members, thereby reproducing forms of capital that are mostly accessible and beneficial to White middle-class members; advocacy groups' limited resources and outreach; and the participants' cultural background, which does not encourage involvement with local communities and organizations (p. 93). The problem of limited resources within advocacy groups is evident in Rainbow Railroad's annual report, indicating that out of 9,591 individuals requesting help, only 4,560 (47% of total requests) received support in 2022 (Rainbow Railroad, 2023a, p. 9). Moreover, this limitation in resources should be viewed alongside the significant increase in requests for help, rising from 2,773 in 2020 to 9,591 in 2022, which is a 245% increase in just two years (Rainbow Railroad, 2020, p. 2, 2023a, p. 14).

The support provided by LGBT advocacy groups should not be interpreted within the framework of Canadian benevolence and exceptionalism. Canada has a long history of being

perceived as a peaceful and welcoming nation for immigrants and refugees, but this narrative often overlooks the country's complex history of colonization and slavery. For instance, the celebratory portrayal of Canada as a safe haven for African and African American refugees fleeing slavery in the United States during the nineteenth century obscures the harsh realities of slavery and the treatment of enslaved people in Canada (Bakan, 2008, p. 4). The romanticized vision of Canada as a refuge for the oppressed, perpetuated by the Underground Railroad, has contributed to the denial of racism's ongoing impact (McKittrick, 2007, p. 9). While Underground Railroad has become a symbol of resistance and hope, its legacy has been truncated and distorted in contemporary discourse. For example, the Civil Marriage Trail, an event held in 2004 where same-sex couples from New York travelled to Toronto to marry, invoked the mythology of the Underground Railroad to promote Canada as a land of freedom and inclusion (Dryden & Lenon, 2015, p. 10). Similarly, the advocacy group Rainbow Railroad has adopted the metaphor of the Underground Railroad, equating discrimination against LGBT individuals with the oppression faced by African Americans during slavery (Beukian, 2020, p. 83). By doing so, the organization situates itself within the discourse of Canadian exceptionalism, where racial, imperial, and colonial agendas shape the conditions of inclusion, safety, and sanctuary (Dryden & Lenon, 2015, pp. 10–11). As Murray (2016) notes, there is a pressing need to move beyond calls for LGBT equality and inclusion in the nation's immigration and refugee politics. He emphasizes that concentrating solely on issues such as making the IRB guidelines more 'SOGI friendly' is profoundly limiting in the absence of a broader strategy (p. 101).

In conclusion, the issues related to SOGIE refuge in Canada have recently gained prominence in the mainstream LGBT movement's agenda, but they are occurring in a vastly different context than the one that shaped the Canadian Immigration Acts and the 'We Demand' moment of the early 1970s. A significant difference is that the ideologies and structures of

current LGBT movements are closely intertwined with neoliberalism, and they struggle for articulation and transformation under contemporary conditions (Wright, 2018, p. 108). Specifically, the agenda of LGBT refugee organizations is heavily influenced by the narrative of 'happy pluralism' or multiculturalism. This narrative revolves around the optimistic portrayal of the Canadian Underground Railroad, aiming to establish conditions of acceptance based on liberal democratic ideals such as nationalism, the division between private and public spheres, capitalist economic participation, and the embrace of a multicultural narrative on diversity (Beukian, 2020, p. 86). In this narrative of happy multiculturalism, recognition is predicated on conformity, and the condition of acceptance in the multicultural project is based on "how much tradition can be accommodated by Canadian modernity without affecting in any real way the overall political and cultural hegemony of Canadian exceptionalism (ibid., p. 84). These frameworks portray LGBT refugees as victims of their own patriarchal cultures, as implicitly underscored by the Rainbow Railroad's statement that the primary challenge for asylum-seekers lies in escaping countries deemed unsafe (Rainbow Railroad, 2023b). As introduced earlier, the primary concern of this thesis is to illuminate the discursive aspects of SOGIE refugee recognition in Canada and the ways in which SOGIE refugee narratives interrogate the delimited and narrow conception of acceptable SOGIE refugees. This chapter demonstrated that this limited and neoliberal-informed conception of recognition of LGBT rights has not remained confined to the official Canadian refugee system but has also significantly informed the activities of LGBT volunteer-run organizations such as Rainbow Railroad, which has been playing a crucial role in supporting SOGIE refugee claimants beyond Canada's borders. The concluding section of this chapter will narrow down the specific focus of the study, acknowledging the complexity inherent in the process of making refugee claims in Canada.

1.4 The Process of Filing a SOGIE Refugee Claim in Canada

This section provides a comprehensive exploration of the process of claiming refugee status in Canada, focusing specifically on the stages involved in making a claim based on SOGIE. It then illuminates the collaborative efforts of three key departments - the Immigration and Refugee Board (IRB), Immigration, Refugees and Citizenship Canada (IRCC), and the Canada Border Services Agency (CBSA) - outlining their distinct roles within the Canadian Refugee Protection System. By delving into the six stages of the refugee claim process, particularly the nuanced fourth stage related to SOGI claims, this section sets the stage for a thorough analysis of publicly available documents in the subsequent chapters.

1.4.1 The Canadian Refugee Protection System: A Collaboration of Three Key Players

The Canadian refugee protection system comprises three distinct government departments: the IRB, IRCC, and CBSA. These departments differ in size, resources, jurisdiction, and organizational culture. The CBSA, a federal agency created in 2003, handles border control and claimant clearance, whereas the IRB focuses on a humanitarian mandate and holds ultimate authority over refugee decisions (Skaidra, 2023, p. 3). The CBSA is also responsible for informing the IRB that security screening has been completed (Atak et al., 2019, p. 479). The IRB is a self-governing tribunal with four separate divisions, including the Refugee Protection Division (RPD), which is tasked with evaluating eligible inland claims for refugee protection, and the Refugee Appeal Division (RAD), which examines most rejections of protection by the RPD (Kaga et al., 2021, p. 5). The IRB processes refugee claimants from designated countries of origin (DCOs) through accelerated procedures with reduced rights due to a change in its scheduling practice for refugee hearings on February 20, 2018. It now hears claims primarily in the order in which they were received to deal with the growing backlog and the increasing number of new refugee claims (Atak, 2018, pp. 177–187). Despite its power, the IRB can be influenced by the Minister and the IRCC through legislative and budgetary means. The IRCC

oversees immigration, including asylum-seeker intake, eligibility, and program integrity, processing paperwork, and reviewing credibility and eligibility issues. The IRCC and CBSA investigate claims, raise objections, and present evidence during hearings, but the final decision rests with the IRB (Atak et al., 2019, p. 468). The IRCC is also involved in non-judicial recourses for failed claimants, including pre-removal risk assessments and humanitarian and compassionate grounds claims (Skaidra, 2023, p. 3).

Additionally, there are six primary sources of immigration and refugee law in Canada, including the Immigration and Refugee Protection Act (IRPA) and the Immigration and Refugee Protection Regulations (IRPR). Ministerial Guidelines provide details on the interpretation of the IRPA and IRPR to IRCC's and CBSA's officers. The IRB Chairperson's Guidelines provide guiding principles for IRB personnel who manage and adjudicate cases. These guidelines are not mandatory, however board members must justify any non-compliance in their written decisions (Kaga et al., 2021, p. 5). The subsequent section outlines the different stages in which all refugee claimants must navigate within the Canadian refugee system to submit a refugee claim.

1.4.2 Stages of Making a Refugee Claim in the Canadian Refugee System

This section provides a comprehensive overview of the process undertaken by an asylum seeker in Canada from the initial claim submission to the final decision on protection or removal. The discussion covers the various stages involved in the process, including the filing of the asylum claim, assessment of the claim by the IRB, potential intervening steps by the CBSA, and the ultimate decision on protection or removal.

Step One: Making a Claim and Eligibility

This step only applies to persons who make a refugee claim at a port of entry, which requires eligibility checks by a CBSA officer, including checking disqualifying criteria as

described in Section 101 of the Immigration and Refugee Protection Act (IRPA), as outlined below:

- A person who has already become a protected person in Canada is not eligible to make a refugee claim, as they already enjoy refugee protection in Canada (Refugees and Citizenship Canada, 2013).
- A claimant who has refused resettlement at a Canadian visa office is not ineligible under paragraph A101(1)(b) because their refugee protection concerns have not been heard by the IRB (*ibid*).
- A person who, before they made a refugee claim in Canada, made a refugee claim in a country with which Canada has an information-sharing agreement (*ibid*).
- A person who has been recognized as a Convention refugee by a country other than Canada and who can return to that country is not eligible for determination by the RPD (*ibid*).
- A claimant who arrives at a land border port of entry (POE) from the U.S. may not be eligible for referral to the IRB under paragraph A101(1)(e) (*ibid*).
- A person who poses a danger to security, or if they have violated human or international rights or committed a serious non-political crime outside the country of refuge before their admission to that country as a refugee (*ibid*).

Having passed the eligibility check, eligible claimants are given a Basis of Claim Form (BOC) to complete, which must be submitted within 15 days, and a notice to appeal for a hearing that tells them when and where their claim will be heard by the RPD and referred to the IRB for a hearing (Immigration and Refugee Board of Canada, 2018).

Step Two: Basis of Claim Form and Submitting Evidence

Asylum seekers in Canada must fill out a BOC that includes personal information, reasons for fleeing their home country, and immigration history (Immigration and Refugee

Board of Canada, 2018). The form is submitted to an IRCC or CBSA office, and supporting documents such as identity papers and country reports may also be included. If the form is not submitted by the specified date, the asylum seeker may be considered to have abandoned their claim; however they can request an extension at an abandonment hearing (Falconer, 2019, p. 11). The IRB schedules hearings for asylum claims, and recently, it has implemented different case streams for different levels of complexity. The three streams are: regular hearing, case-file review, and short-hearing. Case triaging is based on the country of origin and the type of asylum claim. Individuals who have sought asylum in Canada but have since withdrawn their application are not permitted to submit a new claim for refugee status. Instead, they are required to depart Canada (Immigration and Refugee Board of Canada, 2018).

Step Three: Waiting for a Hearing and Gathering Evidence

Asylum seekers who pass security and eligibility checks are granted temporary legal status in Canada, allowing them to work and access limited services. They are not eligible for tax credits or benefits but can receive provincially funded social assistance. Asylum seekers can gather additional evidence and witnesses for their hearing, which must be submitted ten days before the hearing (Immigration and Refugee Board of Canada, 2018). The IRB accepts various forms of evidence, including identity documents, relevant evidence, and witness testimonies. Less complex cases are streamed by country and case type, and claimants are given 15 days' notice to submit additional evidence before a decision is rendered (Falconer, 2019, pp. 14–15).

Step Four: The Claim Hearing and Decision

In the refugee claim process in Canada, claimants receive a Notice to Appear by mail indicating the date of their hearing and a special hearing date if needed. If they miss the initial hearing, they must attend a special hearing to explain their absence, or their claim might be declared abandoned (Immigration and Refugee Board of Canada, 2018). Hearings, lasting half

a day, are conducted privately to protect the claimant's family. Children under 12 aren't required to attend unless determined necessary by the presiding member. Hearing involves introductions, numbering exhibits, claimants' testimony, and witness testimonies. After testimonies, claimants and witnesses explain their case. The members may decide immediately or send the decision later by mail. Rejected asylum seekers have three options: voluntarily leave Canada, appeal to the RPD within 15 days, or apply for judicial review at the Federal Court. The RAD may uphold the RPD's decision, send it for retrial, or substitute a positive decision (*ibid.*). If the RAD substitutes a positive decision, the asylum seeker becomes a protected person. Asylum seekers may also apply for judicial review of a negative decision at the Federal Court, which may deny leaving for a review or uphold the IRB's negative decision upon reviewing the case, leading to removal. If a leave is granted and the court finds the decision to be unfair or made in error, the case is sent back to the IRB for another hearing (Falconer, 2019, p. 16).

Step Five: Non-Appeal Recourses Denied

Denied asylum seekers have two options outside the normal appeal process: the Pre-Removal Risk Assessment (PRRA) and the Humanitarian and Compassionate Grounds (H&C) application. The PRRA is conducted by the IRCC and assesses the risk of returning the asylum seeker to a life-threatening situation (Falconer, 2019, p. 16). The H&C application is based on the asylum seeker's ties in Canada, family ties, and non-asylum-related risks of removing them. Both applications had low success rates, with only 2% of PRRAs accepted between 2007 and 2014. The longer a denied asylum seeker remains in Canada, the more likely it is to develop ties and grow roots in their communities, which are considered in H&C applications. If successful, the applicant becomes a permanent resident rather than receiving protected-person status (*ibid.*, p. 17).

Step Six: Removal from Canada

Asylum seekers in Canada who receive conditional removal orders upon filing their claims have two options. If they receive a positive decision, the order is not enforced. Removal orders become enforceable if an asylum seeker exhausts all available avenues of appeal or allows them to expire without taking further action. If an asylum seeker fails to appear for a scheduled removal date, a Canada-wide arrest warrant may be issued. There are three types of removal orders: departure, which requires the asylum seeker to leave Canada within 30 days and notify the CBSA of their departure at the border; exclusion, which prohibits the asylum seeker from returning to Canada for one year (or five years if misrepresentation occurs); and deportation, permanently barring the asylum seeker from returning (Falconer, 2019, p. 17). Asylum seekers with enforceable removal orders lose eligibility for social assistance and other services. When a denied asylum seeker voluntarily departs, they are usually not escorted. However, the CBSA may detain asylum seekers deemed flight risks or risks to the public and personally escort them to their home countries (ibid).

Overall, the Canadian refugee system consists of two main parts: the Refugee and Humanitarian Resettlement Program for individuals seeking protection from outside of Canada and the In-Canada Asylum Program for those who make claims within Canada. This study primarily focuses on SOGIE refugee claimants who make claims within Canada. As mentioned, making an inland refugee claim in Canada is highly complex, as it involves three distinct government departments: IRB, IRCC, and CBSA, which follow six main sources of immigration and refugee law. The refugee claim process consists of six stages, and every refugee claimant must go through at least four stages when making a refugee claim. These stages included passing an eligibility check, completing the BOC, submitting evidence, waiting for a hearing and gathering evidence, attending the claim hearing, and receiving a decision. This study analyzes the fourth stage of making a SOGIE refugee claim, which involves hearing

claims and making decisions. Focusing on publicly available documents related to SOGIE refugee claims hearings and appeals, the following chapter will further discuss the specific problematic that this study aims to address when analyzing publicly available cases.

Chapter Two: SOGIE Refugee Claimants' Engagement with the Canadian Refugee System

In this chapter, I explore the historical development of the Canadian refugee system's response to Convention Refugee Claims based on SOGIE. I then analyze how SOGIE refugee claimants navigate Western cultural narratives during the asylum process, working with and against these narratives as they articulate their fear of persecution based on their SOGIE within a system that seeks to identify "good immigrants" who conform to a normative narrative of Western sexual citizenship and national belonging. To better understand these underlying assumptions, I introduce the theoretical frameworks of "compulsory heterosexuality," "homonationalism," and "homocolonialism," providing a foundation for a more thorough understanding of the complexities faced by SOGIE refugee claimants in their engagement with the refugee system. In the concluding section, I outline the study's theoretical positionality, critically examining Western sexual exceptionalism in the adjudication of SOGIE refugee claims and emphasizing the transformative potential of narratives that challenge these assumptions, as discussed in SOGIE refugee scholarship. This analysis supports the thesis, which focuses on the ways in which SOGIE claimants' narratives can challenge and transform preconceived notions of a "deserving" SOGIE refugee in Canada. By establishing this groundwork, I set the stage for a detailed examination of specific Western exceptionalist assumptions within the Canadian refugee system in SOGIE refugee determination and the ways in which claimants' narratives interrogate these assumptions. This in-depth exploration will be further pursued in Chapter Three.

2.1 Theoretical Contextualization: Unpacking Compulsory Heterosexuality, Homonationalism, and Homocolonialism

In response to the evolving landscape of SOGIE refugee rights, the first chapter examined the historical shifts that led to the acceptance of non-conforming SOGIE as a basis for Convention

refugee claims in countries such as Canada, which recognize SOGIE as a valid ground for seeking asylum or refugee status. Although significant legal and social changes have occurred since the Canadian Immigration Act of 1952, which labelled homosexuals as "deviant" and "immoral" individuals posing a threat to national security, the Canadian Criminal Code reform of 1969, which decriminalized adult homosexuality, and Canada's repeal of discriminatory provisions that prevented gay or lesbian individuals from entering the country in 1977, the Canadian refugee system has historically applied a narrow, stereotypical definition of SOGIE refugees. Scholarship on SOGIE refugee migration in Canada since the 2000s has highlighted how SOGIE refugee claimants navigate Western cultural narratives of sexual and gender identities, coming out, and gender dysphoria. These individuals work with and against these narratives within a system that favours those who conform to Western notions of sexual citizenship and national belonging (Miller, 2005; Jordan, 2009; Kahn & Alessi, 2018; Fobear, 2019; Jacob & Oswin, 2022). During various stages of the asylum procedure, especially in their written statements and oral hearings, SOGIE refugee claimants are expected to conform to Western conceptions of gender and sexuality. If they fail to do so, they risk being labelled as "inauthentic" and "fake" claimants (D. A. B. Murray, 2014b; Verman & Rehaag, 2023). In this section, I undertake a critical examination of SOGIE refugee scholarship to illuminate underlying assumptions within the Canadian refugee system regarding a "deserving" SOGIE refugee claimant. Central to this analysis is the concept of "compulsory heterosexuality," which I will explore in the first part of the chapter. The subsequent discussion delves into the intersection of "homocolonialism" with homonationalism and compulsory heterosexuality, aiming to provide a concrete understanding of the assumptions underpinning the Canadian refugee system about a "deserving" or "authentic" SOGIE refugee claimant. Finally, I will examine the literature addressing SOGIE refugees' engagement with the Canadian refugee system, which is heavily influenced by homocolonial and homonationalist assumptions.

2.1.1 The Hegemonic Position of Compulsory Heterosexuality

In her essay "Compulsory Heterosexuality and Lesbian Existence," Adrienne Rich (1980) argues that the institution of heterosexuality is taken as the default, required, or even obligatory sexual orientation. She asserts that compulsory heterosexuality results in institutionalized inequality between heterosexuals and non-heterosexuals, and between men and women (p. 645). The central argument of Rich's essay is that compulsory heterosexuality depends on the ways in which lesbian identities are made visible or comprehensible as much as the ways in which they are made invisible or incomprehensible (McRuer, 2006, p. 369). The process through which heterosexuality is presently constructed or established as the primary sexual identity for women is through the utilization of lesbian existence as consistently and universally supplementary. In this sense, lesbianism is depicted as a subjugated alternative to heterosexuality and merely a reflection of patriarchal realities, both straight and gay. The imposition of compulsory heterosexuality, which designates certain identities as alternatives, ironically reinforces the ideological perception that dominant identities are not truly alternatives but rather represent the natural order of things (ibid., p. 369-370). This perception supports the continual subjugation of homosexuality to heterosexuality, fostering the institutionalization of heterosexuality as the "normal relations of the sexes" (ibid., p. 302). Concurrently, this institutionalization sanctions the subordination of homosexuality. Thus, queer identity is frequently viewed as a negative that holds no significance beyond a fabricated dichotomy between heterosexuality and homosexuality within compulsory heterosexuality's dominion.

Judith Butler elaborates on the elusive normalcy of heterosexuality that requires a subjugated alternative to be deemed as normal:

Compulsory heterosexuality sets itself up as the original, the true, the authentic; the norm that determines the real implies that "being" lesbian is always a kind of miming,

a vain effort to participate in the phantasmatic plenitude of naturalized heterosexuality which will always and only fail... There is no "proper" gender, a gender proper to one sex rather than another, which is in some sense that sex's cultural property. Where that notion of the "proper" operates, it is always and only improperly installed as the effect of a compulsory system (Butler, 1991, p. 21).

In this context, Butler's main argument is that heterosexuality presents normative sexual positions that are inherently impossible to embody. The persistent inability to identify completely and coherently with these positions exposes heterosexuality not only as a compulsory legal norm but also as an inevitable comedic performance. This perspective offers an alternative view from the gay/lesbian standpoint, suggesting that heterosexuality is both a compulsory system and a perpetual parody of itself (Butler, 2002, p. 166). Drawing on Butler's contention about the impossibility of a fixed heterosexual identity, one can deduce that a system of compulsory heterosexuality persistently depends on the ways in which queer individuals are made visible or comprehensible to depict heterosexuality as the natural order of things. In other words, the inevitable failure to approximate naturalized heterosexuality necessitates heterosexuality to rely on a subjugated alternative entity. Consequently, the hegemonic position of heterosexuality is consistently at risk of being disrupted (McRuer, 2006, p. 375). This precarious situation requires a subordinate alternative that contributes to the repetition necessary to maintain heterosexual hegemony. In order to explore the subjugated position of this alternative, which is necessary for the reiteration of compulsory heteronormativity, the next section will examine the concept of homonationalism introduced by Jasbir K. Puar.

2.1.2 Homonationalism and the Subjugated Status of SOGIE Refugee Claimants

The concept of homonationalism, coined by Puar (2005), is an abbreviation for homonormative nationalism. Homonormativity refers to a conservative and apolitical form of homosexuality

that not only does not challenge dominant heteronormative assumptions and institutions but also reinforces and strengthens them (Duggan, 2012, p. 50). Additionally, homonormativity entails a rejection of the publicizing strategies and claims of privacy in public spaces that were pivotal to the gay rights movement in favour of a domesticated and non-political form of privacy (ibid., p. 65). This concept promotes a state-sanctioned model of homosexuality that supports a narrow definition of equality as formal access to a few conservative institutions, freedom as impunity for prejudice, and significant inequalities in commercial life and civil society (ibid., p. 66). The homonationalist regime of power was vividly present in the public/private distinction that emerged within the framework of capitalist society in the 1970s, which was an important basis for the decriminalization of homosexuality. This distinction assumes that a private moral realm exists that is free of direct legal intervention (G. W. Kinsman, 1996, p. 215).

Homonationalism also refers to the conflation of sexual exceptionalism with the nation-state and the promotion of a particular domesticated homosexual culture that reinforces nationalist projects (J. K. Puar, 2017, p. 39). Homonationalism first reasserts heterosexuality as the norm, as the push for gay marriage is equivalent to the norm of heterosexual marriage. Secondly, it promotes nationalist homosexuality that is compatible with liberalism. Lastly, it fosters a transnational discourse of sexual exceptionalism that works against racialized bodies of pathologized nationalities (ibid., p. 51). Of significance is how national heterosexual romance narratives rely on the ways in which SOGIE refugees are made visible or comprehensible to depict national heteronormativity as the natural order of things. This is apparent in Luibhéid's explanation of why most nation-states may no longer ban the entry of SOGIE refugees into national borders:

National heteronormativity is thus a regime of power that all migrants must negotiate, making them differentially vulnerable to exclusion at the border or deportation after

entry while also racializing, (re)gendering, (de)nationalizing, and unequally positioning them within the symbolic economy, the public sphere, and the labour market. These outcomes, in turn, connect to the ongoing reproduction of particular forms of nationhood and national citizenship — which have ramifications for local, regional, national, transnational, and imperial arrangements of power (Luibhéid, 2008, p. 174).

