

**CREDIBILITY ISSUES OF LGBTI ASYLUM-SEEKERS IN THE
REFUGEE STATUS DETERMINATION**

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SOSYAL BİLİMLER ENSTİTÜSÜ
ULUSLARARASI İLİŞKİLER YÜKSEK LİSANS PROGRAMI

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İSTANBUL HAZİRAN 2011

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Toplam Sayfa Sayısı:

Anahtar Kelimeler (Türkçe)

- 1) Sığınmacı
- 2) Mülteci
- 3) Cinsel Eğilim
- 4) Toplumsal Cinsel Kimliği
- 5) İnanılabilirlik değerlendirme

Anahtar Kelimeler (İngilizce)

- 1) Asylum-Seeker
- 2) Refugee
- 3) Sexual orientation
- 4) Gender Identity
- 5) Credibility assessment

Özet

Homofobi, eşcinsel aktivitelerin suçlandırılması, ve LGBTI bireyleri hedef alan şiddet dünyada bir çok LGBTI bireyi memleketlerinden daha güvenli yerlere göç etmeye zorluyor. İltica seçeneği LGBTI bireylere zaman içinde tanındı. Son yirmi yılda, 1951 Anlaşması'nda cinsel yönelim ve toplumsal cinsel kimliğin belirli bir sosyal gruba aidiyet temelinde bir iltica talebi seçeneği olduğu konusunda canlı bir uluslararası tartışma yaşandı . Cinsel yönelim ve toplumsal cinsel kimliğin iddialarının kabulü konusundaki ilk engeller cinsel yönelimin "istemli" yönüyle bağlantılı olarak, sonrasında gizlenme ihtimali ve sonrasında da LGBTI ilticacıların uğradığı zulmun tanımı konusunda oldu. Çalışmamız bu tartışmaları sunduktan sonra RSD procedüründeki güvenilirlik değerlendirmesi konusuna odaklanıyor. Araştırmada gerçekleştirdiğim çeşitli mulakatlar ve kişisel katılım sonucu, uluslararası mülteci rejiminin RSD prosedürüne olan etkisinin bir analizini sağladım. Daha belirgin olarak, çalışmamda karar vericiler ve hukuki danışmanların kimlik icra süreci ile nasıl yüzleştiklerine odaklanarak, çeşitli göstergeler ışığında ve LGBTI ilticacılarla ilgili belirli konularda Türkiye'deki duruma daha yakından bakmayı amaçladım.

Abstract

Homophobia, criminalization of same-sex activity, and targeted violence forces LGBTI individuals worldwide to flee their homelands for safer havens. The option of seeking asylum has been opened to LGBTI individuals over time. In the last two decades a vivid international debate brought in the 1951 Convention sexual orientation and gender identity as an option to claim asylum on the ground of membership to a particular social group. First hindrances for the acceptance of SOGI claims have been in connection to the ‘voluntariness’ of the aspect of sexual orientation and possibility of discretion and then on the definition of persecution with regards to LGBTI asylum-seekers. The research then focuses on the emerging issue of credibility assessment in RSD procedure. Through research, interviews and personal involvement, I provided to analyse how international refugee law regime impacted on the RSD procedure. More specifically I aimed my research at how decision-makers and legal advisors face the process of identity performance trying to focus on indicators and specific issues regarding LGBTI asylum seekers with a closer look at the situation in Turkey.

“The principle of universality admits no exception. Human rights truly are the birthright of all human beings.” (UN High Commissioner for Human Rights)

Acknowledgments

Firstly I would like to thank my supervisor assistant professor Pinar Uyan Semerci for the patience in the process of structuring the thesis and for contribution and advice especially in moments of confusion which I was never short of.

A special thank goes to all the friends that endured my stress during the whole procedure of the thesis. First to Daniela Campo, who practically kept me sane and active ; to Natalie Richman whose enthusiastic loving support has never stopped; to Ariel Travis for the long and interesting conversations about LGBTI refugees; to Kay for her ability to delegate; to Sara Miller and Maggie, Ryan for accurate and efficient collaboration; to Mathilde Blezat and Agnese Caputo for more talks and information; to Rachel Alcorn, Nil Delahaye, Cetin Gurer, Onur Bakir, Queenia Pereira De Oliveira, Alessandra Cardone, Emiliano Bugatti, Simone Gobber, Eren Korkmaz, Gabrielle LeRoux, Natali Arslan, Francesca Feleppa, Tania Trionfi, Pinar Buyuk, Begum Basdas for the patience.

A special thank to Bulent Peker for his interest, kindness and will to collaborate.

Last but not least, to my family which even from far and in silence has been supporting me.

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Abbreviation

LGBTI – Lesbian Gay Bisexual Transsexual Intersex

SOGI – Sexual Orientation and Gender Identity

RSD – Refugee Status Determination

UNHCR – United Nations High Commissioner for Refugees

ORAM – Organization for Refuge, Asylum and Migration

HCA – Helsinki Citizen’s assembly

1. Introduction

The thesis aims to explore how advancements in Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) discourse and rights have an effect on sexual orientation and gender identity (SOGI) asylum claims with regards to credibility issues in the refugee status determination procedure with a closer look at the Turkish situation.

The question lies at the intersection of several fields such as international human rights and refugee law, identity politics and sexual minority rights and it is significant for integration and mutual cooperation among those. LGBTI rights are applied in varying degrees across the world. No country though, can claim a full-fledged LGBTI rights system, as in granting them the same rights of heterosexuals. LGBTI individuals are perceived as different, and while within a legal framework they need to be identified and categorized, within society they need to be taken out of these very categories to actually blend in. Particularly, LGBTI asylum-seekers are both at the margins of society as LGBTI and of local LGBTI communities as migrants. They challenge both the already flimsy legal and social achievements granted to LGBTI individuals in the international field and in a handful of countries, and the western conventional definition of LGBTI identity. Additionally, LGBTI asylum-seekers highlight shortcomings in both international human rights and international refugee law; sexual orientation and gender identity as fluid elements clash with the need of

universalizing human rights to make of those an actual tool of international protection. It is a challenge especially with regards to refugee laws which tend to apply jurisprudential categories and standardized mechanisms of identification to assess claims beyond doubt to a group which is eluding common framing¹.

Around December 2010, the news that the Czech Republic was using phallometry² to test and verify the sexual orientation of LGBTI asylum-seekers came to the attention of the media. Articles³ (BBC, Hurriyet) reported that only 10 people have been subjected to the test according to a statement of the Ministry of the Interiors. In the immediate aftermath of the diffusion of such news, the Organization for Refugee, Asylum and Migration (ORAM) describes at length the original uses of this test and how it had already been tagged and dismissed as non scientific by the

¹ For further debate about international gay identity and western and non-western countries Dennis ALTMAN “Rupture or Continuity? The Internationalization of Gay Identities” *Social Text*, No. 48/1996 pp. 77-94; Katherine FRANKE “Sexual Tensions of Post-Empire” Public Law & Legal Theory Working Paper Group Number 04-62/2004, *Columbia Law School*; Sonya KATYAL “Exporting Identity” *The Yale Journal of Law and Feminism*, Vol. 14 Number 1/2002, pp.98-176; Joseph Antoni MASSAD “Re-Orienting Desire: The Gay International and the Arab World” *Public Culture*, Vol 14, Number 2/2002, pp. 361-385.

² “Penile phallometry, also called ‘penile plethysmography’ is a method to allegedly scientifically quantify male sexual arousal by measuring physiological responses to visual stimuli through attachment of electrodes to the penis”. There is also the equivalent treatment for women, vaginal photoplethysmography” (ORAM, 2011a, p.5). For a more accurate description of penile and vaginal photoplethysmography look at ORAM 2011 ‘Testing sexual orientation: A scientific and legal analysis of plethysmography in asylum and refugee status proceedings’ available at:

<http://www.oraminternational.org/Publications/index.html>

³ “AB’yi ayağa kaldıran ereksiyon testi” in *Milliyet* 9-12-2010, [online] <http://www.milliyet.com.tr/ab-yi-ayaga-kaldiran-ereksiyon-testi-dunya/sondakika/09.12.2010/1324179/default.htm>

“Czech gay asylum 'phallometric test' criticised by EU” in *BBC News*, 8-12-2010, [online] <http://www.bbc.co.uk/news/world-europe-11954499>

international scientific community. Supposedly, the aim of this test is to prove that if gay claimants get an erection in response to visual stimuli then they are genuinely gay. This is not only a transgression of basic human rights of asylum-seekers including “the right to privacy; and the right to be protected from medical abuses” (ORAM, 2011a, p.3) but it also violates the prohibition of cruel, inhumane and degrading treatment as stated in Article 6 of the UN Convention Against Torture and Article 3 of the European Convention on Human Rights.

Additionally, when considering the extent and the significance of the latest studies about sexuality and gender identity, especially queer theory⁴, acquired in many fields, the idea of proving someone to be genuinely gay is by itself controversial and unrealistic.

Studies supporting how sexual orientation does not consist exclusively of sexual intercourse, and how sexual identity is not a fixed category but is socially constructed, are questioning the common assumptions with regards to sexual and gender norms.

Those who transgress gender norms are particularly likely to be targeted for violence. In countries where same-sex activity is criminalized those “laws against ‘public scandals’, ‘immorality’ or ‘indecent behaviour’ are used to penalize people for looking, dressing or behaving differently from enforced social norms” (O’Flaherty&Fischer, 2009, p.4). As O’Flaherty and Fischer

⁴ The main figure for queer theory is considered to be Judith BUTLER’s *Gender Trouble* 1990-largely inspired by Michel Foucault’s work.

(2009) concisely remind, the simple presence of these law against 'immorality', regardless of whether they are enforced or not, threatens the lives of non-conformants to gender norms. These laws can be arbitrarily applied to harass or blackmail persons of diverse sexual orientations and gender identities, to restrain their daily lives, as a basis for discrimination in employment and accommodation or to impede activities of LGBTI activists, counselors and safer sex advocates. The state carries out a process of repression by silencing non-conformants to gender norms and confining sexuality *indoors*. On one hand, sexuality is confined to the private sphere, allowing the virtual space to do what they want as long as it is kept invisible so the state does not have to interfere; on the other hand, to be able to publicly enjoy their rights, LGBTI individuals must go out in the streets and be visible to assert their existence within society and claim rights which are due to them, as humans. (Hubbard, 2001 ; O'Flaherty & Fischer, 2009).

Yet those same rights are not applied in a consistent way across the world, and they do not necessarily have the same significance in non-western countries. As Katyal (2002) remarks, "to *commit* a homosexual act is one thing, to *be* a homosexual is an entirely different phenomenon. The difference between identity and conduct raises the difficult question whether sexual orientation is itself a culturally specific concept." (Katyal, 2002, p.103). There are different conceptualizations of sexual identity; in India, as Yoshino reports, it is not necessary for men having sex with men to self-identify as gay. That is to say, their sexual activity does not have a fixed

recognizable expression. Alternately, in western countries same-sex activity is embedded in gay identity: the outward expression of one's own identity matches its private existence. The identification of sexual acts with sexual identity is then a typically western concept and it is based on some kind of gay essentialism where homosexuality has fixed and clear meanings. Jordan (2009) expresses this pattern by highlighting the role of western psychology in creating "a view of sexual and gender identity as an intrinsic, essential trait, discovered, expressed, and, once realized, stable. The popularized *coming out* narrative reinforces this view, and provides an implicit template for identity formation from non-awareness through self-acceptance" (Jordan, 2009, p.175). Against all social demands of invisibility, outward performance of sexual identity becomes a political act which calls for rights to be granted upon this very identity.

Katyal (2002) labels the application of rights on the basis of this model as 'substitutive' approach and argues the universality of such an approach. Conversely, the importance of well-defined and clear-cut gender roles appears to be cross cultural, and non-compliance provokes marginalization and repression across the world. (Wintemute, 2001; Katyal, 2002)

Yoshino indicates how assimilation is used as a legitimization of this invisibility. To analyse how the perpetuation of this invisibility is enforced, Yoshino provides a paradigm. He postulates that in order to be assimilated and to avoid discrimination, LGBTI individuals or in general "disfavored groups are forced to cover aspects of their identity in order to reap the

social, political, economic and legal benefits of mainstream society. Covering does not mean *changing* one's identity (converting) or *denying* one's identity (passing), but rather to selectively minimize traits that visibly mark one as having a disfavored or disadvantaged identity." (Yoshino cit. in Heller, 2009, p.296) These three strategies-either adopted because of no other option or forced upon-are reportedly a form of discrimination of LGBTI individuals whose rights are being sacrificed to a sexually homogeneous society. All LGBTI individuals live within this paradigm and perform the strategies at different degrees. According to Heller (2009) the only moment in which LGBTI individuals are allowed and forced to uncover is when they are undergoing RSD procedure; they are required to act out their full-fledged identity against all internal blocks, impediments, internalized homophobia or self-hatred they carry because this performance will have an effect on their future.

To summarize, repression is defended and legitimized in the name of morals, manners, cultural and religious issues. For that reason forcing the application of human rights can be perceived as going against the sovereignty of the state and interfering with its culture, customary law, and penal code. Within the last decade, this forced invisibility, or call for discretion, has been acknowledged as a form of discrimination in the human rights regime regardless of the preferences of the country. (Millibank, 2004)

Sexual minorities' rights thus rest between domestic criminal laws and international human rights law, which are not always in harmonious

coexistence. There is an increasing jurisprudence showing a wider and consistent application of human rights with regards to individuals of different sexual orientation and gender identity. The issue of sexual minority rights has also been included in the United Nations agenda and its body of human rights treaties in an attempt to update the latter to ensure a wider distribution of sexual minorities rights. (Saiz , 2004) The increased visibility in the international scene and the advancements accomplished in matter of sexual minorities in human rights legislation culminated in the drafting of the Yogyakarta Principles in 2007. Those principles aim to officially and evenly integrate the rights of sexual minorities into the already existing body of human rights treaties.

‘Queer migration’ emerges as a new body of scholarship within this international context. Research on queer migration aims at pointing out discriminatory attitudes in immigration policies and came to analyse the figure of the queer migrant; a queer migrant is someone leaving one’s own homeland towards countries with better conditions for LGBTI individuals where, in any case, they have to face difficult situations. Queer migrants are recognized as a nexus for conflicts of nationality, race and class, and prisoners of a culturally specific binary vision of sexuality. All those differences ensue in a multilayered marginalization as an answer to this identity whose limits are blurred⁵. Analysis on policies for queer migrants

⁵ For further debate about queer migration Anne-Marie FORTIER, “Queer Migrations and multiple evocations of home” *European Journal of cultural studies*, Vol. 4

show that in the last two decades the situation has been tentatively changing. The removal of the ban of LGBTI individuals to enter United States territory in 1990, the first voices about same-sex unions in some states, and the increase in the number of countries to grant asylum to LGBTI applicants up to twenty.⁶ (Budd, 2008 ; Luibhéid&Cantù, 2005)

On this trend, Landau (2005) defines the growth in LGBTI claims as ‘staggering’ and expects even further increases in the near future. The focus on LGBTI asylum-seekers in the international agenda is linked to this growing awareness of the recent phenomenon of queer migration, and to advancements in the international human rights regime towards sexual minorities. The concern of international organizations has been made official by means of the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity issued in 2008 to direct, support and suggest legal standards and appropriate behaviours towards SOGI asylum-seekers.

The basis of the Guidance Note lays within the ongoing and livelier debate

No 4/2001, pp. 405-424 ; Eithne LUIBHEID, *Entry Denied: Controlling Sexuality at the Border* Minneapolis: University of Minnesota 2002 ; Eithne LUIBHEID, and Lionel CANTU’ *Queer Migrations: Sexuality, U.S, Citizenship, and Border Crossing* Minneapolis, University of Minnesota Press, 2005; Eithne LUIBHEID “Queer Migration: an unruly body of scholarship” *GLQ A journal of lesbian and gay studies* 14 No 2-3/2008 pp. 170-190; Martin F. MANALANSAN IV *Queer Intersections: Sexuality and Gender in Migration Studies* University of Illinois, Urbana-Champaign; Derek MCGHEE “Queer Strangers: Lesbian and Gay Refugees” *Feminist Review*, No. 73/2003, pp. 145-147; Cindy PATTON, and Benigno SANCHEZ-EPPLER *Queer Diasporas* London, Duke University Press, 2005.

⁶ These countries are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Latvia, the Netherlands, New Zealand, Norway, South Africa, Spain, Thailand, the United Kingdom, and the United States.

in common law jurisdictions. Millibank and LaViolette, the current main researchers on the issue, are working on the analysis of cases from Australia, Canada, New Zealand, U.K and U.S whose results hint that one of the emerging problems for LGBTI asylum-seekers in the refugee determination process is the framing of non-western sexualities within a western concept. The latest achievements in the sexual minority rights field are still being debated and experimented within those countries, then gradually transferred to the international refugee law regime and made official with the Guidance Note. The vivacity of the debate is also due to the high amount of claims those countries receive both for resettlement⁷ and asylum, and the complex structure of the adjudication system. In the case of the U.S for example, the refugee ceiling set by the Obama Administration for 2010 was 80.000⁸ making of the U.S the largest recipient of first asylum applications and resettlement among western countries. According to UNHCR data, even though most of the asylum-seekers are received in the least developed countries, there is not as much literature or debate about SOGI claims in those countries. (Budd, 2008; Millibank, 2004; UNHCR, 2009)

According to the 1951 United Nations Convention and the 1967 Protocol

⁷ Only a small number of states takes part in UNHCR resettlement programs. The United States are the world's top resettlement country, while Australia, Canada and the Nordic countries also provide a sizeable number of places annually. In recent years there has been an increase in the number of countries involved in resettlement in Europe and Latin America.

