Chapter 9
The Membership of a Particular Social Group Ground in LGBTI Asylum Cases Under EU Law and European Case-Law: Just Another Example of Social Group or an Independent Ground?

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Abstract The 1951 Refugee Geneva Convention relating to the Status of Refugees defines the different grounds upon which a person can be recognized as a refugee. However, throughout the years, different reasons of persecution have emerged which were not envisaged by its drafters. Traditionally, these claims have been recognised under the *membership of a particular social group* ground. This is also the case of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people. When transposing the Qualification Directive 2011/95/EU-recast into their legal systems, some European Union Member States do not explicitly foresee sexual orientation or gender identity as a ground for asylum. This paper aims to analyze what different social group ground approaches exist and what impact these approaches have had on LGBTI asylum cases, as well as to determine the potential role that the interpretation has on them.

Keywords LGBTI asylum applicants · Membership of a particular social group · EU asylum system

9.1 Introduction

Since the first draft of the 1951 Geneva Convention relating to the Status of Refugees (the Refugee Convention) and its 1967 New York Protocol to nowadays, societies around the world have had and still have to face different social issues. Hence, the wide range of situations one person might face when applying for asylum goes beyond the initial traditional definition of what a refugee is. The European Union (EU) asylum protection system adopts the same definition, adding however, a

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further explanation of what a social group should include. Besides, it is important to take into account that the Treaty on the Functioning of the EU (art.67) requires the Union to adopt measures on asylum in accordance with the Refugee Convention which provides, inter alia, for a uniform status throughout the Union, a subsidiary protection status and common procedures for the granting and withdrawal of said status. With regard to asylum on the ground of sexual orientation, both Directives, concerning Reception Conditions (Directive 2013/33/EU) and the Common Procedure for the granting of international protection (Directive 2013/32/EU) foresee at Recitals 35 and 60 respectively the respect of fundamental rights and observe the principles recognized by the Charter of Fundamental Rights of the EU (the Charter). It is added that in particular, it seeks to guarantee respect for human dignity and promote the application of Article 21 (non-discrimination) of the Charter which prohibits any discrimination based on grounds of gender or sexual orientation.

As for an eventual recognition for sexual orientation and gender identity (SOGI) as independent grounds for asylum or any other international protection system, no explicit reference can be found. The *membership of a particular social group* ground has been traditionally covered these cases by the Qualification Directive 2011/95/EU-recast, hence, the importance of understanding the scope of the term *social group* with a special connection regarding Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) asylum applications.

One can examine whether or not the *membership of a particular social group* term summons a pre-established list of situations who immediately fall under this asylum ground. On the contrary, it may evoke a non-exhaustive list of cases that arise as the States and their respective national legislations and courts encounter new cases that might require for some form of international protection. The case of the EU asylum system presents itself as a unique form of regulation, indeed, it is not just one State regulating its asylum system but it is a confluence of States that have to be more or less in agreement in order to harmonize their regulation system and its administrative practices. This chapter aims to analyze the different practices and interpretations carried out by different state actors especially the one made by the EU concerning asylum on the grounds of SOGI. Finally the possibility of rethinking the existing EU asylum legislation (especially the Qualification Directive 2011/95/EU-recast) will be considered in order to introduce SOGI as autonomous grounds and the appropriateness of that possible development.

The first part of the chapter analyzes the Refugee Convention's *membership of a particular social group* ground concerning LGBTI asylum cases and its different approaches adopted by the United States and Australian jurisprudence. The second part examines the definition of this ground adopted by EU Qualification Directive 2011/95/EU-recast (QD), EU Member States, European Courts' responses as well as the possible success of a substantial change of the QD in order to include SOGI as explicit grounds to seek asylum. Finally, the paper concludes that rather than a substantial legal recognition of SOGI as an independent ground, interpretation of the *membership of a particular social group* ground is determinant in order to obtain the refugee status.

9.2 The Membership of a Particular Social Group Ground Envisaged by the 1951 Geneva Convention and Its Context in the EU Asylum System: Balancing Essential Change with Conservation

Prior to dedicate this chapter to the study of the EU asylum system regarding specifically LGBTI asylum applications and the *membership of a social group* ground, it is essential to analyze the first interpretations of this so-called term offered by international jurisdictions, the American and Australian cases.

9.2.1 The Conception of Social Group *from an Early Perspective: The United States and Australian Jurisprudence*

The Refugee Convention, the primary legal instrument of international protection for refugees, does not contemplate SOGI as a valid ground for being recognized as refugees.[1] It is often assumed that claims based on SOGI rather fall into the ground of *membership of a particular social group*. However, much has changed since the Refugee Convention was ratified, both in historical and social terms. A legacy of the lethal consequences of the Second World War, neither sexual orientation nor gender identity are explicitly indicated as grounds of persecution upon which it is possible to be granted protection. If someone is granted refugee status in accordance with the Refugee Convention, she/he is entitled not to be removed to her/his country of origin or residence.[2]

When applying for asylum, international protection seekers not only deal with bureaucracy, which is mostly unknown to them, but also with stigma, stereotypes and often the fact that sensitive aspects such as intimacy, identity and sexual orientation would be analysed by third parties through the eyes of local administrations. These are complex challenges to tackle together with decision makers who sometimes fall into error by imposing on applicants particularly, although not exclusively in the context of claims based on sexuality, a requirement to suppress their identity by hiding or exercising restraint or "discretion" or, tolerating "some elements of concealment", in relation to their activity or behaviour (Hathaway 2014, p. 392).