The homonationalist regime of knowledge and power is evident in the responses to the Toronto gay village homicides that took place between 2010 and 2017. Bruce McArthur, a white gay man residing in Toronto, was responsible for at least eight deaths, with six of the victims being of South Asian or Middle Eastern descent, and one being homeless. McArthur, a small landscaping business owner, concealed the remains of several victims in planters at a client's yard. The case was eventually solved following the disappearance of Kinsman, a well-known white community activist, despite an earlier police investigation into the disappearance of Brown men from the gay village (Seitz, 2020, p. 460). Criticisms have been levelled at Toronto police for their handling of the case, particularly for their initial investigation, Project Houston, and for dismissing community concerns about a serial killer. Mayor John Tory reflected on the Toronto gay village homicides, stating, "I don't think people have any idea how the rest of the world—not in all places, but in many places—still have laws that are incredibly hostile to LGBTQ people and that they face terrible consequences—legal, social, and other consequences—and that Canada, for many of them, is a beacon of hope" (ibid., p. 462). This statement can be better understood in the context of Luibhéid's (2008) discussion on how the homonationalist regime of knowledge and power reinforces a specific domesticated homosexual culture and national belonging. Luibhéid emphasizes that heteronormative romance narratives of the nation-state portray SOGIE refugees as individuals who passionately desire the nation, as demonstrated by their decision to migrate. This portrayal serves to reinforce the desirability of the nation, ensuring that these migrants, who constitute a relatively

small group and pose no threat to the dominant system, contribute to the nation's strength. Consequently, citizens rely on the presence of these migrants as a means of affirming the nation's desirability (p. 175-180). This interpretation can be applied to Mayor Tory's statement, which suggests that even if racialized SOGIE refugees, primarily from the Middle East or South Asia, are murdered by a white gay man in Toronto's gay village, they still cling to the dream of migrating to Canada, perceived as a beacon of hope for the LGBTQ community. This narrative reinforces Canada's portrayal as a liberatory country within persistent white supremacist, colonial, and capitalist projects while obscuring the continuous discrimination experienced by racialized and sexual minorities within Canada (Ali, 2020, p. 30; Martin, 2022, p. 62).

In summary, prevailing progressive, unilinear, and White supremacist models often depict SOGIE refugee migration as a one-sided and linear movement from "repression" to "liberation." This depiction is ideological in nature because it relies on a narrow conception of liberation. According to Sara Ahmed (2010, p. 590), SOGIE refugees are expected to fulfill a "happiness duty" by presenting an optimistic image of themselves and their experiences in promotional materials. The happiness duty also entails a negative obligation not to discuss racism in the present. Through this project, it became evident that diversity-proud organizations often vehemently resist acknowledging racism. Speaking about racism is perceived as introducing negative emotions into these organizations, potentially damaging their self-image as diverse entities (ibid). In this context, Murray (2016, p. 20) maintains that the SOGIE refugee migration to liberation nation narrative adds a new layer to Ahmad's "happy migrants" since it assumes that the SOGIE refugee is a happy migrant because they have moved to a nation where sexual diversity is celebrated, contrasting it with "uncivilized" societies marked by widespread homophobia. These narratives follow an essentialist, unidirectional path, culminating in the liberatory moment of refugee hearings where claimants openly express their

sexual orientation and gendered identity during hearings in "free" Canada, with the expectation of grateful and compliant citizenship in return. This framework not only reinforces simplistic imperialist notions of the civilized West versus the uncivilized rest but also suppresses the ongoing experiences of homophobia, racism, sexism, and classism in Canada. The subsequent section will delve deeper into the ways in which LGBT rights have used as a benchmark to measure the level of civilization, perpetuating the hierarchical distinctions between "civilized" Western societies and "barbarian" non-Western societies.

2.1.3 Negotiating the Homonationalist Notion of Authenticity and Persecution in SOGIE

Refugee Claims

The assumption that the Western notion of sexuality and gendered identity holds universal validity poses a significant challenge for SOGIE refugee claimants during their hearing process. This universal and homogenizing categorization of sexual orientation upholds colonialist, xenophobic, racist, and sexist regimes. The notion of homocolonialism, introduced by Rahman (2014a), explores the intricate connection between the Western stereotypical notion of sexual orientation and gendered identity and colonialism. Rahman (2014b) maintains that the homonormative nationalist interpretation of sexual diversity should not be viewed as a unidirectional process. Instead, it serves as the foundation for Western exceptionalism deployed within the realm of international and internal relations. This deployment operates dialectically and definitionally, not only in relation to the "traditional" Eastern spaces but also within them (p. 279). In simpler terms, homocolonialism legitimizes and perpetuates Western exceptionalism by fabricating an oversimplified linkage between gay rights and progress in Western nations while labelling these rights as incompatible with traditionalism in non-Western countries (Langlois, 2018, p. 378). The implication of constructing such an insurmountable gap between Western and non-Western approaches to LGBT rights within the context of Western exceptionalism is that it attributes LGBT rights exclusively to the West,

thereby categorizing non-Western countries as opposing LGBT rights and modernity (Rahman, 2014b, p. 279). What is lacking in this Western exceptionalist narrative of transformation of LGBT rights is the recognition of the social origins of homophobia. Such a narrow and reductive framework assumes that homophobia stems solely from negative individual attitudes within traditional belief systems, such as religion (Rahman, 2020, p. 3). This perspective disregards the role of the institutionalization of heterosexuality as socially "compulsory." This institutionalization is rooted in essentialist models of gender, sexuality, and ethnicity, forming the basis for the stigmatization of diverse sexual orientations (ibid., pp. 4-6). Moreover, this shift toward an essentialist hierarchy of sexuality was not confined to the West; it was exported through Christian colonialism. This colonialism used the notion of "Eastern" sexual depravity to justify Western moral superiority (ibid., p. 7).

The homocolonial approach to LGBT rights assumes that transformation in LGBT rights can be achieved irrespective of the diverse historical and contemporary cultural, social, and political contexts present in countries beyond the Western world (Rahman, 2020, p. 7). In this regard, by establishing a globally uniform homonormative system of acceptability, mirroring heteronormative structures and institutions, the Global South is consistently portrayed as backward – a region devoid of progressive rights and mired in violent traditions (Delatolla, 2020, p. 155). As a result of establishing a homocolonial regime of LGBT rights as a benchmark to measure the level of civilization in the non-West, “rising power“ countries like India have attempted to detach themselves from being associated with the homophobic “third world” by decriminalizing homosexual relations. As Rao (2014) notes, the decriminalization of homosexuality in India is an attempt to distance the Indian state from the negative racialization of the Global South as being socially, politically, and economically underdeveloped. By engaging in homocolonial standards, India has attempted to fulfill the requirements of attaining a global civilized status, regardless of its continued social norms that

limit LGBT freedoms (p. 172). In this context, the requirement for SOGIE claimants to prove a well-founded fear of persecution based on their sexual orientation and/or gendered identity in their country of origin can be interpreted as a way to encourage them to construct a racialized and pathologized narrative of belonging within national borders. This narrative establishes a hierarchy of Western white, masculine, and industrialized superiority in relation to raced, gendered, and classed communities throughout history, which can be conceptualized as “hetero-turned-homocolonialist” (Delatolla, 2020, p. 179). It is essential to acknowledge that one aspect of homocolonialism involves the acceptance of its premises by Eastern regimes as a rationale for their homophobias, leading to the "export" of queers, given that their existence is allegedly prohibited (Massad, 2008, p. 163). Connecting the abstract notion of homocolonialism to the problematic of this research, the following section will explore the ways in which this Western exceptionalist notion of sexual orientation and gendered identity has been imposed on SOGIE refugee claimants during their hearing and refugee status determination.

2.1.4 Centering the Limitations of Linear Narratives of SOGIE Refugee Claimants and DCO List

One of the avenues through which scholars have explored the discursive impact of homonationalist and homocolonial refugee systems within the realm of SOGIE refugee migration scholarship is by examining the category of "inauthentic" LGBT refugees. This category refers to SOGIE refugee claimants who are characterized as "underserving" refugee claimants in that they fail to conform to Western homonationalist sexual categories (D. A. B. Murray, 2014b, p. 26). In the Canadian context, studies have shown that the current criteria in the Canadian refugee system for authentic LGBT refugees are based on an oversimplified, rigid, and transhistorical conception of acceptable and legitimate SOGI refugees. For instance, in "Real Queer: 'Authentic' LGBT Refugee Claimants and Homonationalism in the Canadian

Refugee System," Murray (2014) shows that an authentic SOGI refugee within the homonationalist Canadian refugee system is characterized as a "delimited LGBTQ identity", an "immutable essence" (p. 22), and constructed based on "specific assumptions about sexuality as fixed, discoverable, and progressing from a position of closeted to "coming out," in which disclosure serves as the culmination of this narrative" (p. 26). In another study, Jasmine Dawson and Paula Gerber (2017) argue that during the process of asylum adjudication, the criteria sought after are heavily influenced by Western conceptions of the linear and unchanging formation of sexual identity, characterized by an innate and occasionally pathological understanding of sexuality that "manifests as a coherent identity" (p. 303-304). In this context, Matthew Abbey (2022, pp. 1-2) argues that during their hearing, SOGIE refugee claimants are expected to adhere to the alleged truth regarding their sexual and gendered subjectivity, although this demand is not limited to that context. Rather than emphasizing the demand for SOGIE refugee claimants to authentically disclose their identities, they are encouraged to approximate the truth. Building upon Foucault's (2011) understanding of the regime of truth, the following section will examine the ways in which the question of the truth of SOGIE refugee claims is highly premised upon a narrow definition of sexual identity and how a significant deviation from this definition can lead to claims being deemed incredible.

SOGIE refugee claimants must establish a well-founded fear of persecution in their country based on their sexual orientation and/or gender identity (LaViolette, 2010, p. 184). One of the challenges SOGIE refugee claimants face during their hearing is providing evidence of their experience of persecution within their private spheres, which may have been perpetrated by family members, coworkers, and neighbours (Fobear, 2019, p. 236). Historically, the concept of persecution in international human rights and refugee law has been based on the masculine model of political engagement. This has led to a focus on public forms of persecution, which tend to disproportionately affect men, including those who identify as gay.

As a result, their experiences often align with the established criteria for asylum claims. In contrast, lesbians and many women face persecution in private settings, which can make it more challenging for them to demonstrate their eligibility for asylum (Neilson, 2005, pp. 419–420). It is important to note that the misconception that lesbian women are more accepted and less likely to face discrimination compared to gay men is not always accurate. Lesbian women often experience violence and discrimination at similar or even higher rates than gay men due to a combination of gender oppression and homophobia (Fobear, 2019, p. 236). Unlike gay men, who may face violence and discrimination in public spaces, lesbian women are more likely to experience violence in private spaces, making it difficult to document and prove the violence, and subsequently, they may struggle to provide evidence to support their claims of persecution (ibid).

Additionally, a significant challenge faced by SOGIE refugee claimants is that some countries are considered safe for the LGBT population simply because they have decriminalized homosexuality despite the prevalence of high levels of violence and discrimination against LGBT individuals (Walters, 2017, p. 11). This situation poses an additional challenge for claimants, as they must convince IRB members that their country is unsafe for them despite legal protections. This situation has been further complicated by the passage of Bill C-31 in 2012, now known as the Protecting Canada's Immigration System Act (PCISA), which created a list of designated countries of origin (DCOs) deemed safe and non-refugee producing. Asylum seekers from DCOs have a shorter refugee process (3 months) and no right to appeal a negative decision at the IRB, making it more difficult for them to seek refuge in Canada (Fobear, 2019, p. 234). For instance, Mexico is on the DCO list, which means that Mexican claimants have less time to build their cases and face more significant challenges in substantiating their claims despite the country's culture of homophobic machismo, where the police discriminate against homosexuals, are riddled with corruption, and operate outside the

law (Walters, 2017, pp. 11–12). Several countries on the DCO list, such as Croatia, Hungary, and Mexico, have high levels of violence against marginalized communities, including ethnic minorities, women, and LGBT individuals. This creates additional challenges for SOGIE refugee claimants in Canada, as the Canadian government considers these countries to be safe despite evidence showing that LGBT individuals in these countries face discrimination and violence due to not conforming to what is socially expected of them (Fobear, 2019, p. 235). The paradoxical situation of countries on the DCO list can be attributed to a homocolonial and Western exceptionalist framework of inclusion. This framework employs LGBT rights as a marker of a society's level of civilization, while concurrently bolstering Western hegemony through concepts of progress (Delatolla, 2020, p. 149). The ramifications of this approach lead to various forms of exclusion, spanning from the international to the individual level. The homocolonial outlook on LGBT rights, deeply rooted in Western exceptionalist ideals of queerness, exerts its influence on the international arena as well. A prime example is Human Rights Watch's (HRW) (2017) utilization of marriage equality as a benchmark to illustrate the geographic rift between states that safeguard and overlook LGBT rights. Despite the advancement made by countries such as Croatia, Hungary, and Mexico through the introduction of civil unions or registered partnerships, there persists a substantial disparity between the legal rights accorded to LGBT individuals and the prevailing public attitudes towards them in these societies. As reported by Equaldex (2023), Mexico, Croatia, and Hungary have LGBT legal rights indexes of 92, 82, and 65, respectively, while their public opinion indices for LGBT individuals stand at 57, 35, and 43. These discrepancies emphasize the importance of adopting a more nuanced perspective on LGBT experiences, acknowledging the intricate interplay of inclusion and exclusion within societies. By reducing the acceptance of LGBT individuals to a matter of marriage equality, HRW perpetuates a binary worldview that positions Western societies as superior to their non-Western counterparts. This

oversimplification neglects the diverse experiences of LGBT individuals and the complex social and political dynamics at play within societies (DeLatolla, 2020, p. 155). Thus, it is imperative to consider the broader context of LGBT rights and experiences to challenge Western exceptionalist assumptions and cultivate a more inclusive understanding of global LGBT issues.

SOGIE refugee claimants encounter another challenge during their hearing, which is the presumption that sexual orientation and gender identity evolve in a linear fashion. This assumption is rooted in the Western model of sexual identity development and ultimate fixity of sexual identity, which proposes a straightforward path for identity formation. According to this model, individuals start by denying and repressing their sexual identity in their home country, then progress to acceptance, and finally reach a stage of public acknowledgment and coming out in “free” Western countries like Canada (D. A. B. Murray, 2014a, p. 453). However, this trajectory does not accurately represent the experiences of many non-Western individuals and may not even be applicable to certain Westerners, including women and racial and ethnic minorities (Berg & Millbank, 2009, p. 197). The Western model of sexual identity development is based on the idea of a unidirectional migration towards a nation of refuge, where the claimants can finally express their sexual orientation and gender identity openly and freely. This narrative assumes that the refugee hearings will be a liberatory moment for the claimants, where they can officially “come out” to the state and be protected. In return, claimants are expected to be grateful and docile citizens (D. A. B. Murray, 2016b, p. 21). However, the formation of sexual identity is neither universal nor linear. It cannot be assumed that a claimant undergoes a straightforward progression toward self-realization, neatly aligning with their arrival in the host country or assertion of refugee status (Berg & Millbank, 2009, p. 200).

In this context, Sima Shakhari (2014) contends that the recognition of refugees within human rights regimes relies on essentialist notions of identity, which are perceived as fixed and

unchanging, while also progressing in “the teleological time of progress” (p. 1005). This is evident in the Canadian Supreme Court's recognition of SOGI refugees as members of a particular social group for Geneva Convention purposes, based on the notion that this population is defined by an innate or unchangeable characteristic (Adjin-Tettey, 1997, p. 22; Storey, 2003, pp. 424–425). Similarly, the 2012 UNHCR Guidelines recognize SOGI refugees as members of particular social groups defined by an innate or unchangeable characteristic (UN High Commissioner for Refugees (UNHCR), 2012, Notes 44 & 47). Shakhsari also contends that the refugee, as a transhistorical and fixed entity, gains recognition only when situated in specific spatial contexts (such as the Global South) and experiences a temporal delay in the linear progression of development. The linear reasoning underpinning human rights discourse produces refugees as individuals who transition from a backward and spatially stagnant homeland toward a future of progress, where they receive the “gift of freedom.” The fixed and universal sexual identity of the refugee—whether gay, lesbian, or transgender—remains constant in this progression, with its authenticity assessed against universal normative sexual categories, particularly those of white Euro-American subjects (2014, p. 1005).

An expressive example of the linear narrative of migration is manifest in specific questions posed to SOGIE refugees during their hearings, such as: How and when did your first romantic “kiss” with your partner happen? Can you provide an example from childhood that shows how you were different from your heterosexual peers? When did you first realize that you did not follow traditional sexual norms in your society? (Dearham, 2017, p. 46; Danisi et al., 2021, p. 218). This linear narrative of coming out imposes undue and excessive burdens on transgender and bisexual claimants, who may not align with the restrictive and linear categorization of SOGIE refugees (Jordan, 2009, p. 177). Moreover, it diminishes the likelihood of success for transgender and bisexual individuals who do not neatly fit into the Western and fixed conception of sexual orientation and gendered identity. Similarly, lesbian claimants who

have children or engage in non-monogamous relationships with their lesbian partners while maintaining traditional heterosexual relationships also face reduced chances of success in their hearing, as shown in some studies (Fobear, 2019, p. 233; Mulé, 2020, p. 1176).

2.2 Critical Examination of Human Rights Discourses on SOGIE Refugee Hearings

This section focuses on the SOGIE refugee claimants' engagement with the Canadian refugee system that is highly informed by homonationalist assumptions. The main argument underscores the importance of shedding light on how SOGIE refugee claimants navigate the prevailing narrative that portrays them as "happy migrants" fleeing "uncivilized societies" plagued by rampant homophobia and seeking refuge in a nation where sexual diversity is celebrated as an integral aspect of a "civilized" society (D. A. B. Murray, 2016b, p. 20). Such a narrative is highly informed by "humanitarian logic" within which SOGIE refugees are deemed to have no choice but to "flee," "escape," or leave their LGBT-hostile countries to Canada as the "safest haven for persecuted gays and lesbians" (ibid., p. 19). This section examines the discursive implications of humanitarian logic as a hegemonic discourse that perpetuates a Western exceptionalist distinction between SOGIE refugee claimants as passive victims and the Western refugee systems as a proactive subject, source of meaning, and action.

2.2.1 Humanitarian Logic and SOGIE Refugee Claims

One of the challenging stages of making a refugee claim for SOGIE refugee claimants is to construct a racialized and pathologized narrative about their country of origin that aligns as closely as possible with the refugee-granting nation's expectations of non-Western countries, as well as an authentic sexual orientation and gender identity. One of the fundamental demands involved in creating such a narrative is that SOGIE claimants need to perform "refugeeness," a specific identity formation characterized by victimhood, passivity, and gratitude, in order to be recognized as authentic refugees (D. A. B. Murray, 2016b, p. 66). In this narrative, a genuine or authentic refugee is regarded as a cultural figure whose primary characteristics are pure

victimhood, passivity, and helplessness, and must be recognized as the "correct" object of compassion and pity in the humanitarian regime of protection (Hall, 2012, p. 104). Miriam Ticktin (2016) describes how this iconic and imaginary cultural figure of the "deserving" genuine refugee elicits specific humanitarian responses. Ticktin argues that humanitarianism, despite its seemingly compassionate nature, is quite restrictive in its emotional scope, limiting our capacity to respond to crises. This narrow emotional bandwidth fails to acknowledge the unique value of individual lives and specific deaths, and instead prioritizes a broader focus on general suffering. Consequently, humanitarianism offers little motivation to advocate for change at the political level (2016, p. 256). In the context of SOGIE refugees, the categorization of a deserving refugee is influenced by the "politics of care," which shapes individuals as "suffering" while deeming others as undeserving (such as the impoverished body). This in turn results in the production of a form of "armed care" or violence through compassion (D. A. B. Murray, 2017, p. 526). As Ticktin noted, the politics of care can be seen as a form of antipolitics in which only specific bodies, such as those who are sick, racialized, violated, or suffering, are recognized as morally acceptable. Refugees can access rights only to the extent that they remain incapacitated and deserving of compassion (2011, p. 218). In this situation, terms such as "economic migrants," "bogus refugees," and "genuine refugees" are used to define and restrict the legality of individuals crossing national borders. These labels assume the existence of a genuine refugee status, represented by individuals who genuinely require international protection according to the Refugee Convention, and distinguish them from those who migrate seeking economic betterment (Akin, 2019, p. 22). In this context, LGBT asylum seekers are often portrayed as pathologized individuals who have experienced constant suffering due to depression and trauma related to their assumed repressed sexuality in their country of origin. In this narrative, LGBT refugees are ready to be liberated in the refugee-receiving country, provided they demonstrate a genuine sense of victimhood (p. 31). The logic of saving

"suffering" LGBT individuals from impoverished regions is a complex phenomenon that unfolds in two distinct, yet interconnected, ways. Firstly, non-governmental organizations (NGOs) and international institutions intervene within these areas, implying a movement towards them, that is, "going out to save them at home." This approach is rooted in a paternalistic and colonialist mentality that positions Western actors as saviours and LGBT individuals from impoverished regions as passive victims in need of rescue. It ignores the agency and resilience of marginalized communities and reinforces the idea that Western intervention is necessary to address the problems faced by LGBT individuals in the Global South. On the other hand, women and queers who cross migration borders may receive humanitarian aid and shelter through various protection mechanisms in the Global North, where the idea is to "receive them, as they cannot be saved at home" (Giametta & Havkin, 2021, p. 102).

In this context, Christine Klappeer (2018) shows how LGBT rights have become a catalyst for development projects. She argues that while queers were previously viewed as hindering development, this population is now perceived as "temporal" and "cultural brokers" within new frameworks, capable of willingly breaking with their "time" and "culture" due to their embodied modernity. They are seen as cultural mediators and "integrable others," distinct from "non-integrable others," who desire to participate in the modernity project (2014, p. 107). The alignment between sexual modernization and development is further reinforced by Western political leaders and actors in global financial institutions, such as the World Bank and the IMF. These organizations have recently begun to fund research, critique, and interventions aimed at addressing homophobia in impoverished regions following the recognition that homophobia (as a distinct form of social discrimination) hinders economic growth (Giametta & Havkin, 2021, p. 102). In this narrative, the Bank ignores its own history of partnering with faith-based organizations in the region, which are often at the forefront of moral panics about

sexual minorities. Instead, the Bank sees homophobia as a cultural problem specific to certain countries without examining the underlying socio-economic conditions that contribute to hostility towards queers. This approach externalizes the problem of homophobia and conceals the violence of capitalism. The argument that LGBT inclusion is "good for development" and "good for business" reduces human subjects to entrepreneurs and views homophobia as an economic structural barrier to be removed, rather than addressing the root causes of discrimination (ibid).

The humanitarian logic underlying the statement "receiving them as they cannot be saved at home" is noteworthy due to the recognition of LGBT refugees as both "valuable" and "suspicious" simultaneously. They are valorized because they can be consumed in socio-political contexts and neoliberal agendas where the protection of women and gender and sexual minorities' rights is increasingly considered a priority of neoliberal democracies (Giametta & Havkin, 2021, p. 102). Yet, they are also assumed to be "suspicious" in the eyes of refugee systems in Global North countries, where they are viewed as threatening bodies, "'guilty' of crowding or 'invading' the national space" (ibid). The burden of suspicion and the ordeal of truth-telling are evident when facing the asylum procedures. For instance, Fassin and Rechtman (2009, p. 273) show that violence, suffering, politics, psychiatry, experience, care, memory, and truth have been linked by developing a therapeutic technique in examining LGBT refugee claims. This therapeutic technique, specific to victims of torture, has changed the role of caregivers to expert witnesses who hold the keys to the truth about refugees (2009, p. 274). As a result of the establishment of this therapeutic technique, the refugees' own words are no longer considered sufficient to establish the truth of their claims, but doctors in bodies, psychologists, and psychiatrists in the psyche were deemed credible in finding the scars left by the alleged violence (ibid). In the case of SOGIE refugee claimants, adjudicators encounter challenges in securing persuasive evidence for claimants' SOGIE credibility, as their narratives

often involve non-visible characteristics (Spijkerboer, 2013, p. 100). To address this, adjudicators increasingly rely, at least partially, on letters from publicly recognized LGBT organizations and institutions (D. A. B. Murray, 2016b, p. 470).

