

**Challenges of Seeking Asylum on the Basis of
Sexual Orientation and Gender Identity**
Research Paper

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Introduction

Not a choice, not a disease, not a phase, but always a stigma. Also, a reason for fear and flight. The world has come a long way on the matter of LGBT+ issues, but many people not only go through situations of homophobia on a daily basis, but get to the point where they have to seek asylum elsewhere. Those after refugee status on the basis of sexual orientation and gender identity face many obstacles to achieve a position of safety, especially due to the misconceptions in key definitions in the determination process and to biases of decision-makers. This paper aims to clarify the general condition of LGBT+ asylum seekers from a sociological perspective, and has as a main question the challenge of proper objective procedure in the refugee status determination considering the 1951 refugee convention.

If we were to put in one single acronym all the possibilities of gender identity, gender expression and sexual orientation, it would be the whole alphabet. The most simplified version containing the four letters indicate Lesbians, Gays, Bisexuals (the three most known sexual orientations) and Transgender people, leaving aside Intersex, Asexual, Pansexual, Non-Binary, Genderfluid, and many more, represented by the “+” sign. It is a world with more colors than the rainbow flag which represents them, greyed away by the cisheteronormative society in which most of society still lives. There is no biological, social, or psychological explanation to the reason why people are LBGT+, and although many achievements in the field have been made, like the depathologization of homosexuality in 1973, when it was taken out of the DSM (Diagnostic and Statistical Manual), it has a long way to go, since it is still criminalized in 70 countries-and it can lead to death penalty in 11 of them.

Focusing on the legal aspects of the subject, our goal is to discuss the “blurred” terms in the definition of refugee in Article 1A (2) of the 1951 Convention Relating to the Status of Refugees in combination with the 1967 Protocol, which states the following:

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

Considering this definition, where there are five grounds on which a person could be being persecuted in their country of origin, LGBT+ would most likely fit in the category of “membership of a particular social group”, but how is a social group defined? What characterizes persecution in their case and where is the threshold between persecution and prosecution in countries where homosexuality is criminalized? How to provide evidence for the process so that decision-makers don’t rely on heterosexual bias, stereotyped views, or underlining homophobia? These are some of the issues that will be discussed here.

I. Beeping the “gaydar”: misconceptions about sexual orientation and the heterosexual bias.

For matters of simplification, this paper will focus more on the conditions of asylum seekers who identify as gay or lesbian; the reasons to do so is because homosexuality is characterized in the process of status determination as the most delicate and intricate case in terms of objective definition. We do not disregard the conditions and specific forms of prejudice and harm that bisexual, transgender and other LGBT+ people face, it will be addressed here more in terms of social issues than legal ones. “Homosexuals”, despite being a correct term when talking about sexuality, can be considered offensive, a little dated and derogatory by many gay people, so the terminology used here will be of “gay men” (male same-sex attracted individuals, “lesbian” (female same-sex attracted individuals), or “gay people” (both men and women).

As the clarifications above mentioned, what characterizes someone as gay is the simple fact of being attracted to someone of their same gender; still nowadays many people still rely on an stereotyped view of “what makes someone gay”. From hairstyle, music taste, body language, preference in clothing, tone of voice...all could be indices that would “beep the gaydar”: an expression referencing to a “radar of queerness”, a subconscious method of finding out who is gay. But gender expression has nothing to do with sexual orientation, and although some things may be common, they don’t constitute a rule or an absolute truth, which can complicate the process of refugee status determination in a series of ways.

As mentioned before, of the five categories stated by the 1951 Convention, “membership of a particular social group” is the most fitting category for gay people, however, it is also the least clear of the grounds. The UNHCR Guidelines propose an approach to establish “membership”:

“a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”

This definition would fit gay people as a social group if considered the fact that homosexuality is “innate, unchangeable and fundamental to identity”, but aside from the fact that they are all sexually and/or romantically attracted to a person of the same gender, gay people not necessarily could be perceived as a group by society, after all, they do not all know each other and they do not act or look the same way. To assume that homosexuality can be “perceived” is to perpetuate certain stereotypes regarding gay people, for example inversed gender expectation, the idea that all gay men are feminine and that all lesbians are masculine. Such presumptions about gender expression could be an impairment in the status determination process in many ways: an actual gay person could be disbelieved for not fitting a certain expectation, someone posing as a gay person could use the stereotypes for their own

benefit, and due to the concept of “imputed membership in a social group”, where a person that does not belong to the group is seen as part of it by society, straight people with such “gay” characteristics could be persecuted in countries where homosexuality is criminalized.