⁸ Migration Policy Institute, Erin Patrick “The US Refugee Resettlement Program” Migration information, available at: <http://www.migrationinformation.org/feature/display.cfm?ID=229>

Relating to the Status of Refugees, a refugee is a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” In order to be under the protection that the term ‘refugee’ entails, all the criteria of inclusion have to be met.

The process to consider LGBTI as candidates for international protection, dates back to the late 80s and grows in importance and visibility through decades. Throughout the course of the thesis I will examine the different levels of debate that brought SOGI claims to be included in the 1951 Convention, and the impediments that LGBTI asylum-seekers meet when accessing international protection.

LGBTI asylum-seekers are permanently given the inclusion in the particular social group (PSG) as a ground through the intense legal debate about the topic, and especially as an effect of two non-LGBTI related cases made as precedents (in the U.S in the 1985 matter of Acosta and in 1993, Canada vs Ward). Those two cases set down the standards for consistently defining the PSG within the 1951 Convention terms. Homosexuals were then officially recognized in this appellation in 1994 when the 1989 Matter of Toboso Alfonso in the U.S was made a precedent.

The long road to acceptance has to battle assumptions of the non-necessity or voluntary nature of sexual orientation and gender identity. As a matter of fact, in early cases in the 90s, the applicant would be sent back home and asked to live discreetly, thus transferring to the individual the responsibility of his own protection by means of self-restraint and covering. It is not necessary to live out one's sex life in an openly blatant way; heterosexuals do not do so. As Millibank (2009) pointed out, while no one is required to hide his/her⁹ own political convictions or religious belief regardless of the risk they might have to face, to go against gender roles as conceived and performed by society is not allowed. In other words, sexual orientation and gender identity do not have a statutory status under the Convention grounds, and LGBTI individuals do not have the right to express their identity but should live in discretion. In other words, they must stay invisible to survive. (Millibank, 2009; Walker, 2000). In the last decade this assumption has been upheld as discriminatory towards LGBTI individuals, asylum-seekers and refugees. James Hathaway (1991) develops a link between discretion and persecution including sexual orientation in the core entitlements granted by international human rights. The nexus lies in the fact that refugee law "protects those whose fundamental human rights are seriously abused or at risk of serious abuse." (Millibank, 2004, p.199) Being asked 'to keep a low profile' is a violation of human rights which has been recognized and

⁹ Language itself gives an idea of the limited perspective on gender and it does not allow the use of a single adjective; I will use the masculine form because of the predominant group in the claimants.

widely accepted in asylum procedures. LGBTI individuals have the right to not hide their own sexual identity regardless of the laws of the country they are living in. The nexus invisibility-repression amounting to persecution is satisfied, so the next step is to prove that persecution happens on account of the membership to *that* particular social group.

The hurdle in SOGI claims thus switches to the procedure of proving the genuinity of LGBTI identity. Whether an applicant is actually homosexual or not and how to assess the truth of it has to be tested; it is a matter of credibility. LGBTI claims are deemed to be the hardest to assess because of the lack of evidence and the sensitivity and relativity of the issue. “The process of preparing for the hearing and the hearing itself places claimants in a web of relationships in which they must be recognized as LGBTQ and as refugee.” (Jordan, 2009, p.174) Within this multilayered discourse, decision-makers are thus attempting to pinpoint the common traits of LGBTI applicants coping with the effect of the subjectivity of both the narration and the resulting judgment. These claims are a stage for the performance and interaction of the claimant and the decision maker and their way of constructing identity. The aforementioned case in the Czech Republic is one example of how decision-makers try to set a standard by using the authority of science to confirm LGBTI identity.

To sum up, LGBTI individuals living under oppressive regimes have gained the right to seek international protection. However, to avail themselves of this right they have to prove the authenticity of their sexual orientation.

Turkey is situated at the crossroad of Africa and Asia (home to many refugees-producing countries such as Afghanistan, Iran, Iraq, Sudan, Somalia) and borders the European Union. The increasing pressure of migration flows combines with the political situation to make Turkey a significant case for research. The percentage of migrants passing through Turkey on their way to Europe or seeking asylum has increased in the last decades; according to the International Organization for Migration (IOM) “Migration in Turkey: A Country Profile 2008”, in 2007 there were 1,328,405 migrants. With regards to the asylum procedure, Turkey is also only a country of transit for non-European asylum-seekers¹⁰ whose fate is necessarily resettlement in a third country or deportation. To date, the key actor in the asylum procedure for non-Europeans has been the UNHCR. According to ORAM, Turkey has the highest known rate of LGBTI refugees passing through because it shares the border, or is in close proximity to, several countries that have oppressive regimes when it comes to the treatment of LGBTI people, especially Iran which not only is one of the countries whose legislation enforces death penalty, it is also the country that western LGBTI and human rights activists groups are targeting as the greatest violator of fundamental rights of sexual minorities (ILGA, 2010; ORAM 2011). Since the UNHCR does not breakdown the claims by ground and it does not publish cases because of confidentiality reasons, the amount

¹⁰ Turkey, as mentioned earlier, is a ratifier of the 1951 Convention and ratified the 1967 Protocol, lifting the temporal limitation of the Refugee Convention; however, Turkey chose to maintain the geographical limitation created by the Refugee Convention despite many requests by international community.

of information available is very limited. A report published by ORAM with regards to LGBTI asylum-seekers and refugees has brought the issue to the attention of the international community.

The following second and third chapters will go through the world conditions of LGBTI individuals and their statuses as migrants, thus introducing asylum-seekers as a part of the so-called queer migration. The fourth chapter will focus on LGBTI claims and how those have been included into international refugee law. At first the process of inclusion of SOGI claims in the 1951 Convention and touchstone legal cases that furthered the issue is retraced, then, mostly referring to common law jurisdictions, information is divided into two sections with regards to hindrances for LGBTI asylum-seekers in general. The first is about practical hardships specific to the group, namely issues that concretely prevent LGBTI asylum-seekers to avail themselves of international protection. The second section deals with impediments encountered at the interview and in the credibility assessment. Once the general situation and its theoretical and juridical framework have been explored, the last two chapters will take a closer look at Turkey as a case study framing it into the international LGBTI asylum-seekers and refugee debate.

1.1. Details of the Turkish case

This research is yet at an exploratory stage due to the fact that the issue is recent and there has been no previous research done about the process of

credibility assessment in Turkey. The aim is to create a better understanding of the UNHCR interviewing procedure in Turkey, to produce an analysis of the current discourse in the interview process, and to obtain a general picture of the situation of LGBTI asylum-seekers and refugees.

The concept of identity is difficult to grasp and categorize beyond doubt. A commonly accepted idea in recent social studies is of it being a performance and interchange between two or more actors. However within jurisprudence a non-fixed concept is not easy to handle. The discourse about LGBTI identity of asylum-seekers rests in between the need for fluidity due to the damage that categorization can provoke, and the need for rigidity so it can be included in legal categories. Because most of this mediation happens at the level of the decision-makers, this paper focuses on their model of interpretation of LGBTI identity rather than on accounts of asylum-seekers.

To frame the Turkish situation with regards to LGBTI asylum-seekers and refugees within an international discourse, to trace a first draft of the situation in Turkey, to outline how they are assessed how the process of identity building is performed in the RSD, interviews were conducted with UNHCR officers and NGO's advocates for refugees. The aim is to draft a pattern of common indicators in the interviews and how those are transformed in a defined identity.

To gather information about such an elusive and difficult topic, qualitative research is the best method. First of all, due to the stigma attached to

LGBTI persons in general, and especially in conservative societies, it is better to elicit answers in an open way in order to avoid forced attempts of political correctness as well as to be able to observe the choice of language, issues or facts. Additionally in-depth interviews make it possible to have a deeper insight considering that sexuality is an extremely subjective, intimate and private topic and research is not only based on direct information.

To gather data I conducted 12 in-depth interviews on the site including legal advisors, legal officers, and people that work with refugees in the legal field. In order to outline some common indicators I asked them what do they expect a LGBTI applicant to be and what they would look at to validate this identity. I interviewed UNHCR officers in the Van Field Office and the Headquarters in Ankara. The background idea was to obtain a varied group of people rather than only the ones dealing with SOGI claims; however, the number of people willing to talk was very limited; most of them refused simply by saying that they did not know enough about the issue and referred me to someone else. I assume that, instead of trying to focus on a single issue, it would have been more productive in terms of response to ask more general questions and try to elicit answers within a wider context. Nevertheless, the number of people in the field is so limited that it would be hard to keep the ‘real’ aim of the research hidden, and with regards to LGBTI asylum-seekers there are even fewer experts. The process was complex because the topic and stories/cases are bound by confidentiality. This is a strong limitation in social sciences because it makes exchange in

research less effective and detailed.

I accomplished a seven-month internship with Helsinki Citizens Assembly, where I experienced an insight from the field, I got in touch with asylum-seekers and observed the asylum procedure. At the same time, I got acquainted with the specific topic while collaborating with ORAM's legal advisor, exchanging ideas, thoughts and experiences. On one hand I had the opportunity to witness real situations and generate my own personal experience as a participant observer, on the other hand I am bounded by confidentiality myself.

Helsinki Citizens' Assembly is a not-for-profit Istanbul-based organization and is one of the biggest dealing with asylum-seekers in Turkey. The HCA Refugee Advocacy and Support Program started in 2006; it originally provided support for all asylum-seekers and refugees, but now only provides legal advice in the case of rejection by UNHCR to organize the appeal; HCA dealt with SOGI claims until 2008, when they set up a partnership with ORAM. Currently, HCA takes care only of LGBTI clients who explicitly declare that they do not want to be represented by ORAM. For this reason I selected the legal advisors who worked there before the partnership with ORAM.

ORAM is the leading non-governmental organization on issues concerning LGBTI asylum-seekers and refugees in Turkey. Its headquarters are in San Francisco, but there is a legal advisor in the Helsinki Citizens Assembly's

office in Istanbul. It conducts international and domestic advocacy, research, education, and legal representation on behalf of refugees fleeing sexual and gender-based violence.

1.2. Terminology

The “LGBTI” acronym stands for different sexual orientations and gender identities. To avoid any misunderstanding about the meaning of sexual orientation and gender identity I refer to the definitions drafted and adopted in the Yogyakarta Principles whereby:

“Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.” (The Yogyakarta Principles, 2007, p. 6)

And:

“Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.” (The Yogyakarta Principles, 2007, p. 6)

For purposes of this research by means of the other categories:

‘Lesbian’ refers to a woman who is sexually or emotionally attracted to other women;

‘Gay’ refers to a man who is sexually or emotionally attracted to other men;

‘Bisexual’ refers to a person of either gender who is sexually or emotionally attracted to both men and women;

‘Intersex’ refers to a person whose sexual anatomy is not considered standard for a male or a female;

‘Transgender’ refers to a person born of one gender who does not fully identify with that gender or identifies primarily as a member of the other gender. There are two specific groups:

‘Male-to-female’ (MTF) refers to someone born male who primarily identifies as a woman;

And:

‘Female-to-male’ (FTM) refers to someone born female who primarily identifies as a man.

According to the UNHCR LGBTI discussion paper 2010, many people consider an intersex condition to be a medical disorder treatable with surgery and counseling. For others, being intersex is a matter of gender identity. It is important to underline how the issue of intersex is new to international human rights and advocacy groups. Whether intersex individuals should be grouped together with LGBT individuals it is being debated. It is important to remember that although lesbian, gay, bisexual, transgender and intersex rights are put together in the acronym, they entail substantial differences and consequently different needs. Gay men are the main category taken into account in LGBTI asylum-seekers and refugees

literature and field work because of the high visibility of their claims; transgenders and lesbians appear in a smaller percentage, thus the abbreviation LGBTI can be often intended to mean only gays but conventionally, and often erroneously, it encompasses all categories.

For the purpose of this thesis I will use the acronym LGBTI when referring to civil and human rights and to the group of claimants. Sometimes the term 'sexual minorities rights' is also used.

Conventionally, the terms 'sexual orientation' and 'gender identity' (SOGI) are used to refer to the ground of the claim. There is an important clarification to make here, which often creates problems in the claims: one's own sexual identity does not necessarily include a given sexual orientation. A common mistake is to equate sexual orientation and gender identity, but they are not necessarily interdependent. Sexual orientation and sexual identity are fluid concepts, varying between individuals and throughout a given person's life.

Additionally, regardless of the recent body of academic literature about queer migration, I choose to leave out the word 'queer' when specifically referring to SOGI claimants because this word entails a whole range of non-conformative sexualities and often expresses a political stance. To the purposes of my research this political meaning is not significant since I focus on the narrower acceptation of sexual orientation; the word will be

used when cited in the original source or when referring more widely to all non-conformative sexualities.

Moreover I will also use the terms ‘asylum-seekers’ and ‘refugees’ in their legal and technical meaning.

‘Asylum seeker’ refers to a person who has requested the protection of UNHCR and the Government of Turkey pursuant to the 1951 Geneva Convention and the domestic laws implementing it, and whose application is still pending a final decision.

‘Refugee’ refers to a person who has been formally recognized as such and is entitled to protection by the UNHCR, the Government of Turkey, or both.

All refugees were previously ‘asylum seekers’ whose request for protection has been approved. However, the applications of many ‘asylum seekers’ are ultimately denied, foreclosing their entitlement to ‘refugee protection.’ (The Yogyakarta Principles, 2007 ; Yoshino, 2002, ORAM, 2011b).

2. International human rights framework and sexual minorities' rights

2.1. International Legal Framework

The predicament of LGBTI individuals across the world is well known. In every countries people are subjected to varying degrees of human rights violations because of their actual or perceived sexual orientation and/or gender identity. Serious bodily harm, acts of discrimination, and laws disfavoring LGBTI individuals are instated around the world. It is only the extent of the violations that varies according to the specific situation of the country. The inclusion of sexual minorities' rights in the international agenda is a recent accomplishment, but so far in its widest and more comprehensive implementation, it involves only a handful of countries¹¹. (ILGA, 2011)

The groundbreaking interpretation of the UN Human Rights Committee (HRC) of the ruling of the Australian State in 1994 in the case of *Toonen vs Australia*¹² as a breach of article 17 and 26 of the ICCPR was recognized as a landmark for the introduction of sexual orientation as a ground for non-

¹¹ See Amnesty International, Crimes of Hate, Conspiracy of Silence. Torture and Ill-Treatment Based on Sexual Identity, August 2001; Daniel OTTSON, State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity between Consenting Adults Stockholm: International Lesbian and Gay Association, 2009, 4–8, available at http://www.ilga.org/news_results.asp?/. See also International Commission of Jurists, Sexual Orientation and Gender Identity in Human Rights Law. References to Jurisprudence and Doctrine of the United Nations Human Rights System, November 2007.

¹² Toonen vs Australia available at: <http://www.unhcr.org/refworld/docid/48298b8d2.html>

discrimination, and as deserving equality and protection before the law. Article 17 establishes the right to privacy and freedom from arbitrary or unlawful interference from the authorities. Article 26 states that the rights in the ICCPR have to be applied “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status¹³”. The HRC states that “other status” can be interpreted as sexual orientation, thus making it grounds for non-discrimination. In the ruling, the HRC underlines how just the existence of those laws disregarding their enforcement had an effect on the applicant’s life and affected public opinion. In the last twenty years the addition of General Comments to UN-charter based human rights treaties bodies¹⁴, along with the *Toonen* ruling, have established that discrimination on the basis of sexual orientation and gender identity is to be internationally rejected. (Saiz, 2004 ; O’Flaherty&Fischer, 2009)

Currently, according to the 2011 ILGA report on state-sponsored homophobia, seventy-six countries criminalize same-sex sexual acts or gender “deviant” behavior. Among these, five maintain the death penalty for male homosexual acts, and four for sexual acts between women. In several

¹³ ICCPR available at <http://www2.ohchr.org/english/law/ccpr.htm>
Art. 17. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
Art. 26. Everyone has the right to the protection of the law against such interference or attacks.

¹⁴ Human Rights Committee (HRC), Committee on Economic Social and Civil Rights (CESCR) , Committee on the Elimination of Discrimination Against Women (CEDAW) , Committee on the Elimination of Racial Discrimination (CERD), International Covenant on Civil and Political Rights (ICCPR,) , Committee Against Torture (CAT), Convention on the Rights of the Child (CRC).

countries, restrictions on association, assembly, and speech have been imposed to LGBTI individuals, and discrimination in employment, education, housing and access to services has been acknowledged across the world. Nonetheless, according to the same report, several positive steps have been registered, including the adoption of marriage law in Argentina and Iceland, recent civil unions in Brazil and, most importantly, the signing of a statement by 85 countries at the UN Human Rights Council advocating equality and human rights for everyone without discrimination on the basis of sexual orientation or gender identity. This positive trend has been read in the ILGA report as a sign of widespread awareness and unity resulting in isolation for the seventy-six ‘remaining’ countries still adopting homophobic laws and attitudes.¹⁵(LaViolette, 2009; ILGA, 2011)

The advancement of the UN human rights system is significant in terms of leverage on domestic laws and as a possible source of uniformity in human rights standards.

2.2. The Yogyakarta principles.

The international debate with regards to sexual orientation and gender identity culminated in 2007, when the International Commission of Jurists and the International Service for Human Rights drafted “The Yogyakarta Principles”, whose aim is to further an international understanding of human

¹⁵ Example of the proposed “anti-homosexuality” bill of Uganda, which has been shelved by the government.

rights standards to be applied by states, disregarding sexual orientation and gender identity. The Principles were presented by NGO's at the 10th Session of the Human Rights Council. During the meeting, an issue between Egypt and the Special Rapporteur¹⁶ on the promotion and protection of the right to freedom of opinion and expression ensued. Egypt's main concern was the fact that the Principles were signed and made official by the Special Rapporteur "in his capacity as UN Representative¹⁷". The Egyptian delegate took no exception to the content of the Principles themselves, or to their endorsement by Special Procedures, only to the fact that the Special Rapporteur had signed them officially. Egypt admonished that "we understand that these values are acceptable in many societies, and we have no objection to this. What we have objection to is the persistent attempt to streamline those values at the UN while they are objectionable by the majority of the countries". This reaction illustrates a widespread position in non-western countries. (LaViolette, 2009; O'Flaherty&Fischer, 2009).

