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## **‘LGBT+ Asylum’: a perspective of “progress” and a matter of time**

**SUMMARY** LGBT+ asylum started its ‘recognition trajectory’ around the 1980’s and 1990’s (disputed between the Netherlands and Canada)<sup>2</sup> via jurisprudential understandings that recognized sexual orientation and gender identity (hereinafter: SO and GI, respectively) as identity markers of social groups, lying under the scope of the 1951 Refugee Convention. Since then, human rights organizations<sup>3</sup>, United Nations<sup>4</sup>, academicians<sup>5</sup> and activists, have generated some normative considerations towards ‘what is’ – expressing severe concerns, human rights breaches, denouncing the need of urgent reforms in a recommendation-style format – and ‘what should be’ – pointing out how some countries are successfully improving this experience in a best practice sharers format and how to professionalize the asylum system. A growing body of scholarship explores local realities in a national context, particularly in the Euro-American axis, rare theorization efforts are found to explain this shift from a total negation of rights to eligibility/recognition – Puar

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<sup>2</sup> The Netherlands is believed to be the first country to recognize SO as a ground to request asylum in 1981 (Jansen & Spijkerboer, 2011, p. 19; Janssen, 2013, p. 1; Millbank, 2013, p. 34) in the following case *Afdeling Rechtspraak van de Raad van State* [Judicial Division of the Council of State] 13 August 1981), and Canada is believed to be the first-ever to effectively grant asylum in the early 1990’s (Farnsworth, 1992).

<sup>3</sup> The Yogyakarta Principles, in a recommendation format, recognizes the ‘Right to seek asylum’, casting its signatories’ members to reform domestic systems. Another example of organizational activism is ILGA-Europe, responsible for releasing policy papers and raising awareness on this topic in Europe as a destination.

<sup>4</sup> UN Normative documents, in a *soft law* character, can be cited: 1) *The Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status and in the Guidelines on International Protection* (1992); 2) *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (2008); 3) *Discussion note on the LGBTI Asylum- Seekers and Refugees* (2010) and *Guidelines on International Protection No. 9* (2012).

<sup>5</sup> Remarkable academic contributions were given by LaViolette (1997; 2004; 2007; 2013) in Canada and Jansen & Spijkerboer (2011) in Europe.

(2013), Millbank (2013) and Dustin & Held (2012) gave contributions in this area. In a theoretical reflection style, adding temporal characters to this discussion, instead of understanding this own logic of 'evolution' in asylum legislation over the last 30 years, we assert that 'LGBT asylum' is currently flourishing in countries that have endorsed pro-identity regimes. This phenomenon is unique to Liberal democracies and is not a reflection of the 'progress' logic debated by some contemporary authors. Therefore, we propose clustering countries into LGBT-sceptical, LGBT-identitarian, and LGBT-quietist.

**KEYWORDS** LGBT asylum, queer migration, LGBT rights, asylum law, multiculturalism

## Introduction

LGBT rights have expanded enormously in recent decades, as evidenced by UN High Commissioners for Human Rights' remarks (such as Navi Pillay and Ban-Ki Moon) (Pillay, 2014; Moon, 2015), statesmen, politicians (Clinton, 2011), and representatives of national governments at global forums.

The subject has gained prominence inside the UN system over the past ten years and occupied many arenas of discussions. In 2011, *UN Human Rights Council Resolution 17/19* acknowledged the worldwide nature of violence against sexual minorities, noting "grave concerns at acts of violence and discrimination, in all regions of the world" (UN Human Rights Council, 2011).

Due to the establishment of extra-judicial tribunals in the territories of the Islamic State practicing death sentences (by beheading, stoning, or throwing from tall buildings) in the territories of Syria and Iraq, the UN Security Council convened a debate on the rights of sexual minorities for the first time in 2015 (Al Jazeera, 2015), and in 2016, we had the first assigned UN Independent Expert on Violence and Discrimination based on Sexual Orientation and Gender Identity (hereinafter: SOGI).

The *1951 Convention Relating to the Status of Refugees* (also known as the Geneva Convention, 1951 Convention, or simply Refugee Convention) was created to address unique circumstances arising from World War II. While it does not provide explicit protection for sexual minorities, in recent years, the definition of "membership of a particular social group" has expanded to include a variety of specific situations, including HIV stigmatization, forced sterilization, female genital mutilation, and gender violence, which includes persecution of sexual minorities. The fundamental principles of the Convention are upheld in each of these seemingly unrelated cases: the protection of vulnerable individuals

who are being persecuted in conjunction with the absence of State protection (or state-sanctioned persecution).

The rights of sexual minorities have significantly increased in the last several years in the European Union due to the creation of a robust legal framework that protects them. These include the legalization of same-sex marriage and civil unions, adoption rights, the ability for same-sex partners to reunite as a family, the outlawing of discrimination in many contexts, and protection related to all spheres of society, including the workplace, healthcare, and education (Mole, 2021, p. 1). A significant and steady contribution to this expansion is being made by European institutions, such as the European Courts and the Council of Europe, according to Ferreira (2021, p. 83), this 'advancement' gives LGBT rights in the region a certain layer of "exceptionalism" comparing to other regions worldwide. All of these actions have influenced the European Union's notion of transparency, diversity, and strong human rights observance (Mole, 2021, p. 1). However, as Colpani & Habed (2014) draw attention to the fact that EU members' experiences can differ greatly from those of migrants and asylum seekers, implying that the EU is only available to its own citizens.