2.2.2 Documenting Sexual Orientation and Gender Identity in SOGIE Refugee Claims: Navigating and Transforming Homonational Narratives

Along with substantiating a well-founded fear of persecution, documenting sexual orientation and gender identity is another vital and intricate aspect of making claims for LGBT refugees. In his anthropological research, Murray (2016) highlights the significance of producing documents in sexual orientation refugee claims in Canada. He indicates that this process contributes to the creation and surveillance of the category of the "sexual orientation refugee" (p. 465). To substantiate the "genuineness" of their sexuality and gender identity, LGBT refugee claimants may submit various documents, one of which is the Personal Information Form (PIF) as the key document explaining the basis on which the claimant is making a refugee claim (p. 472). An important set of other documents relevant to substantiating their sexual orientation identity is documenting membership in LGBT organizations that can be viewed as proof that the refugee claimant was "participating in the community" and establishing a new life in Canada (G. Kinsman, 2018, p. 119; Mulé, 2020, p. 213). Other potential forms of documentation include letters from friends and family members, photocopies of profiles from gay cruising/dating websites like "Gay.com" or "Adam4Adam.com" (which may not be sufficient to prove anything on their own), and images featuring romantic/life partners or depicting one's sexual orientation identity within LGBT communities or at events like the Toronto Pride parade (D. Murray, 2011, p. 131; D. A. B. Murray, 2016a, p. 474). In addition to the documents mentioned earlier, claimants are often advised to compile evidence that supports or proves their life narratives. In most instances, they were guided to shape their narrative in a way that aligns with the UN definition of "refugee," which necessitates substantiating a well-

founded fear of persecution based on membership in a specific social group (D. A. B. Murray, 2016a, p. 474). A more comprehensive analysis should be conducted on the inherent issues of legitimizing an authentic sexual orientation through letters confirming participation in publicly recognized and funded Canadian LGBT community organizations. These letters contribute to the formation of a narrow and privileged notion of sexual orientation that represents particular compositions of raced, gendered, and classed histories and subjectivities in Canada. This may work to the disadvantage of some claimants who may not self-identify with this definition (p. 475). This point is evident in Aryan Karimi's (2020) study on the limits of social capital for refugee integration, where he shows that not all SOGIE refugees identify themselves with this narrow and delimited definition of sexual orientation. The study shows that only two of the nineteen Iranian gay male research participants reached out to Canadian LGBT-oriented organizations, such as the Rainbow Railroad and Access Alliance, which advocate for LGBT refugee rights (p. 92). There are several overlapping reasons for this, including the implicit homonormative agendas of mainstream LGBT communities, which prioritize the demands of white middle-class members and marginalize the voices of racialized members, thereby reproducing forms of capital that are mostly accessible and beneficial to White middle-class members (ibid., 93). This semi-mandatory participation in homonationalist agendas has been interpreted as part of the recolonization process, stemming from the IRB's reluctance to acknowledge that some SOGIE individuals come from places where same-sex orientation and gender variance may not be defined or culturally and socially recognized (Lee, 2018, p. 66). The Canadian refugee system's project to recolonize SOGIE claimants involves herding them into a predetermined notion of the SOGIE refugee that aligns with its human rights framework. This homonationalist agenda requires claimants to acculturate and assimilate into the recognized Canadian LGBTQI culture, which in turn reinforces Canada's image as a rescuer, savior, and safe haven. The alignment of claimants with the Westernized narrative of IRB

reviewers feeds into this homonationalist agenda, making it difficult for those who do not fit the mold to seek refuge and protection (Rinaldi & Fernando, 2019, p. 33; Mulé, 2020, p. 218).

Murray (2016, p. 475), however, reveals that some SOGIE refugee claimants strategically leverage their membership in Canadian LGBT organizations to validate their SOGIE for refugee purposes, thereby improving their chances of application success. Specifically, he observes that numerous members of LGBT organizations in Canada ceased their participation after securing successful hearings and attaining Convention Refugee Status, given that they perceive no further benefits in attending these organizations post-achievement of their objectives (*ibid*). This finding corresponds with other studies, asserting that SOGIE refugee claimants are not solely passive victims of the Canadian homonationalist refugee system, but also deliberately manipulate their identities to adhere to the anticipated narratives of authentic LGBT refugees (Fobear, 2016, p. 66; D. A. B. Murray, 2016a, pp. 475–476; Koçak, 2020, p. 39). In this context, Kahn and Alessi (2018) apply Yoshino's concept of "reverse covering" to expound on the lived experiences of LGBT refugees who strategically conform to stereotypical expectations of sex, race, or social identity categories in the prevailing culture of Global North countries (p. 25). This term pertains to the circumstances wherein SOGIE asylum seekers overemphasize stereotypical traits linked to LGBT group membership in LGBT refugee-receiving nations to fulfill the constricted standards for meritorious LGBT refugees (p. 35). Murray refers to this strategic performance of the homonationalist idea of an "authentic" SOGIE refugee claimant as "aaptive agency," which constitutes the focal point of the subsequent section, accentuating the contribution of this research to the burgeoning field of SOGIE refugee studies.

Murray (2016) draws on the concept of "resistive performativity" used in the work of Pamela J. Kea and Guy Roberts-Holmes (2013) to expand on his notion of adaptive agency. In their studies on Gambian female asylum seekers in London claiming asylum based on the threat

of forced female genital mutilation, Kea and Roberto-Holmes note that these women work to produce a victim identity by portraying themselves as victims of forced female genital mutilation (FGM) and a patriarchal, "backward" culture. These performances reinforce Western feminist accounts of oppressed "third world" women and imperialist imagery of the "other," partly reproducing the relations of subordination within which female asylum seekers exercise their agency. In essence, their agency or capacity for action is a "product" of these relations of subordination (p. 109). Kea and Roberts-Holmes refer to the strategic performance of producing a victim identity by Gambian female asylum seekers as a form of resistive agency because it challenges a state system designed to turn down most asylum claims while simultaneously complying with asylum adjudicators' expectations in producing their own victim identities in an attempt to have their claims recognized (p. 99-100). They argue that this form of agency transcends the liberal notion of agency based on a dichotomy between resistance and compliance, asserting that Gambian female asylum seekers exhibit agency not by their resistance but by strategically complying with the refugee system by producing a victim identity (p. 100). Although Murray (2016b) acknowledges the agency of refugee claimants in actively learning about and attempting to navigate the refugee apparatus successfully, he contends that the performances in the play at the Toronto LGBTQ community center do not convey a form of resistive performativity similar to what Kea and Roberts-Holmes observed in their work with asylum seekers. Instead, Murray argues that the final performance of the play reflected hegemonic homonationalist discourses prevalent throughout the Canadian refugee apparatus (p. 76). Murray acknowledges the limitations of this form of agency, as it benefits a few while potentially penalizing others, consequently reinforcing the "hegemonic homonational discourses found throughout the Canadian refugee apparatus" (ibid).

One would argue that a potential source of transformation in SOGIE refugee determination might be the Guidelines introduced by the IRB to provide a more inclusive

understanding of non-Western SOGIE. The chairperson of the IRB issued *Guideline 9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression* in May 2017 to address certain stereotypes linked to diverse SOGIE refugee claimants (Immigration and Refugee Board (IRB) of Canada, 2017). To be more specific, the purpose of Guideline 9 is to “address the particular challenges SOGIE individuals may face in presenting their cases before the IRB and establish guiding principles for members in adjudicating cases involving SOGIE” (Immigration and Refugee Board (IRB) of Canada, 2017, Note 1.1). This Guideline provides guidance on addressing challenges in presenting evidence for individuals with Sexual Orientation, Gender Identity, and Expression, and Sex Characteristics (SOGIESC), emphasizing the proper use of terminology and language in legal proceedings, protecting sensitive information in reasons for decisions, avoiding stereotyping and incorrect assumptions when assessing evidence provided by claimants, and promoting awareness of unique circumstances that may impact findings across the four divisions (*ibid.*, n. 1.4). Under section 3.1, the Guideline recognizes that every SOGIE refugee claimant may have experienced a unique experience of harm and persecution, influenced by a complex interplay of factors such as "ethnicity, religion, faith or belief system, age, disability, health status, social class, and education." Moreover, this Guideline encourages IRB members to avoid relying on stereotypes or incorrect assumptions when adjudicating cases involving SOGIESC individuals, as such approaches undermine the fundamental human dignity of the individual (*ibid.*, n. 6.1). Stereotypes and assumptions to avoid in cases involving SOGIESC individuals include: equating appearance or mannerisms with sexual orientation, linking occupation to SOGIESC, assuming specific sexual experiences or marital choices, associating promiscuity with SOGIESC, and presuming knowledge or disclosure patterns about one's sexual orientation or gender identity. Other misconceptions include expectations related to cultural, religious, and community engagement, as well as assumptions about seeking specific treatments or

conforming to universal narratives (ibid). The Guideline also notes, "An individual with diverse SOGIE may not have participated in LGBT culture, organizations, or events in their country of reference, nor do so once in Canada" (ibid., 7.2.3).

Although the IRB Chairperson's Guideline 9 offers valuable insights into the intricate challenges faced by SOGIE-based refugee claimants, it alone cannot effectively prevent the perpetuation of homonationalist narratives (Rinaldi & Fernando, 2019, p. 38; Mulé, 2020, p. 220). A case in point is Section 7.6 of the Guideline, titled "Vagueness," which states that "testimony about same-sex relationships that is vague and lacking in detail may support a negative credibility inference." Neglected in this expectation that SOGIE refugee claimants should provide a clear and consistent narrative of their fear of persecution based on their SOGIE in their country of origin is the potential impact of traumatic experiences on memory and recall. Trauma can significantly affect an individual's ability to recollect specific details of traumatic events, while recounting such incidents may result in re-traumatization (Rinaldi & Fernando, 2019, p. 38). Moreover, Mulé (2020) underscores that the revised Guideline 9 on SOGIE cases continues to present obstacles for SOGIE claimants, as it emphasizes the requirement for proof of SOGIE over proof of persecution. This prioritization exacerbates recolonizing and homonationalist assumptions, perpetuating an imbalanced assessment process. Furthermore, the Guideline's failure to incorporate international policies addressing these challenges can further impede SOGIE claimants' ability to successfully traverse the refugee determination process (p. 220). Mulé's critique highlights that, despite the IRB's noteworthy strides in revising Chairperson's Guideline 9, the updated Guideline remains inadequate in sensitively and comprehensively considering the distinct circumstances and challenges experienced by SOGIE asylum seekers and refugee claimants (p. 216).

In conclusion, taking into account the limitations of the IRB's Guideline 9 and the restricted transformative potential of SOGIE refugees' adaptive agency, as observed by Murray,

it is essential to raise a critical question: Where can I identify a source of transformation for SOGIE refugee claimants to disrupt and interrogate Western exceptionalist and homonationalist assumptions of a "deserving" and "authentic" SOGIE refugee? How can SOGIE refugee claimants transcend neoliberal, classed, and raced notions of sexual and gendered identity that perpetuate normative categories such as the "good immigrant" and "proper citizen," creating a dichotomy between the desirable and undesirable? (D. A. B. Murray, 2016a, p. 520). This dichotomy simultaneously constructs the figure of the "bad immigrant" and the "deviant citizen." This homonationalist framework represents a new dimension in the relationship between sexual citizenship and the nation-state, where the homosexual, previously seen as a deviant, criminal "bad" citizen in twentieth-century American and Canadian state actions and discourses, is now replaced by the figure of a grateful homosexual or transgender victim of a foreign nation-state with repressive laws, practices, and attitudes. This victim is rescued and granted citizenship in a supposedly "enlightened" democratic nation-state like Canada or the USA (ibid., p. 523). The empirical part of this study centers on the facets of SOGIE refugee claimants' narratives with the potential to disrupt and interrogate such a homonationalist and Western-exceptionalist notion of a "deserving" SOGIE refugee claimant. To accomplish this goal, in the following chapter, I will narrow down and concretize the literature reviewed in Chapters One and Two, providing a solid foundation for a concrete analysis of the underlying assumptions of the Canadian refugee system regarding "deserving" SOGIE refugee claimants. The purpose of reviewing these assumptions is to ultimately shed light on the ways in which specific elements of SOGIE refugee claimants' narratives challenge these assumptions. Chapter Three will provide a seamless transition from the literature reviewed in Chapters One and Two to the empirical part of the analysis, concentrating on the detailed examination of SOGIE refugee case determinations by IRB members.

Chapter Three: Methodology

This chapter serves as a bridge between the literature review and the study's empirical analysis and findings. The initial section of this chapter offers a summary of the literature reviewed in previous chapters. The primary purpose of this summary is to narrow down the study's scope of analysis by identifying the key assumptions underlying the Canadian refugee system's process of determining SOGIE refugee claims. Judith Butler's concept of citationality and Diana Fuss's perspective on identity categories serve as the foundation for interpreting these assumptions and formulating research objectives and questions. Next, I will offer a description of the dataset utilized to address the research questions, as well as an explanation of the sampling strategy employed. Finally, I will explain the method used to analyze the data, emphasizing the step-by-step process taken to address the research questions. This sets the stage for the detailed analysis presented in the next chapter.

3.1 The Canadian Refugee System's Assumption of a “Deserving” SOGIE Refugee Claimant

Building upon the previous chapter's literature reviews, this section delves deeper into the specific themes underpinning the Canadian refugee system's assumptions about a “deserving” SOGIE refugee claimant: *The Public/Private Discourse of LGBT Rights*, *The Linear, Progressive Narrative of SOGIE*, and *The Homocolonial Inclusion of LGBT Rights*.

3.1.1 The Public/Private Discourse of LGBT Rights

The public/private discourse of LGBT rights has its roots in the partial decriminalization of homosexuality in the 1950s and 1960s, which established a legal distinction between the public and private spheres within the context of capitalist society (Kinsman, 1996, p. 157). This legal distinction often justified state intervention in "private" matters only when deemed necessary to prevent harm (ibid., 215). During this period, the increase in "homosexual offences" based on the criminal law of the time was deemed deeply concerning, particularly when men in

positions of trust and responsibility were involved. This trend raised concerns as it undermined the decision-making abilities of these men and challenged the notion of homosexuality as an “illness,” as there was no clear cause or cure for that (ibid., 221). In response to this problematic situation, the capitalist distinction between public and private spheres was used to create categories for policing and regulating the problem. In this distinction, the public sphere is associated with duty, work, and impersonal decision-making, while the private sphere is seen as a sanctuary for rest, peace, and emotional intimacy. Modernization has led to a polarization of these two realms, with the public sphere becoming increasingly dominated by the market, bureaucracy, and social organizations, and the private sphere becoming more focused on the nuclear family and romantic love (Backscheider & Dykstal, 2013, p. 2). This public/private distinction has resulted in a liberal legalism of homosexuality, where homosexual desires are considered private morality and not the law's business (Kinsman, 1996, p. 214). One of the significant implications of this capitalist public/private distinction was the decriminalization of adult homosexuality in private, which was proposed by the Wolfenden Report⁷ and included in the Canadian Criminal Code reform of 1969 (ibid., p. 182-224). However, this public/private construct has been used to control, regulate, and constitute non-conforming/non-normative sexuality, discriminate against homosexuals in the public sphere, and inform their daily experiences of the world (Freeman & Mensch, 1987, pp. 238, 250). This change in the law marked an important shift in the way that homosexuality was viewed and regulated in society.

The public/private legal distinction has remained a significant factor in defining persecution within international human rights and refugee law. This influence is evident in legal documents, such as the UNHCR Guidelines, which outline the criteria for determining refugee status. Historically, the concept of persecution within this legal framework has been deeply

⁷ The Wolfenden Report (1957) was a significant document published in the United Kingdom recommending the decriminalization of homosexual acts between consenting adults in private. Chaired by Sir John Wolfenden, the Committee on Homosexual Offences and Prostitution produced this influential report.

intertwined with the public/private legal distinction (Akin, 2019, p. 31; Mayers, 2018, p. 156). Furthermore, the public/private construction plays a key role in defining and interpreting persecution in asylum claims based on SOGIE. Based on this construction, public forms of persecution, such as violence or harassment perpetrated by state or non-state actors, are often perceived as more severe and “deserving” of protection than private forms of persecution. This emphasis prioritizes the experiences of men, particularly those deemed to be visibly gay or “effeminate.” As a result, a standard model of persecution has emerged, built upon Euro-American conceptions of a stable, inherent, and visibly identifiable gay identity. SOGIE refugee decision makers, such as IRB members, may then oversimplify the experiences of SOGIE claimants to fit this model, posing challenges to those whose experiences do not conform to this model (Mayers, 2018, p. 159). As Victoria Neilson (2005) emphasizes, this Eurocentric model disproportionately overlooks the experiences of lesbians and many women who often face persecution in the private sphere, making their fear of persecution challenging to substantiate (p. 419-420). She also emphasizes the need to dismantle the inaccurate assumption that lesbian women are less susceptible to persecution than gay men. Lesbian women often experience equally severe, and sometimes even greater, levels of violence and discrimination due to the intersecting forms of oppression based on gender and sexual orientation (Fobear, 2019, p. 236). Lesbian women's persecution often occurs in private spheres, making it difficult to document and present as evidence for asylum claims (ibid). Mert Koçak's (2020) study further illustrates this challenge, where one of his research participants who was an Iranian SOGIE asylum seeker in Turkey prioritized highlighting police persecution over family-based violence to fit the expected narrative of public persecution and gain recognition as a "deserving" refugee (p. 39). In such a narrative, the association of "being visibly queer" in public with persecution and deservingness may lead to the perception of those who are not visibly queer as “fake” and undeserving refugee claimants. Fobear also (2023)

highlights this assumption with the case of Sara and Juliet, a lesbian couple seeking asylum in Canada based on their SOGIE. As queer women, their stories of being persecuted based on their SOGIE defied normative gender expectations and posed a threat to the patriarchal power structure, making them more vulnerable to persecution in their country of origin. They did not present photographs taken before they arrived in Canada due to the constant fear of violence, which made it too risky to have evidence of their lives together (p. 330). The photographs taken and chosen for their hearings demonstrate how their intimacy was limited to the private spheres as going out as a queer couple in public was not an option for them. In this way, Juliet and Sara's history reveals a different story than the Canadian refugee system's discourse surrounding queer asylum seekers who demand persecution in public spheres due to being openly lesbian (p. 332).

3.1.2 The Linear, Progressive Narrative of SOGIE

The Western model of sexual orientation and gender identity can be problematic for SOGIE refugee claimants as it presumes a universal and linear development of sexual orientation and gender identity. In this view, individuals initially reject and conceal their sexual identity within their home country. They then "progress" towards acceptance, ultimately arriving at a point of public disclosure and self-expression in "free" Western countries such as Canada (D. A. B. Murray, 2014a, p. 453). However, this specific path may not accurately represent the experiences of many individuals from non-Western backgrounds and may not even be relevant to certain Westerners, including women and those from racially and ethnically diverse communities (Berg & Millbank, 2009, p. 197). The Western model of sexual identity development presumes a unidirectional progression towards a moment of liberation in refugee hearings, where claimants can freely express their SOGIE in return for being appreciative and obedient citizens (D. A. B. Murray, 2016b, p. 21). Nevertheless, this model may not consider the unique and diverse experiences of SOGIE refugee claimants who may maintain different

cultural, social, and personal perceptions of their sexual orientation and gender identity. It may also not consider the ongoing challenges and discrimination related to refugees' SOGIE, even after being granted refugee status in the host countries (Berg & Millbank, 2009, p. 200). The recognition of SOGIE refugees within human rights regimes relies on essentialist and fixed notions of identity, developing in a linear progression of development. According to Shakhari (2014), refugees are only recognized in certain spatial contexts, and their development is temporally delayed. Human rights discourse portrays refugees as individuals moving from a "homeland" that is considered backward towards a future of progress and freedom (p. 1005). In this progressive and Western exceptionalist narrative, the refugee's sexual identity is viewed as fixed and universal, and its authenticity is evaluated against universal normative sexual categories (ibid). This essentialist and linear progressive notion of sexual orientation and gender identity is evident in both the 2012 UNHCR Guidelines and the Canadian Supreme Court's recognition of SOGIE refugees as members of a particular social group for Geneva Convention purposes, which defines being a member of particular social groups by an innate or fixed characteristic (Adjin-Tettey, 1997, p. 22; Storey, 2003, pp. 424–425; UN High Commissioner for Refugees (UNHCR), 2008, Notes 44–47). In other words, the global LGBT human rights discourse assumes that the freedom of LGBT individuals is dependent on legalized public visibility, which has serious implications for how SOGIE refugee board members interpret the archive of queer history in the Global South. The global LGBT human rights regime may construct queerness in ways that do not recognize sexuality and desire that do not conform to Western LGBT subjectivity (Nicol et al., 2018, p. 23). This essentialist understanding of non-Western sexual orientation and gender identity contributes to the construction of Global South countries as transhistorically and transculturally homophobic, which leads to the silencing of local LGBT individuals and the denial of their agency by prioritizing intervention by Western LGBT human rights regimes (ibid.).

3.1.3 Homocolonial Inclusion of LGBT Rights

Chapter Two highlighted a substantial challenge for SOGIE asylum seekers from “rising power” countries: proving a well-founded fear of persecution despite the legal decriminalization of homosexuality in these countries. This misleading classification disregards the ongoing presence of widespread violence and discrimination against LGBT individuals in these countries (Walters, 2017, p. 11). This assumption was reflected in the 2012 Protecting Canada's Immigration System Act (PCISA), or Bill C-31, which establishes a list of safe countries, referred to as designated countries of origin (DCOs), that are deemed non-refugee-producing (Chekaraou Ibrahim & Jian, 2019, p. 79). For instance, Canada designated Mexico as a safe country in February 2013 despite a significant difference between LGBT legal rights and public opinion indices in Mexico, with scores of 92 and 57, respectively (Equaldex, 2023b). The LGBT legal index evaluates the current legal standing of various issues affecting the LGBT community, including the legality of homosexuality, same-sex marriage, transgender rights, anti-discrimination laws, and censorship laws. The public opinion index assesses societal attitudes towards LGBT people by aggregating data from reliable sources, such as surveys and polls, and is calculated by taking the average of all surveys conducted in a particular region (Equaldex, 2023a). The following table illustrates the difference between the legal equality index and public opinion on LGBT individuals in some countries listed in the Canadian immigration system as DCOs, highlighting the limitations of using only the legal index as a criterion for considering a country safe for LGBT individuals.

Table 1: The Gap between the LGBT Legal Index and Public Opinion Index in Select Designated Countries of Origin

Country	LGBT Legal Index	LGBT Public Opinion Index	Percentage Difference ⁸ (%)
Chile	100	61	39
Croatia	82	34	58
Cyprus	76	36	52
Estonia	88	42	52
Hungary	65	43	34
Israel (excludes Gaza and the West Bank)	80	43	46
Latvia	65	38	41
Lithuania	64	27	58
Malta	100	72	28
Mexico	92	57	38
Poland	65	45	31
Portugal	91	61	33
Romania	57	37	35
Slovakia Republic	58	36	38
Slovenia	86	51	41

Source: Equaldex. (2023). Equality index. Retrieved from

<https://www.equaldex.com/equality-index>

The table illustrates a significant gap between the LGBT legal index and public opinion about LGBT individuals in certain countries on the DCOs list. For instance, in countries such as Croatia, Cyprus, Estonia, Lithuania, Israel, Latvia, and Slovenia, the difference between the

⁸ The formula for calculating the percentage difference is: $\frac{(X2 - X1)}{X1} * 100$

LGBT legal index and public opinion about LGBT individuals exceeds a 40 percentage difference. This gap highlights the importance of considering both legal protections and societal attitudes when examining the safety of LGBT individuals in a country. One of the implications of this gap is the widespread threat of violence and persecution against LGBT individuals, despite the existence of legal protection, in certain DCO countries, such as Croatia, Hungary, and Mexico (Fobear, 2019, p. 235).

