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Persecution on the grounds of sexual orientation and gender identity – asylum rights, procedures and decisions in the European Union

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Abstract:

The main focus of the current discussions on what causes refugees to leave their homeland is put on military or economic crises and emergency situations. However, asylum seekers also include people who are persecuted in their countries of origin due to their sexual orientation or their gender identity. The present expertise examines the EU's legislative developments for the recognition of the refugee status of persecuted lesbian, gay, bisexual, transgender and intersex people (LGBTI) and analyses the most important problems by which they are confronted at their arrival in Europe.

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1 Introduction

The main focus of the current discussions on what causes refugees to leave their homeland is put on military or economic crises and emergency situations. However, asylum seekers also include people who are persecuted in their countries of origin due to their sexual orientation¹ or their gender identity². Due to cultural and religious conventions, the persecution of lesbian, gay, bisexual, transsexual and intersexual³ people (LGBTI) is found not only at societal level but also at state level. In 2015, same-sex sexual intercourse was prohibited by law with criminal penalties in 75 countries – this figure corresponds to about one third of all global states (Carroll/Itaborahy 2015: 28).

An important component of the political agenda of the European Union (EU) is the protection and the granting of LGBTI rights. In recent decades significant progress has been made in the extension of LGBTI rights in EU legislation. In this respect the European Union has a central function as a role model at international level since LGBTI is seen as an important element of the European identity (Colpani/Habed 2014). As a consequence of this, Europe has received an increasing number of asylum applications from LGBTI refugees in recent years (FRA 2015). This phenomenon is currently of importance not just for countries that have traditionally accepted most asylum seekers, but also affects numerous other European states. In 2014, several European states, e.g. Portugal, approved asylum applications based on sexual orientation for the first time (ILGA Europe 2015: 16).

However, LGBTI refugees are confronted by frequent problems when they arrive in EU member states. These problems include in particular the uncertain legal scope of national asylum law in the EU member states, the lack of staff qualified in the area of recognition practice of the refugee legal status with regard to people persecuted on the basis of their sexual orientation or gender identity and the prevailing disapproval of LGBTI people in reception centres by people whose countries of origin are strongly influenced by conservative moral conventions (Faiola 2015).

1 The term “sexual orientation” describes sexual partners’ gender-oriented choice, i.e. the gender or genders to which someone feels sexually attracted.

2 The term “gender identity” describes a person’s inner certainty and self-awareness of belonging to a particular gender. The perceived gender identity is not always in accordance with the biological gender, for example in the case of transsexual people.

3 Intersexuality is a general term which encompasses a broad range of different forms of biological sexuality. The term refers to biological characteristics which are neither distinctly masculine nor feminine.

2 Legal recognition of refugee status for persecuted LGBTI

The fundamental legal instrument for the regulation of asylum law is the 1951 Geneva Refugee Convention. Article 1 of the Convention includes a range of causes for which people can obtain recognition of refugee status. Although homophobic persecution *is not* explicitly mentioned as a factor in determining the *refugee status*, persecution due to “membership of a particular social group” is recognised as a cause why people refuge. According to the case law of individual states, e.g. Canada and New Zealand, the characteristic of sexual orientation is to be included within this group so that asylum can be guaranteed for persecuted LGBTI people. However, as in the past, legal recognition of refugee status for people persecuted in their countries of origin due to their sexual orientation and their gender identity is problematic and legally unclear in many host countries (Wessels 2011).

With regard to the national differences in the interpretation of this legal basis for recognising refugee status based on homophobic persecution, in 2008 the United Nations High Commission for Human Rights (UNHCHR) drew up the *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*. This guidance note for the first time identified numerous problems regarding the legal interpretation of the definition of a refugee contained in the Geneva Refugee Convention for persecuted LGBTI people and facilitated an important starting point for further research and policy-making in this area at international level (*ibid.*).

2.1 Developments in EU asylum law for LGBTI refugees

Only from the 2000s onwards has legislative progress been made with regard to recognising rights of asylum for persecuted LGBTI people. Significant legislative acts for the legal protection of LGBTI refugees were adopted by EU legislative bodies and individual national legislators. From an international perspective the developments in EU asylum rights show the leading role played by the European Union in guaranteeing human rights for LGBTI people.

However, transposition of the common EU legislation on the right of asylum into the national law of individual EU member states shows that there is potential for improvement: The most significant problems are the lack of readiness to host LGBTI refugees, including the legal interpretation of the reasons for their persecution, the recognition procedures and the conflicts observed in accommodation facilities.