Some authors have elaborated on the factors of this expansion of eligible grounds for asylum. We can cite the Homonationalism<sup>6</sup> thesis, by Puar (2013), and the more detailed contributions of Millbank (2013) and Dustin & Held (2021). We find in the literature an explicit and general belief that 'LGBT asylum', as a global phenomenon, is growing, the list of States endorsing rights to LGBT applicants and recognizing the eligibility of their claims is enlarging. Therefore, we will place in a timeline of events and literature citation, how this number of countries is perceived as growing, commonalities of countries endorsing an 'LGBT asylum-friendly' label in terms of minority protection.

For this purpose, we will firstly establish key predictions of the literature to map the particular research gap we envision: the lack of a global template of analysis, which lead to cover the Anglo-Saxon literature on this topic, the attempts of theorizations – contributions of Puar (2013), Millbank (2013) and Dustin & Held (2021) – to state our considerations on time and progress

<sup>6</sup> *Homonationalism* is a concept coined by Puar (2013) as a process of normalization and incorporation of LGBT rights into the State structure. In this context of recognition of rights, granting asylum to SOGI applicants is aligned with the idea of these Receiving States to be perceived as 'LGBT-friendly' spaces.

of 'LGBT+ asylum'<sup>7</sup> recognition worldwide, placing the role of Liberal reasoning, and organizing the known global scenario into countries that can be considered LGBT-sceptical (those where eligibility is non-existent or not explicit yet); LGBT-identitarian (Homonational countries – in which the incorporation of LGBT rights led to recognize persecution based on SOGIESC as eligible ground to request asylum) and LGBT-quietist (as an intermediate stage between negation and recognition).

## Key predictions of the literature – problematizing the asylum-seeking process in Europe

In this section, the key predictions of the literature are going to be stated. We have to cite the first ever diagnosis of LGBT+ Asylum in Europe, published in 2011 by Jansen & Spijkerboer, as a remarkable analysis on Europe, in which we will compare to recent literature to state the presence of patterns and repetitions in the literature, clustering the common critics and complaints of academia and human rights organizations.

The persistent major structural and procedural barriers identified in recent literature can be summarized as follows:

- No clear guidelines for sexual minorities asylum claim assessment (Śledzińska-Simon & Śmieszek, 2013, p. 16; Begazo, 2019, p. 194; Mrazová, 2019, p. 186).
- Lack of official data (Millbank, 2013, p. 35; EU, 2017, p. 2; Begazo, 2019, p. 180) – States do not collect data on LGBT applicants, or collect but do not disclose data disaggregated to the public, some scattered efforts

<sup>7</sup> In the absence of a pre-defined and fixed terminology to delimitate asylum-seekers claiming asylum due to LGBTphobia in their countries of origin, in this particular framing, brief considerations on the terminology adopted are necessary. Some substitute terms can be found as 'Sexual minority asylum claim' (or SMAC) as used by Ferreira (2021), endorsing Wilets (1994, p. 5) classic 'sexual minorities' conceptualization. Other suggestions are those adopted by official state and regional documents, for instance, the acronyms SOGI (sexual orientation and gender identity) and the most contemporary and understanding adopted in some UN documents as 'SOGIESC' (sexual orientation gender identity expression and sexual characteristics) or LGBTI/LGBTQIAPN+. All these propositions have limitations and are not absent of being problematized. We choose to delineate the subjects simply as 'LGBT+' due to its widely acceptance and presence in data sources of varied origin as media newspapers, official State policy and international organizations documents, case law decisions in an asylum context, and as a matter of community self-determination (instead of sexual minorities for instance). Furthermore, 'asylum' due to the context of forced migration, meeting the threshold established in the Refugee Convention, elaborations on LGBT migration placed as forced migration can be found in Lee (2019, p. 71), Fobear (2015, p. 102), Dhoest (2019, p. 1076) and Richard (2013, p. 4) to mention some.

to map the size of LGBT asylum can be found in UNHCR (2009, p. 4) and Council of Europe (2010) following no standardize method of collection (timeframe and grounds of request), and some numbers published by NGOs can be found in EU (2017, p. 4).

- Inadequate staff training (LaViolette, 2013, p. 26; Tsourdi, 2014, p. 21; Begazo, 2019, p. 180) – the presumption that asylum authorities, border agents, interviewers, adjudicators and every professional involved in asylum claim is entitled to professional training on sexual minorities issues and cultural sensitivity.
- High burden of proof (Gomez, 2016, p. 481; Begazo, 2019, p. 180; Güler, 2019, p. 126) – Begazo (2019, p. 180) clarifies that, in contrast to other asylum categories (Religion or Political Opinion), a cumulative approach – combining immutable features and social perception approaches – results in a higher threshold.
- Practice of ‘safe-countries list’ and ‘fast-track procedures’, resulting in reduced timeframes and grounds for appeal (Millbank, 2013, p. 48).
- A discrediting culture grounded on misconceptions and scepticism brought about by ‘late disclosure’ (Gomez, 2016, p. 481; ILGA-Europe, 2016a, p. 4).
- Neglection of the particular reception needs and not addressing violence and marginalization experienced widespread in all European reception centres (ILGA- Europe, 2016b, p. 4; 2021, pp. 7–12). Millbank (2013, p. 48) mentions the practice of housing asylum seekers in detentions as specifically problematic *per se*.
- Reliability, frequency, and accuracy of LGBT data in the Country of Origin reports, used for decision- makers, is questionable (ILGA-Europe, 2016a, p. 4).
- Determinant role of criminalizing laws in the countries of origin to be considered ‘persecution’ under the lights of the Geneva Convention (ILGA-Europe, 2016a, p. 4).