The contradictory situation in some countries on the DCO list can be attributed to the homocolonial regime of SOGIE refugee protection, where LGBT rights are used not only as a benchmark to evaluate a society's level of civilization in non-Western countries, but also as a tool that reinforces Western hegemony and neoliberal human rights through concepts of progress (Delatolla, 2020, p. 155). The homocolonial approach to LGBT rights, which is based on a Western exceptionalist notion of the right way to be queer, is evident at the international level. For example, Human Rights Watch (HRW) uses the benchmark of marriage equality to highlight the geographic division between states with and without LGBT rights (*ibid*). Rahul Rao (2014) shows that the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)'s annual report on “State-Sponsored Homophobia” includes a map that categorizes states based on their criminalization of homosexuality. The map has been criticized for its Eurocentric narrative, implied ranking, focus on formal laws, and state-centric approach (p. 169). Despite these criticisms, the map and report remain influential in shaping global LGBT rights discourse (p. 170). For instance, India is frequently portrayed in orange or red on the map, which exerts pressure on the country to enhance its LGBT rights laws and recognition. This pressure can perpetuate a neo-Orientalist divide and overlook the intricate realities of LGBT experiences in India. This pressure can be perceived as a means of reinforcing Western hegemony and notions of progress, resulting in exclusions at both the individual and international level (p. 171). This exceptionalist regime of LGBT rights perpetuates a divided

world in which Western societies are deemed superior to non-Western societies, disregarding the diversity of LGBT experiences and the complexities of social and political dynamics within non-Western societies (Delatolla, 2020, p. 155). For example, Mexico is often considered a safe country for LGBT individuals because 23 out of 31 states (including Mexico City) recognized same-sex marriage as of October 27, 2010 (Equaldex, 2023b). However, this simplification disregards the country's culture of homophobic machismo, where the police discriminate against homosexuals, are plagued by corruption, and operate outside the law (Walters, 2017, pp. 11–12).

It is worth mentioning that as of May 17, 2019, the IRCC announced the removal of all countries from the DCO list (Immigration, Refugees and Citizenship Canada, 2019). The reason given for this decision was that "the DCO policy did not fulfill its objective of discouraging misuse of the asylum system and of processing refugee claims from these countries faster" (ibid). The IRCC also announced that "Removing all countries from the DCO list is a Canadian policy change, not a reflection of a change in country conditions in any of the countries previously on the list" (ibid). This statement vividly reveals that the reason for removing all countries from the DCO list was not that the policy did not accurately reflect the conditions of these countries, but rather that it was not discouraging enough to deter refugee claimants from "misusing" the asylum system. This inference is supported by studies showing that IRB members' decisions to determine whether a claimant's country of origin is safe for SOGIE claimants are highly based on formal and juridical recognition of sexual minorities in those countries and not necessarily on the lived experiences of claimants (Chekaraou Ibrahim & Jian, 2019, p. 81; Kamat & Sanghvi, 2020, p. 149). Specifically, IRB members' decisions on whether there is a well-founded fear of persecution for a claimant are highly dependent on National Documentation Packages (NDPs). NDPs are compiled by the Refugee Protection Division (RPD) of the IRB and "contain a selection of documents on issues that are relevant to

the determination of refugee protection claims" (D. A. B. Murray, 2016a, p. 521). However, one of the issues with NDPs in terms of reflecting the fear of persecution based on SOGIE is that some countries have comprehensive and detailed NDPs, whereas others are more sparsely sourced and may lack information on certain issues and communities. Moreover, until 2019, the IRB did not specifically record gender identity and expression claims as a unique ground of persecution in their database. Similarly, many lawyers have pointed out that the IRB's NDPs do not adequately address the specific experiences of transgender individuals, requiring counselling to conduct their own research. For instance, the NDPs did not provide sufficient information on the situation of transgender individuals in a particular country, and lawyers may need to conduct additional research to build a strong case for their clients (Verman & Rehaag, 2023, p. 25). In this context, Bond and Wiseman (2020, p. 39) found that inconsistencies may arise when a board member refers to a board-produced NDP or when a claimant introduces evidence from a third-party source on country conditions, such as NGO reports detailing the prevalence of different types of persecution. One type of inconsistency is external inconsistency, which occurs when external country-of-origin information is insufficiently corroborative of or even contradicts key substantive elements of the claim. This can happen with information related to the likelihood of persecution, the absence of state protection, or the feasibility of certain specific events (ibid, 40). Despite the removal of the DCO list from the IRB procedure for determining refugee status, its legacy still affects the IRB's decision on whether a country is safe for a claimant or whether there is an Internal Flight Alternative (IFA) for the claimant to return to their country. This legacy is evident in the way the IRB member's decision heavily relies on formal and juridical documentation regarding the extent to which the claimant's country of origin is "homotolerant." However, as previously mentioned, NDPs may not always accurately reflect the conditions in the claimant's country of origin, particularly when it comes to LGBT-related fear of persecution. The IRB's NDPs do not adequately address

the specificity of the SOGIE claimant's situation because a country that may be safe for the majority of the population may be unsafe for certain minority groups. A country that appears politically progressive, that is, has legislated human rights protection and ratified international instruments, may not have the protocols or resources to ensure the exercise and protection of these rights. This is especially important in the case of LGBT individuals because they tend to be stigmatized, criminalized, and discriminated against, and are often rendered invisible in statistics purportedly representative of a larger population (Chekaraou Ibrahim & Jian, 2019, p. 81).

3.2 Theoretical Framework

Drawing on Judith Butler's theorization of "citationality" as a component of queer theory and Fuss's formulation of identity categories, this section establishes a framework to apply the theoretical categories discussed in the previous section. Specifically, this section narrows down the theoretical themes extracted from the literature reviewed in the second chapter, providing a foundation for formulating research processes and questions. Queer theory focuses on exploring multiple possibilities instead of binary ones and is concerned with social transformation and elucidating power dynamics and normative ideology. Using "citationality" as one of its key concepts, Butler's formulation of queer theory draws heavily on Derridean poststructuralism and tends to view history as a function of textuality (Martin, 1993, p. 9). In this framework, Butler contemplates the idea of "sex" as a construct of hegemonic norms, which are consolidated through performativity (Butler, 1993, p. 107). Performativity, in Butler's view, is the idea that discursive practices create and reinforce social norms and identities. However, Butler emphasizes that this creative ability is not original, but rather a type of cultural reiteration or resignification. Butler also contends that performatives aim to generate what they proclaim but only if they are consistently repeated and endorsed within a particular discursive practice. Without this consistent and endorsed practice, a performative act is merely

a futile attempt to bring about effects that it cannot possibly achieve (ibid.) Butler (1993) argues that legal authority does not originate from an individual speaker, but from established social norms and practices. In other words, when performing any law, judges do not create authority; they simply repeat and reinforce the existing conventions. This creates a paradox: authority appears legitimate and powerful owing to its recurrent references and societal acceptance, yet it does not have a clear, stable foundation. This also applies to "sexed positions," which are citational practices within a legal domain. This means that the embodiment of sex is a form of "citing" the law, but neither sex nor the law exists before their various embodiments and citations. They gain meaning and legitimacy through repeated action and citations. The perception that the law exists before its application arises because a specific practice has become established as "the law" (1993, p. 108). In this view, engaging in specific behaviours serves as a way of "citing" and investing in the symbolic law, which then grants those behaviours authority and legitimacy (Butler, 1997, p. 28). Accordingly, language acts as both the enabling condition for speech and its primary means of expression, resulting in an entanglement between the speaking subject and a pre-existing, dynamic linguistic structure (ibid., 29). Seeing language as both the condition of possibility for the speaking subject and its instrument of expression opens the door to questioning the legitimacy of established legal frameworks. This raises important questions about the potential consequences of subjects performing the law in a manner that deviates from the established norms. For example, in the context of this study, what would happen if SOGIE refugee laws and guidelines were performed in a way that could disrupt the historically established norms of a "deserving" and "authentic" SOGIE refugee claimant in the Canadian refugee system?

Incorporating Fuss's (1991) perspective on identity categories within queer theory serves to emphasize the relevance of Judith Butler's notion of citationality in the context of this study. Fuss argues that identity categories often function as tools of regulatory regimes, whether

they serve as normalizing categories of oppressive structures or as focal points for liberating challenges against that oppression itself (p. 13-14). Fuss clarifies that while appearances at political events under the sign of various SOGIE labels may occur, maintaining ambiguity surrounding the precise meaning of these labels is desired (p. 14). Furthermore, she emphasizes the inherent ambiguity of invoking any gender signifier, such as lesbian, gay, or transgender, as its signification is partially beyond one's control, and its specificity relies on exclusions that disrupt its claim to coherence (p. 15). Despite the absence of a common element among these labels, Fuss suggests that shared knowledge about the workings of homophobia against individuals with non-conforming SOGIE may serve as a unifying factor (p. 17). In Fuss's view, the self can only emerge after experiencing a separation, a loss that is temporarily resolved through the melancholic incorporation of an "Other." This incorporation permanently impedes the self's capacity for self-identity, as it is continuously disrupted by that "Other." The disruption of the "Other" within the self is the very condition for the self's existence (p. 27). Consequently, a stable set of typologies cannot adequately explain or describe SOGIE identities, given the complexities of psychic identification. Put simply, if gender is a performance that produces the illusion of an inner sex, essence, or psychic gender core, then it is drag, an imitation that generates the ideal it seeks to emulate. Gender is thus a performance on the skin, through gestures and movements, creating the illusion of inner depth. One way gender becomes naturalized is by being constructed as an inner psychic or physical necessity, yet it remains a surface sign, a signification on and with the public body, producing this illusion of inner depth, necessity, or essence that is somehow magically and causally expressed (p. 28). In this context, gender identities are the signifying processes through which the identities become visible; they represent both the disruption in repetition and the compulsion that drives it, which is precisely what the performance seeks to negate but is also what compels it in the first place. Applying Fuss's perspective on identity categories to the concept of an "authentic"

SOGIE refugee claimant as an identity category, it is important to note that the invocation of the "authentic" signifier lacks clarity. This ambiguity arises because the "authentic" signifier's specificity can only be defined through exclusions that, in turn, undermine its claim to coherence. As a result, the notion of a coherent, "authentic" SOGIE refugee claimant remains in a state of continuous failure, driving repetition and reestablishing the potential for disruption. This failure emphasizes the alienated and fictional nature of all identities, as argued by Fuss (1989), who asserts that identity categories are insufficient due to their continuous assumption and subsequent questioning, resulting in multiple and contradictory meanings (p. 98). Consequently, the distinction between parody, mimicry, or camp, and imitation, masquerade, or playing it straight becomes ambiguous. These subversive possibilities should be explored and enacted to signify the category of an "authentic" SOGIE refugee claimant. The recognition of this inherent ambiguity within the "authentic" SOGIE refugee claimant category allows for the possibility of disruptive performances within the Canadian refugee system. By examining how the narratives of SOGIE refugee claimants actively shape the understanding of an "authentic" and "deserving" claimant, the study aims to highlight instances where these narratives challenge and interrogate existing assumptions within the Canadian Refugee system.

To conclude, this study applies Butler's concept of citationality and integrates Fuss's perspective on identity categories to examine the signification of the "authentic" SOGIE refugee claimant within the Canadian refugee system. Fuss's understanding highlights the dual role of identity categories, such as the "authentic" SOGIE refugee claimant, as both instruments of oppression and sites of resistance against it. The lack of a unifying element among diverse SOGIE claimants' narratives of their SOGIE underscores the disruptive potential within this identity category, as these diverse narratives cannot be reduced to normative and Western exceptionalist conceptions of SOGIE. The fluid nature of the "authentic" SOGIE refugee claimant signification necessitates repetition due to its continuous failure, which the Canadian

refugee system inadvertently promotes by expecting claimants to frame their stories within a Western-exceptionalist perspective. Applying Butler's notion of citationality to SOGIE refugee determination allows for reframing SOGIE refugee hearings as a continuous process where the authority of IRB members is constructed and reinforced through repeated performances of refugee laws and guidelines. Analyzing SOGIE hearings as citational practices reveals the potential for claimants to engage in an "alternative performance" of SOGIE guidelines, emphasizing refugee claimants' capacity to generate meaning through cultural repetition within a specific context. This potential for disruption arises from the ongoing assumption and interrogation of the "authentic" SOGIE refugee claimant category, which is marked by multiple and often contradictory meanings, as articulated in Fuss's formulation of identity categories. Concurrently, applying Butler's notion of citationality to SOGIE refugee determination allows this study to argue that the authority of the Canadian refugee system is established through the repeated citation and performance of the law by both IRB members and SOGIE refugee claimants. This renders the "groundless ground" of SOGIE refugee guidelines and laws a central focus of the analysis, emphasizing their instability and potential for contestation. This approach enables a contingent and mutually constituted interpretation of the SOGIE hearing process. The primary objective of this study is to identify instances when SOGIE claimants and IRB members cite and perform refugee law in ways that challenge specific assumptions within the Canadian refugee system. Butler's notion of citationality and Fuss's formulation of identity categories serve as the theoretical framework for exploring these categories, setting the groundwork for the research objectives and questions to be addressed in the subsequent section.

3.3 Research Objectives

The main objective of this research is to shed light on the contingent facets of the SOGIE refugee status determination process in Canada. Analyzing publicly accessible SOGIE refugee hearings, this paper focuses on the citational and performative aspects of the Canadian SOGIE

refugee determination process. To do so, I interpreted the publicly available SOGIE refugee hearings as a public text wherein Canadian SOGIE refugee law is viewed as a contingent and mutually constituted process. This suggests that both SOGIE refugee claimants and IRB members actively contribute to performing Canadian SOGIE refugee law and guidelines. Primarily, the study focuses on how SOGIE asylum seekers' narratives of persecution in their country of origin based on their SOGIE interrogate and disrupt specific assumptions about a "deserving" and "authentic" SOGIE refugee claimant within the Canadian refugee system, specifically: the public/private discourse of LGBT rights; the linear/progressive narrative of SOGIE; and the homocolonial inclusion of LGBT rights.

3.4 Research Questions

This study's research questions directly relate to the theoretical frameworks concerning the underlying assumption of a “deserving” SOGIE refugee, as previously outlined. The questions arise from a citational reading of SOGIE refugee clients' hearings, where claimants actively engage in performing Canadian refugee guidelines, challenging the three main assumptions. The research questions are as follows:

- 1) How do SOGIE refugee claimants challenge the public/private distinction implicit in the definition of persecution within Canadian refugee guidelines?
- 2) In what ways and through which strategies do SOGIE refugee claimants' narratives of their SOGIE interrogate the linear/progressive notion of SOGIE?
- 3) Does the homocolonial notion of "homo-tolerant" countries accurately reflect the state protection available for some SOGIE refugee claimants' cases, considering their lived experiences in their countries of origin?

3.5 Dataset and Sampling

This section outlines the dataset utilized to address the research questions and introduces the sampling method used to select the study sample.

3.5.1 Description of the Dataset

The dataset for this study comprises publicly available decisions on SOGIE refugee claims, sourced from the Canadian Legal Information Institute (CanLII) website. Established in 2001 by the Federation of Law Societies of Canada, CanLII is a non-profit organization committed to providing efficient and open online access to judicial decisions and legislative documents. The platform supports legal professionals in their duties and ensures continuous public access to laws and legal decisions across all Canadian jurisdictions (CanLII, 2024). CanLII.org offers access to court judgments from various Canadian courts, including the Supreme Court of Canada, federal courts, and courts across all provinces and territories in Canada. Additionally, it presents decisions from numerous federal and provincial administrative tribunals. The data set for this study consists of all archived decisions on SOGIE refugee claims available on CanLII, encompassing decisions made by the Refugee Protection Division, the Refugee Appeal Division (RAD), the Supreme Court, and the Federal Court. An initial estimation indicates that there are approximately 733 SOGIE refugee cases, identified by searching for the subject of "LGBT refugees" in the website's document text search function.

The sampling period for this study ranges from May 1, 2017, to the end of 2023. This start date aligns with the effective date of Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics. Guideline 9 aims to improve the understanding of cases involving sexual orientation, gender identity, and expression, as well as sex characteristics (SOGIESC) and potential harm faced by individuals due to non-conformance with socially accepted SOGIESC norms in certain cultural contexts (Immigration and Refugee Board (IRB) of Canada, 2017). Given the study's focus on cases

where SOGIE refugee claimants challenge assumptions within the Canadian refugee system, it is crucial to consider the period following the implementation of Guideline 9. The subsequent section discusses the sampling strategy employed to select the study sample from this dataset.

3.5.2 Sampling Strategy

This section outlines the strategy to narrow down the extensive number of SOGIE refugee cases available on the CanLII website. For selecting the study sample, I initially used purposeful sampling to identify and select information-rich cases related to the Canadian refugee system's assumptions about "deserving" SOGIE refugee claimants. Purposeful sampling is widely used in qualitative research to focus on cases that offer rich insights into the phenomenon of interest (Palinkas et al., 2015, p. 523). After establishing a solid foundation for analyzing each of the main theoretical themes as my phenomenon of interest, I used theoretical sampling to enrich and develop the discovered categories. As Barney Glaser and Anselm Strauss (2006) noted, theoretical sampling of data collection is controlled by the emerging theory, whether substantive or formal. The initial decisions for the theoretical collection of data are based only on the researcher's theoretical perspective and on a general subject or problem area. The criteria of theoretical saturation determine the number of cases to be studied. First presented by Glaser and Strauss in their classic book *The Discovery of Grounded Theory*, theoretical saturation refers to the point where "no additional data are found." Later, they added, "[theoretical] saturation is based on the widest possible range of data on the category" (Glaser et al., 1968, p. 61). The pragmatic definition of theoretical saturation is where gathering more data seems counterproductive; the "new" that is uncovered does not add notably more to the discovered categories at this time (Strauss & Corbin, 1990, p. 136). Kathy Charmaz (2006, p. 113) described theoretical saturation as "when gathering fresh data no longer sparks new theoretical insights, nor reveals new properties of these core theoretical categories." Following this definition, I continued collecting and analyzing data until I reached

the point of theoretical saturation, where further data collection did not provide new insights or contribute to the development of the discovered categories. To achieve theoretical saturation, I reviewed 49 refugee cases, encompassing 650 pages of transcripts of SOGIE refugee decisions. However, among these 49 cases, I used 30 cases in the findings chapter, which more explicitly elucidated the categories and subcategories discovered during the case analysis. The table below describes the characteristics of the cases used in the findings.

Table 2: Summary of Case Characteristics Examined in the Final Chapter for Exploring Identified Categories and Subcategories

No.	Case	Country of Origin	Claimant's Alleged SOGIE	Time of Refugee Claim	Time of Decision	Decision-making Agent	Age of Claimants
1	Applicant v. Canada ⁹ (Citizenship and Immigration)	Nigeria	Gay	2020	2022-01-14	Federal Court	26
2	Applicant v. Canada (Immigration)	India	Gay	2021	2023-05-19	Federal Court	Not Specified
3	CanLII 39422 (CA IRB), TB7-12847	Jamaica	Bisexual Man	2014	2018-04-10	RAD	Not Specified
4	CanLII 68622 (CA IRB), MB9-29401	Algeria	Gay	2019	2021-01-14	RAD	Not Specified
5	CanLII 113216 (CA IRB), MB9-26284	Cameroon	Gay	2017	2020-10-28	RAD	Not Specified
6	CanLII 122927 (CA IRB), TB9-28093	Liberia and Nigeria	Bisexual Man	2019	2020-12-22	RAD	40
7	CanLII 123592 (CA IRB), VB9-03138	Nigeria	Gay	2019	2020-12-22	RAD	Not Specified

⁹ Although court cases are publicly accessible, the names of the claimants have been redacted in this text to protect their privacy.

No.	Case	Country of Origin	Claimant's Alleged SOGIE	Time of Refugee Claim	Time of Decision	Decision-making Agent	Age of Claimants
8	CanLII 123649 (CA IRB), TB9-33798	Nigeria	Bisexual Man	2017	2020-12-31	RAD	Not Specified
9	CanLII 125404 (CA IRB), TB9-28491	the Dominican Republic	Bisexual Man	2018	2020-11-02	RAD	49
10	CanLII 126572 (CA IRB), TB8-10506	St. Lucia	Bisexual Woman	2017	2020-09-24	RAD	Not Specified
11	CanLII 128563 (CA IRB), MC0-00634; MC0-00631; MC0-00632; MC0-00633	Nigeria	Bisexual Man	2018	2021-02-05	RAD	Not Specified
12	CanLII 132263 (CA IRB), MB8-00387; MB8-00388; MB8-00389	Nigeria	Gay	2016	2019-05-23	RAD	Not Specified
13	CanLII 132642 (CA IRB), TB8-18620	Nigeria	Bisexual Man	2017	2019-03-25	RAD	Not Specified
14	CanLII 134599 (CA IRB), TC0-12322	Russia	Gay	2019	2022-08-10	RAD	Not Specified
15	CanLII 135128 (CA IRB), TC1-02523	Iraq	Bisexual Man	2021	2022-03-22	RAD	Not Specified
16	CanLII 138570 (CA IRB), VC1-05153	the United States	Transgender Woman	2019	2022-10-27	RAD	Not Specified
17	CanLII 150832 (CA IRB), TC1-04541	Saint Lucia	Bisexual Woman	2018	2021-11-16	RAD	Not Specified
18	CanLII 151916 (CA IRB), TB8-04094,	Nigeria	Bisexual Woman	2018	2018-11-28	RAD	Not Specified

No.	Case	Country of Origin	Claimant's Alleged SOGIE	Time of Refugee Claim	Time of Decision	Decision-making Agent	Age of Claimants
	TB8-04091, TB8-04093, TB8-04092						
19	CanLII 151956 (CA IRB), MB9-27753	Nigeria	Bisexual Woman	2019	2021-03-19	RAD	Not Specified
20	CanLII 153047 (CA IRB), TC0-07056, TC0-07057, TC0-07055, TC0-07058	Nigeria	Bisexual Woman	2019	2021-03-27	RAD	Not Specified
21	CanLII 153222 (CA IRB), TC0-06161	India	Bisexual Man	2019	2021-03-30	RAD	Not Specified
22	CanLII 153276 (CA IRB), TC0-07056, TC0-07057, TC0-07055, TC0-07058	Nigeria	Bisexual Man	2019	2021-03-23	RAD	Not Specified
23	CanLII 153358 (CA IRB), TB8-27369	Nigeria	Bisexual Woman	2017	2021-03-23	RAD	64
24	CanLII 153493 (CA IRB), TC0-08700	India	Gay	2020	2021-03-23	RAD	28
25	CanLII 154314 (CA IRB), MC0-08857	Nigeria	Lesbian	2019	2021-04-30	RAD	Not Specified
26	Applicant v. Canada (Citizenship and Immigration)	Nigeria	Gay	2016	2021-10-25	Federal Court	Not Specified
27	Applicant v. Canada (Citizenship and Immigration)	Mexico	Lesbian	2021	2023-03-24	Federal Court	15

No.	Case	Country of Origin	Claimant's Alleged SOGIE	Time of Refugee Claim	Time of Decision	Decision-making Agent	Age of Claimants
28	Applicant v. Canada (Citizenship and Immigration)	Fiji	Gay	2021	2022-03-28	Federal Court	Not Specified
29	Applicant v. Canada (Citizenship and Immigration)	Saint Lucia	Bisexual Man	2022	2023-08-24	Federal Court	31
30	Applicant v. Canada (Citizenship and Immigration)	Nigeria	Bisexual Man	2022	2023-02-08	Federal Court	34

Table 2 provides an overview of 30 distinct case characteristics examined in the final chapter. These SOGIE refugee cases originate from a range of countries, including Nigeria, India, Jamaica, Iraq, Saint Lucia, the USA, Cameroon, Algeria, Liberia, the Dominican Republic, Russia, Fiji, and Mexico. A variety of SOGIE identities are represented in the data, encompassing gay, bisexual, and transgender individuals. The refugee claims span from 2014 to 2022, with corresponding decisions made between 2018 and 2023. The RA adjudicated most cases, while a few were handled by the Federal Court. Age is specified in a limited number of cases, ranging from 15 to 64 years old. The diverse nature of these case characteristics establishes a robust basis for further analysis and exploration of SOGIE refugee claims and decision-making processes. In the next section, I will discuss the specific methods employed for data analysis.