2.2 Recognition of refugee status for persecuted LGBTI

The transposition of Directive 2004/83/EC in the EU member states⁴ led to an important step forward in the legal recognition of persecuted LGBTI people in the EU. On the basis of the Geneva Convention this Directive established the first common minimum conditions in the EU area for the recognition of third-country nationals as refugees. In the Directive the causes of people seeking refuge are defined by using Article 1(a) of the Geneva Convention in which sexual orientation was not explicitly included as a cause of people seeking refuge. However, Article 10(1)d of Directive 2004/83/EC picks up on the Geneva Convention and subsumes the *characteristic of sexual orientation* under the term “particular social groups”:

⁴ Denmark did not adopt Directive 2004/83/EC.

Depending on the circumstances in the country of origin, a particular social group might also include a group based on a common characteristic of sexual orientation [...]

Homophobic persecution as a cause of people seeking refuge was thus established in EU asylum law for the first time in 2004. With the transposition of Directive 2004/83/EC, *subsidiary protection* was also included in common EU legislation (see Chapter V of Directive 2004/83/EC). It allows asylum seekers who were not recognised as refugees within the meaning of the Geneva Convention to obtain a residence permit if they are able to prove that they are under threat in their countries of origin. The subsidiary protection is particularly relevant for LGBTI refugees because, on the one hand, the danger of the death penalty and torture due to their homosexuality or transsexuality exists in their countries of origin, and, on the other, the legal recognition of their refugee status appears to be arbitrary in numerous EU member states. On the basis of a recommendation from the European Commission in 2009, Directive 2004/83/EC was recast and adopted as Directive 2011/95/EU, which was transposed into the national law of most EU member states at the end of 2013.⁵ The objective of the recasting was to overcome the inconsistencies still existing with regard to the recognition of refugees in the EU area and, building on this, to create a more solid, common legal framework in the EU member states. Important progress was thus made in the recognition of LGBTI refugees, in particular through the expansion of the term “particular social groups” to include the *characteristic of gender identity*:

[...] 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.

Directive 2011/95/EU therefore declares that both sexual orientation and gender identity are important criteria for the legal recognition of refugee status. Despite this, it is de facto difficult to guarantee the right of asylum for persecuted LGBTI people in numerous EU member states. The transposition of the Directive into national law took place in many EU member states without explicit consideration of the sexual orientation and the gender orientation of asylum seekers. As a result, the asylum authorities in numerous EU member states, in particular in Central and Eastern Europe, reject asylum applications from LGBTI people with the argument that they could keep their sexuality or gender identity a secret in their country of origin (Jansen/Spijkerboer 2011). This request addressed to LGBTI asylum seekers often means persecution and a danger to life when they return to their country of origin, and denies people the basic right to live freely. It also represents a denial of human rights according to the Joint Declaration of the United Nations on Sexual Orientation and Gender Identity.

2.3 Accommodation for LGBTI refugees

Due to the widespread homophobia and transphobia in asylum accommodations, accommodation for LGBTI asylum seekers represents another problem which should not be ignored. At their arrival in Europe LGBTI refugees must often live together with people from cultural circles where religion has a strong influence and in which homosexuality and transsexuality

⁵ Denmark, Ireland and the United Kingdom are not adopting Directive 2011/95/EU.

are proscribed. This leads to LGBTI refugees continuing to experience disapproval and social exclusion even in accommodation facilities in Europe.

In response to this problems the European Council adopted Directive 2003/9/EC (recast by Directive 2013/33/EU) to establish common minimum conditions for accepting asylum seekers in the member states. The objective was to guarantee basic rights and equal treatment for applicants in the EU area and to establish the material conditions for the accommodation. Although the Directive makes no explicit reference to the special needs of LGBTI asylum seekers, Article 21 refers to the special situation of “persons requiring protection” in reception centres and accommodation facilities. The EU member states are correspondingly requested to prevent all types of violence in reception centres (Tsourdi 2014). Against this background, discussions are taking place in many EU member states on providing separate accommodation facilities for LGBTI refugees. For example, the municipal authorities in Amsterdam have taken the initiative in this respect and have been providing separate accommodation for LGBTI refugees since September 2015 (Müller 2015).