## ***Homonationalism and the role of identity in refugee determinations systems***

According to LaViolette (2004, p. 996), there is no standard manner for LGBT people to act or behave. It is unreasonable to equate a certain group's "way of acting" with a specific nationality. LGBT individuals who are born and raised in the same nation will act and behave differently; the only thing that can be expected with certainty is that there will be a variety of expressions, as behavior is innately varied. (Jansen & Spijkerboer, 2011, p. 47).

Based on preconceptions of heterosexuals as the "dominant social norm," several presumptions are made. Furthermore, the candidate identifying as LGBT faces discrimination on the basis of race, color, cultural background, and religion (Alessi et al., 2020, p. 23; Dustin & Held, 2021, p. 189).

The asylum space is viewed as a place of violence as well as a space of narratives and cultural clashes (Manalansan, 2006, p. 232; Hertoghs & Schinkel, 2018; Dhoest, 2019, p. 1072). The asylum-seeking context reproduces the moral and cultural East-West dichotomy, which divides the world into non-Western barbaric and homophobic countries and progressive, modern, and open Western gay-friendly countries (Manalansan, 2006, p. 232).

In the West, we find homonationalist countries. The term *homonationalism* was coined by Puar (2013, p. 337) to discuss the merging of the LGBT community and the nation-state, which has historically been portrayed as a heterosexual domain, as well as how States are consciously shifting to become "LGBT-friendly". A change in history and a reorientation following the inclusion of LGBT rights, context, narrative, and individuals into the State structure characterize the phenomena known as *homonationalism* (Puar, 2013, p. 337).

Conversely, non-Western nations – particularly Muslim communities – are perceived as "demonized societies" (Manalansan, 2006, p. 232) in the context of asylum seekers, where they are perceived as sexist, patriarchal, and rigidly divided in terms of gender roles (McNeal & Brennan, 2021, p. 164).

In the process of searching for the "genuine" LGBT refugee (Puar, 2013, p. 239; Hertoghs & Schinkel, 2018, p. 697), the homonationalist State assumes the role of the "benevolent" State willing to "save" from primitive regimes, sorting those who deserve to be "saved" from those who do not. The applicant will be issued an entry ticket to "Heaven" if their story and performance are deemed convincing; otherwise, they will be punished, ordered to be deported, and returned

to the „hell” from which they were trying to flee (Hertoghs & Schinkel, 2018, pp. 691–716).

According to this homonationalist approach, the non-Western candidate, who is viewed as “the Other,” poses a threat to the “fictitious” ideation of Europe as being white, Christian, modern, and pro-LGBT. The defense of LGBT rights is fundamental to the national identity of a homonationalist nation. Policies pertaining to asylum may prohibit applicants who pose a threat in order to protect their cultural identity; in this case: Muslim applicants (Quinan, Theewis, & Cienfuegos, 2020, p. 355).

The procedure of determining someone’s sexual orientation in order to grant them refuge. The State examines and evaluates the applicants’ honesty regarding their sexual orientation through a factual and truthful analysis (Hertoghs & Schinkel, 2018, pp. 692–693). The evaluation of what constitutes a genuine refugee is influenced by Western stereotypes and presumptions (Puar, 2007; Dhoest, 2019, p. 1082; McNeal & Brennan, 2021, p. 171; Singer, 2021, p. 239). These stereotypes include the idea of the LGBT community as “out and proud” in public and private spaces, the idea of the “happy migrant” seeking self-realization and freedom (Dhoest, 2019, p. 1082), and the reproduction of a “stereotypical and oppressive definition of ‘how’ a victim should act or feel” (Quinan, Theewis, & Cienfuegos, 2020, p. 350).

If the non-Western applicants “adapt” to the Western expectations of gay/lesbian identity, they have a higher chance of being accepted and granted refuge. Consequently, it’s an enforced form of “Westernization,” whereby the non-Western candidate may raise their chances of receiving refuge by „assimilating” into the Western way of life (Dhoest, 2019, p. 1086, 1072).

The asylum-seeking process is a space to be protected (Perego, 2021, p. 145). The asylum authorities are concerned to protect the “European paradise” of being overflooded by fake petitioners willing to take advantage of the system as a pathway to the European space (Perego, 2021, p. 145). Abusers taking advantage of the “State generosity” (Hertoghs & Schinkel, 2018, p. 697).

## **The contributions of Millbank (2013) and Dustin and Held (2021)**

Two main contributions, analysing the admissibility in Europe, can be found in the writings of Millbank (2013) – which associates the leading role of the LGBT rights incorporation in the domestic systems as vital – and Dustin & Held (2021), who attributes the performance of a asylum-seeking application

is defined by the action of civil society organizations, transparency of the process and compliance to human rights norms, which will allow asylum-seekers to have access to proper information, legal counselling and basic human rights prerogatives to substantiate their claims.