Most notably, being categorized as members of a particular social group will not necessarily guarantee the refugee protection, since other aspects of the refugee

[1] Recalling that the Convention, in art.1(A)(2), contains five grounds: race, religion, nationality, membership of a particular social group and political opinion.

[2] Article 33 of the 1951 Geneva Convention proclaims the principle of non refoulement, which forbids States to return asylum seekers and refugees to a country in which they would be in danger of persecution based on "race, religion, nationality, membership of a particular social group or political opinion".

definition must be ascertained, i.e. being outside the country of origin, having a well-founded fear of persecution, no protection by the State of origin, etc. This is why it is important to have in mind that refugee status determination does not make a person a refugee. As a matter of fact, refugee status is declaratory; therefore, a positive assessment by a state simply confirms the status already held by a person who meets the requirement established by the Refugee Convention (Hathaway 2014, p. 25). Different approaches have been adopted in order to include LGBTI refugees into the membership of a particular social group category.

Two of them have been predominant in international refugee law (Gartner 2015): one originally developed in the North American jurisprudence, notably in the United States federal case Acosta [1985]. The case concerned a 36-year-old male from El Salvador. He feared for his life after being threatened by anti-government guerrillas. He then fled to the United States where he sought relief from deportation[3] by applying for a discretionary grant of asylum. The immigration judge denied the respondent's applications. On this particular note and in terms of what they understood from *persecution* as established by both the Refugee Convention and its 1967 Protocol, it was found that

> Applying the doctrine of ejusdem generis,[4] we interpret the phrase persecution on account of membership in a particular social group to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.

These arguments interpret *membership of a particular social group* as an innate and immutable characteristic. Even though the judges admitted that it has to be analyzed case by case, they believed that the so-called "shared characteristic" cannot be changed. When referring to "immutable characteristic", it can then be understood as a trait that the applicant either cannot or should not be required to alter (Southam 2011). This is particularly important concerning LGBTI refugees, because applying the ejusdem generis doctrine to defining *membership of a particular social group* not only engages in a serious textual analysis of the Refugee Convention and its Protocol, but also respects the specific situation known to the drafters-concern for the plight of persons whose social origins put them at comparable risk to those in the other enumerated categories (Hathaway 2014).

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[3] Noting that Aliens seeking lawful status in the United States on account of persecution have three available forms of relief: (1) a petition for asylum, (2) a petition to withhold removal, and (3) a petition for relief under the Convention Against Torture (Southam 2011).

[4] Latin for "of the same kind", used to interpret loosely written statutes. Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. Example: if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, "vehicles" would not include airplanes, since the list was of land-based transportation (Bouvier 1856).

With respect to SOGI cases, one can refer to another United States federal case re Toboso-Alfonso [1990], the very first case that recognizes persecution on account of one's sexual orientation (in this case, homosexuality) as a reason to be granted asylum, by using the *membership of a particular social group* ground under United States refugee-law system. Toboso-Alfonso, a 40-year-old Cuban man, was paroled into the United States in June of 1980. Five years later, in 1985, the U.S. government terminated his parole.[5] The Immigration judge denied the applicant's asylum application in the exercise of discretion because of the nature of the applicant's criminal record in the United States but he did receive withholding of deportation. The Immigration and Naturalization Service appealed this decision to the Bureau of Immigration Appeals (BIA) arguing that homosexuals were not a particular social group contemplated under the Asylum Act. Ultimately, the BIA rejected this argument and considered that homosexuals in Cuba constituted a social group and that Toboso-Alfonso might face a risk because of this status.

Even though this decision marked a precedent, involving similar cases' understanding that it was not only for homosexuals in Cuba, it is important to note that the BIA attempted to separate the facts of persecution that formed the basis of the application and the potentially far reaching results of its holding. Two distinctions were made here: homosexual identity and conduct. Focusing on the fact that Toboso-Alfonso was persecuted for being a homosexual rather than for an action, the BIA implicitly recognized the possibility of defining sexual orientation either in terms of status or conduct (Southam 2011). Nevertheless, it is necessary to point out that, although at the time, progressive legal recognition of gay rights in the United States started to show only a couple of decades afterwards,[6] this case meant a step towards sexual orientation claims when applying for asylum in the United States.

Both federal cases are important to understand how LGBTI refugees can be accommodated under the particular social group ground of the Refugee Convention. The United States courts, despite minor differences when defining what a particular social group is, have generally followed Acosta federal [1985] in analysing claims based on *membership of a particular social group* and also embrace and recognize that the existence of a protected characteristic lies at the heart of the definition given by the Refugee Convention (Marouf 2008). In federal case Toboso Alfonso [1990], the main issue resides in its highlighting of the two halves of the status/conduct dichotomy, and indicates that LGBT status alone suffices (Southam 2011).

The second interpretation is derived from Australian case law (Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another, [1997]). Even

[5] Parole permits an alien to remain in the United States on a temporary basis where the Attorney General "in his discretion [finds] urgent humanitarian reasons or significant public benefit". According to Title 8 Aliens and Nationality of the U.S. Code.§ II 82(d)(5)(A) (2006).