2.4 Asylum procedures and asylum decisions for LGBTI refugees

An important component of the asylum procedure is the assessment of the credibility of asylum applications. Persecuted LGBTI people must submit evidence which proves that they are a member of a persecuted social group and which is based on the common characteristic of sexual orientation or gender identity. However, LGBTI refugees come from countries in which an open approach to non-traditional sexual orientation or gender identity is extremely dangerous. This is why they often cannot provide any evidence of their sexual orientation or gender identity, or can only provide very little evidence of this. Due to their fear of distancing themselves from societal conventions, a large number of LGBTI refugees also have children and are married to a person of the opposite sex in their countries of origin. This situation makes it very much more difficult for them to provide evidence of their refugee status. Despite the lack of transparency in asylum procedures for LGBTI refugees, NGOs report on humiliating treatment of LGBTI people during asylum procedures by national asylum authorities in EU member states. Some asylum procedures for LGBTI refugees in the EU area sometimes include questioning on sexual practices and examinations based on the showing of pornographic videos, thus violating the EU Charter of Fundamental Rights (CFR) (FRA 2015).

In 2005, the European Council adopted Directive 2005/85/EC, which established minimum conditions for the asylum procedures with regard to granting or refusing the refugee status of applicants. In 2013, this Directive was recast by Directive 2012/32/EU and for the first time included explicitly requests to take the sexual orientation and the gender identity of asylum seekers into consideration during asylum procedures. In accordance with the Directive, EU member states are requested to provide minimum guarantees with regard to the human integrity of asylum seekers during asylum procedures in view of the EU Charter of Fundamental Rights. The special needs of LGBTI refugees should correspondingly be taken into consideration during asylum procedures. Article 11 stipulates that the asylum procedures for LGBTI asylum seekers have to respect conditions of confidentiality. According to Article 15, there should also be a guarantee that the interviewers present during the asylum procedure are empowered to take the personal circumstances contained in the asylum application into consideration, including the applicants' sexual orientation and gender identity. The Court of Justice of the European Union (CJEU) has been playing a central role in the regulation of

asylum procedures for LGBTI people. Current case law also prohibits the carrying out of tests for the awarding of refugee status to LGBTI asylum seekers which are contrary to the EU Charter of Fundamental Rights: Detailed questioning on the sexual practices of LGBTI refugees or the requesting of evidential material on the acting out of sexual desires such as, for example, films or photos, are correspondingly explicitly prohibited (Intergroup on LGBT Rights 2014).

However, problems are also issued because of the competent authorities' insufficient knowledge base for the asylum procedures regarding the legal, political and social situation of LGBTI refugees in their countries of origin. Their staff require appropriate skills and abilities when dealing with LGBTI people in order to overcome discrimination during asylum procedures; the latter explains above all the frequent observance of the humiliating way in which LGBTI refugees are treated (EU Parliament 2012). Some national asylum authorities have experts who only process and evaluate asylum applications related to sexual orientation and gender identity. For example, the Belgian Office for Migration and Refugees has its own department for processing asylum applications based on sexual abuse and persecution due to sexual orientation or gender identity (FRA 2015). Policy-makers play as well an determinant role in safeguarding the rights of LGBTI refugees. The list of countries of origin described as "safe" in the national asylum laws of many EU member states often includes countries such as, for example, Ghana and Senegal, in which homosexuality is sanctioned by criminal penalties (FRA 2015).

3 Asylum law and asylum procedures for LGBTI refugees in the EU member states

Despite the developments in common EU legislation on the recognition of third-country nationals as refugees and on the harmonisation of asylum procedures in the EU area, clear differences currently exist in the way in which LGBTI refugees are treated in the EU member states. The explicit consideration of the asylum seekers' gender identity in the transposition of the abovementioned EU Directives resulted in no success in many EU member states. Even when persecution due to sexual orientation and gender identity are recognised in the national asylum laws of many EU member states as a cause of people seeking refuge, the awarding of refugee status to persecuted LGBTI people is still arbitrary and difficult (FRA 2015).

The European department of the "International Lesbian, Gay, Bisexual, Trans and Intersex Association" (ILGA Europe), an umbrella association with a total of 422 member organisations in 45 European countries, publishes "The Rainbow Europe" every year, an index which highlights the differences in the legal situation of LGBTI people in European states.⁶ One of the six main categories included in the index sheds light on the differences in national asylum laws. On the one hand, this section of the index records if persecution due to sexual orientation or gender identity is expressly recognised in national asylum laws and, on the other hand, if the states have implemented measures to take into consideration the special needs of LGBTI refugees during asylum procedures such as, for example, training of the asylum authorities' staff or the abolition of examinations and questioning related to sexual practices. The table below depicts the situation of LGBTI refugees in the 28 EU member states on the basis of these criteria.