According to Millbank (2013, pp. 40–41), the degree of domestic protection for LGBT people in each Member State explains why different European States have different LGBT asylum practices and laws. The advancement of the rights of sexual minorities is contingent upon what Waaldijk (2001, pp. 638–639) refers to as a “symbolic preparation” period. The task of paving the ground for a later, enforceable legal change falls to symbolic acts, declarations, pronouncements, and formal administrative procedures, all of which may be seen as having limited applicability, legal force, and practicality.

This process, which occurs in every country's legal system, is what brings about a new recognition: it transforms LGBT persons from stigmatized individuals into subjects with rights and freedoms on par with other citizens, thereby influencing society's perceptions. Acknowledging LGBT people as victims of persecution is directly correlated with how involved and knowledgeable the Receiving State is about LGBT rights in general. Even though formal protection measures for LGBT people have no direct connection to asylum-seeking, they can still initiate this familiarity, contextual approach, and sensitive approach. This leads to a greater understanding, which in turn reduces hurdles and resistance. According to this viewpoint, nations who are hesitant to embrace laws and legalize LGBT rights subject their citizens to harsher treatment, more obstacles, and a lower likelihood of granting asylum because they fail to recognize the persecution that these minorities are subjected to.

The decision-makers' prior knowledge and comprehension of LGBT rights will determine the legal outcome; the more knowledgeable and attuned they are, the better equipped the asylum authorities are to reach a determination about these claims. The degree of acceptance and safety offered to sexual minorities in the home is reflected in the familiarity and understanding levels.

Dustin & Held (2021, p. 188) also present a reasoning to explain the variables that may affect legal outcomes, dividing them into three main factors: 1) Space: the physical space in which the asylum-seeker waits for the asylum decision; 2) Religion: interplay between faith and sexuality; 3) LGBTIQ+ Support.

The space, which can be translated as accommodation or detention centres, depending on the country of refuge, is widely cited as a space of violence widespread in Europe, in which LGBT is targeted especially for being LGBT, adding

extra layers of vulnerability and specific needs of accommodation (Jansen & Spijkerboer, 2011, pp. 10, 77; Jansen, 2013, pp. 1–2, 21; ILGA-Europe, 2016b, p. 1). For example, transgendered hormonal treatment is being neglected in Berlin and Nürnberg, while Muslim applicants are being threatened with beatings and rapes in centers in Amsterdam and Rotterdam (ILGA- Europe, 2016b, p. 2). In Germany, the UK, and Italy in particular, asylum seekers are kept in over-crowded conditions, face harassment and marginalization from other asylum seekers, and live in constant dread of theft and invasion of privacy (Dustin & Held, 2021, p. 189).

Experience has a direct impact on the applicant's capacity to gather evidence and organize the story persuasively, which in turn impacts the quality of the legal performance (Dustin & Held, 2021, p. 194). Regarding religion, national courts in Germany, the UK, and Italy view it as problematic when religion and SO co-exist. The relationship between “being religious” and having a “sexual orientation forbidden” is problematic, and this can be interpreted as an attempt to discredit the argument (Dustin & Held, 2021, pp. 196, 198).

It is unrealistic to expect LGBT asylum seekers to automatically become atheists, even while the persecution is justified on the basis of religion (Dustin & Held, 2021, p. 198). To put it another way, even though the authorities handling LGBT asylum claims view religion as the ‘source of the problem’ faith can be a powerful ‘source of support’ for these individuals throughout the entire process (Dustin & Held, 2021, p. 201)<sup>8</sup>.

In sum, these three theoretical approaches contribute to explain the rise and sustainability of LGBT asylum as connected to ‘homonationalism’ as part of the national identity and State-building of a given country (Puar, 2013), LGBT asylum as a side-effect, or a spill-over effect, of the level of protection observed in the domestic framework of protection (Millbank, 2013), the margin of freedom of civil society organizations to operate in partnership with asylum authorities, empowering applicants with information and legal counselling, and the public perceptions towards religiosity and sexuality (Dustin & Held, 2021).

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<sup>8</sup> A non-academic source that corroborates these findings is the 2008 documentary *A Jihad for Love* (dir. P. Sharma), which details the experiences of nine Muslim LGBT asylum seekers who are fleeing to Turkey, France, Canada, and South Africa.

## Reviewing 'progress' in asylum-seeking context



Graph 1. Synthesis timeline board: time of recognition of LGBT identity as eligible ground to claim asylum

Source: elaborated by the author based on Millbank (2013, p. 34), Janssen (2013, p. 1), Jansen & Spijkerboer (2011, p. 19), Farnsworth (1992), Kofoed (2021), Goldberg (1993), Dauvergne & Millbank (2003, p. 301) and ILGA-Europe Rainbow Index 2024 (ILGA-Europe, 2024).

On graph 1, it is placed in a timeline of events (until 2000) the timing that national courts have decided in favour on the eligibility of sexual orientation to be entitled to receive protection under the Geneva Convention. These dates may present some variations<sup>9</sup> depending on the sources found, therefore, we chose the latest date found, usually the date of publication on the appealing level, which means, the crystallization of the decision as a landmark case, establishing concretely the Courts understanding and becoming a precedent for future adjudications.