[6] It is important to note that historical circumstances played an important role in this case as well, first there was United States foreign policy during Cold War encouraging dissidents coming from Communist countries to seek asylum in the U.S but also the fact that at the time Courts were reluctant and cautious when it comes to recognize LGTB rights which was part of their domestic policy.

though it was not an LGBTI related issue, it was considered to be a notable case because of the adoption of a "test of social perceptions" (Gartner 2015). When a Chinese couple arrived in Australia fearing sterilization under China's *One Child Policy*, one of the arguments used by the judges of the High Court of Australia delimitates itself what a social group is by declaring that "the fact that the actions of the persecutors can serve to identify or even create 'a particular social group' emphasizes the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group".

On the one hand, some authors consider that the immutable characteristics approach operates on the wobbly presumption that sexual orientation is fixed, and follows the same narrative of persecution across all societies, thereby neglecting both the fluidity of sexuality as well as the impact cultural differences can have (Hinger 2010). This impact is particularly relevant in the context of immigration authorities in refugee-receiving countries adjudicating on (their understanding of) foreign identities and sexualities (Gartner 2015). Additionally, bisexuals and transgender persons might have greater problems in convincing adjudicators that such statuses are immutable and might also face problems fitting into rigid stereotypes of gender and sexuality (Southam 2011).

On the other hand, if SOGI are considered as being immutable, one might forget the fact that external perceptions and behavioral patterns are most likely associable with such identities. This is why some authors consider that emphasizing the external over the internal concerning a person's dimension, easily leads to several difficulties. It can indirectly demand a higher standard of proof, since public behavior and external manners are more likely to be judged by the public eye, in contrast to immutable identity characteristics which cannot be proven in the first place, (Gartner 2015, p. 21). Moreover, it may go to the detriment of non-normative queer behavior (Hanna 2005) and hence encourage visibility. As it is assumed that sexual orientation might be expressed through actions and expecting for instance that a gay man should act in a more visible gay manner. This was interpreted in a famous case of the United Kingdom Supreme Court HT and HJ [2010], where one of the judges illustrated the point, with trivial stereotypical examples from British society. The aforementioned judge stated:

> just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically colored cocktails and talking about boys with their straight female mates" (para.78).

A performative model contravenes the immutability standard because it relies on variable social and cultural perceptions of what actions characterize homosexuality (Hanna 2005, p. 920). Perceptions of what characterizes bisexual, transgender and intersex persons extend contraventions of the performative model to these groups.

In brief there is no doubt that these definitions, both the American and the Australian, were useful in order to obtain a wider interpretation of the *membership of a social group* asylum ground understanding. With this in mind, it is now pertinent to proceed to analyse the EU's own conception.

9.2.2 *The Conception Adopted by the EU Asylum System: A Mixed Interpretation*

In an effort to harmonize asylum legislation among EU Member States and regarding specifically the conception of *membership of a particular social group*, it is necessary to refer to the criteria set out by the 2011/95/EU Directive. Article 10(1)(d) Reasons of persecution adopts the same definition as the Refugee Convention but it adds a further explanation of what a *particular*[7] social group entails:

- members of that group share an innate characteristic (see Sect. 9.1), 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

Two approaches emerge from this article. In the first approach, it is examined whether a group is united, either by an innate or immutable characteristic or by a characteristic so fundamental to human dignity that a person should not be forced to abandon. The focus of the second one examines whether a particular group shares a common characteristic that makes it cognizable or that renders group members distinct from the society at large (Tsourdi 2012). Both criteria were also listed before by both American[8] (unchangeable and innate) and Australian (particular social perception) case law (see Sect. 9.1). The references and the terminology are likely similar and in essence mean: how they might feel they are and how others perceive them. Article 10(1)(d) proceeds to clarify that

> Depending on the circumstances in the country of origin, a particular social group *might include*[9] 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.

One question appears then as crucial. As described in the Directive, does these two criteria should be interpreted either cumulative or alternatively? For instance, a decision of the Court of Justice of the EU (CJEU) (X, Y and Z C/ minister voor Immigratie en Asiel-Netherlands [2013]), it was about three asylum applicants coming for three different countries (Sierra Leona, Uganda and Senegal). Their claims were based on the ground that they have reason to fear persecution in their respective countries of origin on account of their homosexuality declaring that they

[7] Emphasis added.

[8] It should be noted that, although the United States have traditionally followed the *protected characteristic* test, a change within its jurisprudence has reinterpreted "social perception" as "social visibility" and demanded an unprecedented level of proof (Marouf 2008) i.e. see cases: A.M.E. & J.G.U & N. [2007] v. B.I.A.; C.A., & N [2006]).

[9] Emphasis added.

have been victims of violent reactions by their families and entourage, or acts of repression by the authorities. The applications were rejected by the Minister arguing that "they have not proved to the required legal standard the facts and circumstances relied on and, therefore, have failed to demonstrate that on return to their respective countries of origin they have a well-founded fear of persecution by reason of their membership of a particular social group" (para.28).

In response, the Netherlands administration questioned whether foreign nationals with a homosexual orientation form a particular social group. As referred to in Article 10(1)(d) of the Directive 2011/95/EU, the Court considered that:

> (…) it should be acknowledged that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports a finding that those persons form a separate group, which is perceived by the surrounding society as being different (para.48).

Therefore, the answer to the first question (…) is that Article 10(1)(d) of the Directive must be interpreted as meaning that the existence of criminal laws, (…) which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group (para.49).

