

CHALLENGES IN SEXUAL ORIENTATION AND GENDER IDENTITY-BASED ASYLUM CLAIMS: PROMOTING A WAY FORWARD TO THE PROTECTION OF LGBTI PEOPLE'S RIGHTS

Denise Venturi
PhD Candidate in International Law
Politics, Human Rights & Sustainability Programme
Sant'Anna School of Advanced Studies, Pisa, Italy
d.venturi@sssup.it

Abstract

The legal framework and the credibility assessment of LGBTI asylum claims raise several challenges, in particular within the European Union. The paper addresses these issues analysing the main problems posed by the 1951 Refugee Convention and the relevant European legislation. It proposes a forward-looking approach, in particular through the implementation of human rights law to the context of sexual orientation and gender identity-based asylum claims.

Keywords

LGBTI asylum seekers, sexual orientation, gender identity, particular social group, LGBTI human rights.

Introduction

The European Union (EU) is currently facing a dramatic increase in the number of people seeking sanctuary in one of its countries (UNHCR 2015). The fight against migrants' smugglers, the prevention of migrant deaths at sea and the respect of the obligation¹ to guarantee international protection to people who are eligible for it, are considered as top priorities that the EU has to deal with.

However, regarding the international obligations towards asylum seekers, light must be shed on another issue which is gaining increasing attention among practitioners and scholars: asylum claims based on sexual orientation and gender identity.² Claims presented by lesbian, gay, bisexual, transgender and intersex (LGBTI) people entail a wide range of implications from different points of view, such as the legal, the philosophical and the anthropological ones. Although this topic is attracting more and more interest, exhaustive research has not been carried out yet, especially with regard to the EU (Jansen and Spijkerboer 2011, 13).³ Moreover, at present there are no clear and well-established data available regarding the numbers of asylum applications filed in EU countries on the basis of

sexual orientation and gender identity, because the vast majority of states do not collect specific statistics on the point. To date, the most comprehensive data available are those collected by the research "*Fleeing Homophobia*" (Jansen and Spijkerboer 2011). The report shows that only Belgium and Norway collect statistical data, while other EU countries present only approximate numbers (Jansen and Spijkerboer 2011, 15). This study has estimated that there are roughly "*up to 10.000 LGBTI related asylum applications in the European Union annually*" (Jansen and Spijkerboer 2011, 16). Notwithstanding, any analysis of figures on LGBTI asylum applicants should consider a higher number of cases than reports show. Hidden cases can be explained taking into account that applicants may be ashamed or reluctant to reveal the real reasons behind their claims, since they may be afraid of the impact that disclosure could have on their lives, such as repercussion in the family or in the reception facility (Jansen 2013, 17). Moreover, claimants may be unaware that they are entitled to protection against sexual orientation and gender identity-based persecution.

Fleeing persecution

Problems related to LGBTI asylum claims intertwine with the protection of LGBTI people's human rights. People who do not identify in the generally accepted notion of heterosexuality or in the traditional qualifications of socially constructed gender roles may suffer discrimination and even abuses. All over the world LGBTI people are exposed to human rights violations; abuses range from discrimination to hate speech, from denial to limitation of freedom, harassment, torture and killing (O'Flaherty and Fisher 2008, 208). Mistreatments can be committed by community fellows or can be institutionalised by means of laws: currently, 76 countries criminalise same-sex relationships and at least 5 of them apply death penalty.⁴ Directly or implicitly, state-sponsored homophobia (Carroll and Paoli Itaborahy 2015) has the effect to foster hatred and intolerance and to favour a culture of impunity, thus putting LGBTI people's lives at risk and

further exacerbating tensions within the society. People who are exposed to acts of violence and who do not feel safe in their country of origins are forced to flee to another state, as it is the case for applicants who decide to seek sanctuary in the EU.

In the context of LGBTI asylum claims there are two issues of immediate importance: the application of the legal definition of 'refugee' to LGBTI asylum seekers and the problems related to the proof of such claims.

Challenges in the current legal framework

Even though sexual orientation and gender identity are not expressly included among the grounds of the Refugee Convention⁵, persecution on those bases can constitute a valid reason for international protection.