Another problematic issue with this definition concerning LGBT+ status is the fact that the common characteristic that unites the group must not be the fear of persecution itself. Nonetheless, the persecutory act may be a relevant factor to ratify the visibility of a group; if gay people are not a coesive group before society but were to be persecuted for being gay, their persecution creates a public perception that they are in fact a social group, even if they do not all know each other.

II. Out of the closet, wearing a target: the definition of persecution in LGBT+ refugee status determination

A. On the definition of persecution

According to the UNHCR *Guidance Note* (1992), the definition of refugee status is based on the fear of persecution in the place of residence of the claimant. But how is persecution itself defined? Based on case law the organization defines it broadly on Art. 33 as “serious human right violations, including a threat to life or freedom, as well as other kinds of serious harm, as assessed in light of the opinions, feelings and psychological make-up of the applicant”. To understand what does it mean in the case of LGBT+ refugees, it is important to take an expansive view of how do countries accross the world deal with homosexuality; from a position of neutrality it can go both ways: starting at recognition and protection all the way until restriction and criminalization.

B. On the threshold between persecution and prosecution

The differentiation of these two terms, persecution and prosecution, is essential in the process of refugee status determination, once that the first is the main reason for asylum seeking while the latter is not accepted. According to the 1951 Convention, Art 1 B (2). 56: “Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice.”

However, as stated in Art 1 B (2) 59: “In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards. More often, however, it may not be the law but its application that is discriminatory. Prosecution for an offence against “public order”, e.g. for distribution of

pamphlets, could for example be a vehicle for the persecution of the individual on the grounds of the political content of the publication.”

Taking as a base the “Global Legislation Overview Update on State-Sponsored Homophobia” of 2020 by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (Geneva: ILGA, December 2020), it is possible to analyse the difference in treatment towards homosexuality on legal grounds; annex 1 contains a map made by the NGO in question containing all the data of their report, but we will break it down into sections here for a better understanding. It will also be used the Yogyakarta Principles as a basis for the comparison between each State law regarding homosexuality and the perspective of International Human Rights Law, where the principles are applied.

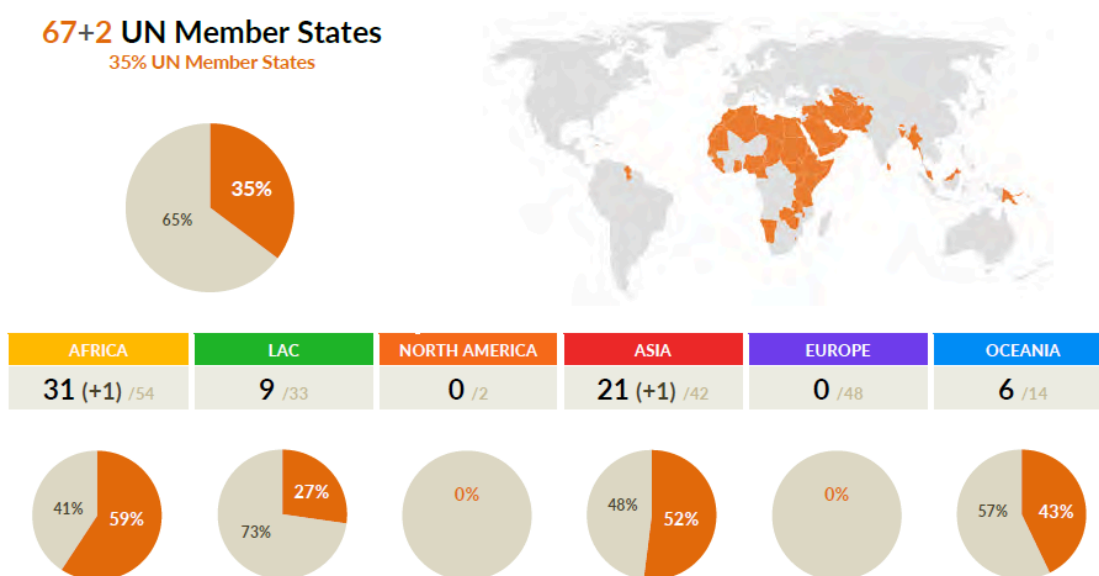


Figure 1. Illegal consensual same-sex sexual acts between adults in private
Source: ILGA, 2020



Figure 2. Criminalisation of consensual same-sex sexual acts between adults around the world
Source: ILGA, 2020

From this overview we can see the amount of countries where homosexuality is criminalized, however, the law is very ambiguous when to specify what kind of conduct falls under the scope of crime. The use of vague terminology, such as “indecent”, “immoral

acts”, “acts against nature”, “sodomy”, among others, give space for a subject interpretation, which leads to the open use of those laws to prosecute LGBT+ people. These are clear examples of when a law itself may not be arbitrary, but its application is discriminatory. Also, the UNHCR states that in some cases, a law may be persecutory *per se*, especially if it comes from religious or cultural backgrounds which are not in conformity to international human rights. According to the Yogyakarta Principles:

“Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person’s actual or perceived sexual orientation, gender identity, gender expression or sex characteristics. -Yogyakarta Principle 33.