By this declaration, the Court considered that homosexuals make part of a social group by meeting the two criteria set by Article 10(1)(d) of Directive 2004/83/EC (the two criteria having not changed in the recast version, See Sect. 9.2.1). Although this could mean a step forward legal recognition, if only for homosexuals in the case *in concreto,* this is also an important note to take into account for State Members and their practices when deciding the inclusion of LGBTI claims as a ground for asylum.[10]

Moreover, in a decision of the House of Lords of the United Kingdom, several Lords stated that the then Qualification Directive 2004/83/EC was in accordance with the United Nations High Commissioner for Refugees (UNHCR 2002) Guidelines and considered the two approaches as alternative rather than cumulative. In relation to this, Lord Bingham declared that

> (…) If, however, this article (art.10 and sub-paragraphs I and II) were interpreted as meaning that a social group should only be recognized as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub –paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority (Secretary of the State for the Home Department v. K.A.[2006], para.46).

However, as pointed out by Marouf (2008, p. 68), a lower level tribunal, the United Kingdom Asylum and Immigration Tribunal (UKAIT), adopted a diverging approach to the Qualification Directive and understood that article 10(1)(d) endorses a cumulative approach as it is stated that "the observations of their Lordships [in K]

[10] Subsequently, this same Court had the opportunity to rule about a similar issue. Although the central debate was the credibility of the applicants and the ways of proving their sexual orientation, the Court assumed that LGTB asylum seekers form indeed a social group CJEU (A, B, C/Raad van State and Staatssecretaris van Veiligheid en Justitie –Netherlands [2014] para.8,10).

were obiter, although very persuasive, because it is clear that their Lordships did not decide the cases under regulation 6(i)(d) or Article 10i(d) of the Qualification Directive" (SB[2008] UKAIT. paras.69,73–74). Some authors consider that interpreting these criteria as cumulative could represent a possible loophole in terms of protection. Most notably, when trying to fulfill the social perception requirement, an individual may be perceived as belonging to a particular social group in one situation but not in another, depending on which of the individual's characteristics are most relevant in the given context (Marouf 2008, p. 73). Such demand in some cases would be harder to put into practice, since a large number of countries do not even accept homosexuality as a valid way of living or if they do so, it exists within a hostile and complex social environment[11] such scenario is connected to the idea of discretionality inasmuch as the society of the country of origin plays then a key role in identifying the existence of a social group in that country. This requirement would translate into the idea that if one keeps their private life private, society would not perceive this person as different and perhaps an eventual LGBTI asylum petitioner would have his/her petition to be rejected.

Moreover, such a proposition (i.e. cumulative approach) may go against the UNHCR interpretation as well. Indeed, UNHCR Guidelines no 9 states that

> The two approaches "protected characteristics" and "social perception" to identifying particular social groups, reflected in this definition are alternative, not cumulative tests. The "protected characteristics" approach examines whether a group is united either by an innate or immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. (para.45)

By the wording of this proposition, the UNHCR might be indicating that the existence of a protected characteristic is sufficient to establish a particular social group and that the public perception approach should only be applied if no such characteristic exists (laViolette 2010). In opposition to this, the EU Directive suggests that the two approaches are to be treated as cumulative requirements (rather than as alternative bases) (Gartner 2015, p. 8). Plus, the wording of Article 10(1)(d) does not explicitly mention the possibility of an alternative comprehension of this, nor does it place an alternative choice between the two approaches. As indeed noted by the International Commission of Jurists (ICJ) in its Practitioner's Guide related to Refugee Status Claims on Sexual Orientation and Sexual Identity, the norm is erroneously introduced by an "and" [as opposed to or] (p. 200). Therefore, if a group meets the two conditions (cumulative approach), it must be then considered to form a particular social group (den Heijer 2014, p. 1222).

[11] This could be the case, for example, in Iran. When asylum claims were made by homosexuals of this country, many European authorities considered that the homosexuals in Iran may act very differently in public and private spaces as they feel freer to be themselves in their private spaces within the Iranian society. That in the latter is where homosexuals could live their life comfortably provided that the relationship is kept private and not talked about and that the Iranian authorities tolerated such behavior with the condition that they are not exposed in public places (Jansen and Spijkerboer 2011).

All of this led to think that, since it might seem that SOGI discrimination might face an additional element of interdependence, than, for instance, race and nationality and even religion grounds, asylum decision-makers have then, been preoccupied with obtaining "proof" that applicants are in fact gay or lesbian or bisexual or transgender. Ultimately, as noted by the ICJ, it is important to take into account that what all of these grounds have in common is that they "are all grounds on which a person may be discriminated against by society" (p. 185). Recalling what it was established at the United States Federal case Acosta [1985], it is then considered that, the ejusdem generis doctrine (see Sect. 9.2.1) is also relevant for the other grounds meaning that "they (the other grounds) are either immutable or part of an individual's fundamental right to choose for himself that discrimination on such grounds is contrary to principles of human rights" (Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah [1999] p. 16).

Some authors have raised the problem that the definition of refugee contained in Article 1(A)(2) of the Refugee Convention fails to cover situations that need special solutions (Hathaway and Gammeltoft-Hansen 2015, p. 239). Between the two approaches posed as a way of solution, one author subscribes to "ensure the survival of a binding text in a quasi-universal environment - among other reasons, for fear that a modification of it will entail the loss of its universality - and to seek the protection of those new refugees (…) who are not truly covered by the Convention" (Gortázar Rotaeche 1997, p. 135).

The other position would be of course to reform the Refugee Convention with the aim of responding to the needs and changes our contemporary society has been experimenting. However, the levels of protection might face substantial changes in order to do so. This would be particularly relevant to the Member States reluctant to accept a high number of refugees in their territories or even States that only want specific profiles such as Christians, high qualified young professionals or families with children, forgetting that the final obligation and compliance with the Refugee Convention and the Common European Asylum System (CEAS) are both in force and binding. All this leads to consider the prospect of an eventual explicit recognition of SOGI at least at the EU level that is to say within the EU asylum system. A deeper analysis on the issue will be presented in the next section.