The advancement of LGBTI rights is being equated to the importation of western values, and the reaction to this increased visibility of LGBTI rights in some governments has been hampering. The talks of immorality are supported by statements referring to such behaviours as non-existent in non-

¹⁶ Statement of the Czech Republic, Interactive Dialogue on the report of the Special Rapporteur on right to freedom of opinion and expression, Human Rights Council, 4th session, Geneva, UN Webcast 12-30 March 2007

¹⁷ Statement of Egypt on the Review, rationalization and improvement the mandate of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Human Rights Council, 6th session (resumed), Geneva, UN Webcast 10-14 December 2007.

western traditions. According to AbuKhalil¹⁸ quoted in Massad “the advent of westernization in the Middle East brought with it various elements of western ideologies of hostility, like ... homophobia. This is not to say that there were not anti-homosexual ... elements in Arab/Islamic history, but these elements never constituted an ideology of hostility as such” (Massad, 2002, p.368) so that often, the stigmatization of homosexuality is ascribed to relics of colonialism. Calling the existence of LGBTI as a western ‘borrowed’ or ‘imported’ behavior can also be identified as strategy used in those countries to add foreign threat to traditional values, thus downgrading the west and, more importantly, disqualifying LGBTI issues from the matter of individual rights by picturing them as the embodiment of western corruption (Budd, 2008; Katyal, 2002; ILGA, 2011; Massad, 2002).

Many homophobic statements have been registered across the developing world. Katyal (2002) gives the example of the Namibian Home Affairs Minister Jerry Ekandjo in 2001, who ascribes the responsibility for the existence of homosexuality to western culture. Another notorious example, President of Zimbabwe Robert Mugabe who in 2000 “compared homosexuals to animals and called gays and lesbians behave worse than dogs and pigs” (ILGA, 2010, p.5) and at the call of violation of fundamental human rights from Amnesty International Mugabe answered that this

¹⁸ For further debate about homosexuality in relation to Arab/Islamic civilization see Abu KHALIL, “A Note on the Study of Homosexuality in the Arab/Islamic Civilization,” *Arab Studies Journal* Vol. 1, no. 2/1993 pp. 32-48; Bruce DUNNE “Homosexuality in the Middle East: An Agenda for Historical Research,” *Arab Studies Quarterly* Vol. 12 no. 3-4/1990 pp. 55–82.

“foolish way” shall remain in Europe, America and elsewhere but out of Zimbabwe. And the more recent example of this is the Anti-gay bill recently rejected in Uganda. (ILGA, 2011; Katyal, 2002).

Pressure and campaigning for the equal application of human rights have been increasingly visible in the last decades. Massad (2002) aims criticism at the major, mostly US based, human rights groups such as Amnesty International or Human Rights Watch, and others, in relation to the Muslim world, by stating that the larger mission of those organization is “to liberate Arab and Muslim ‘gays and lesbians’ from the oppression under which they allegedly live by transforming them from practitioners of same-sex contact into subjects who identify as homosexual and gay.” (Massad, 2002 , p.362) Still, according to Massad (2002), as the early riots shaped women’s civil rights in the fight against the male dominant power, and its way of rule, and transferred them to the non-western world, the same has happened for LGBTI rights. With the opening of debate space for activists, groups, and dialogue in countries where the topic was previously hidden, if not forbidden, the request of a cultural-specific identity is emerging. Viktor Mukasa¹⁹ hints at this cultural transfer during a workshop in Capetown which is organized in order to create a safe space for transgender individuals to discuss their own identity as South African transgenders, independently from European and American standards and definitions. The main debate in

¹⁹ Chairperson of Sexual Minorities Ugand transgender south African activist. This statement comes from the videos gathered at the opening of the *Proudly African and Transgender* organized by Amnesty International in Amsterdam in 2008.

terms of international human rights thus rests between the necessity of universal recognition of those rights versus the effect of cultural relativity. The first approach focuses on the importance of the individual shaping society, whereas the latter rests on societal regulations on the limits of individuals. Another side of the same debate points at the fact that identity-based rights application can hardly be universal because identity is culturally specific. However, from a legal point of view this relativity creates the need of a new approach to sexual minority rights which can be grasped more easily. (Massad, 2002; Morgan, 2001)

2.3. Transnational gay identity?

The enforcement of human rights is not homogenous. The argument against the application of human rights and forcing them upon countries, rests in the debate about the limit of international intervention and domestic sovereignty. Within communities where same-sex activity practice is criminalized it is not possible to uphold LGBTI rights, because to do so would be to go against the law. Because gender roles and family are traditionally considered to be a matter under domestic control that the legal status of homosexuals is different and interference from international community can be seen as meddling with domestic law.

With regards to a legal framework, the mishap is in how to ensure the enforcement of basic human rights within the uneven context without interfering with other state's sovereignty. James Hathaway in "Refugee in

International Law” argues that there is a hierarchy of human rights, and suggests a partition of those right according to a spectrum from core to peripheral rights. Core rights are those that cannot be denied by the state, not even in extraordinary cases or emergencies, and are the ones upheld in the Universal Declaration of Human Rights (UDHR, 1948), in the International Covenant on Civil and Political Rights (ICCPR: 1966), and the International Covenant of Economic, Social and Cultural Rights (ICESCR: 1966)²⁰. Rarely the derogation of peripheral rights can amount to the degree of persecution. However, the violation of those rights still can amount to discrimination thus preventing individuals from leading a dignifying life²¹. Hathaway thus attempts to include human rights into a bigger framework than identity-politics making them more universally applicable. This partition won great success among experts and decision-makers and it is extensively used in asylum procedures. However, it is not as widely applied within human rights, which are geared primarily towards identity.

A brief description of the differences in how gay identity is shaped is significant to the purpose of our discussion because it affects the interaction of the decision-makers and applicants during the RSD procedure and highlights the creation of prejudices and cultural biases in the discourse.

²⁰ Those are freedom from arbitrary deprivation of life; protection against torture or cruel, inhuman or degrading treatment; freedom of thought, conscience or religion; freedom from arbitrary arrest or detention, right to equal protection for all, including children and minorities; the protection of personal and family privacy and integrity; liberty of opinion, expression, assembly and association.

²¹ This tier includes the right to work, to just and favourable conditions of employment; entitlement to food, clothing, housing, medical care, etc.; to own and be free from arbitrary deprivation of property.

The definition of gay identity itself does not always have the same value in the non-western world . If the right for protection is identity-based then the boundaries of this blurry concept need to be universally defined and distinguishable. Katyal in her 2002 essay “Exporting Identity” identifies three different models of constituting gay identity and its attributes within a legal framework to provide the ground for protection. On this basis Katyal argues that the protection of sexual minorities has to be globally effective, and to this end identity-based protection may not be the correct approach to universalize the issue. For “many individuals who fall outside of neatly circumscribed categories of sexual identity” (Katyal, 2002, p.100) there is the need to revise this western-centered idea and find more inclusive criteria. The first and the second model are at the basis of the common definition of sexual orientation and gender identity. The third model, or additive, simply reminds us through examples that identity is entirely context-specific. Sexual activity is not necessarily part of the determination of one’s own identity; other roles can describe and construct the individual as for example in India, same-sex activity can be totally compatible with a heterosexual marriage.

The substitutive model is the more extensively used; Katyal maintains that only in western societies is sexuality so fundamental to defining one’s own identity, and that the conflation of sexual acts with sexual identity is a western operation. More specifically she refers to US cases, the US being one of the major actors in the gay civil rights movement today. The debate

about the ground of protection of gay identity originates in the ruling of *Bowers vs. Hardwick*. In 1986 a police officer in Atlanta entered Hardwicks' home to find him involved in anal sex with another man and arrested him on the account of the violation of the Georgia law that criminalized same-sex activity. To counteract this negative ruling, the argument of litigators at first was geared towards the right to privacy. However, it is impossible to elude the direct association with other outlaw and immoral acts, such as adultery and incest. To acquire constitutional protection gay and lesbian defendants explored other alternatives progressively shifting the focus from the right to privacy to identity - identity being the outward expression of same-sex sexual conduct and expecting it to be accepted overtime. *Hardwick's* case comes in an already tumultuous situation with regards to LGBTI rights in America, the beginning being conventionally recognized as the 1969 Stonewall riots. LGBTI individuals rallied around the only thing they had in common which was same-sex activity and its outward expression thus furthering the need for laws for non-discrimination on the grounds of their identity.

Visibility and expression have become components of this very identity rather than constitutive elements of a gay or lesbian identity, and legally and culturally it builds upon changing the meaning of homosexuality towards a

public, collective social group identity²², rather than an activity. (Katyal, 2002; Yoshino, 2002)

The substitutive model, then, is rooted in the presumption “that the gender of one’s object choice determines a person’s sexual orientation. The model also presumes that a person’s subjective sexual orientation comprises a foundational and central aspect of a person’s sexual identity. Third and most significantly, this model also assumes the interchangeability (or ‘substitutive’ nature) of gay sexual identity, orientation and conduct.” (Katyal, 2002, p.109) The substitutive model took an influential role in legal decisions, drawing on the characteristic of minority-based claims for civil rights and equality by exploiting the presumption that one’s sexual orientation is a fixed and stable marker of personhood. Thus LGBTI rights protection moves from a definition based on sexual activity and right to privacy to one on sexual identity and right to non discrimination.

This engagement of acts and identity can create overly strict categories resulting in marginalization of groups and individuals who do not fit in the clear-cut definition²³. Budd (2008) articulates the fact that western policies

²² Thus explaining the political power of practices like outing and public coming-out.

²³ Queer theory is set to reject the strict categorization of identities. However, I will not take queer theory into account in the main body of the thesis since it does not belong to the mainstream approach. Social constructivism (especially in the sexual identity context authors such as Judith Butler and David Halperlin) draws on Foucault’s work who criticizes the western focus on sexuality to define a person’s identity. Gays and lesbians are discriminated because of who they are. According to this western concept as described by Foucault, sex is at the roots of the maintenance of the existent social structure that is a condition which is desirable for the dominant class. To keep it this way and perpetuate its existence without a change is a way for the dominant power to stay where it is. Sexuality is the mean of this reproduction, therefore who holds control over sexuality has control over

are responsible for the creation of cognizable social groups that did not exist before, thus setting the boundaries for who is 'in' and who is 'out'. Katyal (2002) referring to social constructivism argues that fixed identities are products of sociohistorical, cultural and political contexts. Therefore, to export them to other civilizations can cause a mis-placement. Identities are always multiple, and they intersect with other components such as social and cultural contexts. (Budd, 2008 ; Katyal, 2002). In non-western contexts the stigma attached to homosexuality often originates by transgressions of *gender roles* instead of the tendency to engage in same-sex sexual conduct. In this approach or transformative model, 'transgender' individuals are taken into account as being subject to discrimination on the account of their gender deviant aspect. Defying gender roles can be ascribed to women too. For example, a single woman defies social gender norms by refusing to perform her social function to marry and reproduce. This approach contributes to the definition of a wider category more inclusive than sexual orientation which focuses on power relations between genders in societies. (Hubbard, 2001; Katyal, 2002).

society. And whatever is diverging from this task need to be identified and regulated, kept under control and medicalized. The creation of 'homosexuals' as a group comes from the shift from sexual acts to identity through medicalization and pathologization of the latter. This is a pattern which Foucault places at the basis of western conception of sexual identity and power. According to Katyal and Yoshino, in other countries there is not that much power focused on sexuality but there are different layers of identity. Homosexuals as a category exist in opposition to heterosexuals, namely, in opposition to the norm, they are not-normal thus they do not deserve the same rights.

2.4. Queer Migration

A new concern and body of scholarship is emerging in the intersection of sexuality and migration, where power relations between genders and states interact. The convergence of sexuality and migration constitutes a different body of studies within the academic framework and has bloomed in the last two decades along with the debate about sexual minorities rights. The awareness of the existence of this so-called queer migration from countries where human and civil rights are not granted or applied countries with better conditions or a more tolerant environment is a recent and growing phenomenon. According to Somerville (2005), migration control remains a crucial locus for the production and performance of national sovereignty; immigration and wedding policies are two of the tools states use to keep control over the fabric of the nations, regulating sexual orientation and gender identity is a way to ensure its reproduction²⁴. Migrants have to negotiate their identity when going to a different state. the new set of identities they have to assume in order to be assimilated “connects to the ongoing reproduction of particular forms of nationhood and national citizenship.” (Luibhéid, 2008 p.174) With this assumption, Ernst Luibhéid maintains that migrants have always been considered as heterosexuals and

²⁴ For example, the 1952 American Immigration and Naturalization act in the US, which was substituted only in 1990, where adulterers and homosexuals were excluded from the possibility of entering the nation for the sake maintaining good morality and not inducing a further disruption of the family unit, thus enforcing the same model also for migrants; they had to be heterosexual and possibly already bound in a family contract to access the U.S.; an idea which does not differ too much from the other western countries.

migration policies, and policies for migrants are entrenched in a heteronormative structure; their identities as migrants bring in issues of gender, class, race and language, thus creating a multiple identity at the margins of society which in fact does not include its own LGBTI citizens. Because of this mixture, queer migrants and asylum seekers achieve a condition of double marginality within the host country by acquiring rights which are already discriminatory towards local LGBTI and the disadvantage inherent to their rank of foreigners. Additionally, the peculiar concept of sexuality in their home country entails a stigma which is not washed away 'simply' by migrating. That is to say while migrants tend to seek support in their new country from others belonging to the same ethnic group or same beliefs, queer migrants are as separated from their fellow nationals as they were in their home country. The conflation of these disadvantages places queer migrants in a difficult position.

In recent research, a concept of transnational queer identity has started to emerge to alleviate this situation. LGBTI organizations supporting each other across national borders and beyond nationality on the hypothesis that the conditions of 'minorities' as in non-dominant parts of society are interdependent; what has to be fought is the demand for compliance to structure imposed from above. However, while this debate is currently

emerging in the discourse of sexuality and power, it does not serve to the end of this research²⁵.(Somerville 2005; Luibhéid, 2005)

In short, Somerville insists on how the model of valid sexual behavior in order to be accepted in the society is shaped also through migration policies. A much-debated example of discrimination in migration on the basis of sexuality, especially in the US, are the policies regarding reuniting; while it is not easy for couples to return together to either's home country, for same-sex couple there is the added issue of the different sets of laws between countries that do not recognize unions. (Somerville 2005)

²⁵ For further information see for example Judith BUTLER, 2004, "Precarious Life", Paco VIDARTE, 2007, "Etica Marica", and Virginie DESPENTES, 2009, "King Kong Theory".

3. LGBTI asylum seekers: a new concern for international protection

3.1 A nexus for international refugee law and human rights law

Critics and experts often see refugee law as part of human rights law, but it has developed primarily as domestic law due to the lack of international standards. The debate in key countries acts as a push to make a starting ground of domestic issues and solutions for further debate about common problems in the international agenda. On the matter of LGBTI rights, the Principles of Yogyakarta attempt to integrate sexual orientation and gender identity into human rights law. As an overall evaluation with regards to the extent of the Yogyakarta Principles, O'Flaherty and Fischer point out that in 2009 those were already endorsed and officially adopted in eight of the Special Procedures and by the High Commissioner for Human Rights; the principles have also been extensively referred to and quoted within asylum procedures.

A double push effected the advance of international refugee law regarding SOGI claims. Firstly, sexual orientation and gender identity have been slowly acknowledged as a ground of discrimination in domestic jurisprudence, starting in Canada in 1995 and moving to the US, Australia, New Zealand and in the U.K, domestic legal achievements have acted as a

drawing power for progressively changing the stance versus LGBTI asylum seekers. Secondly, by assembling and integrating the different bodies of law, the interaction between human rights advancements and international refugee law itself which serve as unifiers. (Millibank, 2004).

According to LaViolette (2009), the 2008 UNHCR Guidance Note is a soft tool, not binding and less authoritative than *Handbooks* or *Guidelines*²⁶. It incorporates the Principles and domestic advancements in human rights and international refugee law and it is ‘just’ a first attempt to deal with a new thematic by listing many of the most common and challenging problems in assessing LGBTI refugees. With the 2008 Guidance Note, the UNHCR makes it official that “although freedom of sexual orientation is not explicitly recognized as an international human right, it is now well established that LGBT persons are entitled to all human rights on an equal basis with others.” (UNHCR, 2008, p.6) However, in the last UNHCR roundtable about SOGI claims in Geneva²⁷ the statement of the Egyptian delegate who relegated the issue to matters that do not exist, reminds that this is the starting ground for the UNHCR with regards to sexual orientation and gender identity issues. Universal standards are just not in place yet, and the need of international recognition is required to make them binding.

(LaViolette, 2009; UNHCR, 2010)

²⁶ In order to deal with the caseload there are Specific Need Codes, handbooks, guidance notes and guidelines which put together and standardize the experience with regards to a specific issue in refugee law. In case of LGBTI asylum seekers, before producing the “2008 guidance notes”, the attempt to have uniformly performed interviews lied in the coincident use of several booklets.

²⁷ Geneva Roundtable 2010 Executive committee notes. Unpublished.