Despite some sources mentioning Canada as the first ever country to grant asylum to a LGBT person, some other sources contradict (Jansen & Spijkerboer, 2011, p. 19; Janssen, 2013, p. 1; Millbank, 2013, p. 34) this claims, placing the Netherlands<sup>10</sup> as the pioneer in this recognition, dating back to a period between 1979–1981. Some similar understanding would be reached in other Western nations 10 years after, in 1992 precisely in Canada, followed by the United States<sup>11</sup> and Australia in 1994.

<sup>9</sup> The inaccuracy of dates found in different sources is explained based on the reference taken by the author, for instance, a given date is announced based on 1) date the case was filed/requested to the immigration authorities or the Court; 2) date of the first adjudication decision was made and; 3) date of the appealing level decision.

<sup>10</sup> Case law reference is Afdeling Rechtspraak van de Raad van State (Judicial Division of the Council of State) 13 August 1981.

<sup>11</sup> Landmark case law per country: US – Matter of Toboso-Alfonso (20 I&N Dec. 819, BIA 1994); Australia – RRT Reference N93j00593 (Unreported, Tsamenyi, 25 January 1994) and Canada – Re R (UW) [1991] CRDD No 501 (QL), IRB Reference U91-03331 (Rotman, Leistra, 7 October 1991)

Published by ILGA-World, the Rainbow Map Index 2024 analyses periodically the degree of protection to LGBT population envisioned in State legislation, official policy documents and other administrative measures in 49 countries (mostly, European countries and neighbourhood). The explicit recognition to sexual orientation, gender identity and intersex, prescribed in the national asylum legislation or other policy measures, is understood as enhancing protection to LGBT in a asylum-seeking context, in which we have the following scenario:

- SO is formally recognized as an eligible ground in 33 countries<sup>12</sup> (23 EU member states),
- GI is explicitly predicted as an eligible ground in 27 countries<sup>13</sup> (19 EU member states),
- Intersex is uniquely recognized in Belgium, Malta, Montenegro, Norway, Spain, and Sweden,

In other European jurisdictions, such as Denmark and Switzerland, despite not finding any formal recognition in asylum law, other positive measures were identified as adopted. The total absence of any species of protection is found in 13 countries (Andorra, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Estonia, Georgia, Lithuania, Russia, San Marino, Turkey and Ukraine).

It is undisputed to conclude that the proliferation of protection for LGBT asylum-seekers is a concrete and growing reality. In parallel, it is discussed in academia the degree of what is understood as ‘progress’ for LGBT asylum-seekers, for instance, Millbank (2013) believes that LGBT rights are progressing in international forums, taking the Ban- Ki Moon 2013 declaration emphasizing the neglection of LGBT rights worldwide, as an emblematic example of a “hard-won” and evidence of “real progress” (Millbank, 2013, p. 35), however, in terms

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according to Dauvergne & Millbank (2003, p. 301) or Matter of Jorge Alberto Inaudi, File No. T91 04459 (Immigration and Refugee Board) based on Vagelos (1993), Colwell (2018, p. 10); also cited in Goldberg (1993, p. 616).

<sup>12</sup> SO is formally recognized in (European Union members highlighted with a \*): Albania, Austria\*, Belgium\*, Croatia\*, Cyprus\*, Czechia\*, Finland\*, France\*, Germany\*, Greece\*, Hungary\*, Iceland, Ireland\*, Italy\*, Kosovo, Latvia\*, Liechtenstein, Luxembourg\*, Malta\*, Moldova, Montenegro, the Netherlands\*, North Macedonia, Norway, Poland\*, Portugal\*, Romania\*, Serbia, Slovakia\*, Slovenia\*, Spain\*, Sweden\*, and United Kingdom.

<sup>13</sup> GI (European Union members highlighted with a \*): Albania, Austria\*, Belgium\*, Croatia\*, Cyprus\*, Czechia\*, Finland\*, France\*, Germany\*, Greece\*, Iceland, Ireland\*, Italy\*, Kosovo, Liechtenstein, Luxembourg\*, Malta\*, Montenegro, the Netherlands\*, North Macedonia, Norway, Portugal\*, Serbia, Slovakia\*, Slovenia\*, Spain\*, Sweden\*.

of asylum-seeking rights, Millbank (2013, p. 32) concludes it is in "unsteadily progressive", pointing out the doctrinal barriers and the persistent informal resistance.

Colpani & Habed (2014) put into question to which extent the enhanced protective systems have progressed for the benefits of nationals exclusively, excluding foreigners asylum-seekers of this 'progression', suggesting that the advancements observed in the domestic contexts were not spilling over in asylum legislation. Other authors, as Mrazova (2019, p. 203) and Ferreira (2021, p. 83), debate the 'progressiveness' of the European Courts towards asylum-seeking rights, concluding that the Court of Justice of European Union (hereinafter: CJEU) has a more progressive approach while the European Court of Human Rights (hereinafter: ECtHR), a more conservative<sup>14</sup>. Some other considerations on the 'progress' of asylum rights can be found in Tsourdi (2014, p. 5) and Jansen (2014, p. 4).