9.3 The Common EU Asylum System: A Step Forward Towards Legal LGBTI Asylum Seekers Recognition?

Considering the QD-recast, particularly in terms of its notion of a social group and its special provision concerning SOGI (See Sect. 9.1), a special focus on some of the measures that Member States have adopted as well as the possibility of an explicit recognition of SOGI as valid grounds for asylum at the EU will be analyzed in this section.

9.3.1 *Identifying European States Heteronomous Practices: Explicit and Non-Explicit Mentions Regarding SOGI as a Ground for Asylum*

The wording of article 10 (1)(D) (See Sect. 9.2.2) could be interpreted slightly off the traditional list set out in the Refugee Convention. Moreover, this provision contains some characteristics that can be considered relevant to highlight; for example, there is the fact that explicit mention of *gender identity* and that case-by-case examination cases will have a greater importance. This might due to the fact that it will have to be determined if a social group based on SOGI exists in that particular country of origin (Tsourdi 2012). In that sense, one question arises: does a lesbian, bisexual, gay, trans and/or intersex person be considered as a part of a particular social group in the country of origin?[12]

When doing the legal transposition of an EU's Directive, although there are considerable differences in the way in which European Member States examine and conceive LGBTI asylum applications (Tsourdi 2012), some of them have included SOGI as grounds of persecution as well as special procedural guarantees specifically orientated to them. In a wider range, 26 member states of the Council of Europe[13] have recognized in their national legislation that sexual orientation forms part of the notion of membership of a particular social group. There is no explicit mention within legislation in the other Member States, as signaled in a 2011 Council of Europe study called "Discrimination on grounds of sexual orientation and gender identity in Europe" (Council of Europe 2011). It is also complemented by the EU Fundamental Rights Agency (FRA) report named "Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU: Comparative legal analysis" updated in 2015 (FRA 2010, 2017). It was also reported that explicit recognition of gender identity in national legislation as a notion of membership of a particular social group is hard to find.[14]

[12] Also there is no specific mention of intersex people or bisexuals. This could be due to the fact that, as laViolette (2010) pointed out, it would be useful to clearly reference the fact that in all traditional and patriarchal societies, in which non-conformity to clearly defined gender roles is not tolerated, people who identify as the opposite sex, have reason to fear persecution. One might still rely on the idea that the sexual orientation of an asylum seeker is only to be taken seriously when the applicant has an "overwhelming and irreversible" inner urge to have sex with a person of the same gender. These stereotypes exclude persecuted bisexuals (Jansen and Spijkerboer 2011). The approach could further marginalize specific minority groups: whilst gay, lesbian and transgender movements are slowly emerging in many countries around the word, movements for bisexuals and intersex individuals are not keeping pace. As such bisexual and intersexual individuals may not benefit from such developments and may fail to meet the burden of the "social visibility" test (LaViolette 2010). Once again, the context is very complex especially taking into account the different perceptions and beliefs a country, let alone a society, can have.

[13] Not all Member States of the Council of Europe are also Member States of the EU, nor are all Member States apart of the CEAS.

[14] As reported by the FRA, by the end of 2014, the QD recast was implemented in 22 EU Member States. Among them, at least Greece, Italy, Luxembourg, Portugal and Slovenia included "gender

Within EU Member States that explicitly recognize SOGI as valid grounds for asylum, there is Portugal and its 26/2014 Law following amendments to the draft bill and there is also Spain, which literally adopted the *invitation* of article 10(1)(d) of Directive 2011/95/EU to include in its definition of a refugee both gender and sexual orientation in its 12/2009 Law (art.3 and 7). Thereby, Spanish asylum law does not seem to detach itself from the traditional inclusion of membership of a particular social group adding also an extra requirement: the circumstances in the country of origin. Perhaps in an attempt to identify the possible existence of a particular social group as well as local society's reaction to it, Spanish asylum legislation has set up a strong link between the situation in the country of origin and the SOGI of a person. National authorities then require an updated and reliable source of information in order to examine asylum applications; which has on many occasions acted as a justification for systematically denying applications due to lack of information on the country of origin (Diaz Lafuente 2014). Furthermore, there is no such requirement to other grounds of asylum (race, religion, nationality or political opinion) these grounds are not subject to the circumstances prevailing in the country of origin. This condition discriminates against LGBTI asylum seekers and can be understood perhaps as a way of avoiding the so-called "pull factor" (Diaz Lafuente 2014) thus disincentivising LGBTI people from coming to Spain seeking international protection.

Nevertheless, the Spanish courts have established the principle of sufficient evidence, through which it is the competence of the applicant to prove during the proceedings, in an indicative and not necessarily full manner, the reported circumstances for which international protection is sought (Diaz Lafuente 2014). The scope of this principle is based in indications that allow authorities to conclude that there is a reasonable degree of credibility that what the appellant maintains matches with reality and therefore establishes sufficient evidence.[15] In this regard, a judgement [2012] of the Supreme Court of Spain considered that since the appellant (an homosexual man from Congo) was deprived of documentary support, he should have developed at least an adequate probative activity on the situation of his country of origin that allowed to demonstrate the widespread situation of harassment society suffered by the group mentioned (Diaz Lafuente 2014).