3.5.3 Data Analysis

To explore the various aspects of the underlying assumptions surrounding "deserving" SOGIE refugee claimants within the Canadian refugee system, I employed thematic analysis (TA). TA

has proven effectiveness in examining multiple perspectives within diverse archives, emphasizing both similarities and differences while uncovering unexpected insights. Moreover, TA is advantageous for summarizing key characteristics of large datasets, as it requires a structured approach to data management, resulting in a clear and organized final report (Maguire & Delahunt, 2017, p. 3353). The method aims to identify significant themes or patterns in the data to address the research question and provide valuable insights. To conduct TA, I followed Braun and Clarke's (2020) six-phase process: Becoming familiar with the data, Generating initial codes, Searching for themes, Reviewing themes, Defining themes, and Writing up (pp. 77-101).

Drawing on these phases of TA, I immersed myself in the available transcripts of hearings from the CanLII dataset that met the purposeful sampling criteria. During this phase, I selected 49 cases to document the Canadian refugee system's assumptions about an "authentic" SOGIE refugee claimant. Using both deductive and inductive codes, I proceeded with coding, searching for themes, refining themes, and finalizing the main themes. Deductive codes were derived from major theoretical categories discussed earlier, while inductive codes emerged from the data itself. Subsequently, I revisited the codes to ensure internal consistency before sorting them into one or two categories. Through this process, I identified six main categories for the study's major themes. Lastly, I re-examined the entire dataset to confirm the themes' representativeness and coded any items left uncoded during previous cycles. The main themes extracted from the literature review in Chapters One and Two were used solely to initiate the purposeful sampling process. Theoretical sampling and iterative TA stages guided the analysis of this study and the discovery of categories and subcategories, ensuring a comprehensive exploration of SOGIE refugee claims and decision-making processes.

Chapter Four: Finding

Using Thematic Analysis (TA) as a methodological framework, this chapter explores the prevailing perceptions and presumptions of a 'deserving' SOGIE refugee claimant within the Canadian refugee system. Building upon the methodology outlined in Chapter 3, this analysis draws from a comprehensive examination of SOGIE refugee cases utilizing data from the CanLII database. The analysis adheres to a series of structured TA phases, encompassing data familiarization, code generation, and theme identification, to ensure a thorough and nuanced evaluation of the dataset in alignment with the study's objectives. The subsequent sections will present and discuss the primary themes, categories, and subcategories derived from the TA process. The categories and subcategories are organized under three overarching themes: the Public/Private Discourse of LGBT Rights, the Linear, Progressive Narrative of SOGIE, and the Homocolonial Inclusion of LGBT Rights. By discussing the ways in which claimants' narratives not only challenge these assumptions but also catalyze a disruptive reading of SOGIE refugee laws and guidelines, as well as the homonationalist identity category of an "authentic" and "deserving" refugee claimant, this chapter highlights the transformative potential of SOGIE refugee claimants' narratives. The theoretical and empirical implications of this part of the study will be further discussed in Chapter Five.

4.1 The Public/Private Discourse of LGBT Rights

This theme emphasizes the interpretation of a well-founded fear of persecution¹⁰ in SOGIE refugee laws and regulations. Historically, the concept of persecution has been rooted in Euro-American notions of a stable, inherent, and visibly identifiable gay identity. This definition poses significant challenges for SOGIE refugee claimants who have experienced persecution in private spheres, as their narratives frequently do not align with the public/private dichotomy

¹⁰ In the definition of a well-founded fear of persecution, the fear of persecution constitutes the subjective element, while the well-founded aspect serves as the objective component.

applied in the SOGIE refugee determination process. This dichotomy suggests that claimants who have openly expressed their SOGIE and subsequently experienced persecution in public spheres are more likely to establish their fear of persecution based on their SOGIE, in contrast to those who have undergone persecution in private and intimate settings. The TA conducted on the dataset reveals two distinct categories under this theme: Substantiating a Well-Founded Fear of Persecution in Private Spheres and Discretion Reasoning. The following sections will examine these categories in greater detail, exploring their implications and significance within the context of the SOGIE refugee determination process.

4.1.1 Substantiating a Well-Founded Fear of Persecution in Private Spheres

This category highlights the challenges faced by SOGIE refugee claimants in substantiating their fear of persecution due to the pervasive public/private discourse surrounding the definition of persecution. According to this perspective, persecutions occurring within non-public domains, which frequently include unofficial reports of incidents, are given less weight when substantiating a claimant's fear of persecution. A notable example is the case of a Jamaican bisexual woman whose refugee claim was denied by the Refugee Protection Division (RPD) on June 22, 2017. The appellant identified as bisexual and her Basis of Claim (BOC) stated that she was assaulted by two men while visiting her girlfriend in Montego Bay in 2014. These men later went to her home in Kingston, searching for her. Fearing her life as her sexual orientation became more widely known, she fled to Canada in 2014 (*CanLII 39422 (CA IRB)*, 2018, p. 2). One reason for this decision was the RPD's disregard of the applicant's affidavit describing an incident where two men inquired about her whereabouts and threatened her with death if she returned to Jamaica (*ibid.*, p. 7). Specifically, the RPD stated that the appellant failed to obtain evidence from individuals who could corroborate her claim and failed to provide a copy of a medical report or X-ray from her medical treatment after the assault in Montego Bay (*ibid.*, p. 9). This case exemplifies the obstacles encountered by SOGIE refugee

claimants in providing evidence that supports the objective aspect of their fear of persecution, particularly in instances where persecution occurs in non-public spheres and originates from countries where homosexuality is illegal. Such contexts create significant challenges for claimants seeking to establish the well-founded nature of their fear of persecution. In another instance, a SOGIE claimant from Nigeria was questioned by the RPD regarding her long-term secret relationship with a woman, as the RPD cast doubt on the authenticity of an affidavit describing the details of the claimant's relationship with her partner (*CanLII 151916 (CA IRB)*, 2018, p. 2). Specifically, the RPD's concern revolved around "why a Notary Public would take the risk of notarizing an affidavit admitting to illegal activity" (*ibid.*, 8). However, the Refugee Appeal Division (RAD) deemed the claimant's explanation for the affidavit's authenticity as "credible, consistent, and reasonable." The claimant mentioned that she used the same Notary Public trusted by her brother and previously used for RPD hearing affidavits (*ibid.*, 6). The RAD further emphasized that, "Without more serious reasons to doubt the authenticity of these documents, I agree with the Appellants that they benefit from the presumption that foreign-issued documents are valid" (*ibid.*, 10). As a result, the RAD set aside the RPD's determination and recognized the appellant as a Convention refugee (*ibid.*, 11).

The Public/Private discourse of the definition of persecution is further illustrated in the case of a Nigerian citizen whose claim was rejected by the RPD. The RPD cited the reason for dismissing the claim as the appellant's LGBTQ activities in Canada not having become publicly known in Nigeria (*CanLII 132642 (CA IRB)*, 2019, p. 8). Additionally, the RPD found the appellant's relationship with a man to be implausible due to a lack of documentation, such as video-call logs or text messages, to substantiate the relationship (*ibid.*, 5). Consequently, the RPD determined that there was no well-founded fear of persecution for the claimant in their country of origin, as the RPD deemed the allegation of the claimant's involvement with LGBT pride in Canada being exposed in Nigeria to be incredible (*ibid.*). In another instance, a bisexual

claimant from Saint Lucia faced persecution within the private sphere and suffered sexual abuse due to her SOGIE. After discovering her in a compromising position at her workplace, a group of men physically assaulted, raped, and left her in her home, illustrating the persecution experienced by the claimant in private settings (*CanLII 150832 (CA IRB)*, 2021, p. 3). She also experienced persecutory treatment from her family members and others in her community (*ibid.*, p. 7). The RPD found her fear of persecution based on non-conformity with the socially accepted SOGIE in Saint Lucia to be implausible, given the nature of the persecution she experienced (*ibid.*). The RPD considered her fear of persecution unbelievable because she did not report the incident to the police or seek medical examination and treatment, despite the potential risks of sexually transmitted infections and internal injuries (*ibid.*, p. 8). However, the RAD found the claimant's explanation for not reporting the assault and not seeking medical attention credible. The RAD agreed with the claimant that she could not expect assistance from those involved in her mistreatment and that reporting the crimes would have put her at further risk. The RAD acknowledged that survivors of gender-based violence often do not seek help due to fear of stigma, shame, and the belief that abuse is a private matter. The RAD asserted that the appellant's emotional and psychological reaction to trauma was not unusual for survivors of gender-based violence, and therefore, the RPD was incorrect in dismissing her explanation (*ibid.*, pp. 8-9). The RAD also considered the appellant's claim substantiated by support letters from friends who knew her in Saint Lucia as well as a letter from her son testifying to the assault (p. 9). In cases involving countries where homosexuality has been decriminalized, a distrust of police protection also serves as an obstacle to reporting SOGIE-based persecution. In the case of an Indian claimant fearing persecution as a gay man, the applicant's father, a police officer, caught him with his male partner, beat him, and took him to the police station, only releasing him after a bribe was paid (*Applicant v. Canada (Immigration)*, 2023, p. 2). Here, the police not only failed to provide protection but also served as an agent of

persecution. The applicant argued that police could use technology, such as the Crime and Criminal Tracking Network and Systems (CCTNS), to pursue him even in Mumbai (*ibid.*, 4). Ultimately, the application was dismissed because the federal court deemed an Internal Flight Alternative (IFA) to be available in Mumbai, asserting that potential discrimination in housing and employment did not constitute concrete evidence that the applicant's safety would be at risk in Mumbai (*ibid.*, p. 10). Distrust of police protection is also evident in the case of a Jewish transgender (trans) woman and US citizen seeking protection in Canada in 2019, fearing that the American police and justice system would not protect her against transphobic Americans (*CanLII 138570 (CA IRB)*, 2022, p. 2). The claimant testified about various incidents of transphobia, fear-mongering by American politicians and civil organizations, violence against trans women, personal experiences of discrimination and transphobia in employment and housing, as well as unsuccessful attempts to seek police protection on multiple occasions (*ibid.*). Specifically, she feared persecution by her ex-roommate, ex-landlord (a trans-exclusionary radical feminist), and a debt collection agency targeting her with threats of violence (*ibid.*, p. 3). The RPD rejected her claim, asserting that she had not established that the United States was either unwilling or unable to protect her (*ibid.*). Conversely, the RAD held that state protection for trans people was unavailable in the US for several reasons. One reason for this was that the RAD emphasized that when trans individuals report violence in the United States, police often arrest the trans victim rather than the assailants, dismiss the violence, or blame the trans person for instigating it (*ibid.*, p. 17). To substantiate its decision, the RAD referenced evidence from the United States' country conditions, emphasizing that trans individuals encounter substantial discrimination and risks to their lives. The RAD underscored the disproportionately high rates of discrimination experienced by transgender people in public spaces. Trans women of colour are especially vulnerable to violent hate crimes and killings. Furthermore, the RAD indicated that 2021 marked the most lethal year for trans

individuals in the US since 2013, with 96% of those killed in 2022 being trans women or trans feminine individuals (*ibid.*, p. 12). The RAD also observed the flourishing of hateful rhetoric against the trans community in recent years. This has resulted in numerous calls for direct action against trans and gender-nonconforming individuals and their allies, leading to increased harassment, intimidation, and threats by street gangs disrupting Pride events and far-right individuals targeting trans people, drag shows, and other LGBTQ events. In 2022, 33 incidents have already occurred, signaling a deteriorating situation compared to previous years (*ibid.*, p. 13).

The private nature of SOGIE-related mistreatment is illustrated in the case of a refugee claimant from Algeria who fears his life due to several sexual assaults he experienced at a party by a man in 2018 (*CanLII 68622 (CA IRB)*, 2021, p. 2). The RPD rejected his claim, citing that he did not inform his parent about the incidents and failed to provide reasons for not filing a complaint following the sexual assault. Additionally, the RPD noted that he did not report the assault immediately to the police and could not recall the details of the alleged 2018 sexual assault (*ibid.*, pp. 4-7). The RAD disagreed with the RPD's argument, stating that it "failed to adopt a trauma-informed approach in dealing with the appellant's claim for refugee protection" (*ibid.*, p. 6). The counsel for the appellant emphasized at the outset of the hearing that the appellant was unable to discuss the 2018 event when writing his account due to difficulties in talking about the incidents (*ibid.*, p. 6). The RAD argued that the RPD did not consider the impact of trauma on the appellant's memory or ability to testify about the source of that trauma (*ibid.*, p. 7). Furthermore, the RAD noted that the RPD made no effort to avoid re-traumatizing the appellant, as evidenced by repeatedly asking the appellant to explain why he did not tell his father about the assault, forcing him to reiterate that his father would blame him for the assault (*ibid.*). The RAD highlighted that a young male victim of sexual violence in a country where homosexuality is repressed may hesitate to discuss it with parents or at school, considering the

cultural context in Algeria, where LGBT community members' rights are routinely violated and victims of sexual violence are stigmatized and blamed for their abusers' crimes (ibid., pp. 7-8). Moreover, the RAD mentioned that the RPD should have accounted for the difficulties faced by the appellant in testifying through an interpreter on a sensitive subject due to his young age, severe trauma, and the fact that sex between men is considered "immoral" in Algeria (ibid., p. 8). This further explains why the appellant appeared visibly troubled and spoke in hushed tones when discussing his experiences (ibid, p. 9). This case highlights the delicate aspect of establishing the objective facet of a well-founded fear of persecution for claimants who are victims of sexual assault in their country since the primary evidence available for testifying to the incidents is the claimant's testimony, which is not easy to discuss due to the highly sensitive nature of the subject matter and the factors mentioned by the RAD in this case.

4.1.2 Discretion Reasoning

This category concerns the assumption that individuals who have not publicly disclosed their SOGIE do not have an objective fear of persecution. This assumption suggests that these individuals could relocate within their country to a place where their SOGIE remains unknown, even if society does not accept non-conforming SOGIE. However, this assumption has two limitations. First, it implies that individuals with non-conforming SOGIE should conceal their SOGIE, which is a fundamental violation of their human rights, as stated by the UN High Commissioner for Refugees (UNHCR 2008, Section IV). Second, this assumption could lead to the underreporting of discrimination against individuals with non-conforming SOGIE. Consequently, their home country may appear safer or more tolerant than it actually is to Immigration and Refugee Board (IRB) members, potentially denying protection, support, and safety to those who genuinely need it. For example, in a case involving a bisexual claimant from Nigeria seeking asylum on the grounds that her husband was arrested in connection with the claimant's same-sex activity and that the police were searching for her in Nigeria, the RPD

dismissed the refugee claim. The RPD based its decision on the grounds that the applicant failed to establish an objective fear of persecution based on her SOGIE (*CanLII 151956 (CA IRB)*, 2021, p. 2). The claimant appealed the RPD decision, arguing that the underlying climate of homophobia in Nigeria made it difficult to provide evidence beyond her testimony (*ibid.*, p. 11). The RAD considered the claimant's argument valid, citing the SOGIE guideline's statement that "an individual's testimony may, in some cases, be the only evidence of their SOGIE" (*ibid.*). The RAD also found the applicant's documentary evidence, including text messages from her former partner and photos of them together, credible in substantiating her SOGIE (*ibid.*, p. 14). The RAD highlighted that gender-non-conforming individuals in countries such as Nigeria might experience mistreatment, such as being disowned and beaten by family and community members (*ibid.*, p. 15). Furthermore, the RAD stated that the appellant had no viable IFA, given that "the Nigerian state would be unwilling to protect" her and "she would not be expected to conceal her bisexual identity if she was to live there" (*ibid.*, 15). This argument vividly highlights how the notion of a viable IFA is premised upon the implicit expectation that the claimant should conceal their SOGIE to ensure safety in another part of their country of origin.

Discretion reasoning can also be observed in cases in which applicants avoid publicly exposing their relationships because of the prevailing homophobic environment in their country of origin. This may have resulted in their fear of persecution being perceived as less credible by IRB members. This is illustrated in the case of a SOGIE claimant from Russia, who met his boyfriend in Moscow in 2005 and later filed a refugee application in Canada in 2009, eventually being granted Convention refugee status in 2013. The claimant applied to sponsor his partner's immigration to Canada in 2019 (*CanLII 134599 (CA IRB)*, 2022, p. 1). The claimant testified that the homophobia he and his partner faced in Russia had a significant impact on their public display of affection. Initially, they avoided publicly revealing their

romantic status due to the inconvenience it brought them. The only place they felt comfortable being together was at the claimant's mother's country home (ibid., p. 4). They continued to hide their relationship while living in his apartment, never leaving or returning together in Moscow, and only disclosed their relationship to a few trusted individuals (ibid., 5). In this case, the need for being discreet about their relationship in a homophobic society posed a challenge in establishing the credibility of their relationship and the well-founded fear of persecution. Despite the absence of concrete evidence, the RAD found the claimant and his mother's affidavit testimony about their conjugal relationship convincing, thus establishing its genuineness (ibid., p. 6). The RAD also considered the appellant and applicants' testimony about the homophobia they experienced in Russia a reasonable explanation for their decision to disclose their relationship to only a few people (ibid., p. 7). However, the appeal was ultimately dismissed as the RAD determined that the claimant failed to demonstrate that their conjugal relationship was ongoing at the time of filing the sponsorship application.

4.2 The Linear/Progressive Narrative of SOGIE

This category is based on the assumption, both implicit and explicit at times, that SOGIE refugee claimants should adhere to clear-cut Western labels of SOGIE. This assumption often results in the expectation that the claimant's narrative should follow a linear progression, transitioning from being closeted in their country of origin, often perceived as "homophobic" and sometimes "barbaric," to 'discovering' and openly expressing their SOGIE in "civilized" and "safe" Western countries like Canada. Underlying this assumption is the notion that Canada should be portrayed as a beacon of hope for SOGIE individuals, progressing from "oppression" to "freedom," from "homophobia" to "gay rights," and from "backwardness" to "progress." SOGIE refugee claimants frequently encounter challenges in reconciling their personal experiences and understanding of SOGIE with Western perspectives, which can clash with their cultural backgrounds. In the subsequent section, I will examine SOGIE refugee cases in which

claimants navigate their personal experiences and understanding of SOGIE within these linear, progressive narratives. Subsequently, cases where claimants' narratives diverge from this linear, progressive narrative of SOGIE refugees will be examined, emphasizing how their experiences and understanding of their SOGIE were acknowledged as credible. Central to this analysis is the transformative potential of these narratives. This theme is divided into two main categories: Clear-cut SOGIE Labels and Canada as the Beacon of Hope for SOGIE Refugees.

4.2.1 Clear-cut SOGIE Labels

SOGIE refugee claimants often face the recurring challenge of providing a detailed and consistent narrative of their SOGIE that conforms to Western SOGIE labels. The inability to meet this expectation can significantly impact their chance of substantiating the credibility of their SOGIE. A notable case demonstrating this issue involves a claimant from Jamaica, who sought refugee protection after being assaulted by two men during a visit to her girlfriend in Montego Bay. The RPD raised concerns about her credibility due to an inconsistency in her self-identification: she identified as a lesbian in her BOC form but identified as bisexual during the hearing (*CanLII 39422 (CA IRB)*, 2018, p. 3). The RPD asserted that the claimant had severely undermined her credibility by providing inconsistent evidence concerning her sexual orientation and omitting her bisexual identity in her BOC form (*ibid.*). In contrast, the RAD held that the RPD did not take into consideration the possibility that a person's understanding of their sexual orientation might evolve and that refugee claimants may not always be familiar with or identify with various concepts used to describe one's sexual orientation in Western countries. Citing the SOGIE Guidelines, the RAD emphasized that an individual's self-awareness and self-acceptance of their SOGIE could be a non-linear process. Expressed sexual identity can be fluid, flexible, and more complex than that of neat labels. Consequently, changes in a claimant's sexual behaviour or self-identification should not be seen as conclusive evidence of misrepresentation. In RAD's view, the claimant attempted to align herself with

Western labels to explain to the RPD why she had sexual relationships with men in the past while claiming persecution based on her most recent relationship with a woman. The RAD also noted that if sexual identity is viewed as fluid and flexible, the claimant's shifting labels of her sexual identity should not be used to challenge her credibility or undermine her sexual identity as either lesbian or bisexual (*ibid.*, p. 4).

The linear and progressive narrative surrounding SOGIE refugees often assumes that claimants possess a clear understanding of their SOGIE before fleeing perceived "homophobic" countries of origin and immediately seek refugee status upon arrival in "LGBT-friendly" countries like Canada. However, some cases challenge this narrative, such as a claimant from Cameroon who pursued refugee protection on November 9, 2017, contending that returning to Cameroon would pose a threat due to his sexual orientation (*CanLII 113216 (CA IRB)*, 2020, p. 3). The claimant met a man in September 2015 who became his partner, during which time he was allegedly secretly filmed by other Cameroonians (*ibid.*, p. 3). On October 22, 2018, the Minister of Citizenship and Immigration Canada intervened, raising concerns about the claimant's credibility due to inconsistencies between his BOC and testimony (*ibid.*, p. 5). The claimant stated in his BOC that he discovered his homosexuality in Canada; however, during the hearing, he testified that he was attracted to men at the age of 13 but remained silent about it (*ibid.*). When questioned about not mentioning his attraction to men in his BOC form, the appellant explained that he had desires from age 13 but concealed them due to the non-acceptance of same-sex attraction in his country (*ibid.*, p. 6). The RPD acknowledged that the claimant's written statements suggested he discovered his homosexuality in 2015; however, during the hearing, he testified about being aware of his attraction to men at age 13 without labelling himself as homosexual (*ibid.*). Consequently, the RAD deemed the claimant's sexual orientation credible and overruled the RPD's determination (*ibid.*, p. 9). Another example of not conforming to clear-cut Western narratives is the case of

a claimant from Nigeria who sought refuge based on his sexual orientation as a gay man because same-sex relationships are illegal in his country of origin (*CanLII 123592 (CA IRB)*, 2020, p. 2). The RPD concluded that the appellant had fabricated his Grindr account to support his claim due to his misspelling of Grindr as Grinder (*ibid.*, p. 4). The RAD, however, held that the authenticity of the claimant's Grindr account could not be refuted solely by misspelling the name of the website (*ibid.*, p. 5). This case exemplifies how the credibility of a claimant's SOGIE may be unjustly questioned based on Western narratives of being gay, as it was presumed that an authentic gay claimant should be able to accurately spell the name of dating apps in English.