The path to the acknowledgment of LGBTI individuals as candidates for inclusion to refugee status has led through different steps; from the recognition of LGBTI individuals being particular social group, to the acknowledgement of the fact that sexual orientation is a fundamental part of human identity and the expression of it does not have to be repressed, to later issues concerning the credibility of claimants and the determination of a standard LGBTI identity to be used in the international asylum law regime. Before going through details specific to LGBTI asylum-seekers, an overall description of the international asylum procedure standards is required.

3.2 The status of refugee

According to the “IOM World Migration report 2010” displacement has produced a total of 214 millions migrants out of which 20-30 millions have illegal status and 43.7 millions were forcibly displaced. Although refugees and asylum seekers have a different statutory condition distinct from migrants, they often travel alongside migrants, using the same journey routes or smuggling channels and facing similar violations in transit or destination countries. (Amnesty International, 2009; IOM, 2010).

UNHCR estimated 15.2 millions refugees, out of which Pakistan, the Syrian Arab Republic, and the Islamic Republic of Iran host the largest number with 1.8 million, 1.1 million and 980,000 refugees respectively (see table 1).

With regards to refugee-producing countries, Afghanistan (2.8 million) and Iraq (1.9 million) produce the most (see table 2).

Afghanistan*	2.887.100
Iraq	1.785.200
Somalia	678.300
Dem.Rep. of Congo	455.900
Myanmar*	406.700
Colombia*	389.800
Sudan	368.200
Viet Nam**	339.300
Eritrea	209.200
Serbia	195.600

Pakistan	1.740.700
Iran (Islamic Rep. of)	1.070.500
Syrian Arab Rep. **	1.054.500
Germany	593.800
Jordan**	450.800
Kenya	358.900
Chad***	338.500
China***	301.000
United States****	275.500
United Kingdom****	269.400

²⁸ *Includes people in a refugee-like situation

** The 300.000 vietnamese refugees are well integrated and in practice receive protection from the government of China

²⁹ *Includes Afghans in a Refugee-like situation

** Government estimation

*** The 300.000 vietnamese refugees are well integrated and in practice receive protection from the government of China

**** UNHCR estimation on 10 years of individual recognition of asylum-seekers. Figures exclude resettled refugees

In a press release in March 2010, the UN High Commissioner for Refugees Antonio Guterres stated that "the notion that there is a flood of asylum seekers into richer countries is a myth. Despite what some populists claim, our data shows that the numbers have remained stable."³⁰ This statement is confirmed by the "UNHCR Asylum Levels and Trends in the 44 Industrialised Countries³¹", the number of asylum seeker applications received in 2009 was 377,200 and in 2010 was 358,800. The 38 European states and the US, all reported a decrease in the number of claims³². Together, the top five receiving countries, accounted for more than half (56%) of all asylum claims received in the countries included in this report and four out of five are developing countries.

For the purpose of my research it is significant to keep in mind the allocation of refugees and asylum seekers across the world map. Although the general refugee flow has been keeping a stable trend, according to research SOGI claims have been increasing.

In the case of LGBTI asylum-seekers and refugees it is vital to produce international asylum standards because many of the receiving states are

³⁰ UNHCR "Upsurge in asylum seekers in industrialized world a myth, says UNHCR Chief" Press release 03/23/2010 available at: <http://www.unhcr.org/4ba880059.html> [Accessed 05/21/2011]

³¹ The European 27 plus Albania, Bosnia and Herzegovina, Croatia, Iceland, Liechtenstein, Montenegro, Norway, Serbia, Switzerland, The former Yugoslav Republic of Macedonia, and Turkey, as well as Australia, Canada, Japan, New Zealand, the Republic of Korea and the United States of America.

³² The numbers in this report reflect asylum claims made at the first instance of asylum procedures. Applications on appeal or review are not included, nor is information on the outcome of asylum procedures or on the admission of refugees through resettlement programmes, as such details are available in other UNHCR reports.

already applying discriminatory laws to their own LGBTI citizens. It is impossible to know the numbers of LGBTI asylum-seekers because the UNHCR does not distinguish the claims in grounds and countries where the mass-flow of people fleeing their homeland do not have individual claims. (UNHCR Statistical Yearbook, 2009; Landau, 2005)

Each party to the Convention implements the procedure of refugee status determination (RSD) differently; Turkey did not sign the 1967 Protocol³³ and is still short of an asylum law so UNHCR runs the whole RSD procedure.

At first, the UNHCR was assigned the duty to give humanitarian assistance and monitor the processes regarding refugees, then it progressively became the institution to refer to for guidelines and legal norms. UNHCR assumes responsibility where:

- The State is not party to 1951 Convention/1967 Protocol
- States are party but national asylum determination procedures are incomplete or absent; or such processes are manifestly inadequate or based on erroneous interpretation of 1951 Convention.

³³ In the original wording of the article 14 of the 1951 Convention, prior to the 1967 Protocol a restriction of international protection in term of time and geography was given with “events occurring in Europe before 1 January 1951”; or (b) “events occurring in Europe and elsewhere before 1 January 1951”. With the end of the Cold War, new conflicts linked to the dissolvment of the Soviet Bloc would have produced more refugees. That being so, in the 1967 Protocol to the Refugee Convention, following a widening of the phenomenon, the limitations of the Refugee Convention was lifted for parties to the Protocol.

Differences in domestic asylum systems notwithstanding, the legal definition of refugee is stated in the 1951 Convention and adopted by domestic law of receiving nations thereby in the Article 1 (A)(2) defining a refugee as a person who:

‘...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group and political opinion is outside the country of nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside of the country of his former habitual residence, is unable, or owing to such fear, unwilling to return to it.’³⁴”

In the legal sense, the key element is the unwillingness of the state to protect the individual. Refugees are not individuals whose governments offer inadequate protection but those who have been purposefully excluded from the general protections offered to nationals. Availability of state protection distinguishes the systematic targeting of a part of society from a situation of generalized violence or widespread difficulties; thus the aim of refugee law

³⁴ Even after fitting the status of INCLUSION there are some exclusibility criteria.
--1D.Special arrangements (e.g. palestinians)
--1E.Not in need.
--1F.Not worthy because of being guilty of non-political crimes.
There are other statuses which apply in case of non-inclusion or later on namely EXCLUSION/CESSATION/CANCELLATION. Exclusion can occur because of
--Voluntary action on the refugee side
--Changes in the circumstances
--List of possible causes art 1C
--Special agreements given according to the convention

is restricted from fixing entire countries and is able to tend to only those lacking diplomatic protection (Parish, 1992).

In view of the main function of asylum, applicants have to prove in the first place that there are no other valid alternatives for them to remain in their own country before availing themselves of the asylum system, international protection being the last resort. Internal displacement is one of UNHCR's favorite alternatives, nonetheless in the case of LGBTI asylum seekers it has to be remembered that the option is generally not available due to the fact that homophobia is often nationwide. (Goodwin Gill, 1983; Hathaway, 1991; UNHCR, 2010; LaViolette 2010).

It is essential to remember that the duration of refugee status is not endless; the aim is finding durable solutions for refugees. Recognition of the status opens the way to three alternatives which are sought for in the 1951 Convention,

- 1) Voluntary repatriation; it is the most desirable solution. The authenticity of the voluntariness of the choice has to be verified to make sure this is not compelled by threats or pressuring issues.
- 2) Local integration; it falls on the resources of the country of asylum. It is often not doable considering that a mechanism of burden sharing is not always enforceable and that the countries with the highest number of asylum seekers do not have many resources to draw from.

3) Resettlement in third states; it is the least preferred option. It makes repatriation harder since it cuts the bond and information flow with relatives, society and culture and it has a strong impact on the refugee. However, it is a way to share the burden of international responsibility and costs.

In case of LGBTI asylum-seekers, the range of options is again quite limited. Despite the fact that the overall situation of sexual minorities rights is slowly improving, the most likely scenario is still resettlement in a third country which accepts LGBTI asylum seekers and so far the main recipients for them are no more than thirty. (UNHCR, 2010)

In order to be included in the 1951 Convention and focus on the challenges to the acceptance of SOGI claims in domestic and international law, SOGI claims took several steps. The latest studies draw attention to how the key to a SOGI claim is currently membership to the particular social group putting the identity of the claimant into question. With regards to credibility assessment, researchers have worked to identify common flaws or shortcomings that will be covered in the last chapter in reference to my research in Turkey.

3.3 LGBTI-specific asylum procedure issues

In 2010, on the basis of the Guidance Note, the UNHCR produced a discussion paper, aiming at highlighting specific concerns of LGBTI asylum seekers. With the joint use of the two UNHCR documents and recent

research from Millibank and LaViolette, it is possible to identify common traits that have a crucial role in defining claimants.

Upon arrival, LGBTI asylum seekers face impending security concerns. They fear local authorities in relation to the legislation and mindset regarding sexual minorities in the country of arrival. As said before, many refugees flee persecution to lesser developed countries. In some of those countries, same-sex activity can be criminalized, thus preventing a potential LGBTI claimant from applying. Upon arrival they may have to maintain their previous hidden life within a group of fellow nationals, thus experiencing the same feeling of refusal and contempt or, as an alternative they may find themselves isolated and have no one to turn to. This feeling could even be worse than in their home country, considering that most LGBTI individuals flee from their families, or relatives and are not supported by any network. They live in a state of double marginalization, isolated both from the local community and fellow nationals. Considering as well the impact of linguistic and cultural barriers, LGBTI asylum seekers may have difficulties retrieving information about asylum procedures because of this marginalization. Within this environment, the potential applicant may decide not to reveal the ground of the claim when registering for fear of being turned in or disclosed to the authorities, which undermines the future credibility of such claims. While the situation does not have always to be that gloomy it has often been depicted this way, as

reports from Turkey demonstrate; I will go these specific scenarios when analysing my case.

Another reason not to lodge the claim is because of the societal stigma attached to LGBTI individuals. Studies show that these individuals have been keeping a part of their identity hidden because of persecutory laws, pervasive social rejection, homophobia and possibly have never revealed themselves as LGBTI until exposed or fleeing, if disclosed at all; this may be caused by a general feeling of shame shared by such individuals which goes along their whole life. This undermines the effectiveness of the asylum procedure. The necessity to be secretive and the feeling of shame are not associated with any other asylum ground such as in political opinion or religion which are well established and conventionally there is no shame to these. (LaViolette 2010; Millibank 2009; UNHCR, 2010)

In addition to widespread discrimination, LGBTI individuals “also frequently reveal experiences of serious physical and, in particular sexual violence.” (UNHRC, 2008, p.7) Common points have been noted between gender-related claims and SOGI claims. In the “Guidelines on International Protection: Gender-related Persecution” a first definition of gender and sex is delineated in “the relationship between women and men based on socially and culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination.” (UNHCR 2002, p.2) In societies where gender roles are strictly codified and separated, women and LGBTI individuals

play the role of the subverters of such order simply because of non-compliance to societal standards. Generally punishments enforced against such deviants from gender roles have a sexual dimension. LGBTI individuals are reportedly subjected to sexual abuse, aimed at re-addressing the deviant individual to the correct and valid performance of one's own gender role, under the umbrella of the same notions of "patriarchy and misogyny" (LaViolette, 2010, p.9) as repression against women. Rape is the ultimate acting out of the dominant sexual role of the heterosexual man against rebellious individuals, both women and LGBTI. It is used as a reassertion of the entrenched gender roles in heteronormative society that does not allow for any deviation. Single women, single mothers, lesbians, gay men, transsexuals - all go against morality and social order and are not part of traditional, heteronormative society. In brief, they can be subject to forms of persecution specific to their sex and violation of gender norms. Sexual harassment and violence have been reported to affect the narration of the claimant undermining the credibility in ways I will describe in the following chapter (Millibank 2007; Neilson 2005; UNHCR 2002; UNHCR 2008).

Another similarity with gender-related cases is that most often punishment comes at the hand of non-state actors such as relatives, strangers, private individuals and the state is often reluctant or even refuses to act in their defense. Neilson (2005) stresses that while men often undergo persecution at the hand of the state, whether in the military or by the police, lesbians are

generally less visible and mostly undergo domestic violence, forced marriage, sexual abuse, corrective rape, beatings or honor killings at the hand of relatives. It would be significant to have a more detailed insight about differences between gays and lesbians³⁵ but it is beyond of the scope of this study. Those abuses often happen in an environment of tolerance, acceptance or lack of consequences from the authorities for this kind of crimes³⁶ because of law, customs and traditions, family and the community which all collaborate to uphold the gender roles norms. Both Millibank (2009) and LaViolette (2010) argue that this similarity between SOGI and gender-related claims is rarely put into use and they encourage decision-makers to use the UNHCR Guidelines on Gender-Related Persecution in combination with the Guidance Note to highlight the similarity of the ways of persecution of sexual minorities in their common behavior of defiance of

³⁵ There is very little information specifically about lesbians in general and more specifically about asylum-seekers. See Victoria NEILSON, “Homosexual or female? Applying gender-based asylum jurisprudence to lesbian asylum claims” 16 *Stanford Law and Policy Review* 417/2005 ; Shannon MINTER, “Lesbians and Asylum: Overcoming Barriers to Access” in Sydney Levy, ed., *Asylum Based on Sexual Orientation: A Resource Guide*, San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996 pp. I.B, 3–16.; National Center for Lesbian Rights *The challenge to successful lesbian claims*, 2009; Rachel LEWIS “The Cultural Politics of Lesbian Asylum: Angelina Maccarone’s *Unveiled* (2005) and the case of the lesbian asylum-seeker” *International Feminist Journal of Politics*, Volume 12, Issue 3-4/2010, pp.424-443.

³⁶ There are many specific reports about violence against gender deviant behaviours among which with regards to LGBTI individuals in middle east: Human Rights Watch, 2009, *They want us exterminated: Murder, Torture and Sexual Orientation and Gender in Iraq*; Human Rights Watch, 2010, *We are a Buried Generation: Discrimination and violence against Sexual Minorities in Iran*; with regards to Turkey, Human Rights Watch 2008, *We need a law for liberation: gender sexuality and human rights in a changing Turkey* ; Human Rights Watch, 2011, *He loves you, he beats you: family violence in Turkey and access to protection*; Amnesty International, 2011, *Not an Illness, nor a Crime: Lesbian, Gay, Bisexual and Transgender people in Turkey Demand Equality*.

gender roles. (LaViolette 2010; Millibank, 2009, Neilson, 2005; UNHCR, 2002).

In the previous paragraphs, common characteristics of LGBTI asylum-seekers as LGBTI individuals were identified. The next chapter will follow the process of acceptance of LGBTI asylum-seekers and refugees as a subject of international refugee law, going through the debate in the last two decades.

4. Sexual orientation and Gender Identity as a Ground

The UNHCR 2008 Guidance Note is an introductory point for the debate about LGBTI asylum seekers. It represents and makes official the integration of SOGI claims into international refugee law focusing on each of the elements mentioned in the 1951 Convention definition by integrating the tenets expressed in the Yogyakarta Principles and both domestic and international asylum law. It also lays the grounds for further developments demonstrating the shortcomings of asylum law and pointing at ‘new’ needs. Combining the two documents provides a more complete set of tools currently available to evaluate SOGI claims. In light of the fact that the Guidance Note is a synthesis of the latest development in terms of LGBTI asylum seekers, it is worth focusing on the antecedents of the document. The key-phrase in the procedure of refugee status determination is “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group and political opinion”.

4.1 A particular social group.

The conceptualization of the particular social group as a 1951 Convention ground has been reviewed over the years to stretch the category to include non-traditional refugees. Significant contributions for the LGBTI asylum-seekers debate came from Hathaway, Goodwin-Gill and case law from common law jurisdiction countries such as the US, Canada, Australia, New

Zealand and the UK whose legislative systems appear to be more flexible and prone to adapt to new situations than civil law jurisdictions.³⁷ The UNHCR 2008 Guidance Note is a synthesis that encompasses domestic laws and international developments so that “sexual orientation case law clearly shows that LGBT persons may be recognized as a members of a “particular social group” and, as such, are entitled to protection under the 1951 Convention.” (McGhee, 2001; UNHCR, 2008)

Goodwin-Gill (1983) suggests that “the attitude to the putative social group of other groups in the same society is also relevant and, in particular, the treatment accorded to it by the state authorities. The importance and therefore the identity of a social group may well be in direct proportion to the notice taken of it by others, particularly the authorities and the state.³⁸”. It is not only this though. Claims on the particular social group ground have often been lodged on the account of persecution by non-state actors as in most gender-related violence cases. Such categorization has been referred to as the social perception approach when integrated into the 2002 UNHCR Guidelines on international protection: Membership of a particular social group. (Aleinikoff, 2003; McGhee: 2001; UNHCR: 2002a)

³⁷ For further debate about membership of a particular social group: Atle GRAHL-MADSEN 1966 *The status of Refugees in International Law*; A.C. HELTON “Persecution on account of Membership in a Social Group as a Basis for Refugee Definition” *Columbia Human Rights Law Review*, 1983; David PARISH “Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee” *Columbia Law Review*, Vol. 92 No.4/1992 pp. 923-953; Brian F. HENES, “The Origin and Consequences of Recognizing Homosexuals as a ‘Particular Social Group’ for Refugee Purposes”, *Temple International and Comparative Law Journal* 5/1994

³⁸ Goodwin Gill, 1983, p.30

Hathaway combines the immutability or protected characteristics approach, expressed in the *Matter of Acosta*, and the social perception approach in defining the particular social group:

- 1) Groups defined by an innate, unalterable characteristic,
- 2) Groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change,
- 3) Existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it. (Hathaway, 1991)

The UNHCR issued guidelines in 2002 to widen the 1951 Convention definition of membership of a particular social group according to the latest judicial developments, policies and practices. Such a definition has been built drawing on the approaches by Hathaway and Goodwin-Gill previously mentioned. The guidelines want to provide a fair and standardized tool for decision-makers to tackle the issue of the claims lodged on this ground. To this end UNHCR recommends the two approaches to be used jointly; the resulting definition is “a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights. Nonetheless,

persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society.” (UNHCR, 2002a, p.3)

Often a socially distinct group, not only because of a set of laws, but also because of historical enmity or identification as ‘other’ in a particular society, can acquire the status. Groups qualifying under the protected characteristics approach such as racial minorities are easier to identify and be provided with protection of the particular social group ground. Likewise groups based on fundamental characteristics that can be socially identified and have been subject to serious harm on account of such characteristics can be ascribed to the particular social group; otherwise they would have taken the required cautions to avoid the harm. (Aleinikoff, 2003; McGhee, 2001; UNHCR, 2002a)

McGhee ascertains that the intersection of international refugee law with human rights law emerged after the rulings in the US for the *Matter of Acosta* and *Canada (AG) v. Ward*³⁹ that set the basis for the later inclusion of LGBTI applicants. With regards to LGBTI claims, the *Matter of Toboso Alfonso vs US Board of Immigration Appeal* formed legal precedent in the 1994 ruling by Janet Reno (who was, at the time, an immigration judge

³⁹ Both these cases are considered as benchmarks in the opening of the PSG ground to LGBTI claimants. The *Matter of Acosta* is the case of a taxi driver from El Salvador couldn't succeed in proving and validating membership to a particular social group when as a taxi cooperative they were persecuted by an anti-governmental guerrilla to which they cooperative resisted. However this has not been recognized as innate characteristic nor fundamental. The *Ward* case . who was sentenced to death by the INLA for assisting in the escape of hostages but he was refused protection by the police. Ward asserted he would be persecuted if returned based on his membership of the INLA. This establish the effect of past actions that cannot be changed and likely situated persons who have been failed by the authorities on the same ground in determining the particular social group.

from the 9th circuit). In the *Toboso Alfonso* case, for the first time, membership to the social group was acknowledged. However in the appeal, with the annotation that not all members of the class may be at risk of persecution, the court refused to find the causal link ‘persecution for reasons of’. Ultimately, in a second appeal, the treatment of the Cuban State towards homosexuals was considered by the court and acknowledged as persecutory and thus paving the way for further claims on SOGI ground (McGhee, 2001).