There are also some countries that have direct references to SOGI in their policy documents: Austria's 100/2005 Act Article 20 mentions "his right to sexual self-determination" when interviewing an asylum seeker, and the United Kingdom in its Regulation 6(d) and (e) of the Refugee or Persons in Need of International Protection includes the possibility of a group based on a common characteristic of sexual orientation and also have updated versions of policy instructions concerning SOGI issues in asylum claims.

identity" also as noted at the Fleeing Homophobia 2011 case report, Bulgaria has not implemented Article 10(1)(d) concerning the definition of sexual orientation as a persecution ground into its national Asylum Law (FRA LGBTI 2015 report).

[15] See for instance, Tribunal Supremo (Supreme Court) cases Section 5, of February 24, 2010 RC 1156, October 10, 2011 RC 3933, and Section 3 of September 21, 2012.

More or less, other State Members are likely to put those claims under the particular social group ground. Nevertheless, the fact of making direct references to LGBTI asylum claims does not necessarily mean that the chances of obtaining the asylum status will increase. It is certainly the duty of national administrations to ensure that the procedure is the most effective and reliable to the needs of the petitioner. On this particular point, if one refers to the criteria set by the QD-recast, Article 10(1)(d) (See Sect. 1), some hints to those in charge of resolving asylum claims are already mentioned. Additionally it features stereotypes, simple assumptions and the search of visible signs might fall under the one-dimensional vision of what an LGBTI person might look like especially if the so-called distinct identity in the country of origin is being examined carelessly.[16] For this reason, the UNHCR recommends

> decision makers should avoid dependence on stereotypes or assumptions, including visible signals, or lack of them. This can lead to errors in establishing the applicant's membership of a particular social group. Not all LGBTI people are seen or behave according to stereotypical notions. In addition, while a visibly expressed attribute or characteristic may reinforce the conclusion that the applicant belongs to an LGBTI social group, it is not a prerequisite for group recognition. (UNHCR Guideline no. 9, para.49)

The extensibility of the social group notion, according to the High Commissioner, must be based on whether it is "knowable" or "apart from society" in a more general and abstract sense (UNHCR 2012, para.49). Therefore, the proposed definition of *particular social group* presents itself as a half empty glass in a metaphorical manner leaving a higher and crucial task to those in charge of taking decisions when trying to *fulfill* the other part of the glass. There is of course a need to understand interviewers and officers wanting to ensure that applicants claims are credible and that they meet the requisites set by asylum legislation; such a complicated operation requires of a high level of preparation and training.

At a regional level, the European Court of Human Rights (ECTHR) could be criticized for the manner in which it handles deportation cases on the basis of the risks faced if sent back to a country where LGBTI people are considered criminals, offenders and even face death penalty. The case law so far seems contradictory (Ducoulombier 2015), in one hand the application was dismissed to an Iranian man on the fact that his discreet homosexual life was not persecuted in his country (F v UK [2004]), on the other, discretion took another regard, a married man with children who kept a discreet same-sex relationship and allegedly led to the death of his partner in Iraq saw also his application dismissed (MKN v Sweden [2013]). In both cases, not only the burden of proof was higher but the applicant's petitions were also considered as lacking in credibility or not sufficiently sustained (Ducoulombier 2015). Plus, in comparison to those cases when treating European citizens (i.e.: Goodwin vs UK, Schalk and Kopf vs Austria), the perception of a social group could be implicitly recognized national petitioners even if their claims based in the

[16] For instance: a homosexual who does not behave in a feminine way, people who have children or/and have been married with a person of the opposite sex, besides, burden of proof for bisexual applicants might face even more challenges.

recognition of different rights for European nationals. Also, in these decisions the Court forgot to take into account the double vulnerability present in both cases: asylum seekers and sexual minorities (Ducoulombier 2015).

It may seem that the Court is reluctant to apply the same margin of appreciation and decides to increase the burden of proof when dealing to third country nationals and their respective national legislations. Although, in a recent case, FG v Sweden [2016]-in which an Iranian man who had converted to Christianity *sur place* shortly after arriving in Sweden and feared for his life upon returning to Iran-the judges of the ECTHR admitted the possibility of a share duty between the asylum applicant and the examiner when it comes to the burden of proof and observed that[17]

> if a Contracting State is made aware of facts, relating to a specific individual, that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion. This applies in particular to situations where the national authorities have been made aware of the fact that the asylum seeker may, plausibly, be a member of a group systematically exposed to a practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned. (FG v Sweden [2016] para.127)

Other than Articles 2, 3 of the ECHR Convention as a sometimes justification of non-deportation, the reasoning of the ECTHR appears itself conservative and favors to grant a broader margin of appreciation to the States. If, in X, Y and Z C/ minister voor Immigratie en Asiel-Netherlands [2013]), the CJEU foresees the possibility for LGBTI applicant (or at least for homosexuals) to form a social group, on a negative note, the mere fact that the country of origin criminalizes homosexuality is not considered *per se* as persecution (Ducoulombier 2015).

The right to remain for the duration of risk follows from Article 33 of the Refugee Convention of non-refoulement. Nevertheless, one must not forget that, even if they are not refugee specific international legal instruments, similar non-refoulement duties arise under other human rights instruments, including the 1966 International Covenant on Civil and Political Rights, the 1984 Convention Against Torture, the 1989 Convention on the Rights of the Child, the 1989 American Convention on Human Rights, and the 1950 European Convention on Human Rights (Hathaway and Gammeltoft-Hansen 2015).

