

LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective

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Editors

LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective

Persecution, Asylum and Integration

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This work is dedicated to those who had to forcibly leave their countries to seek safety and undertake perilous journeys to live freely their love and their identity. Perhaps, a book cannot do justice to their struggle, but their resilience is there to show us that human rights are not fancy words, but something to pursue and protect always.

Foreword

In 1981, for the first time a court recognised that persecution on account of sexual orientation can be grounds for recognition as a refugee (Dutch Council of State 13 August 1981). In 2008, UNHCR published its *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, followed in 2012 by *Guidelines* on the topic. In 2011, the European Union explicitly mentioned sexual orientation as a relevant persecution ground in its amended Qualification Directive. There is by now an abundance of case law, policy documents, reports, research projects and academic literature on the issue. Some of these sources address large issues; others focus on seemingly miniscule details. I see four major themes emerging.

1. I am not sure that we already fully understand the issues we are working on. Sure: LGBTQI refugees flee violence and seek protection. But simultaneously, we are aware that they face violence in countries of refuge too—in reception centres, in the asylum procedure and on the streets. How can we understand the commonalities between countries of origin and countries of refuge? And how can we make sense of the differences? What do we do with the interactions between them? Two examples may help to clarify how complex these issues are. One: in some countries in the global North, LGBT rights and women’s rights are used to illustrate the backwardness of Muslims and others who are perceived as non-Western. In such cases, discrimination and hate are projected onto countries of origin, and countries of refuge are deemed to be free of them. It is easy to recognise this as a nationalist distortion. Yet there is also some truth in it (LGBTQI people flee from some countries to others and for a reason). In addition, this idealised self-image of destination countries can be seized by LGBTQI refugees to substantiate their refugee claim (“if you are really against gay bashing, protect me against it by granting me asylum”). A second example: in many countries of origin, legislation against LGBTQI people is a colonial heritage. At the same time, current regimes insist on maintaining and intensifying this legislation in order to emphasise national or religious identity.

Both examples show that LGBTQI refugees live in a tension between countries of origin and destination. This tension plays out in the violence that causes

their flight; it plays a role in their chances of getting protection; and it underlies the commonalities between the situations in both countries. The relation between this dynamics and the legal situation, the safety and the well-being of LGBTQI people in countries of origin and refuge is an issue that needs further reflection.

2. A concrete issue in asylum procedures in countries of destination is what has been labelled “the discretion requirement”: the idea that asylum seekers will be safe in the country of origin if or because they will conceal their religion or gender or sexual identity. A number of court decisions all over the world have abolished this ground for rejecting asylum claims. These decisions have been the subject of (sometimes heated) debate. But regardless of these debates, discretion reasoning seems to mutate and pop up again in different places. It can occur in the well-founded fear analysis, in the persecution ground element of the refugee definition or in deciding whether what is being feared amounts to persecution. This cycle of abolition and re-emergence of discretion reasoning has led to what in cycling is called a *surplace*—but one that lasts quite a bit longer than what cyclists undertake. This is a piece of legal doctrine where the idealised self-image of receiving countries meets its limits: discretion reasoning essentially amounts to authorities in receiving countries agreeing with authorities in countries of origin that people can be expected to “behave”. Authorities in countries of origin have a different motivation than those in countries of refuge. In the country of origin, authorities want people to “behave” because their religion or gender/sexual identity is considered inappropriate, while authorities in the countries of refuge expect this because otherwise LGBTQI people would need scarce protection capacity. But it is hard to understand how authorities in receiving countries can simultaneously deny they “return people to the closet” (as the activist rallying cry puts it succinctly) while at the same time doing exactly that.
3. It has been widely observed that abolition of discretion reasoning not only leads to discretion reasoning popping up somewhere else. It also leads to more emphasis on credibility assessment: if discretion cannot be expected, the only ground for dismissing the asylum claims of LGBTQI people from many countries is lack of credibility. Credibility assessment is difficult in all asylum cases. However, when it comes to assessing whether an asylum applicant is lesbian, gay or bisexual (as far as I know, the issue is far less prevalent in trans and intersex cases), there are two specific issues. The first issue is empirical. Minority sexualities take different forms in different contexts; sexual identity works differently in different cultural, social, religious, and economic contexts. Also, the way in which people experience their identity and act upon it is closely related to the response of the environment. As a consequence, a lesbian from Afghanistan may act differently, experience herself differently and speak about this differently than asylum authorities in Denmark expect. She may have learned to deny her sexuality and may initially go on doing so in the country of refuge. She may not feel comfortable with identifying herself as lesbian. And the current expectation that LGBTQI refugees are able to speak about their process of becoming aware of their sexuality creates problems for people with little education; there are increasing indications that people with little education respond to questions

about how they felt, with answers about the physical violence they experienced (as opposed to psychological processes), which leads to distrust of decision-makers. So the first, empirical issue is that it is almost impossible to decide on the basis of an interview whether or not someone is lesbian, gay or bisexual. The second issue is normative. At the core of the liberties many people the world over hold dear is that we decide for ourselves whether we are Methodist or Shiite, liberal or Christian Democrat, bisexual or straight. It is fundamental that the authorities not be competent to decide that, all in all, I would be happiest if I became an orthodox Jew, voted for the nationalist party or married and had children. If the authorities will only allow a man to have sex with another man if they believe him to be actually gay or bi, sexual freedom (and in technical legal terms: the right to privacy) is fundamentally undermined. Yet that is exactly what asylum authorities do. They do not expect LGBTQI people to conceal their identity in the country of origin, but they do decide that they are not LGBTQI and send them to a country where they cannot be so. This is another point where the idealised self-image of countries of refuge meets its limits because they refuse to grant refugees the liberties which for ourselves we find essential.

4. A last point of puzzlement is the position of trans refugees. In refugee law, trans refugees have often been either ignored or subsumed under LGB refugees. But gender identity and sexual orientation are different things and the issues trans refugees face are partly different from those of LGB refugees. On both points, progress is being made in policy, case law and literature—and activism of trans refugees themselves has been essential in this. But one puzzle remains. Violence against trans people occurs frequently all over the world. The number of people claiming refugee status because they are trans is very small. This contrast (high levels of violence, few asylum applications) is disquieting—very disquieting. It means that trans people have problems in even invoking refugee protection, either because they do not succeed in fleeing their country of origin or because once outside their country of origin they do not succeed in accessing the asylum procedure (through a lack of capacity to do so, a lack of trust in the institution or other factors). It seems that trans people are so marginalised that while many of them would qualify for asylum, at the same time they are unable to apply for it.

These four themes are never far away in research on LGBTQI asylum issues. What they share is that a universal form of inequality (namely that between sexual majorities and minorities) intersects with global inequality between refugee-producing and refugee-receiving countries, which overlaps (but in interesting ways not entirely) with the global South/global North divide. In this, LGTBQI asylum issues are specific, but not unique. Other forms of universal inequality (gender, religion, politics, class) also intersect with the South/North divide. These intersections are highly unstable. As mentioned before, the idealised self-image of Western countries as bulwarks of sexual freedom can serve to exclude people from the global South as well as to support their claims to inclusion through asylum. And the idealised self-image may be undermined by the way in which Western countries treat LGBTQI refugees. Especially because asylum discourse on these intersections is so

unstable, it actually matters what we say and do. Seemingly minor shifts in perspective can make a difference and at times more so than large gestures.

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Thomas Spijkerboer

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