4.2 Well-founded fear of persecution

The well-founded fear of persecution is the key sentence in the determination of a refugee. The sentence is broken down in two parts. With regards to the concept of ‘well-founded fear’ there is a subjective and an objective side to consider. In order to prove the subjective element the claimant has to establish “to a reasonable degree, that his continued stay in his country of origin has become intolerable” (UNHCR, 1998, p.4) thus enabling the decision-makers to express a forward-looking speculative risk assessment through his narration or evidence which are the key elements in the assessment of credibility. The ‘well-foundedness’ of this fear is the objective element and it is confirmed through a procedure of investigation of the personal profile and particular circumstances, namely past persecutions, of the applicant and whether they may have repercussions for the person, in order to establish the likelihood of future persecution, in comparison with the conditions of persons similarly situated.

To verify the truthfulness of the account of the claimant, decision-makers have to look for up-to-date objective country of origin information (COI). Decision-makers resort to COI to test the external consistency of the narration with what is commonly known and found as research. LaViolette (2010) underlines the significance of independent COI, being a different source from state information and often more reliable. LaViolette states that in the first decade of SOGI claims (1990s) most of the information came from mainstream NGO's such as Human Rights Watch and Amnesty International, but it is only recently that local and international NGO's expressly addressing sexual minorities rights (such as ILGA or ILHRCG) are taken into account when providing information to decision-makers. Even the way for the acceptance of the organizations was paved with problems; ILGA, for example, has been blocked from accessing UN consultative status since 1994. Absence or scarcity of information, may be in itself an indicator of the situation because sexual minorities rights are a recent issue in the international field and NGO's have been slow to pick up on that. (LaViolette, 2010; UNHCR, 1998)

The second part of the sentence encompasses the definition of persecution. Adjudicators are focusing on evaluating the impact of laws criminalizing homosexual conduct and establishing whether gay, lesbian, bisexual or transgender claimants fear discrimination rather than persecution. To this end, the human rights framework provided by Hathaway attempts to objectively define what amounts to persecution and disengages the matter of

homosexuality from moral values integrating it into the legal system. It is made objective only by the integration with human rights that “transforms violence and oppression on the basis of sexual orientation *into* a cognisable wrong under the Refugee Convention: i.e. persecution.” (Millibank, 2004, p.200) In other words, if it was a matter of morality and manners it could not amount to persecution. When writing the 1951 Convention with regards to “persecution” the drafters were not aiming at protecting from “certain forms of harm *per se*” (Hathaway, 1991, p.104) but were rather set on intervening exclusively where the state acts with persecutory intent or in the same intent is pursued by other actors and the state fails to protect. (Hathaway, 1991; LaViolette, 2010, Millibank, 2004)

4.3 Discretion

At first SOGI claims were rejected by resorting to the possibility of internal relocation; namely, claimants could simply return home and keep a low profile. This option is flawed in the first place because disclosure to the authorities or relatives is not the only reason for persecution; it is unreasonable to ask to live in secrecy since homophobia is rooted in laws, culture, tradition, society and morality and “it often tends to exist nationwide rather than merely being localized.” (UNHCR, 2008 p.15).

Secondly, the idea of the discreet homosexual was first adopted and then refuted in several countries. In the UK it dates back to the 1989 *Binbasi vs IAT* case and the 1991 *Golchin vs IAT* case when the applicants were told to

go home and abstain from their practice, furthering the idea that since homosexuals can blend in they do not need protection. In the same way, the U.S case of Hernandez Montiel, whose first asylum rejection rested on his mannerism and his way of dressing as non essential, is significant. His female identity was acknowledged as not fundamental. The first appeal was dismissed on the grounds that conduct was not immutable: “If he wears typical female clothing sometimes, and typical male clothing other times, he cannot characterize his assumed female persona as immutable or fundamental to his identity. The record reflects that respondent's decision to dress as a woman is volitional, not immutable, and the fact that he sometimes dresses like a typical man reflects that respondent himself may not view his dress as being so fundamental to his identity that he should not have to change it.” (Hernandez Montiel vs INS 2003 p. 12) The same pattern applies to the 2002 Australian case of the two appellants being rejected because ‘naturally discreet’ in their own country and therefore did not need asylum. The reasoning behind these rulings rests on the assumption that persecution is ‘sought’ for by the applicant because being visible means calling for harm, violence and persecution and it can also be avoided. The 2008 UNHCR Guidance Note underlines that neither political opinion nor religion claims are to be dismissed on the argument that the applicant could just change their mind; the same should apply to SOGI claims. No state should expect an individual to restrain their own identity by considering being closeted and discreet as a reasonable and durable solution.

(Dauvergne & Millibank, 2003; McGhee, 2001; UNHCR, 2008; Walker, 2000)

Eventually, the High Court of Australia, on further appeal in 2002, ruled in *Appellants S395/2002 and S396/2002* that “requiring LGBTI people to conceal their sexuality could be tantamount to forcing them to participate in their own persecution.” (Dauvergne & Millibank, 2003, p. 123) The same happened for Hernandez Montiel when the ruling of the INS judge was overturned as not a matter of fashion but as actual expression of one’s own gender identity, bringing in the debate the first approach with regards to transgender issues. The court coined the phrase "gay men with female sexual identities" to describe Hernandez-Montiel and other similarly situated asylum seekers⁴⁰. (HM vs INS, Landau 2005).

The ‘discretion’ line of reasoning reflects the western concept of the coupling of sexual activity with sexual identity which is gradually being refuted through the acceptance of a wider meaning of sexual identity expressed also in the Yogyakarta Principles. The ‘discretion’ approach conveys a deeper attitude of downgrading the human rights of LGBTI individuals to “family life, freedom of association and freedom of expressions as necessarily less in scope than those held by heterosexual people.” The ‘discretion’ stance thus reveals broader social norms on the

⁴⁰ By doing so the court evaded any clear-cut definition for membership to this social group, essentially trusting an individual's self-definition as a true and accurate reflection of gender identity. This ruling opens the way to several outward expressions of sexual identity focusing on the idea of performative identity which Landau called soft immutability. The concept of soft immutability has been used later to categorize cases within a wider margin

adjudicator's side about the 'proper place' of lesbians and gay sexuality as something to be hardly tolerated and exist only in private being it mere sexual behavior rather than a considerable and fundamental aspect of identity. (Yoshino 2002; Millibank, 2009)

In the matter of invisibility, Yoshino points out that "assimilation is an *effect* of discrimination as well as an *evasion* of it." (Yoshino, 2002, p.772) LGBTI individuals are asked not to flaunt their identity in exchange for tolerance, protection and the possibility of disappearing among the straights since gays and lesbians 'have' the possibility of blending in the mainstream. Nonetheless demands for assimilation, if limiting the identity of a human being, must be considered as a breach of human rights. Yoshino (2002) suggests a paradigm of assimilation according to the hostility of the demands, divided in conversion⁴¹, passing and covering. There is not a big difference between passing and covering, the former is mainly about visibility whereas covering is about being conspicuous; these mechanisms have a significant role in the assessment of credibility of a claim because they can be of hindrance in the narrative of the claimant. (Yoshino 2002; McGhee, 2001)

⁴¹ In medical terms after the exclusion of homosexuality from the Diagnostic and Statistical Manual of Mental Disorders in 1987, conversion through medical or psychoanalytical treatment is not considered valid anymore. Legal developments, especially in the US are the decriminalization of homosexuality, in the Immigration and Naturalization service in the US the idea of homosexuality as a mental disease was held for 15 years after it was removed from the DSMD in 1987 thus including homosexuals in the category of 'carriers of a mental disease' (Somerville, 2005).

In addition Millibank (2009) maintains that adjudicators have been slow to accept that sexual minorities are secretive about their orientation not out of voluntary choice but out of laws and societal pressure: “LGBT persons who live in fear of being publicly identified will often conceal their sexual orientation as a risk of incurring in harsh criminal penalties, arbitrary house raids, dismissal from employment and society disapproval. Such actions can not only be considered discriminatory and as violating the right to privacy but also infringing the right to freedom of expression and opinion.” (UNHCR, 2008 p.8) The Guidance Note then quotes the ‘updated’ version of the rights to freedom of opinion and expression as interpreted by the Yogyakarta Principles in “everyone has the rights to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.” (The Yogyakarta Principles, 2007, p.24); (Yoshino, 2002; UNHCR, 2008).

Therefore the question raised is not whether the applicant’s conduct with regard to his or her own sexual orientation can be held as ‘reasonable’ or ‘necessary’ so that he or she could live in his own country. Instead it questions the fact that “a person’s sexual orientation is confined to a mere sexual act, thereby overlooking a range of behaviors and everyday activities

otherwise affected by that person's sexual orientation and gender identity.” (UNHCR, 2008, p.13) It would be held as an authorization for the behavior “which the agent of persecution seeks to achieve by persecutory conduct” (UNHCR, 2008, p.13) that forced the claimant to flee denying once more his or her fundamental rights⁴².

⁴² Universal Declaration of Human Rights Article 19.
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

5. Proving the membership: credibility

5.1. Disputable attempts of scientific judgment

As mentioned in the introduction, in the Czech Republic, to answer to the need of a standard legal category for LGBTI identity, the use of vaginal and penile plethysmography test for women and men was used. The test for men is called phallometry and is a way of measuring the degree of arousal experienced by asylum-seekers using visual stimuli which should result in an increase in the flux of blood. It has been proven that there is no way to ascertain cross-cultural, single reasons of arousal that would produce the same reaction in all individuals. These tests also constitute a form of degrading treatment prohibited by human rights treaties such as UDHR and the Yogyakarta Principle, as they are a perpetuation of the undignified treatment which the asylum-seeker may have suffered in the home country to which a denial of asylum would have them sent back. The reaction to the stimuli can be influenced by violence or stress that the asylum-seeker may have been subjected to in his home country considering the stigma often attached to sexual practices resulting in a feeling of shame for such a behavior. The performance in the test can also be thwarted by the effect of a punitive and repressive environment in which the applicant was brought up. (ORAM, 2011a).

This procedure has already been discredited from a technical standpoint by the scientific community. The outcome does not take into account the

personal and psychological factors behind the reaction and this kind of testing can be an additional reasoning that invalidates an asylum claim ending with deportation to a country where the rights of the claimant are at risk of being violated.

In 1995, in the case of Vraciu the claimant encountered the same attempt to create scientific objective evidence. There was no evidence given in his case, and there is no way to produce it because he was discreet in his own country so no one knew his sexual orientation. More importantly the subjective factor, sexual identity, also becomes important. It's a self-declared status which needs legal knowledge to be validated. To verify the self-declaration, Pond (the home office lawyer) called for anal inspection thus once more identifying and reducing homosexuality to one simple act by looking for practical signs of 'passive' homosexuality. It brought the eye of an expert in the legal discourse and as a defense Mr. Russell (Vraciu's lawyer) similarly asked for another scientific device: a psychiatric evaluation. Both sides resort to the discourse of scientific authority as a way of converting the knowledge of a non-legal subject into institutionalized official reports, the former through medical evidence, the latter through confession to psychiatry. (McGhee, 2000)

Those are two examples of the use of scientific knowledge to validate an assumption. However, the stress on cultural relativity and previous persecution as sources of unpredictable reactions to scientific testing, places

the burden of decision on the adjudicators whose only tool is their own logic and reasoning and its validated by the authority bestowed upon him.

An example of how this can go to the detriment of the applicant is the Australia vs Szakd from 2004. There, a Ukrainian man who was not believed to be gay on the grounds of his being homosexual and Catholic Roman at the same time; the adjudicator could not see how it was possible to conciliate two concepts which are commonly maintained as being opposite, a question raised to the applicant's surprise who had never thought of such an incompatibility. (Berg & Millibank, 2007)

The central point of the debate is centered on who owns the authority to know sexuality and how the subjective experience of sexuality can be translated to 'objective standards'. In the perspective of this kind of solution, the attempts to rationalize sexual identity into a physical reaction are a symbol of how difficult it is to assess the identity of LGBTI asylum seekers beyond doubts. Many studies and researches are focusing on indicators of this identity and issues that can undermine credibility.

Berg and Millibank (2007) found an increasing trend in the statistics of the reasons of rejection in SOGI claims in Australia, an increase from 18% until 2004 to 38% until 2007 for claims denied on disbelief of LGBTI identity. LaViolette (2009) encountered a similar general trend in Canadian claims while same data could not be examined in the UK and are not often provided as precise in any other countries.. Both Millibank and LaViolette

conducted an overall research of potential hindrances for LGBTI to lay down their claims, mostly with regards to credibility about actual membership to the particular social group.

5.1 Providing proof

Research has shown a widespread ‘fear’ among decision-makers of an invasion of SOGI ‘bogus’ claims on the assumption that “the claim of being homosexual is in many ways an easy one to make, and a difficult one to dispute.” (Millibank 2009 p.21) In the event that there will be ill-minded people with the intent of taking advantage, decision-makers by focusing on identity testing produce one of the main obstacles for LGBTI applicants. There are rarely clear markers concerning membership to LGBTI identity leaving decision-makers short of a standard to identify a LGBTI claimant beyond doubt. (Millibank, 2007; Landau, 2005; LaViolette, 2009)

The RSD generally consists of an interview where the reasons of the claim are laid down in order to evaluate whether the applicant is a candidate for international protection. It is generally expected that the applicant provide all pertinent information concerning himself and his past experience in as much details as is necessary to enable the examiner to establish relevant facts. RSD relies on the overall consistency, reasonableness and plausibility of the personal narration, available corroborative documentary evidence and the consistency of the statement with generally known facts with regards to the situation in the country of origin. As a matter of fact, while this is a hard

task in all cases, for LGBTI individuals it is especially complicated. Repression in the home country, the intimate nature of the matter and the stigma often attached to it, the absence of witnesses of their sexual orientation or gender identity, all function as factors which can lead to a lack of evidence to corroborate SOGI claims. In consideration of the fact that neither documentary evidence nor witnesses can be produced easily and the main source is self-narration, it is commonly assumed that a SOGI claim is the most likely to be ‘bogus’. (Landau, 2005; LaViolette, 2007; UNHCR, 1998)

LGBTI individuals appear not to have a cross-national identity nor standard proof so that as said before, the 2008 UNHCR Guidance Note attempts to isolate what is common across LGBTI individuals. Its aim⁴³ is to provide tools to identify traits common to the group of claimants, like the type of persecution or violence they are subjected to or common reasons of rejection and mistakes in the assessment, in order to enable decision-makers to critical thinking and a structured background for analysis.

Besides the practical factors I previously outlined, I will now highlight elements that undermine credibility during the interviewing process, later integrating those with the procedure in Turkey.

⁴³ As well as the UNHCR 2002 Guidelines on International Protection: gender related persecution

5.2 Impediments to credibility assessment

To carry out the refugee status determination the applicant lays out the grounds of the claim. The narration is a synthesis of the two subjectivities, the decision-maker and the applicant, and the resulting identity originates in this interaction. However this interaction is based on imbalanced roles and one of the two has the power to project expectations; the adjudicator has the authority to establish what counts as identity and whether this identity matches with the decision-makers' expectations or it is 'wrong' by evaluating consistency, plausibility and demeanor. Available studies are partially based on rejections given by lower tribunals but the response does not always change once reaching a higher grade. Unexpectedly, during my research I did not encounter such a wide spectrum of variation in the articulation of reasons for rejection. I will now focus on some of the impediments in the narratives that go against consistency and expectations.