Typically, LGBTI claims fall under the ground of 'membership of a particular social group' (UNHCR 2012, para 40), although some critical issues remain still open. Traditionally, the concept of 'social group' in the Refugee Convention envisages two alternative approaches: the '*protected characteristic*' and the '*social perception*' (UNHCR 2012, para 45).

The former refers to the group's immutable characteristic attached to the group as such. On the one hand, this approach underlines that the group deserves protection because of some innate specifications that are inherent to its members and, thus, linked to the concept of human dignity; hence, acts of persecutions carried out on the basis of such characteristics represent an attack to individuals' dignity and humanity. Therefore, sexual orientation and gender identity should be protected to the extent that a person should not be forced to change them or to conform to others' ideas or normative conceptions

¹ As commended by the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention) and the relevant EU legislation on the point. The "Common European Asylum System" has its legal basis in Article 78 of the Treaty on the Functioning of the European Union and it is composed by the *Qualification Directive* (2011/95/EU), the *Procedure Directive* (2013/32/EU), the *Reception Conditions Directive* (2013/33/EU), the *Dublin III Regulation* (604/2013/EU) and the *EURODAC Regulation* (603/2013/EU).

² UNHCR (2012: 8) endorsed the definition of gender identity and sexual orientation given by the Preamble of the Yogyakarta Principles: "'sexual orientation' to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender; [...] 'gender identity' to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms".

³ Both from a quantitative and a qualitative point of view.

⁴ These 5 countries are: Mauritania, Sudan, Iran, Saudi Arabia and Yemen. For more specific information see ILGA 2015.

⁵ Art. 1(a)(2) Refugee Convention: "For the purpose of the present Convention, the term 'refugee' shall apply to any person who: [...] 2. [...] 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".

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LGBT RIGHTS ARE HUMAN RIGHTS!

(UNHCR 2012, para 47). On the other hand, this interpretation risks to neglect that sexuality is not always fixed and immutable throughout a person's life (Cragnolini 2013, 100). Hence, if this aspect is not properly considered, it risks to deny cases that are instead worth of protection; for instance, a lesbian woman may not be considered as such because she has had children before. The social perception approach, instead, focuses on whether the group shares some peculiar and common characteristics which makes it "*cognizable [...] from society at large*" (UNHCR 2012, para 45), thus emphasising the group's visibility within the society. Although

this approach does not require the individual to have any feeling of common belonging or identification to a certain group (UNHCR 2012, para 48), it can be problematic for those asylum seekers who are obliged to conceal their identity in the country of origin. Moreover, it risks to reinforce stereotypes, since it leaves room for speculation on how LGBTI people should look or act. The UNHCR Guidelines on claims based on sexual orientation and/or gender identity point out that the group must be "*'cognizable' [...] in a more general, abstract sense*" within the society (UNHCR 2012, para 49); however, it is not very clear what this means in practical terms.

These concerns regarding the international legal framework couple with those posed by the EU legislation. Article 10 of the Qualification Directive 2011/95/EU explicitly mentions persecution based on sexual orientation and gender identity⁶, thus acknowledging

⁶ Article 10(1)(d) of the Qualification Directive: "*[...] Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation.[...] Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.*"

its relevance among the range of elements to consider in judging on international protection. However, two points appear critical. Firstly, problems arise regarding the definition of '*particular social group*'. Differently from the Refugee Convention⁷, the Qualification Directive requires the 'protected characteristic' and the 'social perception' approach to be present cumulatively.⁸ Considering the unresolved issues connected to what exactly 'membership of a particular social group' entails, it seems that the formulation of Article 10(1)(d) further complicates and limits the decision of LGBTI claims.

Secondly, the Article further specifies that sexual orientation can be included among the characteristics of the social group '*depending on the circumstances in the country of origin*'. While this reference appears as a reminder to pay attention to the information available on the applicant's country of origin, at the same time it can lead to protection denials if not carefully applied. In fact, regarding the criminalisation of same-sex conducts, it has been argued that laws must not only be in place, but also enforced, so to have a 'well-founded fear of persecution'. Hence, considering the inclusion of sexual orientation as a group's characteristic depending on the circumstances in the country of origin may lead to think that in case of mere criminalisation, without enforcement, people are not entitled to international protection. However, this solution is not consistent with the protection of human rights and must be rejected. In fact, '*criminalisation reinforces a general climate of homophobia*' (Jansen 2013, 9). Moreover, it puts LGBTI people at risk at any time, since laws are still in place even if inactive; a change of government or in the judiciary system can easily lead to

their actual application. In addition, this interpretation is inconsistent with Article 9(2)(b) of the Qualification Directive, which states that acts of persecution can originate from "*legal [...] measures which are in themselves discriminatory*"; thus, the existence of such provisions in itself amounts to persecution. Eventually, it clashes with the principle of non discrimination enshrined in Article 21⁹ of the European Charter of Fundamental Rights (EU Charter) and also constitutes a serious limitation to the right to private life.