Discussions on 'progress' are reasonable in law, given that sexual minorities asylum rights are part of asylum legislation and international law discussions, as a field of knowledge, the progressive paradigm of law in which states that once a given set of rights is established, the regression is not possible. A key prediction in our review is a substantial procedural critique<sup>15</sup> of the current stage of asylum and refugee determinations systems, expressing severe concerns, human rights breaches, denouncing the need of urgent reforms and pointing out how some countries are successfully improving the asylum-seeking experience and giving recommendations on how to professionalize the system. For these authors,

<sup>14</sup> The contribution of these rulings, by establishing precedent cases, may impact Courts' future rulings, States' new administrative measures and asylum policy making. Decisions made CJEU are binding to all Member States. Decisions made by ECtHR are obligatory only for the State in which the case was filed. Some remarkable case law decisions from both Courts: CJEU determined the prohibition of the discretion criteria (*X, Y and Z case* [2013]) – asylum authorities and adjudicators cannot substantiate a negative claim decision based on the presumptions that the individual seek concealment. ECtHR endorsed discretion criteria in the ruling (*M.K.N. v Sweden* [2013]). CJEU concluded on (*A, B, C case* [2014]) ruling that late disclosure (or revealing sexual orientation not in the first occasion to asylum authorities/decision makers) is not a factor of discredit per se and shall not lead to automatic rejection of a claim. Conversely, ECtHR has endorsed late disclosure in the rulings (*M.K.N. v Sweden* [2013]) and (*ME v. Sweden* [2014]).

<sup>15</sup> These authors, such as (Millbank, 2013; Boncompagni, 2021; and Ferreira, 2022 to mention some) will problematize the functioning of the asylum system, pointing out grave problems of implementation, not complying with international and regional standards, endangering the lives of asylum-seekers situation. In other words, while in some other countries are still in process of explicit recognition, in other countries, mostly Western Europe and North America, the explicit recognition is not sufficient, in a scenario of enforcement presenting grave concerns. These authors advocate in favour of reforms and adjustments, in a "ideal-type" manner, questionable to which extent can be found in a real-life observations.

the mere explicit recognition and punctual positive decisions are not sufficient. Furthering this discussion, what we would discuss here is the implications of this debate on progress.

De Benoist defines what progress is:

progress can be defined as a cumulative process in which the most recent stage is always considered preferable and better, i.e., qualitatively superior, to what preceded it. This definition contains a descriptive element (change takes place in a given direction) and an axiological element (this progression is interpreted as an improvement). Thus it refers to change that is oriented (toward the best), necessary (one does not stop progress), and irreversible (no overall return to the past is possible). Improvement being inescapable, it follows that tomorrow will be always better than today. (2008, p. 7)

In addition, we have the relationship between ‘progress’ and ‘civilization’, merging to become almost synonymous. Progress was achieved by the selection of the “fittest” or “the bests”, under a broad conceptualization of competition. This reinterpretation served to strengthen Western imperialism by asserting that the culture of the West, being the most advanced, was inherently superior. Therefore, Western civilization represented the pinnacle of social development. The historical development of humanity was segmented into consecutive “stages” denoting the different phases of its “progression.” The spatial distribution of different civilizations was mirrored in time: “primitive” societies provided Westerners with a mirror picture of their own history (they were “contemporary ancestors”), while the West offered the m a mirror image of their future (Benoist, 2008, p. 14).

Therefore, firstly, we have implied an expectation that LGBT asylum is a state of recognition to be achieved, and once achieved, cannot be reverted and shall be improved to reach even higher human rights standards, prescribed by United Nations, European Union and international human rights experts. Secondly, the possibility of dividing the world into LGBT asylum-seeking countries, which will be further developed in the next section.

## Proposing a global overview on LGBT Asylum based on stages of recognition

For this purpose, we propose a division into LGBT-sceptical, LGBT-identitarian and LGBT-quietist<sup>16</sup> countries, considering how their refugee determinations systems and asylum authorities handle identity asylum claims based on sexual orientation and gender identity.

### LGBT-Sceptical / negation of eligibility

We place all the countries which haven't adjusted their domestic systems according to the UN, UNCHR and Yogyakarta Principles recommendations. In these countries, the '*Right to asylum*' is not explicit recognized.

Those countries in which individual and communitarian protections are questionable or simply non-existent, and LGBT individuals can resort to no ground of protections. In these countries, being an LGBT asylum seeker highly likely will not lead to positive decision, given that, being a LGBT individual doesn't engender or triggers any legal mechanism. In other words, being a LGBT asylum seeker, and substantiate an asylum claim based on LGBT-phobia 'doesn't matter' to the State. In a domestic context, still in these countries, LGBT people face State-sponsored violence, discrimination, LGBT-phobia in many spheres of the social life, in which it is found a very negative societal attitude towards the mere existence of sexual minorities. In the absence of any legal grounds of protection, these individuals will migrate and request asylum in 'LGBT-friendly' countries.

Potential countries to be placed under this label are those who are origin of LGBT applicants fleeing on grounds of persecution, as reported by Jansen & Spijkerboer (2011, p. 16), Europe received applicants from 104 countries worldwide<sup>17</sup>: 35 African countries, 28 Asian countries (including 16 countries

<sup>16</sup> This nomenclature is proposed inspired by the work of Eisenberg (2009) which proposed a nomenclature to classify how States are assessing identity-claims for accommodation in multicultural societies. In this article, we are taking some inspirations in Eisenberg's terminologies to present a nomenclature tailored specifically to present the connection of refugee determinations systems and the examination of LGBT identities.