5.2.1 Alleged causes for reluctance in the exposure.

Reluctance or hesitation in the exposure can be problematic in eliciting information. There are several causes to that. The applicant can be reluctant to openly communicate and be suspicious or afraid of the interviewer because of the interviewed being perceived as the authority, especially as a result of past experience in the country of origin. Additionally, the identity of the interpreter is also significant when considering his role as a conveyor of truths; in many cases it can have negative bias, for example if belonging

to a different ethnic group or to the opposite gender; there may also be problems in translating some terms especially belonging to western traditions. For example in the case reported by Grungras et al (2009), Farsi interpreters sometimes might refer to the applicants through a word which has a negative connotation and is associated with prostitution⁴⁴. In one of the interviews, I have been explained that Kurdish interpreters often do not have other words to refer to gays but the word ‘nemer’ which means ‘not-men’⁴⁵.

Millibank (2007) argues that an equation of consistency with truthfulness is often applied; at times though, information and details simply are not there and research has shown considerable reasons for the occurrence of this phenomenon.

Recalling an event in the first place might not be as detailed as it is when there is more back thinking and some details are gradually put into focus so that a more accurate memory of the event would appear overtime.

The psychological state could affect the interview and it can sometimes lead to being called back for a second one to clarify misrepresentations, inconsistencies or incomplete information. (Millibank, 2007)

⁴⁴ *Hamjensbaz*, rather than the more neutral *hamjensgara*

⁴⁵ Personal Interview

A study⁴⁶ conducted by Diane Bogner et al. in 2007 in the UK in the home office interviews confirmed a link between sexual violence and hesitancy. The interview may be the first time the applicants are dealing with their past trauma and also the adjudicator may be the first person to which they try to give a detailed account of their past. Until that moment they might have perceived their past as something to be ashamed of or to push away and forget about, it might have been avoided because of the stigma attached within one's own culture; rape is a reason of shame for both men and women and even though it is apparently used more often against women data⁴⁷ show that there are many cases among men too. To conclude, asylum-seekers who had been victims of sexual violence showed more difficulty in narrating, and reported a greater overall PTSD severity and hesitancy in narrating or disclosing as well as a stronger feeling of shame. (Bogner et al, 2007)

Studies from Gencoz and Yuksel (2005) examined the relationship between internalized homophobia and psychological problems, and findings confirmed that it often leads to self-hate and shame. It can then occur that applicants are ambivalent about their sexuality, referring to it as a disease or as 'my problem' or 'my addiction', thus using terms which express a negative connotation, possibly because it is the only terminology they know.

⁴⁷ LaViolette (2007) and Millibank (2009) focused on data of reports of rape across Canada, Australia and U.K finding that in Canada 45% of the lesbians and 27% of the gays have undergone sexual violence and declared it in the interview while in Australia is 37% and 7% and in the U.K is 28% and 2%. The reasons for such a gap may be whether because of a stronger effect of shame or less impact on the applicants; the difference in men statistics is still a matter of discussion.

5.2.2. Prejudices and expectations of adjudicators.

Being confused and unclear about one's own sexuality is often taken as reason for mistrust. It is one of the main issues in the latest research, how not having a linear development in sexual identity is considered as an indicator of falseness because adjudicators expect sexual identity to proceed in a certain way. According to Berg and Millibank (2007), the evaluation of the plausibility of the narrative is a process of projection of the adjudicators upon the applicant who is expected to behave reasonably within the limits of the model. This forced matching of the expectations with the narration leaves little ground for the description of the applicant's actual 'personal' story.

There are expectations, or prejudices, based on demeanors and mannerisms which according to Berg and Millibank were more frequent in the first years of studies (late 90s). Recurrent ideas of gay men that have to be flamboyant (that is a very recurrent word in the studies) and lesbians 'butch' localized 'gayhood' in demeanor, mannerism and dress. There are frequently reported cases based on such preconceptions and preformed ideas; there are exemplary cases of gay applicants expected to be more feminine, or the case of a Colombian lesbian in Canada who was firstly rejected because she was deemed to be too well groomed to be a lesbian⁴⁸. In addition there are assumptions on the likely behavior of gay applicants as in the case of a

⁴⁸ Cases in Berg & Millibank and generally reported in studies about impediments to credibility.

Guyanese guerrilla fighter who was rejected because “gays do not have a violent nature.”⁴⁹

Adjudicators also proved to base their own idea of ‘gayhood’ upon assumptions on how social and sexual interactions should be. With regards to same-sex relations, decision-makers tend to focus on sex roles and activities because those are seen as the common ground. As in the aforementioned Bangladesh case (2002), the couple was asked questions whether lubricant was used or not during sexual intercourse as though it was significant to the decision. Additionally, an Iranian man was questioned whether he was the insertive or receiving partner, resting on the assumption that if he was the insertive one he did not count as homosexual in Iranian culture⁵⁰. As well in the case of Vraciu where anal examination was called for, revealing the assumption that only homosexuals have anal sex and this is a scientific proof on which to rely. (McGhee, 2000; Millibank, 2007)

There are also standard expectations for relations with the opposite sex. One of the rejections of the case of the Bangladeshi couple (which has been taken as an example in many following rulings for its four rejections) was based on the fact that both men were married. For example an applicant declared to have had sexual contact with the opposite sex once to make sure

⁴⁹ Ali V. Murasey 2008 available at:
<http://www.law.com/jsp/article.jsp?id=1202422481683&slreturn=1&hbxlogin=1>

⁵⁰ VAO 02318

he actually did not like it⁵¹, or another applicant who was married and fathered sons⁵² so that it cannot possible for him to be gay. While adjudicators should inquire in the reasons for such situations, pervasive societal homophobia, fear of being out of gender roles or family pressure may be the reasons for forced marriages or any interaction between the sexes which is considered appropriated and necessary; the predominant line of reasoning is based on the assumption that any contact with the opposite sex is against homosexuality. Such a position stems from the western idea of sexuality as being fixed and unchangeable. (LaViolette, 2009; Berg & Millibank 2007)

5.2.3 Linear development of sexual identity

There are standard expectations with regards to developments of sexual identity of individuals and those are represented in the staged theory of sexual identity which is the more extensively used in LGBTI identity shaping. This theory culminates and ends with the coming-out and it is based on Vivienne Cass model of 1979-84 as reported in Berg & Millibank (2007) which raised many criticisms. Among the criticisms to the approach⁵³, LaViolette (2010) points out cultural and gender ‘blindness’, namely the specific western approach based almost exclusively on accounts of gay men (as much as the whole research) being the most visible category,

⁵¹ RRT V97/66483, where the applicant had sexual contact once to make sure he actually did not like it because he could not rule out any option.

⁵² LEKE vs Canada

⁵³ Vivienne Cass in Millibank and Berg 2007

while lesbians, transgenders and bisexuals⁵⁴ would require a different reading.

Assumingly the applicant is looking back at his life from the acceptance stage and follows the developments of his own sexual identity unwinding from the stage of early adolescence, conventionally the moment of discovery of sexuality and the first feelings of difference. It is an expectation of linearity that cuts out different experiences of self-discovery and leads to problems in dealing with non-conformants or closeted individuals who did not experience persecution.

Much importance is put on coming-out as a decisive moment of LGBTI individuals. However it is not often taken into account that it can have different stages and several alternatives; it is not a specific single moment “but an activity that is continually repeated over time to a multitude of people in different contexts, with varying meaning and effect.” (Millibank, 2007 p. 215) People can perform selective coming out in different situations, from friends to family to work colleagues according to the environment they live in. Selective coming out is a passing strategy (or covering) where the claimant might decide to be open to adjudicators and partner but not to fellow nationals. However while this indecisive behavior is seen as not reliable in a SOGI claim, it is performed similarly by western

⁵⁴ For further debate about bisexuals Sean REHAAG “Bisexuals need not apply: a comparative appraisal of refugee law and policy in Canada, the United States, and Australia” *The International Journal of Human Rights*, 13: 2/2009 pp. 415 - 436

individuals and in that case it is not assumed as symptomatic of non-veracity of a gay identity.

Therefore sexual identity can be unsettled and swinging in between categories for a long time and there is no legal tool in which to wrap this kind of sexual identity. Nonetheless sexuality is still expected to develop through a linear process. At this point a parallel between sexual identity development and the RSD procedure is drawn; the asylum procedure is seen as a 'meta-narration', expected to unfold and necessarily ending in self-acceptance and final disclosure which in a like manner coincides with assimilation in the receiving country. The successful conclusion is supposed to come through the narration and depiction of a previous miserable life in the country of origin which now can be completely forgotten by cheerfully welcoming his new free life. The host country is a symbol of freedom from all previous persecutions and societal pressures so that consequentially the applicant can lead a full gay life. The applicant is then expected to reap the advantages of this freedom, blend in immediately and go hang out in bars thus completely overcoming experiences of marginalization and alienation. Rejections occurred when this did not happen; an Albanian man⁵⁵ was refused on the fact that he was too shy to have intercourse with other gays without taking into consideration the fact that he was raped and brutalized by four men when attempting contact in his homeland. (Millibank 2007, LaViolette, 2010)

⁵⁵ Menaj vs. Canada

A notorious ruling by Judge Hardy in 2001 in Australia is taken as a recurrent example of these expectations. He assumed that a gay Iranian applicant, thanks to his newly found freedom, would be involved in the gay scene, attend gay venues and know where gay life happened because he should have been enthusiastic about being able to participate and that is what homosexuals do in the west (Millibank, 2009). The applicant was even asked whether he had any kind of empathy for gay icons and whether he felt ‘proud’ of such people. The applicant could not understand the question. This ruling was oblivious of the specificity of each person who is free to have different interests or lifestyle and forgetting class differences or education.⁵⁶ Both Millibank and LaViolette warn adjudicators not to forget the ‘cultural relativity’ of the gay experience; reminding that language and class differences can be a barrier so that going to bar may not be appealing or that the individual can actually prefer to stay home⁵⁷. Such rulings bring in the relativity of gay identity in relation to what is considered appropriate and it entails further discussion about queer and homonormative behavior⁵⁸ within the LGBTI group itself but that is not the purpose of this research. (Millibank, 2009; LaViolette, 2010)

⁵⁶ RSD for an Iranian man run by Judge Hardy in 2001 mentioned in Budd.

⁵⁷ 0902348 (2009) mentioned in Budd.

⁵⁸ An example of this homonormative attitude given in Budd with regards to another Australian Judge’s ruling. In countries where homosexuality is criminalized and it prevents the opening of gay venues, gay men use to have “casual” encounters in parks ‘strictly’ focusing about sex. In a western point of view such a behavior is seen as promiscuous and it is raised doubts in the western judge who focuses on emotional relations.

6. A case study: LGBTI refugees and asylum seekers in Turkey

6.1. General framework for refugees and asylum-seekers

Turkey, as mentioned earlier, has ratified the 1951 Convention and the 1967 Protocol which removes the previous temporal limitation; however, Turkey chose to maintain the geographical limitation created by the Refugee Convention⁵⁹ which is still in force despite many demands from the international community and NGO's such as Amnesty International, ECRI, and Human Rights First to the government to lift the limitation.

The ECRI fourth report⁶⁰ lists the progress made in the advancement of human rights in Turkey in the last five years. An opening up towards recognized and non-recognized minorities has been acknowledged. Up to now there was no comprehensive asylum law but in recent times the Turkish Ministry of the Interiors started drafting the new laws regulating foreigners' entrance and permanence rights in Turkey. It also includes the establishment of a new 'Migrants Administrative Bureau' (Goc Idaresi) that will be in

⁵⁹ In addition to Turkey, Monaco, Madagascar and Congo all maintain the geographical limitation of the original Refugee Convention; however, Madagascar and Congo are party to a regional refugee convention that offers international protection irrespective of country of origin. (the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa)

⁶⁰ ECRI (European Commission against Racism and Intolerance) 2010, *Report on Turkey: fourth monitoring cycle*, available at: http://www.coe.int/t/dghl/monitoring/ecri/library/publications_en.asp#P26_300

charge of dealing with the growing problem of illegal and legal migration. (MOI, 2011; ECRI, 2011)

In an interview with one of the HCA legal advisors, it was remarked that in the first draft in the 1st section, 2nd chapter, article 4 “Non-discrimination⁶¹” sexual orientation was mentioned among the reasons, while in the 2nd draft on the 27th of January 2011, this ground had been excluded and not yet reintegrated.

Moreover, with regards to the draft, the approach the Turkish state has towards this asylum regulation is based on EU standards instead of UNHCR practice, and it is believed that, as recent events prove with the emergency of the Arab spring migrants, EU standards fall below international standards⁶².

The geographic location and the political situation of the European nations in relation to Turkey have made of it the bridge for access to Europe. Asylum seekers and migrants share the same fate upon arrival: they are reportedly denied entrance to the country or deported straight away if not

⁶¹ MOI (Ministry of Internal Affairs) “Yabancılar ve Uluslararası Koruma Kanunu Tasarısı Taslağı” (Draft Law on Foreigners and International Protection) available at: http://www.icisleri.gov.tr/default.icisleri_2.aspx?id=5851

Ayrımcılık yasağı

MADDE 4- (1) Bu Kanunun uygulanmasında; cinsiyet, ırk, renk, etnik veya sosyal köken, kalıtsal özellikler, dil, din, inanç, siyasi veya diğer düşünceler, medeni hal, servet, doğum, özürlü olma, yaş veya benzeri unsurlara dayanılarak ayrımcılık yapılamaz.

Prohibition of Discrimination

Article 4- (1) – In the application of this law; discrimination based on sex, race, color, ethnic or social origin, hereditary characteristics, language, religion, belief, political or other opinions, civil state, property, birth, disabilities, age or similar elements is prohibited.

⁶² Personal Interview.

arbitrarily detained⁶³. During my trip to Van, I gathered that smugglers at the border of Iran and Turkey often just leave asylum seekers in front of the UNHCR Field office so that they can escape detention and be sure to be able to access the asylum procedure⁶⁴.

Table 3. Statistics of how many, from where in Europe/Turkey: percentage of Asylum seekers

Persons of Concern					
Type of Population	Origin	Total	Of whom assisted by UNHCR	Per cent Female	Per cent under 18
Refugees	Iraq	3.700	3.700	43	34
	Islamic Republic of Iran	2.100	2.100	42	26
	Somalia	700	700	53	42
	Various	480	480	-	-
Asylum seekers	Iraq	1.800	1.800	39	21
	Islamic Republic of Iran	100	100	39	27
	Somalia	800	800	45	28
	Afghanistan	700	700	40	44
	Occupied Palestinian Territory	170	170	40	34
	Sudan	110	110	6	8
	Various	600	600	-	-
Returnees (refugees)	Various	160	-	-	-
Others of Concern	Various	310	-	-	-
Total		12.630	12.610		

According to data I gathered through the interviews to UNHCR officers which I integrated with the Amnesty International 2009 “Stranded” report, the population of concern in Turkey increased to 18.300 in March 2011 after resettlement (new quotas opening) and repatriation out of which 11.000 are refugees; by the end of 2010, 6.000 refugees were resettled and 500 repatriated. Looking at the statistics and the breakdown in nationalities, Iraqis make up the biggest share of the population of asylum-seekers and

⁶³ Asylum seekers do not have to be punished if they came irregularly from a country where their life and human rights were being violated.

⁶⁴ Personal interviews.

refugees. They are generally accepted as prima facie⁶⁵ (i.e. because of who they are), because they are affected by generalized violence. In other words, they do not have to present a personal account and there is no need for a credibility assessment. Considering the high percentage of Iraqi refugees and the coming changes to the UNHCR approach, there is speculations that in the future, even though Iraq does not enforce death penalty for same-sex acts, there could soon be applicants on this ground given the reported harsh conditions as described in the HRW 2009 report⁶⁶. One remark in the interviews about Afghanistan is that often there were boys and girls who underwent sexual violence but could not articulate the concept of sexual orientation that could underlie a potential claim, but if suggested, it would be hard to evaluate whether the thought was genuine or a manipulation of the decision-makers.⁶⁷ With regards to Iranians, as agreed in all the interviews I conducted, the most common groups at risk are Baha'i and Christian converts, political dissidents, women, and LGBTI. They are all required to have a personal profile which entails a more detailed credibility assessment process.

In recent years Turkey has seen a rise in the numbers of LGBT asylum seekers. According to the readings of the interviews, they were not sure

⁶⁵ The same treatment was reserved for Somali, Sudanese and Afghans. Often instead of refugee status, extended mandate is agreed. Extended mandate is granted because there is no temporary asylum and it is a system not to deport the applicant. It is normally given when the applicant is at risk of generalised violence and they do not need a profile, not to send them home.

⁶⁶ Human Rights Watch, 2009, *They want us exterminated! Murder, torture, sexual orientation and gender in Iraq*.

⁶⁷ Personal Interview with UNHCR officer.

whether the acceptance rate is indeed higher than other countries because UNHCR does not give breakdowns of the grounds for seeking asylum, but in any case for what concerns Turkey, LGBTI acceptance rate is higher than other grounds. Nearly all of them originate from Iran, though according to the 2011 “*Unsafe Haven*” update, Iraqi, Afghani, Sudanese and Palestinian refugees have also sought protection on this ground. Since 2008, the claims are divided so⁶⁸:

- 124 Iranians
- 5 Iraqi
- 5 others

According to the interview, by the beginning of 2011 all of them were recognized, with the exception of 10 Iranians. I assume that those are all the LGBTI asylum-seekers and refugees that crossed Turkey from 2008 until March 2011. Moreover I could not get to know how many are being processed at the moment because data does not become available until the end of the procedure. Likewise, to accurately break down the data in the different groups (i.e gays, lesbians, etc) is impossible, but it is evident that the percentage of gay men in comparison to lesbians and transsexuals is very high.

⁶⁸ Personal interview with UNHCR officer.