In conclusion, even though the inclusion of sexual orientation and gender identity in EU legislation shall be welcomed positively, concerns still remain regarding its consistency with the Refugee Convention and with the general protection of LGBTI people's rights; it seems that the formulation of the Qualification Directive restricts the possibilities for LGBTI asylum seekers. Furthermore, other aspects should be considered, namely those related to the reception of the Qualification Directive in the EU member states.

Credibility and burden of proof

In the context of asylum claims, credibility assessment is defined as "*the process of gathering relevant information from the applicant, examining it in the light of all the information available to the decision maker*" (UNHCR 2013, 27). While the issue of credibility lies at the core of all asylum claims, it acquires an additional meaning with regard to LGBTI applicants. Literature concurs in considering credibility as one of the most pressing issues to be addressed within this context, as well as one of the most under-researched (Jansen 2013, 15).

Addressing the problem related to credibility assessment requires to find a balance between states' need to investigate whether an application is sound and supported by adequate proofs vis-à-vis the individuals' need not to undergo intrusive and inappropriate procedures, in order to demonstrate that their application is motivated by persecution based on sexual orientation and/or gender identity. The main question is whether the person applying for international protection on such grounds

is really (or is perceived as) a LGBTI individual (Middelkopp 2013, 156). This matter is closely related to the 'quantum of evidence' that is necessary to obtain the refugee status. At the moment there is no 'one-size-fits-all' solution to this problem and a common procedure has not been established yet at EU level, with the result that there is a '*huge diversity*' in the way LGBTI applications are assessed (Jansen 2013, 15). UNHCR reiterates the need for an '*individualized and sensitive*' assessment (UNHCR 2012, para 62); interviews should not revolve around the applicant's sexual practices, but should look to other elements, namely the personal narrative of shame, social stigma and self-identification. It is also crucial the way in which results are interpreted. Stereotypes on LGBTI people's behaviour and appearance, as well as pre-constructed assumptions and cultural biases can result in the rejection of the application because the person does not correspond to the examiner's ideas of how a gay man or a lesbian woman should appear (Jansen 2013, 16). Thus, relying upon Western-constructed notions of sexuality and gender identity risks to overlook some fundamental elements.

Addressing protection gaps

As showed before, LGBTI asylum claims give raise to different kinds of problems, from several perspectives. Without being exhaustive, three main points can be taken into account to ensure better protection to LGBTI asylum seekers:

The evolving nature of international refugee law

The established legal framework provides the possibility for LGBTI people, owning a well-founded fear of persecution, to apply for international protection; however, it does not further clarify the aforementioned legal issues, especially those related to credibility (Jansen 2013, 1). Although the recognition of sexual orientation and gender identity persecution on the ground of the membership of a particular social group is established, it does not mean that other grounds should not be considered (Cragolini 2013, 100). In fact, this legal expedient is the result of jurisprudential application, while UNHCR has addressed

⁷ UNHCR, 2012: para 45: "*The two approaches – 'protected characteristics' and 'social perception' – to identifying 'particular social groups' reflected in this definition are alternative, not cumulative tests*".

⁸ Article 10(1)(d) of the Qualification Directive: "*[...] a group shall be considered to form a particular social group where in particular: – members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and – that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society [...]*".

⁹ Article 21(1) EU Charter: "*Any discrimination based on any ground such as [...] sexual orientation shall be prohibited*".

this area only at a later stage.¹⁰ Consequently, the fact that a case cannot fall within the scope of "particular social group" does not automatically mean that the person is not entitled to protection. International refugee law in this field is still evolving (UNHCR 2008, para 2); hence, LGBTI asylum cases should be researched systematically, so to identify new avenues and compare legal solutions. Particularly, dialogue and exchange should be fostered both in a vertical sense (international – regional level and regional – national level) and in a horizontal one (among different national systems). Both dimensions are important for the EU, since asylum law should be applied in a manner that is consistent with international refugee law and homogeneous within EU countries.