In view of the results included in the index, it is possible to conclude that both the way in which LGBTI people are treated and the legal situation in the EU member states are very heterogeneous. Although persecution due to sexual orientation is expressly recognised as a cause of people seeking refuge in the national asylum laws of most EU member states, persecution due to gender identity is considered a cause of people seeking refuge in only six EU member states. Above and beyond this, measures taking the special needs of LGBTI refugees into consideration during asylum procedures have been implemented in only nine EU member states.

Legislative acts and reports from the EU's institutional bodies have for years been reporting on the considerable discrepancies in the asylum laws of the individual EU member states (EU Parliament 2012, 2014). In February 2014, the EU Parliament adopted a resolution on the promotion of European cooperation in the harmonisation of asylum policy. In cooperation with the EU Commission and different European actors the objective is, amongst other things, to ensure that the transposition of the abovementioned Directives into national law also takes the sexual orientation and the gender identity of persecuted people into consideration (EU Parliament 2014).

⁶ An overview of the data matrix in the 2015 Index, including the categories and sub-categories covered, can be accessed via the following link:

http://www.ilga-europe.org/sites/default/files/Attachments/side_b-rainbow_eurpe_index_may_2015_no_crops.pdf (last accessed: 12/02/2016).

National asylum laws and asylum procedures in the EU member states

EU member state	Asylum law (Takes sexual orientation into consideration)	Measures taking special needs into consideration (sexual orientation)	Asylum law (Takes gender identity into consideration)	Measures taking special needs into consideration (gender identity)
Belgium	✓	✓	✓	✓
Bulgaria	✓			
Denmark		✓		✓
Germany	✓	✓	✓	✓
Estonia				
Finland	✓	✓	✓	✓
France				
Greece	✓			
Ireland	✓			
Italy	✓			
Croatia	✓		✓	
Latvia	✓			
Lithuania	✓			
Luxembourg	✓			
Malta	✓			
Netherlands	✓	✓		✓
Austria	✓		✓	✓
Poland	✓			
Portugal	✓		✓	
Romania	✓			✓
Sweden	✓	✓		✓
Slovakia	✓			
Slovenia	✓			
Spain	✓			
Czech Republic				
Hungary	✓			
United Kingdom	✓	✓		✓
Cyprus	✓			

Source: ILGA Europe 2015 Index (Status: May 2015)

4 Conclusion

The current refugee situation poses big challenges for the EU as a political system. The growing flow of refugees requires the harmonisation of the EU member states' asylum policies and the creation of a solid legal framework in the EU area. By developing the Common European Asylum System it is necessary to take the variety of infringements of human rights and reasons why people are persecuted and in an international context into consideration. This objective should be a priority in the EU's political agenda. The EU should assume this responsibility and thereby consolidate its important role in the protection and the guaranteeing of human rights at international level. In recent years important legislative acts have been adopted by the EU's legislative bodies to guarantee asylum laws and *for the adequate treatment of LGBTI refugees*. Persecution due to sexual orientation or gender identity was expressly established as a cause of people seeking refuge in **Directive 2011/95/EU**. **Directive 2013/32/EU** requires the EU members states to implement minimum guarantees to ensure asylum seekers' human integrity during asylum procedures in view of the EU Charter of Fundamental Rights and, amongst other obligations, **Directive 2013/33/EU** requires the EU member states to prevent all types of violence in reception centres.

However, the current process of transposing the abovementioned Directives into the national law of many EU member states does not guarantee that asylum seekers' sexual orientation and gender orientation will be legally considered in every EU member state. Consequently, numerous problems can be identified by which LGBTI refugees are confronted when they arrive in the EU area. The arbitrary nature of how refugee status is recognised in law, humiliating treatment during asylum procedures and the persistent discrimination due to sexual orientation and gender identity in reception centres continue to exist in several EU member states. But due to the lack of transparency of asylum procedures and the legal basis for asylum decisions by the competent authorities in the EU member states, the real extent of the problem is not clear.

This evidences the need of consequent political intervention by EU institutions and EU member states. First of all it is essential to ensure the transposition of the EU legal instruments in the entire EU area guaranteeing the rights of LGBTI refugees. Furthermore it is crucial to place at the disposal of authorities and the civil society the required instruments to monitor and measure the problems mentioned above. Only then it will possible to develop and further improve the EU asylum legal framework.

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