A general panorama about LGBTI refugee status recognition (or the lack of it) within the EU Member States has been explained so far. With this in mind, one can argue if there is a need for explicit recognition of this particular group in the EU or not. A special attention on this issue will be addressed at the upcoming section.

[17] See also UNHCR guidelines that were mentioned in this judgement, notably Note on Burden and Standard of Proof in Refugee Claims (1998, para.6).

9.3.2 *Towards an Explicit SOGI Ground for Asylum in the EU?*

There is no doubt that the EU Member Sates' LGBTI asylum application practices are heterogeneous (Jansen and Spijkerboer 2011).[18] The category of membership of a particular social group is quite complex due to the fact that in most cases it is most likely left to the discretion of the administration to whether to decide if LGBTI asylum seekers form part of a social group or not.[19] While the interpretation of a particular social group by both the US and Australia can be hailed as a positive development in refugee law, the fact that different interpretations are afforded to it indicates that there is no uniformity as to the meaning of a particular social group (Braimah 2015).

In broader lines, it can be summarized that some States make a distinction between LGBTI status or LGBTI conduct (related to stereotypes, visibility, behavior) and those that consider the society from which the applicant comes and contemplate how that society would respond to the putative social group, sometimes looking for some undefined level of visibility within the society (Southam 2011; Marouf 2008).[20] These different lines of inquiry overlap themselves (Southam 2011).

The lack of an explicit mention of SOGI as a valid ground for asylum in most EU national legislations presents itself as an incomplete way of recognizing international protection to the LGBTI community. From a legal perspective, it is important to keep in mind that although both Directives and Regulations are EU'S secondary law, the criteria set by Directive 2011/95/EU are flexible while those of a Regulation are not. While adopting a Directive, Member States are free to choose the means by which to implement it (art.288 of the Treaty on the Functioning of the EU States). This explains the wide range of practices especially regarding asylum issues in general. When it comes to SOGI as valid grounds for asylum, the problem is even more complex and it explains in part the lack or absence of recognition at least in a legislative basis.

In 2016, the European Commission presented a number of proposals in order to remove differences among State Member's asylum practices and one of the novelties

[18] For further illustrative cases about European States different practices see *Fleeing* H*omophobia* (Jansen and Spijkerboer 2011), *Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* report as well as the Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers, made by the FRA (2017).

[19] As one of the judges of the Australian case law previously analyzed declared (See Sect. 9.1.2): "the insertion of the social group category (…) was intended to include groups that would not be identified by any of the other categories of discrimination. Whether or not the term *a particular social group* would be wide enough to encompass those other categories." (para.19, 21) The definition of "safety net" here might be relevant if one takes into account that many authorities can interpret it as indeed a residual category without any explicit legislative support nor recognition.

[20] This is for instance the case of Spain in accordance with the provisions of the Qualification Directive.

is the replacement of the QD-recast with a Regulation[21] ensuring *uniform standards* instead of the existing *minimum ones.* In order to make sure all LGBTI people are covered and protected, ILGA-Europe calls for the inclusion of gender expression (how a person publicly expresses or presents their gender) and sex characteristics (referring to intersex people) as additional grounds in the relevant provisions. Likewise, ILGA-Europe calls for Article 10 to be amended in order to ensure full protection of all LGBTI asylum seekers (ILGA 2016).[22]

Considerable political and social changes in Europe regarding LGBTI rights embodied in laws, policies and so on, have emerged the last two decades. From legal gender recognition in France and Norway and civil unions in Italy to the recent recognition of marriage equality in Germany and Malta in 2016, progress is present, which should also apply to those LGBTI persons in need of national protection.[23]

Furthermore, the Charter of Fundamental Rights of the EU explicitly prohibits discrimination based on sexual orientation (art.21). Albeit only applicable to employment, EU law specifically outlaws discrimination on the grounds of sexual orientation in all its member states (Directive 2000/78/EC). Altogether, LGBTI asylum applicants should be entitled to asylum because they are treated as distinct, excluded, and restricted from enjoying their fundamental human rights, guaranteed under international human rights law (Braimah 2015).

Expanding the traditional Refugee definition (at least in the EU) in order to include SOGI as an independent ground when seeking for asylum thus heightening its official recognition at the level of the already existing grounds is far from being discussed within the EU. Especially considering the management of the refugee protection system since 2014 and the divergent decisions when dealing with the issue (i.e.: Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece), the EU-Turkey agreement sought to stem the flows of asylum-seekers and migrants crossing from Turkey's shores to the Greek islands and the EU's emergency relocation and resettlement schemes).

Nonetheless, given the non-existence of LGBTI asylum data, the administrations' inadequate training when dealing with LGBTI asylum applications, the argumentation in some of the case laws studied here and the implication of a high level of burden of proof LGBTI that asylum applicants might need to provide create an

[21] Discussions on this reform are currently ongoing. A Regulation have legal effects simultaneously, automatically and binding in all the national legislations (art.288 of the Treaty on the Functioning EU States).

[22] For instance, they propose to change the wording of art.10 of the current QD-recast (see Sect. 9.2.1) changing the might and replace it with "shall include a group based on a common characteristic of". Thus imposing an obligation rather than a recommendation, it does not create a fully independent category but instead expressly names it within *the membership of a social group* one.