States shall repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent. -Yogyakarta Principles 2(b) and 6(b).

Pending repeal, cease to apply discriminatory laws criminalising or applying general unitive sanctions on the basis of sexual orientation, gender identity, gender expression or sex characteristics. -Yogyakarta Principle 33(c)”

Persecution, therefore, can be found, and not only when it relies on a legal basis. In the report “Crimes of Hate, Conspiracy and Silence - Torture and ill-treatment based on sexual identity” made by Amnesty International in 2001, homophobia can happen in many levels, and the discriminatory actors could be the State, the police, or the community. As an example, let’s take Brazil. When analyzing its data in the ILGA 2020 report, Brazil would be seen as “progressive”: it has broad and employment protection against discrimination based on sexual orientation, it has legal recognition for same-sex couples (marriage and adoption are allowed by law), and on the social sphere it is the country with the biggest pride parade of the whole world (the São Paulo Pride had an attendance of over 5 million people in 2017 according to the Guinness Book of World Records). Nevertheless, Brazil remains the country that murders the most transgender people in the world, and it has even been named “LGBT Murder Capital”; of the 4042 murders registered so far in between 2008 and 2021, 1645 happened in Brazil, representing over 40% of them (Figure 3).

Given this information, it is important to notice not only the unclear definition to what constitutes persecution and its differentiation from prosecution in countries that hold legal settings concerning homosexuality, but necessary to understand that gay people suffer discrimination that very often leads to persecution even in countries that have legal measures to protect them. If by the 1951 Convention gay people fit in the category of social group, it is not imperative that all member of such group are persecuted for the matter to be taken into account, if there is any “reasonable degree of likelihood” that the applicant could suffer persecution, there should be institutional mechanisms to deal with such a situation. If not by political or social means of eradicating homophobia in society, at least legal measures to assure protection in case of flight.

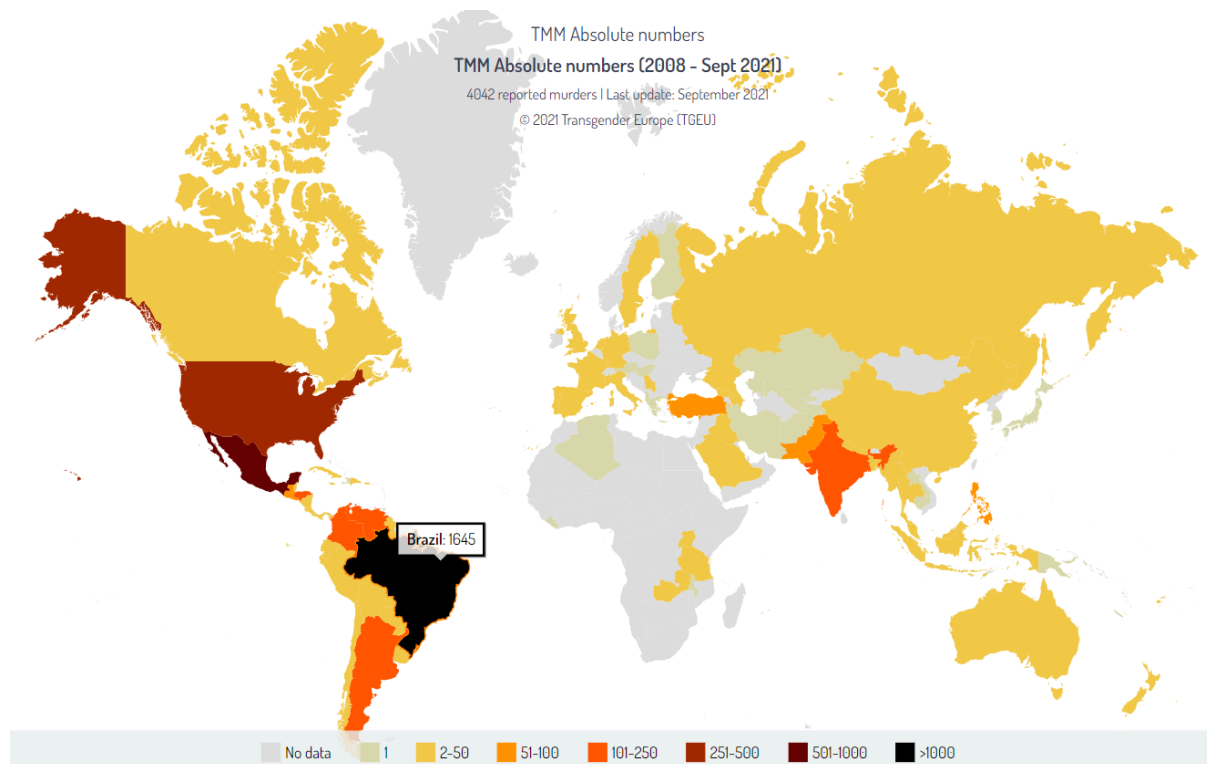


Figure 3. Trans Murder Monitoring in absolute numbers

Source: Transgender Europe (TGEU-2021)