Expecting claimants to provide a detailed and consistent narrative of their SOGIE to establish their claims is evident in another case involving a bisexual claimant with citizenship in Liberia and Nigeria. The RPD questioned the claimant's credibility regarding his SOGIE due to their inability to recall the name of his first same-sex partner at the age of 15 (*CanLII 122927 (CA IRB)*, 2020, p. 3). The claimant argued that the relationship occurred 25 years prior and that he could not be expected to recall details from many years ago, asserting he should not be impugned for failing a memory test (*ibid.*). The RAD also found the claimant's testimony inconsistent, stating that "the Appellant repeatedly contradicted himself when testifying before the RPD, providing an inconsistent account of the relationships, an inability to recall the full names of even his most recent relationships" (p. 6). This case demonstrates the shared assumptions between the RPD and RAD in certain cases, highlighting their expectation that claimants provide consistent and detailed narratives, even for events that occurred decades in the past. In a separate case, the credibility of a bisexual claimant from Nigeria was questioned by the RPD, citing the claimant's "inability to recall straightforward information about his only alleged same-sex relationship (*CanLII 123649 (CA IRB)*, 2020, p. 6). More specifically, the claimant testified that he met his partner at a party but could not recall the year they met or the

party's location. He initially testified that he could not remember if they took any precautions to avoid getting caught, despite being aware of Nigeria's laws against homosexuality (ibid.). The claimant argued that the RPD had failed to consider the impact of trauma on his memory. When asked about his inability to recall information, the claimant stated that he was traumatized and his memory was impaired (p. 7). Both the RPD and RAD agreed that the claimant's explanation for his inconsistent and evolving testimony about his alleged same-sex relationship was unsatisfactory. The RAD found no error in the RPD's conclusion that the claimant's credibility was undermined by inconsistencies and omissions in his evidence (ibid., p. 7). In another case, a claimant's self-identification as bisexual was rejected by the RPD due to the limited details provided by the claimant regarding the establishment of his SOGIE (*CanLII 128563 (CA IRB)*, 2021, p. 13). The RAD questioned the claimant about his interest in men, to which he responded, "Since I was young I have developed interest in men and I enjoy them when I am playing with them." When asked for further details, the claimant stated that he preferred men over women (ibid.). Both the RPD and RAD found the claimant's lack of detail about their relationship with his alleged partner of six years questionable, casting doubt on the credibility of the claimant's SOGIE (ibid.). In a case involving a claimant from Nigeria, the RPD questioned the credibility of her SOGIE based on a discrepancy in her ex-husband's birth month between her refugee intake papers and the copy of his biodata page from his passport (*CanLII 153047 (CA IRB)*, 2021, p. 5). The claimant argued that the RPD exaggerated the importance of the discrepancy, as it was minor and unrelated to the central aspects of the claim (ibid.). The RAD agreed with the RPD's concern, stating that "the discrepancy in the husband's birthdate does detract from the credibility of the appellants" because "the principal appellant reasonably ought to know the birthdate of her husband" given their marriage in 1999 and divorce in 2011 (p. 6). This case demonstrates that the claimant's SOGIE credibility can be challenged based on factors not directly related to the claimant's

narrative of their SOGIE. In another instance, one reason given for disputing the credibility of a claimant who alleged her life was at risk in St. Lucia due to her sexual orientation as a bisexual woman was that "the RPD found it unreasonable that the claimant would spell the name of her partner incorrectly when she testified she had known her partner since elementary school" (*CanLII 126572 (CA IRB)*, 2020, p. 6). Another reason given for refuting the claimant's credibility by the RPD was the "limited detail in the Appellant's BOC about her relationship with her same-sex partner in St. Lucia and the development of that relationship, how often they were able to pursue the relationship, and notes that the RPD was therefore obliged to elicit further information from the Appellant at the hearing, including where and how they were able to conduct their intimate relations without being discovered" (*ibid.*, p. 8). However, the RAD did not hold this issue against the claimant's credibility, as the RPD could not find any contradictions in the answers provided by the claimant, even if they were not detailed enough from the RPD's perspective (p. 8). During the oral hearing, the RAD found the claimant's testimony convincing enough to establish her SOGIE. The RPD asked the claimant if she still believed she was bisexual, not why. The RAD specifically cited this exchange from the hearing transcript as sufficient evidence to establish the claimant's sexuality:

MEMBER: Okay. Now, having the perspective now, having had a few relationships with men as well as a relationship with women, do you now still think that you are a bisexual?

CLAIMANT: I still believe I am a bisexual.

MEMBER: So none of the relationships sort of persuaded you that that wasn't for you?

CLAIMANT: No. (*ibid.*, p. 7).

In the following section, I will discuss cases that interrogate the assumption that SOGIE refugee claimants must provide a consistent and detailed narrative of their SOGIE that aligns

with Western narratives of a credible SOGIE refugee claimant. The first case concerned a Nigerian bisexual man who feared persecution in Nigeria based on his sexual orientation due to the illegality of same-sex relationships in the country (*CanLII 153276 (CA IRB)*, 2021, p. 2). The RPD raised credibility concerns regarding discrepancies in the claimant's wife's birthdate in her identification documents (p. 5). The RAD, however, recognized the potential for inaccuracies in Nigerian government documents and emphasized that these inconsistencies should not automatically undermine the credibility of the affidavits or the appellant's trustworthiness (*ibid.*, p. 6). The RAD maintained that drawing adverse conclusions without considering reasonable explanations for these inconsistencies would be imprudent (*ibid.*). The RPD acknowledged that the inconsistent birthdate was insufficient to determine the affidavits' inauthenticity (*ibid.*, p. 8). Citing *Odetoyinbo v. Canada (Citizenship and Immigration)* (2009 FC 501), the RPD stated that despite negative credibility findings about non-SOGIE-related aspects of a claim, an assessment of a claimant's sexual orientation remains necessary. This means that even if a claimant is found to have embellished or lied about unrelated events, they could still be truthful about their sexual orientation (*ibid.*, p.5). As a result, a claimant's fear of persecution based on their SOGIE and the evidence directly testifying to it cannot be dismissed solely due to credibility concerns regarding unrelated aspects of their testimony, such as inconsistencies in the wife's birthdate.

The issue of questioning a claimant's overall credibility based on the truthfulness of a single piece of evidence can also be observed in a case involving a joint refugee claim made by a Nigerian claimant and their partner. In this instance, the RPP raised concerns regarding inconsistencies in the couple's testimony about their relationship, which led to doubts about their SOGIE-based refugee claim (*Onyekweli-Ugeh v. Canada (Citizenship and Immigration)*, 2021, p. 2), the Pre-Removal Risk Assessment (PRRA) officer doubted the claimant's credibility due to a supposedly fraudulent police document (*ibid.*, p. 14). The Federal Court,

however, set aside the decisions made by both the RPD and RAD, referring the case back for redetermination by a different decision-maker (p. 20). The Federal Court stated that doubts about the truthfulness of a single item of evidence do not necessarily lead to concerns about an applicant's overall credibility (*ibid.*, p. 16). Similarly, in another SOGIE refugee case involving an Iraqi claimant, the RPD refuted the claimant's credibility due to discrepancies between their testimony and affidavit (*CanLII 135128 (CA IRB)*, 2022, p. 2). In his affidavit, he claimed that he and his partner were merely friends, with his sexual encounters limited to other men. However, during the oral hearing, the claimant stated that after meeting his partner on the online dating app Tinder, they engaged in sexual relations at the partner's residence, after which their relationship continued to be sexualized (*ibid.*, p. 9). Conversely, the RAD found the claimant's testimony to be "credible, consistent, and comprehensive" (*ibid.*). The RAD based this decision on a nuanced understanding of the claimant's personal, psychological, cultural, and social factors, recognizing that he was a married individual from a country where SOGIE activity is marginalized and criminalized. As such, the RAD determined that no adverse inference could be drawn from the inconsistency between his testimony and affidavit (*ibid.*).

In another case, a Nigerian woman seeking refugee status due to fear of persecution from her family, community, and government based on her sexual orientation had her claim initially rejected by the RPD. The RPD drew a negative credibility inference from her testimony regarding her early realizations of her sexual orientation (*CanLII 154314 (CA IRB)*, 2021, p. 3). When asked about her feelings upon first becoming aware of her sexual orientation, the claimant stated she felt different and had questions but could not discuss them with anyone, resulting in feelings of disorganization and isolation (*ibid.*, p. 4). The RPD considered her inability to explain her feelings convincingly as undermining her credibility (*ibid.*, p. 3). However, the RAD recognized the potential impact of trauma on her memory and recollection of her early feelings about her sexual orientation, given the severe consequences of being

discovered in a compromising situation in Nigeria (ibid.). Additionally, the RPD drew a negative credibility inference from her delayed involvement in LGBTQ+ organizations in Canada, suggesting she joined an organization only months before her refugee hearing to create self-serving evidence (ibid., p. 9). The RPD found her failure to provide a satisfactory explanation for her delayed engagement with the LGBTQ+ community center further weakened her claims about her sexual orientation (ibid.). In contrast, the RAD determined that the RPD's conclusions were based on unfounded assumptions that individuals fleeing homophobic societies would exhibit typical and predictable behaviours upon arriving in Canada. As a result, the RAD overturned the RPD's decision and granted the appellant Convention refugee status (ibid., p. 10). This case illustrates a clear disconnect between the RAD and RPD decisions, as SOGIE refugee claimants are pressured to exhibit "induced outness," as observed by Sarilee Kahn and Edward J. Alessi (2018). Inducing outness refers to the pressure placed on claimants by service providers to engage in social activities that demonstrate public affiliation with other LGBT people, such as participating in LGBT organizations in Canada (p. 30). This practice is called "coming out under the gun" because it involves coming out before the claimants are ready, potentially leading to mental health crises and identity confusion for LGBT claimants (p. 22).

Another challenging aspect for SOGIE refugee claimants is establishing their SOGIE based on self-identification in the absence of documentation to substantiate their claims. This challenge arises because in countries with limited or no protection for individuals with nonconforming SOGIE, publicly disclosing or documenting their identities can pose significant risks to their safety. Consequently, when SOGIE refugee claimants are required to present documentation from their countries of origin, they may encounter substantial barriers due to the inherent risks associated with publicly acknowledging their SOGIE in their home countries. This is evident in the case of a Nigerian citizen who sought refuge based on being bisexual and

engaging in two same-sex relationships in Nigeria (*CanLII 132642 (CA IRB)*, 2019, p. 2). The RPD deemed the evidence of involvement in LGBTQ organizations in Canada insufficient to establish the applicant's sexual orientation (p. 6). In this case, the RAD upheld the RPD ruling in finding that the letter testifying to the claimant's involvement in LGBT organizations merely indicated their participation in a group for LGBTQ refugee claimants. Notably, the RAD found no evidence suggesting that membership in the group was based on anything other than self-identification, which was deemed insufficient for substantiating the appellant's SOGIE claim (*ibid.*, p. 7). However, in another instance, the RAD endorsed self-identification as sufficient evidence of an individual's sexual orientation. In this case, the RAD referenced the Office of the United Nations High Commissioner for Refugees Handbook, asserting that self-identification as an LGBT person should be considered when determining an individual's sexual orientation (*CanLII 113216 (CA IRB)*, 2020, p. 2). This approach was applied in the case of a Cameroonian claimant who sought refuge in Canada due to same-sex activities and fear of persecution upon returning to his home country. The RAD rejected the RPD's concerns about contradictions in the claimant's testimony regarding the timing of discovering his homosexuality (*ibid.*, p. 5). Disagreeing with the RPD's decision, the RAD noted that SOGIE-based claims are unique because credibility is largely established based on the truthfulness of claimants' statements about their sexuality (*ibid.*, 5). In this case, the RAD found that the RPD did not adequately consider the complex process some individuals may experience before accepting their sexual orientation, thus rendering their conclusions erroneous (*ibid.*, 6). Ultimately, the RAD determined that there were no valid reasons to doubt the claimant's statements regarding his sexual orientation based on the presented evidence (*ibid.*).

The presented examples in this section demonstrate that requiring SOGIE refugee claimants to provide a detailed and consistent narrative of their fear of persecution based on their SOGIE overlooks the risks involved in documenting their SOGIE or experiences of

persecution, even after leaving their country of origin. Providing evidence in countries where homosexuality is illegal necessitates testifying to criminal activity, and offering proof from countries with insufficient protections for individuals with non-conforming SOGIE can induce stigma, shame, and impede civil, cultural, economic, political, and social rights of the of the claimants and their families. Moreover, anticipating SOGIE refugee claimants to offer a consistent and detailed narrative of their SOGIE disregards the possibility that some claimants may feel uneasy discussing their SOGIE because of internalized stigma, shame, or trauma resulting from their experiences of persecution. In this context, Anna Barrufet (2019) states that traumatic experiences can disturb the language and thoughts of SOGIE refugee claimants, complicating the process of accessing and transforming their experiences (p. 10). Likewise, UNHCR (2008) explains that SOGIE refugees "can be reluctant to discuss such intimate matters, particularly where their sexual orientation would be a source of shame or taboo in their country of origin. Consequently, they may initially lack the confidence to speak freely" (p. 17). Furthermore, Diego García Rodríguez (2023) emphasizes the adverse effects of the asylum process on the mental health of LGBTQ claimants, including early disclosure of traumatic experiences, limited timeframes for submitting a refugee claim, and hasty coming-out processes (p. 533).

4.2.2 Canada as a Beacon of Hope for SOGIE Refugees

SOGIE refugee claimants frequently encounter expectations to conform to Western exceptionalist narratives, which portray seeking refuge based on SOGIE as a transition from countries perceived as transhistorically "homophobic" to those considered "havens" for SOGIE refugees, such as Canada. This narrative adopts a dichotomous structure, characterizing claimants' home countries as oppressive, unfree, and unjust, while presenting the host country as a land of freedom and liberation from all forms of oppression. Such a narrative attributes qualities such as "safety," "love," "health," and "freedom" to refugee-receiving countries, while

describing claimants' countries of origin with terms like "crisis," "unjust," "no rights," and "hopeless" (Murray, 2016b, p. 36; Shakhsari, 2014, pp. 1005–1012). This oversimplified and reductionist perspective overlooks the fact that leaving their country of origin often involves loss, sorrow, and loneliness for some claimants due to separation from family and friends. These factors emphasize the intricate nature of migrants' lives and challenge the notion that their journeys can be oversimplified as a linear progression from oppression to freedom. Migration, despite its potential benefits, inevitably entails sacrifices and the relinquishment of aspects of one's former life. Within this narrative, claimants are expected to depict their countries of origin as transhistorically homophobic, leaving no room for the possibility of improvement or progress in SOGIE rights and acceptance. This reductionist perspective fails to capture the complexity and potential for change within the social, cultural, and legal landscapes of claimants' home countries. One implication of such a reductionist framing of SOGIE refugee movement is the assumption that a delay in making a refugee claim indicates the claimant's fear of persecution is not genuine. This assumption originates from the Western exceptionalist framing of SOGIE refugee movement, where claimants' hesitation is deemed unreasonable since it suggests indecisiveness between the dichotomous framing of Canada as the place to be "safe," "lovely," and accepting of queer identities, and their home country as "oppressive," "cruel," and transhistorically and transculturally "homophobic." Such narratives dehistoricize SOGIE refugee claimants, neglecting the possibility that their movement from their home country to Canada might not be framed as a linear progression in their minds, allowing for hesitation and uncertainty about permanently deciding not to return home.

This assumption is illustrated in the case of a SOGIE refugee claimant from Jamaica who arrived in Canada in 2014 but delayed seeking refugee protection until 2017. The RPD considered this delay detrimental to her claims of fear, credibility, and basis for seeking refuge. They argued that she should have sought protection immediately upon arrival in 2014 if she

genuinely feared for her safety in Jamaica (*CanLII 39422 (CA IRB)*, 2018, p. 5). The claimant explained that she did not make a refugee claim upon arrival because she wanted to observe if the situation in Jamaica would improve, given the ongoing events within the LGBTQ community. She also expressed her desire to focus on her children, who were still in Jamaica, and to consider her next steps, as she felt safer in Canada. However, both the RPD and RAD found that her delay in claiming refugee protection undermined her credibility and subjective fear (*ibid.*). In a separate case, the RPD cited the delay in claiming refugee protection as one reason for undermining the credibility of a claimant from Cameroon. The RPD associated this delay with doubts about the claimant's sexual orientation (*CanLII 113216 (CA IRB)*, 2020, p. 4). In contrast, the RAD determined that the delay was not decisive given the appellant's belief that he could temporarily pursue work and studies before seeking protection in Canada. The RAD further acknowledged that attempting to regularize his status through alternative means did not necessarily negate his reported sexual orientation (*ibid.*, p. 5). In another case, the credibility of a SOGIE refugee claimant from Nigeria was called into question by the RPD due to his delay in making a refugee claim in Canada in 2014, his return to Nigeria in 2017, and his further delay in filing a claim in 2017 (*CanLII 123649 (CA IRB)*, 2020, p. 2). In response to these concerns, the claimant explained that he did not believe himself to be at risk until his sexual orientation was exposed in Nigeria in 2017, despite his trust in his partner's discretion (*ibid.*, p. 17). Citing a Federal Court decision¹¹, the RAD emphasized that in assessing the implications of a delayed claim, only an unexplained delay after the crystallization of fear and the possibility of seeking protection can reasonably cast doubt on a claimant's subjective fear (*ibid.*). From the RAD's perspective, the claimant's explanation for the timing of his claim could be considered reasonable if his allegations were credible, given that his fear only materialized

¹¹ *Zeah v. Canada (Citizenship and Immigration)*, 2020 FC 711, at para 62

following the events of 2017. Consequently, the RAD concluded that it was an error to use the timing of his claim to undermine his credibility (*ibid.*, p. 18).

The case of a refugee claimant from the Dominican Republic further highlights the assumption that SOGIE refugee claimants originate from countries with transhistorically homophobic cultures, making it nearly impossible for them to live without constant threat to their safety and lives. The claimant asserted that his homosexuality endangered his life in his home country, where he experienced assault and harassment (*CanLII 125404 (CA IRB)*, 2020, p. 2). In 2017, the claimant had an intimate relationship with a man who was a government official in the Dominican Republic. In 2018, someone in the official's entourage discovered their relationship, leading to threats and intimidation to prevent the claimant from disclosing their homosexual relationship. The claimant alleged that he was assaulted by henchmen in 2018 while on vacation in Punta Cana (*ibid.*, p. 2). Following these incidents, the claimant initially came to Canada in 2018, seeking respite but returned to the Dominican Republic the following month, hoping that the situation might have improved. Unfortunately, he continued to face threats and surveillance, prompting his return to Canada on September 23, 2018, when he sought refugee protection (*ibid.* p. 3). The RPD rejected his claim, citing his voluntary return to the Dominican Republic as evidence of a lack of subjective fear (*ibid.* 5). However, the RAD found the claimant's statement credible, recognizing that his brief return to the Dominican Republic was motivated by the hope that circumstances had improved and his reluctance to abandon his minor daughters who still resided there (*ibid.*, p. 6). The RAD concluded that the appellant's temporary return to his home country was insufficient to cast doubt on the credibility of his allegations (*ibid.*). This case illustrates the Western exceptionalist assumption wherein SOGIE refugee claimants' countries of origin are constructed as inherently and persistently homophobic in a binary opposition to Western nations such as Canada, which are depicted as unwavering safe havens. As a result, any delay in making a refugee claim in a

perceived safe country, as seen in the initial RPD decision, is considered unreasonable enough to reject such claims, although, as we see, RAD processes read these delays differently. In this instance, the RPD's conclusion that the claimant's "voluntary return to his country demonstrates an absence of subjective fear" (p. 5) aligns with the Western exceptionalist assumption that any hope the claimant might have for improved conditions in their country of origin is deemed unjustifiable and sufficient to refute the credibility of their fear of persecution. This interpretation is a reductionist view of the claimant's statement, overlooking alternative explanations. The RAD's response to the RPD's decision illustrates this point when it noted that "there is reason to give the appellant the benefit of the doubt in this matter. He explained that he was waiting for things to settle down in his country and that he was reluctant to abandon his minor daughters, who still live in the Dominican Republic. When, after just a few days, the appellant realized that things had not improved there, he decided to return to Canada" (p. 6). This highlights the need for a more nuanced and multifaceted understanding of SOGIE refugee claimants' experiences and motivations rather than relying on overly simplistic, binary narratives that reinforce Western exceptionalist assumptions about SOGIE refugee movements.

This assumption is exemplified in the case of a 64-year-old bisexual Nigerian woman who feared persecution in her home country. The appellant moved to the United States in 1985 with her Nigerian husband, later divorced, and married two American citizens. After her application to reopen her removal order was denied, the claimant sought refuge in Canada in 2017 (*CanLII 153358 (CA IRB)*, 2021, p. 2). The RPD found that her failure to claim asylum in the USA between 1985 and 2014 based on her sexual orientation negatively affected her credibility and proof of fear of persecution (*ibid.*, p. 4). The RAD, however, disagreed with the RPD's assessment, asserting that the claimant's bisexuality was still a secret from her family and community in both the USA and Nigeria when she filed the application to reopen her

removal order. Thus, the RAD argued that the RPD erred in speculating about her fear of Nigerian authorities due to her bisexuality (ibid., p. 5). The RAD also found it reasonable that the appellant would be hesitant or fearful of revealing her sexual orientation to her husband and community, considering her personal circumstances (ibid., p. 6). This fear of disclosing her bisexuality within her Nigerian community in the USA reasonably explains why she did not make an asylum claim earlier (ibid.). More specifically, when asked by the RPD why she did not indicate her bisexuality to the American authorities during her 2014 asylum claim, the appellant stated, "I didn't tell them because my husband will know if I tell them." She explained that her husband hired the lawyer and that they often went to the lawyer together. Disclosing her bisexuality to the lawyer would have risked her husband finding out (ibid., p. 5). Consequently, the RAD overturned the RPD's decision and granted her Convention refugee status (ibid., p. 10).

The case of a claimant from Nigeria also exemplifies the Western exceptionalist perception of Canada as "the right place to be a queer." In this case, the RPD determined that the claimant was not a credible witness and found, on a balance of probabilities, that there was insufficient evidence to support the claimant's allegations regarding either his sexual orientation or any of the allegations or problems in Nigeria (*Applicant v. Canada (Citizenship and Immigration)*, 2022, p. 3). To provide more context, the claimant recounted the beginning of a secret same-sex relationship with a male classmate at university in December 2011, when he was 15 years old. Their relationship continued until the summer of 2013, when rumours began spreading within their community (ibid., p. 2). The claimant alleged that his father's family planned to subject him to a potentially harmful or lethal cleansing ritual to "cure" his homosexuality upon learning of the relationship. The claimant's father prioritized his son's safety and arranged their travel to the United States. There, an agent helped the claimant enter Canada, reuniting him with his stepmother and siblings, who had already been granted refugee

status in Toronto (*ibid.*, pp. 2-3). Here, both the RPD and RAD agreed that the absence of the claimant's same-sex relationships during his time in Canada served as one of the reasons to undermine the credibility of his claims regarding his sexual orientation (*ibid.*, p. 4). This inference aligns with the sexual exceptionalist assumption that Canada is the place where individuals can openly express their sexual orientation. As a result, the claimant's lack of sexual activity in Canada was deemed unjustifiable, as it contradicted the binary opposition that portrays Canada as a liberating haven and the claimant's country of origin as inherently homophobic. However, this perspective neglects the possibility that factors other than the claimant's sexual orientation, such as the marginalized situation of claimants after migration or feeling unsafe in Canada, could have contributed to his lack of sexual activity in Canada. Research shows that racialized, immigrant, and Indigenous LGBT and two-spirit persons face significantly more violence in Canada than their white citizen counterparts (Fobear, 2015, p. 110). This case also demonstrates that sexual exceptionalism often equates SOGIE with sexual behaviour, potentially placing undue weight on the sexual behaviour of claimants. This sexualization of SOGIE partially stems from heterosexist discourses of deviance. Consequently, claimants with limited sexual experience are at a disadvantage, as the emphasis placed on sexual relationships in hearings can work against SOGIE claimants (Jordan, 2009, p. 176). These cases illustrate how the Western exceptionalist narrative oversimplifies complex experiences and imposes a reductionist framework that may not accurately reflect the lived experiences and circumstances of SOGIE refugee claimants. They emphasize the importance of considering the intersections of multiple forms of marginalization and the challenges faced by SOGIE refugees, even in countries perceived as more accepting and inclusive.