[23] In October 2016 the National Assembly in France passed the "Law about justice in the 21st Century" (*La loi sur la justice au XX1eme siècle)* which included provisions relating to legal gender recognition. Same-sex marriage became legal in Germany on 1 October 2017. On July 2017, Malta's parliament agreed to amend its marriage act, replacing words like "husband" and "wife" with the gender-neutral alternative "spouse".

atmosphere of incertitude for LGBTI people. This does not mean that LGBTI asylum applications are per se being neglected but that the level of vulnerability[24] for this group of people may be relatively high if compared, for example, with the category of religion or political opinion, both fully recognized in the Refugee Convention and the QD-recast of the EU. The membership of a social group ground appears to be a residual category. Although it may be useful in relevant circumstances according to the specific events and situations of history, it is undeniable that the awareness on the existence of non-heterosexual persons plus the fact that there are countries that do not accept, nor tolerate or advocate for SOGI diversity is an issue present in our societies.

Connected to the above then, making a mandatory proposition within the membership of a particular social group, Article 10 of the Qualification Directive, would be a valid and more viable option for LGBTI asylum seekers in the EU, especially when ongoing negotiations of a new recast version of the CEAS started in July 2016. It is true that some State Members, as previously pointed out (see Sect. 9.2.1), have made some small recognitions. However, the considerable sense of legal insecurity for LGBTI asylum seekers would be solved if an inclusion of an express mention within the social group notion might be recognized.

9.4 Conclusion

This chapter analyzes what membership of a particular social group ground approaches were established by international jurisprudence and especially within the EU. It attempts to understand the impact of these approaches on LGBTI asylum cases and the potential role that interpretation has on such cases. The question that ultimately emerges is that whether a substantial legal change in the EU asylum system is needed in order to include SOGI as explicit grounds for asylum.

The evolution of the *membership of a particular social group* notion has basically formed two criteria (immutable characteristics and social perception) that, at least for EU Member States, should be read cumulatively. However, this is not fully established nor if the requirements of the Qualification Directive (where both criteria are met) are either alternative or cumulative, this seriously and especially affects LGTBI asylum requests. The heterogeneity of approaches when examining an asylum request for SOGI reasons is clearly present. Credibility assessments will nonetheless always be a central part of queer asylum cases.

[24] It remains unclear what exactly qualifies someone as vulnerable (Flegar 2016) although, as ILGA-Europe reported, in the proposed regulation on the EU Asylum Agency (COM (2016) 271 final), there are numerous references to "vulnerable groups" and "vulnerable persons", but no definition of vulnerability is provided either. They recommend that such definition should be inserted in the proposal including vulnerability based on sexual orientation, gender identity, gender expression and sex characteristics. The emerging concept of "vulnerability" and "vulnerable groups" would lead to another academic article.

EU institutions and State Members are being tested in terms of their capacities to face challenges and manage the situation according to the systems and precepts set by both the European and International refugee legal framework. The response so far might have left those in need unprotected, meaning that LGBTI individuals' vulnerabilities face a higher risk of danger and discrimination. Raising the burden of proof on LGBTI asylum claims seems to be a common practice between Member States, the social group ground might present itself as a residual one which is worrying taking into account the number of countries that consider homosexuals, lesbians, transgender and intersex people as some sort of problem or abomination.

Returning to the idea mention above of how they are or how they are seen by society (*eye of the beholder)*; it has been noted that it is possible that in many cases an LGTBI person not only considers themselves part of that social group in particular or that is not recognizable based simply on stereotypes. This is the main reason why specialized proper training for asylum officials responsible for the examining and deciding the outcome of applications would be crucial. Greater care and recognition is warranted, for instance, for transgendered and transsexual people who are the most stigmatized and discriminated within the LGBTI population.

It was noted that the problem with membership of a particular social group ground is the different tests afforded to it. However, of the two major approaches used to determine the membership of a particular social group, the protected characteristics approach appears to be more adequate than the social perception approach as, being based on the principles of non-discrimination and self-determination.

It is observed that the search for a European consensus when it comes to LGBTI protection framework, including of course asylum seekers, is far from being conquered, the non-existence of data collection is testament to this. Widespread silence from both European Asylum System and European jurisdictions especially when it comes to cases with foreign LGBTI people involved on the issue of discrimination on the grounds of SOGI is undoubtedly present. Despite the fact that the case law of European Courts considered that indeed LGBTI asylum applicants form a particular social group, it is necessary to directly call upon Member States and in particular their national legislations to be more open when it comes to establishing *the content* of what they consider to be a social group and, if possible (mostly desirable path), to explicitly contemplate it (the SOGI ground). This can become much easier when lodging a request for asylum, both for the administration and for the applicant. An eventual inclusion of SOGI ground as a cause itself might seem necessary if only the openness of States existed. However, this is not the case for the EU and its Member States practices (some are more socially conservative than others especially regarding SOGI rights). A possible recast of the CEAS where explicit legal provisions for SOGI applicants such as adding an specific reference to gender identity, sex characteristics and gender expression in each CEAS proposed recast, render the cumulative approach of the QD alternative, replacing "and·for an "or", include LGBTI asylum seekers to the category of 'applicant[s] with specific reception needs', under Article 2(1)(13) of the Proposed Reception Conditions Directive, etc., would only serve as a pathway to narrow the mechanisms settled so far.

To sum up, it was found that the cumulative approach adopted by the EU asylum law raises the standard of proof on LGBTI asylum applications. This is why it is fundamental to consider that, rather than a substantial legal recognition of LGBTI as an independent ground, interpretation of the *membership of a particular social group* ground is determinant in order to obtain refugee status.

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