The procedure to follow for all new-comers is to register to the foreigners' police to apply for 'temporary asylum', a procedure run by the Ministry of Interior which, after registering, disperses the asylum-seekers into smaller urban centers, namely satellite cities⁶⁹, where they have to stay and report to the foreigners' police office one or two times per week with no possibility of choosing a different location. These satellite cities are located in the Turkish inland, and have often been depicted as traditional and conservative urban centers which present difficulties to live in for all refugees; LGBTI claimants especially encounter many problems as of the matter of which I will deal with more in depth in a later paragraph.

After applying asylum-seekers are required to go for an interview both to the foreigners' police and to the UNHCR. The application for refugee status



Table 4 UNHCR Global reports 2009 – Satellite cities in Turkey

⁶⁹ Out of the 28 satellite cities the ones with the greatest number of resident asylum seekers include the eastern city of Van and the central Anatolian cities of Kayseri, Konya and Eskişehir.

runs parallel to the UNHCR process, however the foreigners' police has the authority to give temporary permission to stay in Turkey while RSD is in process. Turkish authority decisions mostly mirror UNHCR regarding RSD whereas they are less generous in giving temporary asylum.

In any case, once given temporary asylum, all asylum-seekers must apply for a residence permit. The cost is beyond the reach of many.⁷⁰ ECRI, Amnesty International, Human Rights First, and ORAM all call for the abolishment of residence fees which would enable asylum seekers and refugees to enjoy social services. The residence fees slow down the resettlement process too, since many who cannot pay are denied the exit stamp even after being accepted because these fees were not corresponded beforehand, so it can happen that a refugee who was kept waiting for years has to settle the back payments⁷¹. However in March 2010, Turkey's Ministry of Interior⁷² in circular 19 on refugees and asylum-seekers gives a derogation to asylum-seekers without the wherewithal; since the issue of this circular, LGBTI asylum-seekers have, with varying success, been able

⁷⁰ The cost of a residence permit is set by the Ministry of Finance each year and established in the Law on the Collection of Fees (No. 492). In 2008, a sixth-month residence permit cost 273.80 YTL per person plus an additional 81 YTL for the residence permit booklet, which only needs to be purchased once. As of April 2009, that amounted to about 225 USD or 165 Euros.

⁷¹ The long wait for resettlement is not only Turkish responsibility but countries of destination, mostly Canada and U.S.A, which have a regional quota for refugees so once the limit is reached, applications are closed until the next opening.

⁷² Turkish Ministry of Interior on "Refugees and Asylum-seekers" (Mülteci ve Sığınmacılar) Circular n. 19-2010 available at: <http://www.multeci.org.tr/index.php/yayinlar/mevzuat/161-tc-cileri-bakanlın-muelteci-ve-snmaclar-konu-201019-say-ve-19032010-tarihli-genelgesi>

to access residence permits at no or reduced cost.(Amnesty International, 2008; MOI, 2011; ORAM, 2011b)

The whole RSD procedure has varying durations according to many factors, vulnerable categories (unaccompanied minors, torture survivors, lonely women and LGBTI) have often an expedite track to shorten the wait. Still, the time frame changes sensibly according to single cases. In Van there are people whose wait ranges from 9 months to 10 years. I gathered that to get to the UNHCR interview for LGBTI it takes about two and a half months and the refugee status determination can take up to one month. The whole procedure amounts more or less to four months, without counting additional time to wait depending on the resettlement country.⁷³ Interviews unanimously provided that for LGBTI it does not take more than one year, I just encountered a contrasting voice giving a different timing, stating that it can take from two weeks to two years.

I will go through some of the main challenges faced by LGBTI asylum-seekers in Turkey before analyzing the situation of the refugee status determination procedure.

⁷³ Most LGBT refugees are resettled in Canada and USA, even though many do not want to go to the U.S. European countries very rarely accept LGBT refugees. Every resettlement country has its own process (KAOS GL). For example the USA, especially for Iranians refugees, has a very strict policy of security control. This extends the duration of the wait. Australia already has many files on the waiting list. However, in general after acceptance the file is sent to the resettlement country, at first it has to pass a some specific controls Then they wait for the plane ticket dates and it can take up to 8-9 months. In general it follows those steps but it changes from country to country and the files are not in the hand of the UNHCR once the resettlement procedure has started.

6.2 Practical impediments in Turkey.

Upon arrival LGBTI asylum-seekers often face renewed violence and harassment by local communities and other refugees, making them one of the most vulnerable categories in Turkey. The situation of the LGBTI community in Turkey is not in itself that different. Human rights advocacy groups report continuous hate-crimes, and violations of the rights of LGBTI individuals because of going against moral values and family structure. Like the Turkish LGBT population, LGBT refugees and asylum seekers continue to be targeted for hate-based verbal and physical harassment and violence, and may be more vulnerable to targeting because they are both foreign and often non-gender conforming. The more outwardly recognizable the more they are subject to physical attacks and to discriminatory practice in employment, housing, education and medical health. (Levitan, 2009; ORAM 2011b).

Upon arrival in the satellite cities, asylum-seekers are often told to stay discreet to reduce the risk. In an interview in Van, I have been told that “when they come here, from Iran, they think of here like Europe, they want to wear make-up and earrings so that as soon as they come here they are spotted and identified.”⁷⁴ Very frequently they become victims of physical violence. If they turn to the police they often receive answers on the line of “you deserved that violence, why do you wear this way? Why do you speak

⁷⁴ Personal interview.

and move this way?” thus implicitly meaning that the authorities will not provide personal safety since they are calling for violence if they do not keep a low profile. During my trip to Van I also got to know that there had been no LGBTI applicants in the last three years in the Van field office though and that in case of security concerns UNHCR tends to transfer the claimants to a safer environment.

Since the publication of *Unsafe Haven* in June 2009, HCA and ORAM have documented five violent physical attacks on LGBTI asylum seekers and refugees, two sexual assaults, and multiple accounts of verbal harassment and threats. Keeping a low profile, namely not leaving the house, is common to avoid violence or harassment in the streets. One gay male client reported, “The local people here are cruel to us. I am even taunted by the little children. Once they threw rocks through our windows, and I am afraid to be out on the street. I feel very isolated and alone because of this”. (ORAM, 2011b, p.7) A lesbian couple claimed that they could not leave the house nor talk to men also because of how single (not married to a man) women are perceived in society, since without marriage the woman is already breaking gender rules. (ORAM, 2011b)

Moreover LGBTI asylum-seekers and refugees have very limited financial resources. Their reason for fleeing often involves hatred from members of the family, or relatives who reject them thus forcing them into a social and financial isolation, with no bridge to the homeland nor in Turkey.

“All refugees have problems in Turkey. However, I believe that some problems are very unique to our situation. Many LGBT refugees have no one to turn to. Refugees who fled their countries because of their political activism often can turn to their political parties for support. Refugees who fled for religious reasons can turn to their religious communities. Some refugees can turn to their families in their home country for support. Many of us left everything behind. We have been cut off from our communities, our families in our countries and have no one to turn to.” (ORAM 2011b, p. 19)

As a matter of fact, this double-marginality pattern is typical of LGBTI asylum-seekers and refugees and is one of the main obstacles for their own sustenance and participation in society and its requirements. It is a commonly held idea that fellow nationals tend to build tight-knit communities to rely on. However, for LGBTI individuals often such a safety net is not an option. Often on the run because of the stigma in their home country, fellow nationals mock and despise them as much as before fleeing. In the report (ORAM, 2011b) the clients interviewed describe their predicament with regards to fellow nationals: “When other Iranians realize that I was once a man, they don’t want to talk to me and stop socializing with me. For example, there was an Iranian woman who was really nice to me when I got here and helped me find a job. When she realized that I was transsexual, she stopped talking to me.” (ORAM 2011b, p. 17)

To be regularly employed is virtually impossible so many asylum-seekers turn to illegal employment. LGBT asylum seekers and refugees, especially those who are identifiable, are particularly vulnerable to employment discrimination and mistreatment. They then reported having been fired upon discovery of their sexual orientation, or refused jobs because of their gender identity. They are also frequently victims of sexual harassment and violence in the workplace.

Social assistance and education are restricted for LGBTI asylum-seekers and refugees as well. Firstly, due to the isolation they live in they might not be informed of anything going on, or if there are not specific organizations to take care of them, (such as Kaos GL and ORAM) they might not be able to access information. Secondly, because they are reportedly abused or harassed when attempting to attend LGBTI asylum-seekers may avoid going to these organisations. Additionally, the health system remains inaccessible for many LGBTI refugees, often even for those who can present a residence permit. In general, there continues to be a dearth of interpreters available in medical or state settings for those who cannot communicate in Turkish.

They encounter discriminatory behavior also in housing. Their sexual orientation and gender identity, if perceivable from the outward appearances, is often responsible for refusal of accommodation. Once a place to stay is found, to cover for its costs they live together. This can be seen also as a matter of security. They know they can rely on each other, so that

there is someone who knows where they are and they can call in case of adversities. (ORAM, 2011b)

There are security concerns for LGBTI applicants even when reporting to the police. Both “*Unsafe Haven*” Most of the interviews remark that the signature procedure as a risky moment for both LGBTI and women. Women in the queue for signature are repeatedly harassed; many of them are there alone, or with kids, so that they easily become victim of locals who sometimes chase them back to their houses. In the report especially, interviewed asylum-seekers expressed their unease when appearing at the foreigners’ police because of harassment and ridicule by other asylum-seekers and refugees in the line. An Iranian lesbian in Kayseri reported being physically attacked “While I stood in line with my friends, another refugee from Iran, a man, ran at me and hit me in the face. I told him to leave me alone. There was a group of them, and they were yelling at us, calling us “lesbians,” “whores” and “prostitutes”. (Oram, 2011b, p.17) They do not understand the difference. (Amnesty International, 2009 ; ORAM, 2011b)

7. Credibility assessment in Turkey

All the problems previously identified pertain especially to practical conditions of LGBTI asylum-seekers and refugees in Turkey. There are also elements to take into account with regards to SOGI claims at the interview level. A benchmark for Iranian cases in Turkey is the 2006 New Zealand case⁷⁵ which ruled that being discreet is not a solution in Iran. With regards to Iran, at first officers and legal advisors had to deal with the lack of information which led to wrong assumptions; the LGBTI issue is invisible within Iranian society, it is considered immoral and often not even activists want to deal with it⁷⁶. The fact that there were no reports made it ‘tolerable’ to be gay in Iran since often, conventionally, only gross violations of human rights are reported and we assume that if there are no reports there are no violations. International refugee law, human rights advancements and the increasing amount of independent COI provided, progressively changed the pattern so that in the absence of information the assumption would not be no information equal no problems.

The hardest challenge is to prove sexual identity, the lack of understanding of it and its reduction to sexual conduct. This is a hard obstacle to overcome, but there are indeed results. I will analyze the challenges reported in assessing SOGI claims by legal officers. All interviewees agreed on the

⁷⁵ Refugee Appeal No. 75576, No. 75576, New Zealand: Refugee Status Appeals Authority, 21 December 2006, available at: <http://www.unhcr.org/refworld/docid/477cfbc8d.html>

⁷⁶ Personal interview with UNHCR officer.

fact that it is a serious challenge for decision-makers to express judgments beyond cultural differences, although from 2009 on, there has been a lot of training about vulnerable groups and especially LGBTI.

7.1 Identity assessment

In the authoritative discourse of the creation of identity, there is only one main actor who is the decision maker. The clash of a dominant power with a ‘weaker’ one is represented in the way the interview is structured. When lodging a claim, the demand is, in some way, to downgrade one’s own country and to be ready to praise (through the performance) the values of the receiving country. From the ‘dominant’ side the expectations are for them to have survived unspeakable horror and be grateful about the opportunity given to them. This myth of the newfound land reiterates the pattern of the dominant—dominated (Luibéhid, 2005). It is the same with regards to sexual categories. These are all a matter of definition and boundaries, which queer theory is pushing to stretch; and especially in relation to queer theories, there was not a deep knowledge of these issues, but there is still a more jurisprudential approach in the assessment.

In the first years, look and mannerism, in addition to sexual acts, were the main indicators, however, thanks to training and more insight with regards to the issue surrounding sexuality and gender, the focus is being shifted to the process of identity shaping. In 2007, in fact, there was a training session by lawyers about LGBTI cases. Before this training, there was no standard

for officers to find indicators of LGBTI identity. I asked then what are the indicators to take into account when eliciting information in an interview.

The effect of look and mannerism was historically one of the more influencing factors because it is a ready-made categorizing tool. This means the coupling of sexual orientation and their physical manifestation can be directly linked. With regards to gay men, “if you look masculine there might be an option that you were not gay so you are having a false claim to get the status”. Just “sometimes you find really offensive stuff too. Once an applicant was rejected because he didn’t wear eyeliner and he was too masculine for them⁷⁷” In one of the interviews, I was told that the adjudicator was surprised because one of the lesbians in the interview looked like a woman.

The focus is then the general context of identity formation, and particularly the elaboration of this identity and the motivation to leave.

In case of a specific event, its credibility with regards to the way it triggered the applicant to flee the country is significant. To be sudden, it often has to entail involuntary disclosure if not exposure to the authorities or relatives, possibly during an LGBT party, and the narrative has to be internally consistent. I have been told of a case of a 45 years old gay man who claimed to have become gay in a day; his friend informed the authorities and after which he was rejected from asylum. As well in the case of other two

⁷⁷ Personal interview.

rejections, the fact that there was no link at all between the former happy life and the reason to flee the homeland was decisive.

Questions are asked in order to reach a certain moment in the formation of the identity. It is a procedure which has its downsides as analyzed in the course of thesis because it is based on a standard procedure of emerging of sexual identity which does not take into account deviations from the norm.

In an attempt to make of sexuality a category that is juridically categorizable, sexuality is forced to fit in a box, particularly given the degree of subjectivity. As with Butler (1993) and more generally in queer theory, the idea of a performative and ever-changing identity has begun to emerge, but it has not yet modified conventional perceptions of sexual identity.

The division of sexuality into fixed categories is a reproduction of western conceptions about gender and sexual roles. Decision makers have their own projections of the identity and the authority bestowed to him allows for it to be subjectively defined and validated. The authority is given not by undisputable scientific proof but undisputable legitimized power, the power of being in the position of deciding. As in the examples given in the thesis with regards to the value of scientific proof, this is valid for example in cases of gender identity claims for transsexuals; for them to prove their identity can be easier if they already underwent an operation; it is easier to

have documentary evidence of the medical torture they were subjected to or the documents of gender reassignment surgery.⁷⁸

There are recent recurrent examples of gay claims attempting to provide proof beyond doubt by having a witness or a tape. They tell of having been caught in the act and had to flee immediately after. Or there are also people making recordings of some sort in intimate moments and then these recordings get to the hands of the wrong person.⁷⁹ The counter arguments are often based on assumptions of plausibility as “if it is this dangerous why didn’t you lock the door or hid it better”; however these kind of recurrent cases are very ambiguous in nature because at the same time they cannot simply be ruled out but immediately call for second thoughts.

Questions focus on full life history and daily lives accounts. First, focus is on adolescence which conventionally is the phase in which sexual identity emerges, and then the school time. There is an interesting remark I received by legal officers which goes out of the expectations from ‘categories’ and actually focuses on what LGBTI individuals supposedly have in common: the feeling of difference. They assume that since this general difference is part of their identity it pervades all the aspects of their lives so it can be perceived by accounts of relations with neighbours, classmates or family. The target is then to ‘unravel’ this feeling of difference more than finding revealing events.

⁷⁸ Personal interview with UNHCR officier.

⁷⁹ Personal interview.

A further indicator is the language. Internalized homophobia could be externalized through a language which despises the identity the applicant is claiming. Many of them refer to their sexual orientation like ‘my thing’, ‘my problem’ or ‘my addiction’. The subtle power of the absence of definitions and positive connotation in words referring to LGBTI identity contributes to keep the stigma and the shame at a high level.

The officier would try to read in between the lines, from the way they talk about family, or other people and comments about sexuality the applicant would remember. Conclusions would be partially inferred by the bias or resentment applicants have against specific people, what they talked to those people, what they wanted to talk of and what were their expectations.

As Butler (1993) remarks on Foucault’s theories, clear-cut gender roles and sexual orientation are only a reiteration of a status quo where the dominant power aims at keeping people’s sexuality under control; the process of attributing a sexual identity is the same as excluding non-conformants from a codified social participation thus stripping those of their social and legal status. The whole RSD procedure follows this pattern, western adjudicators provide models and non-western claimants match those in order to be allowed to access the system; the recognition of some characteristics over others creates a hierarchy of valid traits.

With regards to Iranian applicants in Turkey, rumors regarding the necessary traits that constitute a genuine identity have a strong impact.

Applicants share their experience after interviews and, by talking, shape a hierarchy of allegedly required traits to show during the interview. The specific life experience is modified by requests of a specific performance, even actually genuine applicants who want to make sure of being awarded the status, are ready to exaggerate one or another aspect.

Once it happened that one applicant came wearing eyeliner and was attempting to be more feminine than he actually was, Apparently there is also a trend of claims which focusing on a big sensational event overdoes and exaggerates a traumatic moment to match with the rumored expectations while often it is not necessary. UNHCR officers concluded that sometimes a confession with sufficient insight of how tiring it is to be mistreated, rejected and hiding can be the satisfactory without staging persecution or 'big' events.

A significant factor in the spreading of these rumors is illuminated by the specific situation of LGBTI Iranian applicants in Turkey. The Iranian LGBTI community is really tight-knit ethnic group, they live in the same satellite cities (mostly Kayseri, Eskisehir, Isparta and Nevsehir), and in the same houses. Presumably they share information and details about RSD interviews and those rumors give a hand to the building the requirements the 'genuine' LGBTI identity.