Tackling procedural gaps through the adoption of a LGBTI-sensitive approach

Proposals to close procedural gaps regarding credibility and evidentiary matters should take into consideration both the short and the long terms, as they should try to foresee problematic issues and be sensible to future developments. To this extent, three points are crucial. First, asylum interviewers need to be specifically trained to deal with LGBTI applicants, taking into consideration the importance of 'cross-cultural competence' (LaViolette 2013, 197). The ability to understand different cultural backgrounds without adopting judgemental attitudes avoids recurring to stereotypes, since it empowers the examiner's knowledge and expands the range of available tools. It also favours a positive attitude towards diversity, thus creating a safe environment for LGBTI people (UNHCR 2012, para 60). Second, since facts on the situation of LGBTI people are often lacking or unreliable (UNHCR 2012, para 66), robust country of origin information should be collected and exchanged, particularly at the EU level. In this sense, cooperation among institutions, academics and non-governmental organisations must be encouraged, as different expertises can analyse different aspects, such as the legal situation, the perception of diversity and the cultural mindset. Finally, the assessment of LGBTI cases should not focus on the demonstration of the applicants' sexual orientation, but rather on the proof of the fact that

persecution is put in place because of their sexual orientation and/or gender identity. (UNHCR 2012, para 62). This would avoid intrusive questions regarding sexual practices, which are against the right to private life as enshrined in Article 7 EU Charter.¹¹ Furthermore, attention should be paid to the coherency of the applicant's narrative, at the same time keeping in mind the difficulties and the fear in disclosing one's intimate life.

The UNHCR Heightened Risk Identification Tool (HRIT)

The HRIT¹² is the UNHCR's instrument aimed at better identifying people who are at greatest risk in the context of resettlement. In a nutshell, it is composed of a list of questions and statements that guide the interviewer towards those elements worth of immediate and specific attention when dealing with vulnerable people.¹³

The HRIT latest edition (2010) includes LGBTI people as a target group (UNHCR 2010, 4). They fall under the '*legal and physical protection*' risk category: belonging to a sexual minority is explicitly considered among the risk indicators (UNHCR 2010, 10). Other indicators can be useful, such as the sexual and gender-based violence risk or the rejection by the community due to the '*transgression of social mores*' (UNHCR 2010, 10). Even though the HRIT cannot be seen as the panacea, it can indeed represent an important step towards the prioritisation of LGBTI people's claims, because it acknowledges their high vulnerability and reduce risks of overlooking important elements related to the legal situation and the personal safety.

It should be worth considering adopting a similar tool within the EU context; not only would it enhance LGBTI people's visibility, but it would also constitute a uniform role model to guide asylum adjudicators.

Conclusion

Many problems are still to be addressed in the context of LGBTI asylum claims and both qualitative and quantitative

research need to be undertaken especially regarding the EU. As for credibility and burden of proof, future research should adopt an analytical approach to asylum decisions, linking domestic, regional and international case law. Through the application of an inductive methodology, studies should aim to identify best practices and draft guidelines to be adopted homogeneously by EU countries. This would be in line with the creation of a common asylum system and would create the bases for a mutual recognition of decisions.

Eventually, a proper approach to LGBTI asylum claims can also boost the awareness and the protection of LGBTI rights, both in countries of origin and destination. Emphasising the human rights dimensions of these asylum applications has the merit to link the respect for one's sexual orientation and gender identity to the core concept of human dignity, thus putting aside culturally-rooted justifications for abuses.

In this sense, future research should analyse the implementation of the '*Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*' within the context of refugee law. As for now, it seems that these principles have a great potential to advance LGBTI people's human rights, providing a sensitive interpretation of international human rights law.¹⁴

¹⁴ "The Yogyakarta Principles reflect binding international legal standards", UNHCR, 2008: para 9.

¹¹ See ICJ, 2014: 7.

¹² See UNHCR information: <http://www.unhcr.org/4cd417919.html> [Accessed 30 May 2015].

¹³ Such as elderly people or women and girls.

¹⁰ In 2001 and expressly in 2008.

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