4.3 The Homocolonial Inclusion of LGBT Rights

In my analysis of Chapters Two and Three, I addressed the concept of the homocolonial inclusion of LGBT rights, which involves using LGBT rights and freedom as a global

benchmark for evaluating the implementation of Western liberal human rights in non-Western states. This has increased pressure on some SOGIE refugee claimants from countries that have decriminalized homosexuality or witnessed improvements in formal LGBT rights, making it more challenging for them to prove their well-founded fear of persecution based on their SOGIE. Even with efforts made by these countries to distance themselves from associations with the homophobic "third world," individuals who do not conform to socially accepted SOGIE norms may continue to face negative public opinion and discrimination in public life. Utilizing formal reports such as those from the Human Rights Watch (HRW), which employ indices such as marriage equality to differentiate between countries with and without LGBT rights, may not provide an accurate representation of the operational level of these rights. As a result, there remains a possibility of inadequate state protection for individuals with non-conforming SOGIE in these countries, leading to a fear of persecution rooted in negative societal attitudes, as previously discussed in the Third Chapter. The thematic analysis of the dataset in this study identified two categories for this theme: The Accessibility of Protection at the Operational Level and Inaccurate Assumptions About Protection Available in Claimants' Countries of Origin.

4.3.1 The Accessibility of Protection at the Operational Level

The experiences of some SOGIE refugee claimants revealed a substantial disparity between the existence of formal rights for LGBTQ+ individuals in their countries of origin and their ability to access state protection and support at the operational level. This gap persists because, despite progress in decriminalizing homosexuality and formally recognizing LGBT rights in some countries, claimants continue to face considerable challenges in their daily lives. These challenges include pervasive negative public opinion, discrimination, and limited access to essential resources for individuals with non-conforming SOGIE compared to the socially accepted norms in their country. The discrepancy between formal rights and actual lived

experiences highlights the importance of considering claimants' personal accounts and not relying solely on a country's formal reports on recognizing LGBT rights. One case in point is a claimant from Saint Lucia who identifies as bisexual and fears persecution on this basis. The RPD rejected her claim, asserting that the treatment experienced by bisexual women in Saint Lucia did not constitute persecution since sexual acts between women were not criminalized in the country (*CanLII 150832 (CA IRB)*, 2021, p. 2). In response to this decision, the claimant recounted incidents of physical and sexual assault, threats, and marginalization following the disclosure of her sexual orientation within her community (*ibid.*, p. 3). Specifically, she mentioned an instance in 2019 when she was caught in a compromising position with a female coworker, which led to the spread of information about her sexual orientation. As a result, her superior sent a group of men to her home, where she was subjected to beatings and rape. Additionally, one of her uncles physically assaulted her (*ibid.*). Despite these traumatic experiences, the RPD concluded that the claimant did not face a risk of persecution in Saint Lucia, given that sexual acts between women were not criminalized, and relationships between women were generally tolerated or ignored. Moreover, the RPD found the claimant's claim about her experience of sexual assault not credible because, from their point of view, it was implausible that the claimant would not have reported the matter to the police (*ibid.*). Conversely, the RAD found the claimant's explanation credible, emphasizing her lack of trust in the police's effectiveness in handling SOGIE-related matters, a sentiment supported by evidence from country conditions (*ibid.*, p. 8). The claimant explained that her colleagues were threatening, insulting, or ostracizing her at work, which deterred her from seeking assistance from the very individuals engaged in her mistreatment. Given the reports of the police force's inadequate response to crimes against people with diverse SOGIE in Saint Lucia, the RAD maintained that the claimant could not be expected to further endanger herself by reporting

these incidents (*ibid.*, 8). Consequently, the RAD determined that state protection was not available under these circumstances and set aside the RPD's negative decision.

The case of a claimant from India who fears persecution based on his sexual orientation as a bisexual man further demonstrates that the decriminalization of homosexuality does not automatically ensure societal acceptance of the LGBT community or lead to meaningful, effective, and durable changes in country conditions regarding LGBT rights (*CanLII 153222 (CA IRB)*, 2021, p. 2). The claimant concealed his sexual orientation and entered an arranged marriage in 2012. Following a secret relationship with a man in India, they faced increasing suspicion, harassment from the family and police by mid-2019, and death threats, forcing them to flee to Canada in late 2019, where they filed separate refugee claims (*ibid.*). While the RPD found the claimant credible concerning his sexual orientation, it denied his claim after determining that he had a viable IFA in Delhi (*ibid.*, p. 3). The RPD cited advancements since the decriminalization of homosexual relations in the September 2018 decision by the Supreme Court of India to support its decision (*ibid.*, p. 5). However, the RAD held that although same-sex relations have been decriminalized in India, this alone does not establish state protection (*ibid.*, p. 6). The RAD's decision was based on the fact that it considered the RPD's assessment to have disregarded crucial evidence concerning the violence and significant discrimination faced by LGBTQ people across all areas of public life in India (*ibid.*). The RAD cited a section of India's National Documentation Package (NDP)¹², stating that "[t]he attitude and behaviour of the police is one of the biggest barriers to queer persons' access to the justice system in India." LGBTQ persons have continued to face "violence, abuse and harassment [...] at the hands of the police" (*ibid.*, 7). Citing the 2018 United States Country Report for India, the RAD added that "[s]ome police committed crimes against LGBTI persons and used the threat of arrest to coerce victims not to report the incidents" (*ibid.*, 7). Moreover, the RAD emphasized

¹² RAD-1, National Documentation Package (NDP), India, 17 July 2020, tab 6.1 p. 7.

that, despite the decriminalization of same-sex relationships, there remains a lack of protection for sexual minorities in India, including constitutional protections, broad protections, employment protections, safeguards against hate crimes and incitement, and a ban on conversion therapies (*ibid.*, 7). Given this evidence, the RAD concluded that the claimant's fear of persecution was well-founded and that the availability of state protection remained inadequate. The RAD's decision in this case is further reinforced by another RAD ruling involving a 28-year-old Indian citizen originally from Uttar Pradesh. The claimant, a bisexual man from India, experienced violence owing to his sexual orientation throughout his life, starting from childhood. He concealed his bisexuality, married, and eventually established a successful business with his male partner. However, they faced ongoing harassment from the police and conservative groups, which led the claimant to seek refuge in Canada in late 2019 (*CanLII 153493 (CA IRB)*, 2021, p. 2). The RPD denied refugee protection on the grounds that the 2018 judicial decriminalization of consensual same-sex relations, the surge of pro-LGBT public events and campaigns across India, and the increasing integration of LGBT individuals into mainstream society indicated that India was progressing and that the claimant would not face a serious possibility of persecution, particularly in large cities (*ibid.*). Conversely, the RAD determined that the RPD had erred in its assessment, as these positive developments did not outweigh the substantial evidence of the ongoing persecution of LGBTQ+ persons in India (*ibid.*). More specifically, the RAD concluded that no IFA was available to the claimant, given that he was gay and subject to hatred, potential honour killing by his family, or murder by the "orthodox community." Furthermore, the RAD found that the evidence, including documentary sources and personal testimony, demonstrated that the claimant would not receive police protection (*ibid.*, p. 6). Citing the 2018 *Navtej Singh Johar v. Union of India* Supreme Court case, the RAD emphasized that "extensive violations of human rights principles can be found in discrimination with respect to rental accommodation, denial of housing, exclusion from

neighbourhoods, and harassment from landlords, neighbours, family, and police" (ibid., p. 9). Additionally, the RAD highlighted the systemic barriers and human rights violations faced by LGBTQ+ individuals in all aspects of employment, education, and training, including violence, bullying, and harassment. According to the RAD, LGBTQ+ individuals often experience discrimination in seeking employment or lack job security if they are employed, with harassment and arbitrary or discriminatory dismissal being persistent problems (ibid.). Ultimately, the RAD concluded that the state had failed to provide adequate protection against systemic discrimination and risks to safety stemming from widespread homophobic attitudes in society. Consequently, the RAD substituted its own decision, recognizing the appellant as a Convention refugee (ibid., p. 11).

In another case, the refugee claim of a claimant and his family from Mexico was initially denied by the RPD, which held that the applicants were not in need of Canada's protection and dismissed their refugee claims (*Applicant v. Canada (Citizenship and Immigration)*, 2023a, p. 2). The principal applicant and family, Mexican citizens, seek review of a RAD decision denying them refugee protection. They claim persecution by Los Zetas, with the applicant receiving threats due to his journalism. The RAD and RPD found the family had an IFA, despite the daughter alleging persecution due to her sexual orientation. The review assesses potential errors by the RAD regarding the Convention nexus, state protection, and the impact of the daughter's sexual orientation (ibid.). More specifically, the RPD found the applicants to be generally credible but held that they had an IFA in Mérida or Mazatlán. The RAD also noted that the claimant had viable IFAs in Mexico City or Guadalajara (ibid.). The RAD cited a report by the director of a non-profit organization focusing on LGBTQ+ issues, which indicated that the treatment of LGBT individuals varies from state to state, and in the main cities, there are "gay-friendly" zones where members of the LGBT community feel safe. In this report, cities such as Mexico City and Guadalajara were described as quite gay-friendly,

although this did not mean there was no violence against the LGBT community. Based on this report, the RAD reached the conclusion that occurrences of hate crimes against gay individuals in Mexico City were nearly nonexistent (*ibid.*, p. 8). However, the Federal Court challenged the RAD's decision, asserting that the division had not adequately addressed key issues or primary arguments presented by the applicants, particularly concerning the principal claimant's 15-year-old lesbian daughter with a documented history of anxiety (*ibid.*, pp. 4-9). The Court's argument centred on the particular vulnerabilities faced by the daughter who would experience anxiety in disclosing her sexual orientation due to widespread homophobia in Mexico. In the Court's view, this anxiety would lead to a reasonable fear of living openly, making her face persecution even in seemingly gay-friendly cities such as Mexico City or Guadalajara. The Court held that concealing her sexual orientation to avoid persecution would be detrimental to her well-being and personal development (*ibid.*, 7). In light of these circumstances, the Court maintained that the anxiety the daughter would endure while attempting to live openly as a 15-year-old gay individual rendered an IFA in either Mexico City or Guadalajara unreasonable (*ibid.*, 9). As a result, the Court remitted the case to a differently constituted panel of the RAD for redetermination (*ibid.*, p. 9).

In addition to the complexities surrounding IFAs, SOGIE refugee claims face another challenge: the responsabilization of claimants to demonstrate the inaccessibility of state protection in their countries of origin. Responsibilization in this context is the assumption that SOGIE refugee claimants are individually responsible for demonstrating the inaccessibility of state protection in their countries of origin. This notion shifts the responsibility for seeking protection to claimants, assigning them tasks and duties previously handled by state agencies or other actors. Consequently, claimants may be held accountable for pursuing protection, even when such protection may be unavailable or ineffective. Consequently, SOGIE refugee claimants from countries with progress in LGBTQ+ rights or high levels of democracy may be

responsible for proving that they exhaust all possible avenues for state protection before claiming fear of persecution based on their SOGIE. This implies that, in some instances, refugee claimants are expected to navigate and find the protection they need, regardless of whether there has been a significant, effective, and lasting change in their countries' conditions. An example of this can be seen in the case of a claimant from Fiji who sought refugee protection in Canada based on his Indo-Fijian ethnicity and sexual orientation as a gay man (*S.K. v. Canada (Citizenship and Immigration)*, 2022, p. 2). In this case, the claimant was expected to demonstrate the unavailability of state protection. Despite experiencing discrimination and violence related to his sexual orientation, his claim was dismissed due to insufficient evidence of the inaccessibility of state protection. The RAD further emphasized that the claimant's argument heavily relied on his personal experiences, including the tragic loss of friends and fear of police brutality (*ibid.*, p. 9). While the RPD found his sexual orientation credible, it concluded that he had not provided sufficient evidence to disprove the assumption that Fijian state authorities could protect him (*ibid.*, p. 2). Upon appeal, the RAD examined whether the claimant had approached the state for protection and whether he had exhausted all available courses of action. The RAD noted that the claimant had sought police assistance for incidents of criminality but had not contacted the police or any state authority regarding discrimination due to his sexual orientation or Indo-Fijian identity (*ibid.*, p. 3). When the claimant pursued a judicial review of his rejected claim by the RPD in the Federal Court, the Court also dismissed his claim, stating that the claimant's argument for the unavailability of state protection relied heavily on his personal experiences. These experiences included the tragic loss of friends to suicide following discrimination and violence related to his sexual orientation, along with his fear of police brutality (*ibid.*, p. 9).

The case of a 31-year-old bisexual and cognitively impaired claimant from St. Lucia further also exemplifies the responsabilization of claimants in SOGIE refugee claims

(*Applicant v. Canada (Citizenship and Immigration)*, 2023b, p. 2). The claimant faced societal stigma and violence due to cognitive impairments and same-sex attraction. Outed at 15, he experienced escalating threats, including armed confrontations. After police discrimination and inadequate protection, he fled St. Lucia in March 2011, seeking refugee protection in Canada (*ibid.*, p. 3). The Federal Court denied the claimant's leave application regarding the RPD's decision on February 6, 2012. A subsequent Pre-Removal Risk Assessment (PRRA) application was also denied on September 16, 2020 (*ibid.*, 4). Although the PRRA Officer acknowledged the claimant's sexual orientation and impairments, the PRRA application was rejected based on the assumption that state protection would be available in St. Lucia, a country where same-sex activities are criminalized and stigmatized (*ibid.*). The Officer referred to the country condition documentation to argue that St. Lucia is a multiparty parliamentary democracy, and the Royal Saint Lucia Police Force is responsible for maintaining law and order (*ibid.*, p. 6). The claimant's brother's letter, detailing a beating due to the claimant's sexual orientation, was dismissed, as the Officer argued it did not indicate law enforcement's unwillingness to provide assistance (*ibid.*, p. 7). Similarly, threats against the claimant's mother were not considered sufficient proof of the state's inability to protect its citizens (*ibid.*). The claimant appealed for judicial review of a PRRA in the Federal Court, which had been denied on August 19, 2022. In assessing the availability of state protection, the Court referenced Justice Brown's decision in *Dawidowicz v. Canada (Citizenship and Immigration)*, 2019 FC 258, which emphasized that "actual results" are required and that state protection "must be effective to a certain degree, and the state must be both willing and able to protect" (*ibid.*, p. 20). The claimant argued that the criminalization of same-sex activities in St. Lucia creates a stigma against the LGBTQ+ community, which rebuts the presumption of state protection (*ibid.*, p. 22). The PRRA Officer's implication that the burden of proof for fear of persecution increases in proportion to the level of democracy in the country in question was also addressed

by the claimant (*ibid.*, p. 23). The claimant contended that after being threatened by armed men and subsequently seeking help from the police, he was informed that they could not assist people "like him." Following a second incident with the armed men, the claimant again sought help from the police, this time accompanied by his mother and stepfather, but to no avail (*ibid.*, p. 22). The claimant argued that his inability to obtain help from the police due to his sexual orientation serves as evidence of ineffective state protection. The Court agreed that the claimant had rebutted the presumption of state protection by repeatedly attempting to seek police assistance without success, as they did not help people "like him," concluding that he had "tried enough" to seek state protection (*ibid.*, p. 24). Moreover, the Court acknowledged the claimant's intellectual disability (IQ evaluated at 68) and the challenges he would face when trying to access state protection, including the need to disclose his sexual orientation, which is criminalized under St. Lucian law (*ibid.*, p. 25). As a result, the Court allowed the application for judicial review, and the case was remitted for redetermination by a different officer (*ibid.*, p. 28).

The cases examined in this section demonstrate that the formal advancement of LGBT rights in certain countries does not automatically ensure state protection for individuals with non-conforming SOGIE in those countries. This is exemplified by the case of the claimant from India, where, despite the decriminalization of homosexual relations in September 2018 by the Supreme Court of India and the rise in pro-LGBT public events and campaigns across the country, India may still be an unsafe environment for individuals with non-conforming SOGIE. The human rights violations experienced by LGBTQ+ individuals in different areas of life, including violence, bullying, and harassment stemming from negative societal attitudes, could amount to persecution, as indicated by the RAD in the discussed case. Another example from Mexico also challenges the notion that decriminalizing homosexuality or legalizing same-sex marriage automatically ensures safety for individuals with non-conforming SOGIE throughout

Mexico. Even with the decriminalization of homosexuality, widespread homophobia continues to persist in Mexico, leading to anxiety and a reasonable fear of living openly, as observed by the RAD. This fear exists even in ostensibly gay-friendly cities such as Mexico City or Guadalajara. The assumption explored in this section carries significant implications for SOGIE refugee claimants. Specifically, it introduces the concept of responsabilization, where IRB members regard it as the claimant's individual responsibility to exhaust all possible avenues to feel safe in their country, rather than placing the onus on their government or the police to protect them. Failure to fulfill this responsibility could result in questions about the credibility of the claimants, as illustrated by the cases of claimants from Fiji and Saint Lucia.

4.3.2 Inaccurate Assumptions About Protection Available in Claimants' Countries of Origin

This category explores instances in which IRB members inaccurately presume that SOGIE refugee claimants' countries of origin are safe or "homo-tolerant," leading to the conclusion that there is no significant fear of persecution simply because homosexuality has been decriminalized or the index of democracy has improved in those nations. However, this assumption often conflicts with the lived experiences of SOGIE refugee claimants in their home countries. A notable example involves three Nigerian claimants. They presented documents to the RPD, stating they feared persecution by family members, religious leaders, and police officers in Nigeria due to the principal appellant's sexual orientation, despite being married and engaging in romantic relationships with men (*CanLII 132263 (CA IRB)*, 2019, p. 2). Although the RPD recognized the principal appellant as a homosexual person, the focus of the case shifted to whether there was an IFA for the appellants in Abuja, a large city situated far from their home (*ibid.*). The RAD, on the other hand, acknowledged that, while there might be some tolerance toward sexual minorities in cities like Abuja, members of these minorities still face attacks and discrimination (*ibid.*, p. 4). The RAD further noted that seeking protection

from authorities would likely be futile, particularly since the passage of a law in 2014 prohibiting same-sex marriage (*ibid.*, p. 5). Consequently, the RAD concluded that the principal appellant had a reasonable fear of persecution based on his SOGIE and granted him Convention Refugee status (*ibid.*, 5). In another case, the RPD rejected a gay claimant's refugee claim from India, reasoning that the claimant would not face a serious possibility of persecution in large cities due to the 2018 decriminalization of consensual same-sex relations, the increase in pro-LGBTQ+ events and campaigns, and the growing number of openly gay individuals (*CanLII 153493 (CA IRB)*, 2021, p. 2). The RAD, however, challenged the RPD's decision by questioning whether the 2018 decriminalization of consensual same-sex relations had significantly improved the country's conditions (*ibid.*, p. 8). The RAD examined various documents, including a BBC report, and argued that the impact of decriminalization on social attitudes remains uncertain, with widespread violence and discrimination still prevalent (*ibid.*, p. 10). The RAD emphasized that state protection against systemic discrimination and safety risks arising from widespread homophobia is inadequate, concluding that the claimant faced risks throughout India as a member of a particular social group (*ibid.*). Consequently, the RAD decided that the claimant qualified as a Convention refugee due to the absence of adequate state protection and the pervasive nature of the risk in the country (*ibid.*).

An underlying factor contributing to IRB members' inaccurate assessment of protection for some SOGIE claimants is the underreporting of discrimination these individuals face. This underreporting often results from fear of further marginalization and distrust in the authorities. A prime example is the case of a bisexual woman from Saint Lucia whose refugee claim was rejected by the RPD due to the perceived non-persecutory treatment of bisexual women in her country (*CanLII 150832 (CA IRB)*, 2021, p. 2). The RPD acknowledged her bisexual identity but believed she did not face persecution in Saint Lucia, since sexual acts between women were not criminalized (*ibid.*, 3). The RPD deemed her allegations of physical and sexual assault,

threats, and marginalization following her sexual orientation disclosure implausible, citing the absence of laws criminalizing sexual acts between women (ibid., p. 4). The RAD disagreed with the RPD's ruling. They argued that the absence of laws criminalizing sexual acts between women did not guarantee a life free from discrimination or persecution for queer women in Saint Lucia (ibid., p. 5). The RAD highlighted the pervasive societal discrimination against people with diverse SOGIE, with those who live openly facing daily verbal harassment and occasional physical abuse, including attacks on public transport, job discrimination, and hostile work environments (ibid.). Consequently, the RAD noted that hate crimes based on SOGIE are likely underreported or unnoticed, as victims hesitate to report incidents to the police due to their insensitivity towards sexual minorities and prevalent homophobia. In some cases, police perpetuate violence and discrimination against sexual minorities (ibid., p. 5).

Underreporting discriminatory acts against individuals with non-conforming SOGIE is also observed in the case of a Jewish transgender (trans) woman from the United States who sought protection in Canada in 2019 due to fear of transphobic persecution (*CanLII 138570 (CA IRB)*, 2022, p. 2). More specifically, she testified about incidents of transphobia, discrimination, and violence against trans women in the US, including her own experiences with employment, housing, and seeking police protection. The claimant also expressed fear of being targeted by specific individuals: her ex-roommate, ex-landlord, and a debt collection agency. In 2015, she sought protection against her ex-roommate after a threatening incident but was not granted a permanent protective order. She believed her ex-landlord was providing her address information to her ex-roommate, enabling continued stalking and threats. Additionally, in 2021, a debt collector threatened Ms. B via email. While the RPD found the claimant credible and acknowledged the discrimination and violence faced by transgender individuals in the US, it rejected her claim, stating that she had not established the likelihood of the United States being unable or unwilling to protect her (ibid., p. 3). The RAD, however,

cited findings from the Williams Institute,¹³ indicating that transgender people are over four times more likely to experience violent victimization, including sexual assault, aggravated assault, and rape (ibid., p. 12). The RAD noted that approximately half of all violent victims go unreported to the police, as indicated by this report (ibid.). This aligns with the SOGIE Guidelines, which state that underreporting may be more pronounced for marginalized groups. Referencing country reports, the RAD pointed out that legal services and courts are among the essential services where trans people face discrimination (ibid., p. 13). To support its argument, the RAD referred to the claimant's testimony, where she expressed her fears of transphobic persecution by society and targeting by specific individuals, such as her ex-roommate, ex-landlord, and a debt collection agency, with police not responding to her calls for help (ibid., p. 2). The RAD further highlighted the lack of comprehensive policies and training on trans interactions in most US police departments, increasing the likelihood of police violence and discrimination (ibid., p. 17). Based on the evidence presented, the RAD concluded that transgender individuals often hesitate to seek police protection due to the high rates of abuse, victimization, and further discrimination they experience when doing so (ibid.).