<sup>17</sup> Full list of countries (Jansen & Spijkerboer, 2011, p. 16): Afghanistan, Albania, Algeria, Angola, Armenia, Azerbaijan, Bangladesh, Barbados, Belarus, Bolivia, Bosnia-Herzegovina, Brazil, Burundi, Cameroon, Central African Republic, Chile, China, Colombia, Congo (DRC), Costa Rica, Croatia, Cuba, Dominica, Ecuador, Egypt, Eritrea, Estonia, Ethiopia, Gambia, Georgia, Ghana, Guatemala, Guinea-Conakry, Guyana, Honduras, India, Indonesia, Iran, Iraq, Israel, Ivory Coast,

in Middle East and Southeast Asia), 21 Central and South American countries, and other 20 countries such as Russia, Mexico, the United States of America, Caucasus, Baltics, Balkans' nations, and Central Eastern European countries including EU members as Romania, Slovakia, Lithuania and Estonia.

Another angle to map these countries are those which have enshrined explicit laws targeting sexual minorities, countries which envision death penalty for consensual same-sex relationship can be placed under this box (Brunei, Iran, Mauritania, Nigeria – twelve states – Saudi Arabia, and Yemen) and in other five countries where death penalty is imposed based on interpretation of non-direct legislation (Afghanistan, Pakistan, Qatar, Somalia, and the United Arab Emirates) according to ILGA-World (2020). In the lack of a global LGBT asylum study, assessing all countries who have recognized eligibility, this list could be extended to those countries where same-sex sexual acts are criminalized – 69 countries around the globe – an area that covers 3 billion of the global population (ILGA-World, 2020, p. 113) The level of criminalization is the highest in Africa<sup>18</sup> (almost 60% of the African continent or 32 countries), followed by Asia<sup>19</sup> (52% of the continent or 22 countries), Latin America and Oceania (9 and 6 countries, respectively).

A report published by Organization for Refuge, Asylum & Migration (ORAM, 2012, p. 7) esteems 2.5% of the global population living in persecutory environments comprises LGBT population (or approximately 175 million people), out of this sizable share, 1% of people (or 1,75 million people) will be openly perceived or known as LGBTI, in turn, approximately 175,000 will be targeted, seriously harmed or threatened – which would place them all as potential asylum-seekers – however, only 17,500 is able to gather conditions to flee to countries of transit/asylum. 7,500 is able to access information on legal protection,

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Jamaica, Jordan, Kazakhstan, Kenya, Kosovo, Lebanon, Liberia, Libya, Lithuania, Macedonia, Malawi, Malaysia, Mali, Mauritania, Mauritius, Mexico, Moldova, Mongolia, Morocco, Nepal, Nicaragua, Niger, Nigeria, Pakistan, Palestine, Panama, Paraguay, Peru, Philippines, Qatar, Romania, Russia, Rwanda, Saudi Arabia, Senegal, Serbia, Sierra Leone, Slovakia, Somalia, South Africa, Sri Lanka, St. Vincent & the Grenadines, Sudan, Syria, Tajikistan, Tanzania, Thailand, Togo, Trinidad & Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United States, Uzbekistan, Venezuela, Vietnam, Yemen, Yugoslavia (FRY), Zambia, Zimbabwe.

<sup>18</sup> Criminal offenses are effectively enforced in 25 African countries: Algeria, Burundi, Cameroon, Chad, Egypt, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Malawi, Mauritania, Morocco, Nigeria, Senegal, Sierra Leone, Somalia, South Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe (ILGA- World, 2020, pp. 114–126).

<sup>19</sup> Effectively enforced in 18 Asian countries: Iraq, Iran, Kuwait, Lebanon, Saudi Arabia, Syria, United Arab Emirates, Yemen, Turkmenistan, Uzbekistan, Afghanistan, Bangladesh, Pakistan, Sri Lanka, Maldives, Brunei, Malaysia, Myanmar (ILGA-World, 2020, pp. 129–140).

5,000 will formally request asylum and half of this number – 2,500 applicants – will succeed in their claims.

### **LGBT-Identitarian**

Those countries which have recognized discrimination and LGBT-phobia as persecution, entitling a LGBT applicant to receive international protection under the Geneva Convention. As destination countries, in other words, be a LGBT and suffer persecution on ground of identity in their home countries matters for these countries.

We place all countries who have officially recognized LGBT-phobia as an eligible ground for request asylum: Canada, Australia, New Zealand, the United States, the United Kingdom, South Africa, Brazil and Europe (SO is recognized by 30 European countries and GI in 24 according to the ILGA-Europe, 2021).

### **LGBT-Quiet**

We propose a third view on LGBT+ asylum, in which we place as a transitory stage from total scepticism to recognition of eligibility. Under this approach, despite not recognizing the eligibility, the State authorities will process an asylum claim for refugee resorting to other grounds of protection or assessing the criteria of violence and persecution not centred on identity grounds. Despite not explicitly recognizing, the claim is not automatically deemed ill-grounded, and other forms of evaluation take place, in order to substantiate a decision 'neutralizing' the identity content of the claim. Some examples lying under this scheme can be found in cases where, despite not being granted refugee, other forms of protections were granted to the asylum seeker, lesser levels of protections (ECRE, 1997).