III. A hidden right is not a right: The matter of the discretion requirement

Another problematic issue concerning refugee status determination in the case of LGBT+ people is that many decision-makers, by heterosexual bias, underlying homophobia, or simply a lack of knowledge, rely on “discretion” as a solution to persecution, in other words, concealing one’s sexual orientation, which by itself is, according to the Yogyakarta Principle 19, a violation to human rights and to the UNHCR Guidance Note a situation that when condoned or instigated by the State, may result in persecution.

“Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means...”
-Yogyakarta Principle 19

When a decision-maker proposes the reasoning of discretion, it is seen as if the applicant should cooperate in their own protection; moreover, they treat something as personal as identity and self-expression as something that could be concealed. Discretion can implicate the status process determination in the following ways:

- a) It separates gay people into two imaginary groups: the “discreet” ones and the “open” ones, not only perpetuating stereotypes concerning gender expression, but placing the burden of persecution in one group while the other can even face discredibility
- b) Due sometimes to unawareness of human sexuality and the idea that homosexuality is “something that you always know/since an early age” and not as something fluid, an applicant that come out later in life, after maybe a long period of time identifying themselves as heterosexual, face discredibility and could be set as an example of how it is possible to live discreetly.
- c) Assuming that one chooses to live discreetly given a homophobic environment, what happens if they are “outed” (perceived as a homosexual) eventually? If the State intends to only act in case of persecution, why the need to be discreet in the first place?

These were some of the questionings brought about by the requirement of discretion by decision-makers. The very notion to what does it mean to be discreet or not is build over the hegemonic nature of heterosexuality in society. The so-called “heterosexual bias” can be applied in any situation where a heterosexual couple would not face discrimination while a gay couple might: kissing, holding hands, or other public forms of displaying affection. It is a form of violence that is deeply infiltrated within society and that reduces gay sexuality to sexual acts, leaving aside a huge part of a person’s identity. The discretion requirement can even implicate other possible solutions in the refugee status determination process, such as the possibility of internal flight alternatives. Since homophobia tends to exist nationwide, relocation within the State would be just a form of making the applicant undergo re-concealment of their identity instead of being relocated to a place of actual safety.

IV. The subjectivity of proof: how to be credible regarding sexual orientation

If being perceived as a homosexual and persecuted for it is the reason why LGBT+ applicant seek refugee, the biggest impairment in their application process could be the exact opposite: having their sexuality validated. Since credibility is an issue of great significance in the determination process, when it comes to sexual orientation it has been often described as “easy to make and impossible to disprove”. Of the five grounds stated by the 1951 Convention, membership to a social group is already one of the hardest ones to provide objective proof, it relies solely on self-identification and the person’s testimony alone.

In the past, methods of proof have been borderline inhumane, from medical and psychological reports (which reinforced the idea of homosexuality as a disease) to “phallometric testing”, where sensors would measure the blood flow to the penis when men would be shown heterosexual and homosexual pornography, that was banned in Czech Republic only in 2010. If asked to provide objective documentation, such as membership to a political organisation of LGBT+ rights, the results could be questionable; not necessarily

every gay person is politically active or has any form of tangible proof, and someone posing as a gay person could use this possibility to falsify documents. In the end, the burden of the subjective proof falls on the applicant, who can have his credibility questioned by decision-makers marked by biases.

Conclusion

There hasn't been found a precise number of the amount of LGBT+ refugees nowadays, but from successful to fruitless process of relocation one element encompasses all stories of LGBT+ people who seek help: a homophobic and cisheteronormative environment. The lack of objective proof in a procedure that relies on unclear terminology, stereotyped views of sexual orientation expression, lack of empathy, and heterosexual bias among decision-makers are some of the obstacles faced by those who simply seek a safe place to be who they are and love who they want.

Despite international human rights law principles, NGOS and social movements all across the globe in the pursuit of equal treatment regarding LGBT+ issues, these people still deal with difficulties in a local sphere, from different treatment in health, education, work, and prejudice in their communities, to a global scale, generating migration flows throughout all continents. There is an urgent need to more research, clearer legislation, and in the core of it all, political and social measures to deal with homophobia.

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Annexes

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