Questioning is also a significant part in the process of assessing this genuinity, even as much as the expected answer. It is a projection of what is

deemed important by the adjudicators in performing the identity. In RSD before 2007 there was very offensive and intrusive questioning. With regards to the UNHCR office “Interviews were horrible, offensive and direct questions and lack of understanding, in this office they didnt know how to ask”. A legal advisor in HCA recalls that it used to be very bad. For instance, in 2006 questions included “oh do you give or take” or “do you take pleasure” using this kind of language.

Legal officers selected as a proof of authenticity sexual interaction alone, considering it the only certain indicator of homosexuality. “Questions were very harsh, asking them about positions during sexual intercourse with their partner in order to understand whether they were passive or active as though it would affect their claim!” This typology of questions is an exemplification of the close identification of sexual orientation with sexual acts. However, according to recen developments, a LGBTI identity is built beyond sexuality, by aquiring social and cultural connotations thus disengaging it from a direct identification to sexual acts.

In the specific case, the inquiring about one of the two being the “insertive” partner is a presumption based on cultural stereotypes. Positions do matter as in both Iran and Turkey, the active member is not considered as homosexual thus would not require protection. (HRW, 2008) The legal advisor in Helsinki remembers only one case but nonetheless this was the line of questioning adopted.

In the last two years, none of interviewees recalls having heard harsh or excessively intrusive questioning; there was only one that recalled hearing of recent harsh questioning but it did not have a date and it is unclear whether it came from the UNHCR or the local police.

Because the dominant power projects acceptable answers onto the weaker party, there answers are inherently subject to the dominant power's reasoning on the plausibility of the narrative or consequences of it.

There are also prejudices based on social and sexual relationships.

In 2006-2007 for example with regards to same-sex relations, a man who was raped as a boy who later enjoyed having sex with men, did not have his traumatic event or violence regarded as an actual rape. This is a totally groundless assumption based on an equally groundless idea of LGBTI identity. It is a direct connection between a precedent and an outcome which is, in reality, not connectable. Followed to its logical conclusion, this assumption would predict that all young children that have been raped did not suffer of it because it made them gay.

The same is done with relationships with the opposite sex. The statement "he was married so he can't possibly be gay" is the result of an assumption based on a behavior which does not come out from free choice. It does not take into account societal pressure in Iran for a gay man to get married. Erasing this aspect reiterates the expected norm of a fixed sexual identity.

Among the interviews and reasons of rejections there are issues specific to LGBTI iranians on which UNHCR officers and legal advisors attempt to isolate. A more recent prejudice that lead to mistakes in assessments was with regards to transsexuals. It was linked not to doubts about the actual membership to the social group but to a presumption of knowledge of legal and social conditions in Iran. The number of transsexual applicants increased after 2005 and again after the elections in 2009. In 2009 transsexuals (MTF) were being rejected on the presumption that since the gender reassignment surgery was encouraged by the government it meant that their status was approved of in society if not supported and integrated.

Luckily, in the last year it has been acknowledged that despite being formally legal, being transsexual informally entails discrimination, social rejection and harassment and that there is a likelihood of being discriminated against and being expelled from their families. Research has also shown it as a cover-up operation to ‘force’ gays to fit gender roles and conform gender binary division⁸⁰. Also, there is proof that the operation is not always concluded for MTF; the genitals are not reproduced which is a form of gender based violence⁸¹. The UNHCR stance about Iranian transsexuals is based on a tendency to accept them almost prima facie because of this peculiar legal and cultural situation.

⁸⁰ Vanessa BARFORD “Iran's 'diagnosed transsexuals'” *BBC news* 25-02-2008
[online] <http://news.bbc.co.uk/2/hi/7259057.stm>

⁸¹ Personal interview with UNHCR officer

7.2. Bogus Claims

As a consequence to the whole debate about the increasing number of SOGI claims and a consequential parallel increase of fake SOGI claims, I asked whether there were reported cases in Turkey. The growing awareness of the potential existence of bogus claims is confirmed by a diffuse attitude among the interviewees.

Only in one case I heard that “there are no liars because it is too dangerous in both countries. I don't think many people would put up a claim of being gay, lesbian or so....it can be understood if you listen to their past history...I don't think that many people would feel comfortable claiming that they are lesbians and transsexuals in Turkey too. Why would a person do such a thing? The false claim is part of the prejudices of the legal officers and it can happen in all the claims.” The idea is that the stigma entrenched in the claim would prevent people from lying, thus leaving only real claims to be assessed.

While this is a captivating concept and it is based on the actual cultural and social situation of Turkey and Iran, to draw such a conclusion is impossible. This remark must be taken as a reminder of the effect of the hosting country on applicants and how it is vital to be aware of the condition of it. The fact that there are organizations taking care specifically of LGBTI asylum-seers and refugees makes Turkey a ‘more comfortable environment’ than other countries, countries where Christian or religious organizations take care of

refugees or where they mostly reside in camps would make SOGI claims more arduous.

A set-up claim was reported in 2006. There, an Iranian Christian convert who was at first rejected and in order to have a stronger claim in appeal asked to a gay person to testify that they were living together. The man was rejected again but was eventually accepted on his first story upon reopening.

Often a second time disclosure is seen as a fake claim. To have a sudden change of mind or previously hidden or unavailable corroborative evidence is looked upon with suspicion unless there is actually something to substantiate the appeal; a legal advisor remembers that in 2007 “there were many cases at the reopening stage which I do not think were all in good faith, I think they were opportunistic but I do not like to use overgeneralization saying that people bring up LGBT claims when they are rejected and they are making it up. There might be very legitimate cases where the person just did not think it was prevenient to ‘confess’ or it was just private and didn’t want to share it with the UNHCR but having understood that they have to mention it ...it does happen”. A UNHCR officer stated that “a second time disclosure is yet another stratagem to try to get the status.⁸²” This is a belief that there are rumors among asylum seekers reporting that LGBT cases acceptance rate is high and they could more easily be accepted.

⁸² Personal interview with UNHCR officer.

While only four years ago a disclosure in a second time could have drawn doubts, research and precedents illustrated the meanings connected to such a fact, so now hasty judgments for this reason happen less often.

It is generally accepted that applicants do not always talk easily. Behind this attitude there are usually people who cannot speak possibly because of rape or sexual abuse as a consequence of suspected sexual orientation. They might not be willing to talk about their sexual experience or they are reluctant to recall any kind of experience or memory that they will have problem to deal with, trying to repress stories. A UNHCR officer states that there are techniques to try to understand what is behind a silence. LGBTI asylum-seekers are often also regarded as torture survivors; in some claims the interviewers grow accustomed to detecting specific issues. For instance, if someone claims to have been raped or torture “he could cry or then suddenly stop and start laughing and then shut down. You need to use your astute senses to understand, to read between the lines as well. If someone comes and sits in front of me saying ‘oh by the way, I had been tortured’, I believe it is something that someone who underwent torture wouldn’t come up with⁸³”. This thought, especially, shows how subjective is the whole procedure, words like “I believe” or “astute senses” are an indicator of the difficulty of it; in any case, if there is a feeling that the reluctance of the applicant may be caused by such reasons, the cooperation of a psychologist

⁸³ Personal interview with a UNHCR officer

is sought. It was underlined resorting to a psychologist is a way to induce the talk and not to attach a clinical record to the applicant.

On the other hand, when talking to their legal advisor and not in the official RSD situation, applicants may have longer talks and many more vivid details and sometimes they even “indulge in more details you would be eager to hear of, possibly because of the different perceived degree of authority”.

The more the investigations in the claims the more “the myth of the good refugee” (Budd, 2008, p.77) is being dismantled. This is a phenomenon occurring in all claims but SOGI claims appear to virtually serve this end; what is valuable to know is that there are speculations about the fact that asylum-seekers talk among each other and share their experiences so that asylum-seekers lose their aura of innocence and acquires traits to mistrust.

8. Conclusions

The overall findings do not diverge much from the general literature about the topic. The campaign of awareness with regards to LGBTI asylum seekers and refugees in the international arena has had a strong effect in Turkey; achievements have been highlighted in human rights reports since 2009. According to the ORAM 2011 updated report and to a widespread opinion, there have definitely been recognized advancements in the asylum-procedure and treatment of asylum-seekers and refugees in Turkey. Improvements, achieved thanks to considerable funding from the US, and careful training from international consultants such as ORAM, have benefited the process greatly. Officers undertook several trainings about vulnerable categories and LGBTI and this training and a stricter control over RSD officers resulted in a fairer procedure, not necessarily in the meaning of less rejections but in a more sensitive and concerned assessment of the claims. The UNHCR has more in general a sensitive way of approaching to applicants. To further improve the asylum procedure since information after resettlement is very limited, a more detailed follow-up to evaluate the functioning and shortcomings of the both asylum procedure and resettlement system may be of help to have a better insight of the past experience of the claimant and the procedure.

However what I gathered from the interviews is that there is only a restricted circle of officers that deals with LGBTI asylum-seekers and

people who are not directly and continuously involved with LGBTI asylum-seekers have very little knowledge of the issue. Some examples are: confusing intersex with transsexual; being surprised at someone who is referring to herself as a woman but was formerly a man and after expressing the wish to be identified as a woman, stubbornly keeping on referring to her as a “he”; needing reminding that the conservative environment affects judgement; or that a lesbian that looks like a woman is surprising.

The main issue for LGBTI asylum-seekers in Turkey remains the residence in satellite cities and ensuing security concerns. While NGO’s in the recommend the Turkish authorities allow LGBTI refugees to reside in bigger urban centers, I personally feel such a suggestion is controversial. It sounds inconsistent, considering the overall conditions of asylum-seekers all around Turkey. To find employment or medical assistance is a challenge for all so this ‘change’ of satellite cities should be a joint effort to ensure better life-conditions to the whole community.

I also acknowledged that there is little concern, not so much about LGBTI asylum-seekers, but about LGBTI issues in general. This lack is being tentatively countered by COI and reports with regards to asylum procedure and Iran but would require to be integrated also with regards to LGBTI in Turkey so that the knowledge of specific issues would acquire a wider context and a deeper critical dimension.

On the side of the decision-makers, first of all, growing awareness campaigns and professional training on behalf of international consultants and LGBTI experts for UNHCR officers and people in sensitive positions have been very effective. This led to the production of country specific guidelines and reports which are ready to use by all the officers. The written production available and the small number of claims can create a sound and fair system of assessment if implemented.

Secondly, the fact that the procedure rests only on the UNHCR reduces the “independent opinions” which apparently damages so much LGBTI applicants in the US, Canada, Australia and UK as reported. Reaching all the rings of the chain with information and standard training is easier and more effective in comparison to big systems like America or Australia where there are different offices for appeal and many judges. However this aspect may be affected by the alleged upcoming entry into force the new asylum law, and further changes of the workload between UNHCR and the Turkish state.

With regards to the tipology of applicants, the fact that there is a predominant homogeneous group of LGBTI asylum seekers reduces the need for ‘superfluous’ time-demanding researches leaving room for deeper insights and detailed knowledge for the officers involved in dealing with the group. In the case of Turkey, its being at the crossroad of continents and different cultures and the closeness to Iran and its cultural mindset can

supply more and better tools to understand claimants because of an ongoing interaction over time.

Due to the specific legal, social and cultural situation of Turkey with regards to LGBTI individuals, any legal or social improvement in their direction will automatically benefit LGBTI asylum-seekers. From a legal viewpoint and its effect on society, to improve the general situation of LGBTI individual in Turkey, the prohibition of discrimination on the basis of sexual orientation and gender identity should be included in all codes of conduct, especially in the Constitution. This aims at furthering rights of LGBTI individuals and organizations across the country by creating a friendlier environment and a network among organizations, enabling LGBTI individuals to play a stronger role in sensitizing political parties, authorities and people. Advancements effect both local LGBTI individuals and asylum-seekers. Service providers in the health, public assistance and education sectors should similarly undergo training to ensure that services are provided on an equal basis with locals or other refugees, ideally with support from LGBTI organizations. Such training should extend to intake staff and interpreters to increase receptivity towards LGBT asylum-seekers refugees and creating safer environments where discrimination and intolerance are minimized.

8.1 Queering the procedure

The fact that gender related persecution and LGBTI claims are ‘relegated’ into the membership of particular social group shows how family issues and rebellion to those are not considered as part of politics. Theoretically those issues are still linked to morality or tradition because it is accepted that the values suggested by society and the states are the righteous ones. The political importance of LGBTI asylum seekers is a very charged issue because they lay at the intersection of migration policies and policies about sexuality, two elements, as Somerville postulates, whose control is required to maintain the status quo of countries both domestically and internationally. Budd suggests that what has to be highlight is the political side of those claims to ‘stretch’ the questioning from identity assessment to “Does persecution results from a divergence of the applicant from dominant norms?” Choosing to live out a non-normative sexual orientation has to be considered as a political act, as suggested by Butler or practically by the practice of public coming out; performative identity changes social structure because it is supposed to change interaction among people, in between individuals and society. ‘Queering’ the social structure is a political act.

If read in this way, many essentially simple acts such as rejection of marriage or a non-monogamist relationships are ways of protest. These behaviors go against heteronormative structure that excludes diversity, undermining the state-sponsored family structure as ‘the only’ one thus

discouraging alternative forms of social life. What queer⁸⁴ individuals have in common across the world is this subversive power against the dominant system, so that a trans-national queer identity has been theorized. A network that puts together sexual minorities in the meaning of heteronormativity-deviants and could attempt to build a network of people living at the margins of society overcoming national borders, classes and races where queer migrants are included too.

Moreover the acronym LGBTI is often and erroneously seen as a single block as much as Sexual orientation and gender identity are rarely considered independently. Despite the fact that sexual orientation and gender identity are often confused and referred to as the same thing, they are different. A MTF trans can be attracted both to women and men, and as in the Principles of Yogyakarta her refers to her deeply felt internal and individual experience of gender,

In the light of the previous conclusions it would be interesting to break down the acronym “LGBTI” and remember that each group needs to have a tailored approach and at the same time attempt to include future policies in a queer theory framework. Research has been focusing mostly on gay men, and studies about transgender individuals have been recently on the rise, but there is not much research about lesbians, and bisexuals likewise are still an obscure matter.

⁸⁴ I now use the word queer because it includes all society non-conformant identities without strictly referring to sexuality.

While statistics confirm that there is not much research about lesbians, there are hypothesis about why there are not as many claims. For example the fact that in some countries women have restricted access to financial assets or public transportations. In many countries, lesbians are often subjected to violence specific to their identity such as corrective rape, forced marriage, deprivation of children and discrimination in employment, education, housing, and health services. Women's sexuality is in general less visible than man-to-man, it is considered to be more fluid and to emerge at a later age; sexual activity is carried on much more in an "underground" way that makes it less dangerous for society. I personally do not share the same point of view with this belittling of the importance of women's sexuality, and believe that it is indeed kept more invisible because of the extreme subversive power it holds. Lesbians are not considered as an issue by themselves but often integrated with gender-related claims. Lesbians are thus often subjected to a phenomenon of triple marginality, encompassing at the same time the multilayered identity of a woman, lesbian and migrant. It would be significant to look into women applicants to check whether they lodge claims on other grounds, what is the percentage of rejections and on what assumptions thus focusing further research on the invisibility of lesbians in general and more specifically on lesbian claims and their possible problems during RSD procedure.

One of the more controversial and powerful issue is found in the emergent interest towards bisexuals. As a result of the impact of queer theory and all

following developments, bisexuals are on the rise in LGBTI and gender studies because they challenge the conception of fixed identity and gender role. Bisexuals have a strong subversive power because, by not defining themselves, they break categories erasing conventional binary divisions. Bisexuals in general live a specific 'rejection' both within society and among gays and lesbians who often are suspicious of this non-defined identity. With regards to asylum-seekers, according to the little research there is, bisexual claims are very rare and often rejected if declared openly. There is the idea is that since they can 'choose' the object of their sexual orientation there is no real risk and they can pass in society. They may just be less able to tell because they are still trying to hide some elements thus producing gaps in the narration or they may be leading a complete different life. Or not being sure about what happens to them because bisexuality is a topic which is rarely expressed. 'Bisexuality' is charged of a destructive power which can push towards changes within the binary sexual orientation system thus challenging the dominant structure of society, and in the asylum procedure, adjudicators. Of course with regards to the RSD a whole new debate about the well-founded fear of persecution should be attempted, taking into account the specificity of this identity but focusing more on the fluidity of it instead of its fixed characteristics.

While from a legal standpoint this issue adds a new subject to international refugee law, its impact is more significant and evident within LGBTI and gender studies. It is connected to up-to-date queer studies focusing on

gender roles and a new division (or no division at all) of the social structure and societies themselves. If considered in association to queer migrants, LGBTI asylum-seekers are bringing up and challenging consolidated aspects of societies across the world and generate a new space for the integration of former theories, values and structure with queer theory and its subversive and inclusive power. It highlights the shortcomings in the asylum procedure and the call for updated and flexible categories of judgment.

This study retraced the main steps SOGI claims took in the last two decades and the main difficulties encountered throughout this process focusing on the issues of credibility assessment and its common mistakes. The problems connected to credibility assessment have been on the rise in the last two decades, especially in international refugee law, and a whole new body of literature has started to develop across common law jurisdiction countries and it calls for contributions from other contexts and backgrounds. A more complete and varied literature can contribute to the creation of an helpful tool to simplify and support RSD decisions. With regards to Turkey, this has been a preliminary study about challenges of LGBTI asylum-seeker and more specifically with regards to the credibility generally encountered during the RSD procedure. It is thought in addition to recent research about practical conditions of LGBTI asylum-seekers and aims at providing a starting ground for further research in the emerging issue of credibility assessment.

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