All in all, SOGIE claimants face considerable hurdles when their persecution accounts conflict with official reports documenting the protection available for individuals with non-conforming SOGIE in their home countries. This issue is particularly pronounced in cases where advancements have been made in formal LGBT rights, such as the legalization of same-sex marriage or the elimination of SOGIE-criminalizing penal codes, or when the claimants' countries of origin are considered democratic. The assumption that state protection is available

¹³ Williams Institute. (2022, June 23). Transgender people over four times more likely than cisgender people to be victims of violent crime [Press release]. <https://williamsinstitute.law.ucla.edu/press/ncvs-trans-press-release/> Organization of American States. Inter-American Commission on Human Rights. (2022, February 3). United States of America. Chapter IV.A: Human Rights Development in the Region. Annual Report 2020 (NDP for the United States, Tab 2.9); Organization of American States. Inter-American Commission on Human Rights. (2022, February 3). United States of America. Chapter IV.A: Human Rights Development in the Region. Annual Report 2020 (NDP for the United States, Tab 2.9).

for these individuals may be a result of underreporting the discrimination and persecution experienced by those with non-conforming SOGIE in these countries, as previously discussed. As a result, underlying discrimination and negative societal attitudes not only increase the burden of proof for these individuals but also contribute to the perception that their home countries are safe due to the underreporting of persecution incidents.

4.4 Conclusion

This chapter analyzed SOGIE refugee decisions, revealing that IRB members hold certain assumptions during SOGIE refugee determination processes. Using Thematic Analysis (TA), the primary objective of this chapter was to delve deeper into these assumptions by offering categories and subcategories for each assumption. To achieve this, the study investigated various aspects of the main themes. First, I demonstrated that IRB members rely on specific assumptions in SOGIE refugee determinations: The Public/Private Discourse of LGBT Rights, The Linear, Progressive Narrative of SOGIE, and The Homocolonial Inclusion of LGBT Rights. Through an in-depth analysis of the study samples, I discovered categories and subcategories for each assumption. The main categories for The Public/Private Discourse of LGBT Rights are: 1) Substantiating a Well-Founded Fear of Persecution in Private Spheres, and 2) Discretion Reasoning. The Linear/Progressive Narrative of SOGIE categories include: 1) Clear-cut SOGIE Labels, and 2) Canada as a Beacon of Hope for SOGIE Refugees. Lastly, the Homocolonial Inclusion of LGBT Rights categories are: 1) Accessibility of Protection at the Operational Level and 2) Inaccurate Assumptions about Protection Available in Claimants' Countries of Origin. This section also underscored the interconnectivity of these categories. For example, the public/private discourse of LGBT rights can intersect with the homocolonial inclusion of LGBT rights, as seen in the case of the bisexual claimant from Saint Lucia. Facing persecution in private settings and sexual abuse due to her SOGIE, her testimony about the abuse and the resulting fear of persecution was not deemed credible by the RPD. This was

because sexual acts between women were not criminalized in her country and the claimant could not provide official evidence to substantiate her experience of abuse based on her SOGIE (*CanLII 150832 (CA IRB)*, 2021, p. 3). The interconnectedness of the homocolonial inclusion of LGBT rights and the public/private discourse of LGBT rights is evident in this case, as certain countries are deemed safe for individuals with non-conforming SOGIE solely because homosexuality is not criminalized. Consequently, IRB members responsabilize claimants to prove that their country is unsafe, while widespread negative societal attitudes towards individuals with non-conforming SOGIE often lead to discreet intimate relationships and experiences of persecution in private spheres. The publicly defined notion of persecution, combined with the oversimplified assumption that a claimant's country of origin is safe simply because homosexuality is not criminalized, further intensifies the burden of proof for individuals who have experienced persecution in private spheres and originate from countries where homosexuality is not criminalized. Thus, the intersection of the public/private discourse and homocolonial inclusion of LGBT rights exacerbates the challenges faced by SOGIE claimants in establishing the credibility of their claims.

Another intersectional aspect of the examined SOGIE refugee claims is the connection between discretion reasoning and inaccurate assumptions about protection available in their home countries. It is often assumed that claimants' home countries are safe, provided individuals with non-conforming SOGIE remain discreet to ensure safety. However, concealing one's sexual orientation violates fundamental human rights (Immigration and Refugee Board (IRB) of Canada, 2017; UN High Commissioner for Refugees (UNHCR), 2012, Section IV). This is apparent in cases where claimants' sexual orientations are credible, but an IFA is proposed, suggesting they should hide their SOGIE in another part of their country. This was discussed in the cases of claimants from Nigeria, India, Mexico, and the United States (*Applicant v. Canada (Citizenship and Immigration)*, 2023a; *CanLII 128563 (CA IRB)*, 2021;

CanLII 138570 (CA IRB), 2022; *CanLII 153493 (CA IRB)*, 2021). Moreover, the inaccurate assumption regarding protection available for individuals with non-conforming SOGIE from countries perceived as having improved LGBT rights—due to the underreporting of persecutory behaviours—is noticeable in cases of refugee claimants from India and the USA (*Applicant v. Canada (Immigration)*, 2023; *CanLII 138570 (CA IRB)*, 2022). The intersection of ableism and responsabilization of claimants for establishing their fear of persecution amidst negative societal attitudes towards those with non-conforming SOGIE is also apparent in the case of the claimant from Saint Lucia. Despite the claimant's intellectual disability (IQ of 68) and repeated failed attempts to seek police assistance, the PRRA Officer rejected her claim for not exhausting all avenues of seeking state protection, citing general police performance in her country (*Applicant v. Canada (Citizenship and Immigration)*, 2023b, pp. 22–28).

Throughout this chapter, various aspects of assumptions held by IRB members in SOGIE refugee determination processes have been explored and analyzed. The chapter not only provides concrete evidence that the Canadian refugee system is influenced by these assumptions but also highlights cases where these assumptions were questioned during the appeal process or Federal Court reassessment. The question remains: what are the theoretical and empirical implications of these appeals? Why is it significant to address decisions that directly challenge these assumptions? The following chapter will address these questions in-depth and clarify the contribution of this study to the growing body of literature on SOGIE refugee studies.

Chapter Five: Discussion

I concluded Chapter Four by raising several questions: What was the purpose of discussing decisions appealed by SOGIE refugee claimants that directly revealed and challenged the underlying assumptions of the Canadian refugee system in SOGIE refugee determination? Another interrelated question concerns the contribution of this study to the growing body of SOGIE refugee scholarship. I will address these questions under two headings: the theoretical and empirical implications of the study.

5-1 The empirical implication of the study

One key reason for addressing the decisions appealed by SOGIE refugee claimants that directly engage with the assumptions discussed in the previous chapter was to underscore the agency of SOGIE refugee claimants. To clarify the form of agency highlighted in Chapter Four, it is necessary to first examine existing studies that discuss the subject of agency in SOGIE refugee determination.

In their research on Gambian female asylum seekers' narratives of self-production in the asylum claims process in London, Pamela J. Kea and Guy Roberts-Holmes (2013) discuss the concept of "resistive performativity." Specifically, they interpret the asylum seeker's production of a victim identity as a form of resistive performativity, as it works "against a state system that is designed to turn down the majority of asylum claims," as well as a form of compliance as they "comply, through interactions with asylum adjudicators, with the production of their own victim identities, in attempting to have their claims recognized" (pp. 99-100). Such a notion of agency problematizes Western liberal conceptions of agency, in which agency is effectively reduced to resistance within a binary dichotomy between resistance and compliance, as the authors noted (p. 109). This conception of agency moves beyond the limitations of the liberal notion, as asylum seekers could reclaim their agency not through resistance but through compliance or strategic essentialism as they attempt to have their claims

recognized (p. 100). David A. B. Murray (2016b), in his ethnographic examination of the Canadian refugee apparatus, analyses the social, cultural, political, and affective dimensions of a legal and bureaucratic process predicated on separating the 'authentic' from the 'bogus' LGBT refugee. Murray discusses "resistive performativity," which he terms "adaptive agency," and argues that the final performance of a play at the Toronto LGBTQ community centre does not convey the same form of 'resistive performativity' observed by Kea and Roberts-Holmes in their work with asylum seekers (p. 87). Instead, he asserts that the performance reflects hegemonic homonational discourses found throughout the Canadian refugee apparatus and identified in some iterations of queer theory. While Murray advocates for acknowledging the agency of refugee claimants in actively learning and navigating the refugee apparatus (p. 87), he also notes that this form of agency is limited as it rewards a few and potentially punishes many more, reiterating the hegemonic homonational discourses found throughout the Canadian refugee apparatus.

Building on the agency identified in the works of Murray and Kea and Roberts-Holmes, my research demonstrates that SOGIE refugee claimants are not passive victims of the assumptions prevalent within the Canadian refugee system. The form of agency I identified, however, differs from that in the works of Murray and Kea and Roberts-Holmes. This agency refers to the ways in which SOGIE refugee claimants' narratives actively contribute to the discursive construction of an acceptable SOGIE refugee claimant within the Canadian refugee system. More specifically, the agency identified in my work stems from the aspects of SOGIE refugee claimants' narratives that disrupt and interrogate the underlying assumptions of the Canadian refugee system in SOGIE refugee determination. To highlight this agency, I first discussed cases that explicitly demonstrate how IRB members rely on specific assumptions when conducting SOGIE refugee determination, such as the public/private discourse of LGBT rights, the linear/progressive narrative of SOGIE, and the homocolonial inclusion of LGBT

rights. I then identified the various aspects of each assumption by establishing categories and subcategories. Subsequently, to shed light on the active role of SOGIE refugee claimants, I focused on moments in which their narratives of fear of persecution based on their SOGIE did not conform to the discussed assumptions. More precisely, I emphasized the cases in which SOGIE refugee claimants' narratives became catalysts for performing SOGIE refugee laws and guidelines in ways that interrogate certain assumptions. In particular, I discussed SOGIE refugee claims that were appealed, during which the very same reason for refuting the claimants' credibility in the initial determination was subsequently considered the basis for granting them Convention refugee status. This kind of agency can be termed "discursive agency." One distinctive aspect of discursive agency is its rejection of antiquated notions of sovereign or "autonomous agents" (Macgilchrist & Christophe, 2011, p. 150). Although discursive agency is premised upon actors acting from discursively constituted subject positions, these positions are not deterministic. Rather, discursive agency "exceeds the discourse which enables it" and is "constrained but not determined in advance" (ibid.). This connects the notion of discursive agency to the concept of performativity, offering an alternative to standard one-factor accounts of performativity that focus exclusively on either intentional or social aspects of communication. As a hybrid form of agency, the concept of discursive agency challenges determinism and voluntarism. It disputes the idea of the subject as an autonomous source of their own agency while emphasizing their active role in speech production. This involvement in the series of performances that maintain and produce linguistic practices calls for what José Medina refers to as "echoing responsibility" (2007, Section xiii).

Applying this concept to SOGIE refugee claimants, they bear responsibility for the continuation or discontinuation of homonationalist discourse within the Canadian refugee system. This perspective sheds light on Murray's (2016b) critique of Kea and Roberts-Holmes' resistive agency, which he argues is limited and potentially reinforces "hegemonic

homonational discourses found throughout the Canadian refugee apparatus", as it may benefit a few while potentially penalizing many others (p. 37). Acknowledging the limitations of the strategic and resistive agency employed by SOGIE refugee claimants in navigating their stories within the homonationalist discourse, this study emphasizes claimants' discursive agency. This form of agency not only avoids the reinforcement of the Canadian refugee system's homonationalist apparatus but also contributes to disrupting the hegemonic discursive signification of a "deserving" and "authentic" SOGIE refugee claimant. By focusing on SOGIE refugee claimants' narratives that interrogate specific assumptions in Canada's SOGIE refugee determination process, an examination of appealed decisions underscores the potential of these narratives to challenge underlying homonationalist and Western-exceptionalist assumptions that have frequently resulted in the rejection of SOGIE refugees' claims.

It is vital to acknowledge that speaking from the margins of discursive practice is always perceived as a threat to hegemonic and established discourses (Medina, 2007, p. xiii). This perspective sheds light on the initial rejection of the claims discussed in chapter four, as these narratives diverge from the Canadian refugee system's hegemonic narratives. One notable example is the SOGIE refugee claimant who stated that he "no longer wanted to have same-sex relationships in the future and instead wanted to commit to his relationship with his spouse and their minor son" (*CanLII 132263 (CA IRB)*, 2019, p. 3). The RPD initially rejected his claim by focusing on his statement about not wanting to be gay. However, the RAD emphasized an essential point in response to this decision, stating that "it is not advantageous for a person to say things that are not in their best interest" (*ibid*). To rephrase the RAD's point, why would an individual say something during their hearing that significantly increases the likelihood of their claim being rejected? This case exemplifies other cases reviewed in Chapter Four, illustrating that not all SOGIE refugee claimants navigate their stories based on the Canadian refugee system's homonationalist apparatus to maximize their chances of approval. Yet, their

narratives serve as catalysts for questioning the assumptions that had led to the rejection of their claims and those of other applicants. These narratives showcase an irreducible diversity and heterogeneity of perspectives that cannot be reduced to a single normative image of a "deserving" SOGIE refugee claimant. This demonstrates that SOGIE refugee claimants can be considered agentic without adhering to the liberal notion of agency, which assumes "autonomous agents" deliberately resisting restrictive and hegemonic assumptions of an "authentic" SOGIE refugee claimant. Their agency lies in their narratives' disruptive potential to dismantle the homogenous image of a "deserving claimant," and the disruptive potential of their narrative is an unintentional consequence of narrating their lived experiences in their country of origin. The examined appealed decisions following rejected cases show that, while SOGIE refugee claimants' agency is limited within the Canadian refugee system's homonationalist discourse, their stories contribute to disrupting SOGIE refugee laws and guidelines by interrogating certain underlying assumptions. These narratives highlight the potential of SOGIE refugee claimants' stories to create discursive spaces for new voices, fostering new discourses that challenge silence and empower marginalized voices.

5-2 The theoretical implication of the study

The theoretical implications of this study are closely tied to its empirical implications. As previously discussed, the SOGIE refugee claimants' narratives possess discursive agency, indicating their ability to challenge and resist the hegemonic homonationalist discourse of the Canadian refugee system. The disruptive power of these narratives originates from their ability to destabilize constructed identity categories, such as a "deserving" SOGIE refugee claimant, by sharing their lived experiences of persecution based on their SOGIE. Diana Fuss's conceptualization of identity categories is valuable in articulating this disruptive agency. As highlighted in Chapter Three, Fuss asserts that identity categories can operate as "instruments of regulatory regimes" simultaneously acting as tools for normalizing oppressive structures and

as catalysts for challenging that oppression (Fuss, 1991, pp. 13–14). In Butler's conception of citationality, challenging oppression is possible by participating in the very repetition that constitutes identity categories, which inherently present opportunities for contestation (Butler, 1993, p. 147). My study applies this framework to SOGIE hearings, arguing that the refugee determination process can be understood as a citational practice. This allows claimants to engage in an "alternative performance" of SOGIE norms, thereby demonstrating their capacity to intervene in the signification process and contribute to the construction of identity categories. The disruptive potential stems from the continuous assumption and questioning of the "authentic" SOGIE refugee claimant category, characterized by its multiple and contradictory meanings, as outlined in Fuss's formulation of identity categories. This analysis underscores the importance of investigating instances where SOGIE refugee narratives not only adhere to homonationalist and Western-exceptionalist narratives but also stimulate the disruption of the hegemonic discourse surrounding "deserving" SOGIE refugee claimants within the Canadian refugee system.

This study's theoretical framework sets the stage for delineating its contribution to the expanding scholarship on SOGIE refugees. Mainstream research on SOGIE refugee claimants in Canada has documented instances where the Canadian refugee system heavily relies on homonationalist and Western-exceptionalist assumptions of an acceptable SOGIE refugee claimant. For example, Nick J. Mulé's (2020b) analysis of the Immigration and Refugee Board's decision to require claimants to prove their SOGIE in Canada argues that this policy has homonationalist implications, as it recolonizes SOGIE individuals from colonized nation-states (p. 216). Similarly, Kahn and Alessi (2018), in their studies on the psychological impact of refugee claims for LGBT individuals in Canada, observed that the SOGIE refugee determination process imposes early disclosure of sexual violence, compressed timelines for filing claims, and premature coming out, leading to mental health crises and identity confusion

for LGBT claimants (p. 22). Another study exploring the experiences of lesbian refugee claimants in the Canadian immigration system demonstrates that claimants must navigate discourses of homonationalism, homonormativity, and authenticity, which function as gatekeeping mechanisms for the settler state (Dearham, 2017b, p. 77). Furthermore, Megan Gaucher and Alexa DeGagne's (2016) examination of the Canadian state's reliance on Western understandings of sexuality and discrimination for assessing refugee claims based on sexual persecution reveals that the current Canadian refugee system relies on a rigid conception of sexuality and discrimination. This system evaluates refugees according to Western notions of sexuality, positioning claimants as strangers in need of Canadian protection (p. 476). The study also highlights the significant consequences of the normative SOGIE refugee determination system, as refugees who do not conform to the Canadian state's normalized definitions and criteria are ignored, silenced, and delegitimized. Additionally, claims of certain sexual minorities within Canada are overlooked when Canada's exceptional human rights record is used to depict the country as a haven for sexual minority refugees (ibid.). These studies share a common thread: they expose the ways in which the Canadian refugee system relies on Western-exceptionalist and homonationalist assumptions in SOGIE refugee determination. This, in turn, silences and delegitimizes certain SOGIE refugee claimants who do not fit these normative assumptions and criteria. Implicit in these studies is the notion that the Canadian refugee system is constructed as an agent of change, while SOGIE refugee claimants are either seen as victims of the normative refugee determination system or their agency remains unaddressed. To bridge this gap in scholarship, Murray's (2016) concept of "adaptive agency" and Macgilchrist and Christophe's (2011) notion of "resistive agency" provide valuable insights. However, Murray acknowledges the limitations of such agency, as it can inadvertently reinforce the homonationalist apparatus of the Canadian refugee system. In response to these limitations, the current study introduces the concept of "discursive agency" to highlight aspects

of SOGIE refugee narratives that interrogate homonationalist and Western-exceptionalist assumptions of the Canadian refugee system. This understanding of agency transcends the limitations of the neoliberal concept of agency, which is based on a dichotomy between resistance and compliance. It focuses instead on the potential for refugee narratives to disrupt restrictive and hegemonic assumptions of an "authentic" SOGIE refugee claimant. To conclude, it is essential to consider the discussion of the discursive agency of SOGIE refugee claimants in the context of other studies that examine the normative assumptions of the Canadian refugee system. While acknowledging the transformative potential of SOGIE refugee claimants' discursive agency, it is crucial not to neglect the limitations of the Canadian refugee apparatus in determining who is considered an "authentic" SOGIE refugee claimant.

Conclusion

This study has sought to recognize both the constraints of the homonationalist refugee system and the disruptive power of SOGIE refugee claimants' narratives to exploit discursive limitations and make them productive. My goal in writing this thesis was to open up discursive spaces for non-conforming SOGIE refugee narratives and in the process foster new discourses that challenge the silencing of marginalized SOGIE narratives and open up possibilities for more inclusive and nuanced understandings of SOGIE refugee experiences. By centering the transformative potential of SOGIE refugee narratives, this study emphasizes the potential for SOGIE refugee claimants in Canada to actively shape their own stories and challenge the oppressive system designed to deny claims and separate "desirable" SOGIE refugee claimants from "undesirable" ones, while recolonizing the "desirable" ones who predominantly originate from colonized countries.

In conclusion, I want to underscore areas for further analysis within this study's scope. Although my current work identifies and categorizes an archive demonstrating significant normative assumption influence on SOGIE refugee determination in the Canadian refugee

system and how SOGIE refugee claimants' narratives challenge these assumptions, more in-depth exploration would yield valuable insights. With more time, I would delve deeper into alternative, trauma-informed methods the Canadian refugee system could employ to analyze claimants' credibility. For instance, in section 4.2.1 of Chapter Four, I discuss the implicit assumption that SOGIE refugee claimants should provide detailed and clear-cut narratives of their fear of persecution based on their non-conforming SOGIE in their country of origin. However, this expectation neglects the fact that trauma can greatly impact an individual's ability to recall traumatic events. With additional time, I would investigate alternative methods of establishing claimants' credibility without requiring them to directly retell their traumatic stories, potentially retraumatizing them, while still substantiating their fear of persecution.

To clarify, my research contributes to the conversation about SOGIE refugees in Canada in two significant ways. First, I not only provide more detailed insights into the normative identity categories of an "authentic" and "deserving" SOGIE refugee claimant¹⁴, but I also uncover a previously undiscussed underlying assumption held by IRB members in SOGIE refugee determination: the homocolonial inclusion of LGBT rights. Applying Rahman's notion of homocolonialism to moments in which IRB members evaluate the well-roundedness (objective) aspect of the claimant's fear of persecution, this assumption refers to the perception that some countries are considered safe for individuals with non-conforming SOGIE due to official improvements in LGBT rights, such as decriminalizing homosexuality or legalizing gay marriage. However, I argue that the lived experiences of claimants discussed in section 4.3 in Chapter Four and the information provided in Table 3.2 in Chapter Three demonstrate that such formal changes in LGBT rights do not necessarily guarantee substantial, effective, and durable improvements in country conditions. The cases show that claimants coming from

¹⁴ While various aspects of the SOGIE refugee claimant experience have been explored in the literature, certain elements remain underexamined. One such aspect is the intersection of discretion reasoning and publicly defined notions of persecution, which this thesis discusses in greater detail.

countries with seemingly improved LGBT rights still face SOGIE-based discrimination, impeding their civil, cultural, economic, political, and social rights, and risk exposure to violence. They encounter difficulties accessing public services from both state actors and members of civil society. Discussing the intersecting aspects of the homocolonial inclusion of LGBT rights and the public/private discourse of LGBT rights, as discussed in the conclusion of Chapter Four, is another contribution of my thesis to the conversation about SOGIE refugees in Canada.

Finally, I would like to acknowledge that this thesis employs a unique theoretical framework by integrating Butler's theory of citationality with Fuss's conceptualization of identity categories as the foundation for its analysis. This framework was utilized as a methodological tool in two key ways. First, it allowed for an exploration of the potential interrogation of the normative identity category of an "authentic" SOGIE refugee claimant. Second, it examined how such an interrogation could occur through the narration of stories that deviate from the normative assumptions of a "deserving" SOGIE refugee claimant within the Canadian refugee system. Fuss's conceptualization of identity categories effectively lays the groundwork for applying Judith Butler's notion of citationality to the main focus of the study. Within the context of this work, if we consider the concept of an "authentic" SOGIE refugee claimant as a normative identity category, Fuss's formulation suggests that all identity categories possess ambivalent functions: as tools for reinforcing oppressive structures and as catalysts for challenging that oppression, which contributes to their inherent ambiguity. Butler's notion of citationality helps clarify the implications of this ambivalence, revealing that identity categories must be performed to be signified, with the result of this performance always uncertain. This interpretation emphasizes the potential synergy between Fuss and Butler's theories in the analysis. As a result, this synergy opens up the possibility of exploring how the SOGIE refugee claimant's narrative can contribute to the signification of an acceptable SOGIE

refugee claimant through an "alternative performance" of SOGIE guidelines. Ultimately, it is my hope that this thesis can foster a more complex and nuanced understanding of non-Western SOGIE, enabling SOGIE refugee claimants to navigate the homonationalist assumptions within the Canadian refugee system with less difficulty. As discussed, by “being themselves,” these claimants have the potential to transform their surroundings and communities, challenge legal authorities' essentialist and reductionist understandings of gender and sexuality, and ultimately interrogate our normative assumptions about queerness and refugeeness.

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