We place those countries – more aligned with a Liberal Democracy regime – who have accepted LGBT+ asylum-seekers and granted asylum, despite the non-official recognition, due to the lack of clear guidelines, but have accepted on other grounds (Humanitarian grounds) or granted lesser levels of protection.

## **Discussions and final considerations**

The logic of 'progress' can explain the proliferation of protective systems for LGBT asylum-seekers as an inevitable goal. However, we propose a review of this logic, considering homonationalism (Puar, 2013) and the protection

of minorities' rights in the domestic context (Millbank, 2013) as prerequisites for the rise of LGBT+ asylum, we must emphasize the role of liberal-democratic reasoning. This involves establishing regimes that emphasize the importance of identity in justifying state interventions, protections, and state design. It is undeniable that some of the pioneers who have endorsed the eligibility of LGBT+ asylum claims have actively participated in multicultural experiences and developed robust protective systems for minorities, both individually and collectively. We must define 'LGBT+ asylum' as a phenomenon typical of liberal democracies, where the protection of sexual minorities, including those seeking asylum, finds an accommodating and protective justification in liberal reasoning. It would be a logical and theoretical contradiction in these regimes to not acknowledge and regulate a certain level of protection for gays, lesbians, bisexuals, and trans people who face harsh persecution and life threats in their homelands and who aspire to receive the same level of protection as their fellow citizens. It makes sense that LGBT people have had a lot of success in countries with a liberal history when they try to get asylum. Understanding this connection lets us talk about this recognition through the lens of "identity politics," since recognizing minority claims for housing (in a domestic context) and asylum claims based on SOGIESC share some similarities. Both of these claims put the state in a position to judge minority identities on a communal and an individual level.

The topic remains under growing exploration in Western Europe-North American axis, predominantly in Anglo-Saxon origin countries, usually approaching on a national focus, with rare transnational comparative approaches (such as Imran, 2015); furthermore, rare investigations taking place in other regions as Serbia (Badali, 2019), Central Eastern Europe (Śledzińska-Simon & Śmiszek, 2013); and out of the European space, some citations can be found investigating Brazil (Cowper-Smith et al., 2020; França, 2023), African countries (Cammenga & Marnell, 2022), and Israel (Boxerman, 2022).

There is currently no global framework for asylum, nor a common template capable of evaluating various refugee determination systems and the practices of asylum authorities across a wide range of factors. Based on the templates established to date by Jansen & Spijkerboer (2011), Jansen & Le Déroff (2014), and the ILGA-World Rainbow Index (2024), we could set that a global template shall be able to evaluate: 1) asylum legislation and explicit eligibility to SOGIESC; 2) data transparency and accessibility in terms of disaggregation of data, grounds of rejection and approval; and 3) procedural compliance to international standards set by UNHCR, covering accommodation needs, access

to civil society institutions, legal counseling, etc. In conclusion, it is lacking an incorporation of how LGBT asylum is contextualized within the LGBT scholarship and the global LGBT history.

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## 'Azyl LGBT+': perspektywa „postępu” i znaczenie czasu

**STRESZCZENIE** Azyl dla osób LGBT+ rozpoczął swoją „ścieżkę uznania” około lat 80. i 90. XX w. (spór między Holandią a Kanadą) poprzez orzecznictwo, które uznalo orientację seksualną i tożsamość płciową za cechy tożsamościowe grup społecznych, objęte zakresem Konwencji dotyczącej statusu uchodźców z 1951 r. Od tego czasu organizacje praw człowieka, Organizacja Narodów Zjednoczonych, naukowcy i aktywiści sformułowali pewne normatywne rozważania dotyczące „tego, co jest” – wyrażając poważne obawy, naruszenia praw człowieka, potępiając potrzebę pilnych reform w formie zaleceń – oraz „tego, co powinno być” – wskazując, w jaki sposób niektóre kraje skutecznie poprawiają tę sytuację, dzieląc się najlepszymi praktykami, oraz jak profesjonalizować system azylowy. Coraz więcej badań naukowych dotyczy lokalnych realiów w kontekście krajowym, szczególnie w osi euroamerykańskiej. Rzadko spotyka się próby teoretycznego wyjaśnienia tego przejścia, od całkowitego zaprzeczenia praw do kwalifikowalności/uznania – Puar (2013), Millbank (2013) oraz Dustin i Held (2012) wniesli wkład w tę dziedzinę. W stylu refleksji teoretycznej, dodając do tej dyskusji elementy czasowe, zamiast rozumieć własną logikę „ewolucji” w ustawodawstwie azylowym w ciągu ostatnich 30 lat, twierdzimy, że „azyl LGBT” kwiśnie obecnie w krajach, które poparły reżimy sprzyjające tożsamości. Zjawisko to jest charakterystyczne dla liberalnych

demokracji i nie odzwierciedla logiki „postępu”, o której dyskutują niektórzy współcześni autorzy. Dlatego proponujemy podzielić kraje na sceptyczne wobec LGBT, identyfikujące się z LGBT i ciche wobec LGBT.

**SŁOWA KLUCZOWE** Azyl LGBT, migracja queer, prawa LGBT, prawo azylowe, multikulturalizm

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