



International Law

Elixir Inter. Law 36F (2011) 3421-3435

Elixir
ISSN: 2229-712X

Forced migration & asylum claims on the basis of sexual orientation: a demand of justice under the refugee law

Mithilesh Narayan Bhatt¹ and Nidhi Saxena²

¹Post- Doctoral Fellow of Indian Council of Social Science Research, New Delhi, affiliated to Faculty of Law, J.N.V.University, Jodhpur.

²Faculty of Juridical Sciences, Modi Institute of Science & Technology, Lakhshamgarh, Sikar.

ARTICLE INFO

Article history:

Received: 13 May 2011;

Received in revised form:

6 July 2011;

Accepted: 16 July 2011;

Keywords

Sexual Orientation,
Sexual Minority,
Refugee,
Persecution,
Migration Gay,
Lesbian,
Transgender,
Bisexual, Intersex.

ABSTRACT

Sex, Gender and Sexual orientation are a deep rooted part of human identity. Unfortunately sexual orientation is not explicitly documented in any international human rights documents and humanitarian laws. Except Heterosexual orientation, no others are in mainstream. Undoubtedly Sexual Minority (Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI)) is also part of human community, so as they are entitled to all human rights on an equal basis with others. But homosexuality is punishable in several countries and misleadingly members of sexual minority people considered as homosexuals further Criminals. Extralegal violence and Discrimination against those are also common. Sexual minorities are forced to remain underground. LGBTI individuals are forced to lead lives in secrete. Despite recent steps forward in the recognition of sexual minority's rights, the persecution of these people because of their sexual orientation and gender identity is going on continuously. Persecution directed against individuals because of their real or presumed sexual orientation is also a humanitarian issue, as is any persecution. Determination of Refugee Claims based on sexual orientation needs special attention. There are legitimate claims for LGBTI people to gain refugee status under the 1951 UN Convention relating to the Status of Refugees (the Geneva Convention⁷). This Article examines the causes of persecution on the basis of sexual orientation moreover how International Law is embarking upon the problem, most notably the regional legal approach on this issue of persecution, This article suggests that there is a discernible national response in the courts and tribunals of all over world to sexual orientation-based refugee claims.

© 2011 Elixir All rights reserved.

Introduction

True all human beings are born free and equal in dignity and rights and all human rights are universal, interdependent, indivisible and interrelated. Sex, Gender and Sexual orientation are a deep rooted part of human identity. But due to stereotyping thinking of society, these sex and gender variant are discriminated. Undoubtedly Sexual Minority (lesbian¹, gay², bisexuals³, intersex⁴ and transgender⁵ (hereinafter "LGBTI")⁶ is also part of human community, so as they are entitled to all

human rights on an equal basis with others. Misleadingly all members of sexual minority people considered as homosexuals and homosexuality is punishable in several countries. Various states do not recognize the pain faced by LGBTI. LGBTI individuals are forced to lead lives in silence and people and send them back to their country of origin, where they face persecution.

The persecution⁷ of people based on their sexual orientation⁸ and gender identity is not a new phenomenon. Unfortunately sexual orientation is neither explicitly documented in international human rights documents nor in humanitarian laws. Despite recent steps forward in the

¹ Lesbian persons experience sexual, emotional and affectional attraction towards same-sex.

² Gay persons experience sexual, emotional and affectional attraction towards same-sex.

³ Bisexual persons can experience sexual, emotional and affectional attraction to both their own sex and the opposite sex.

⁴ In medical terminology also known as hermaphrodite. "Intersexed individuals are usually born sexually ambiguous at birth and some [intersexed] persons may develop secondary sex characteristics of the opposite sex during puberty.

⁵ Transgender is an umbrella term that encompasses male and female cross-dressers, transvestites, pre-operative and post-operative transsexuals, transsexuals who choose not to have genital reconstruction and intersexual.

⁶ The term "LGBTI" is used in preference to "homosexuals".

⁷ Such types of persecution may be best described as "persecution based on sexual orientation."

⁸ Sexual orientation is an enduring emotional, romantic, sexual or affectional attraction to another person. It can be distinguished from other aspects of sexuality including biological sex, gender identity (the psychological sense of being male or female) and the social gender role (adherence to cultural norms for feminine and masculine behavior). Sexual orientation exists along a continuum that ranges from exclusive homosexuality to exclusive heterosexuality and includes various forms of bisexuality.

recognition of sexual minority's rights, the persecution of these people because of their sexual orientation and gender identity is going on continuously. Persecution directed against individuals because of their real or presumed sexual orientation is a human rights issue, as is any persecution. Determination of Refugee Claims based on sexual orientation needs special attention. There are legitimate claims for LGBTI people to gain refugee status under the 1951 UN Convention relating to the Status of Refugees (the Geneva Convention").

In sheltering these people on our coast, perhaps we can learn from their struggles and hardships in daring to be different that our basic norms must expand to recognize sexual minorities. This Article will through some light in the area of immigration law, wherein sexual orientation and gender identity meet head-on social traditions. Moreover the article will try to find out about the violation of human rights and action which has been taken by nationals and international fraternity to recompense the same.

Persecution: The Causes

Sexual orientation of LGBTI individuals appears different to society and people cannot accept easily the things which are uncommon. Incidence speaks that these individuals are subjected by State authorities, their own families or communities to physical, sexual and verbal abuse and discrimination, because of whom they are or who they are perceived to be. This might be because of prevailing cultural and social norms, which results in intolerance and prejudice, or because of national laws, which reflect these attitudes, where such acts of abuse and discrimination go unpunished and/or where LGBTI orientation is criminalized.⁹

Many people who claims asylum on the basis of fearing abuse for reasons of their sexual orientation face serious obstacles in the countries where they seek protection. General elements in the experience of many LGBTI applicants have to keep aspects and sometimes large parts of their lives secret. This may be in response to societal pressure, explicit or implicit hostility and discrimination. The consequence is that they often have inadequate evidence to establish their LGBTI identity or may not be able to demonstrate past persecution, in particular where they were not living openly as LGBTI in the country of origin.¹⁰

⁹ UNHCR Guidance Note on Refugee Claims Relating To Sexual Orientation and Gender Identity ,United Nations High Commissioner for Refugees (UNHCR) Protection Policy and Legal Advice Section Division of International Protection Services, Geneva 21 November 2008 at 4 (cited on 2010, July, 15) Available from <http://www.unhcr.org/refworld/pdfid/48abd5660.pdf>. More than 80 States have laws prohibiting or regulating sexual acts performed by consenting adults of the same sex, often referred to as "sodomy laws". Some proscribe specific sexual acts regardless of sexual orientation and gender identity, while others prohibit a range of same-sex sexual activities. At least seven States maintain the death penalty for such acts. For further information on such laws, See also International Gay and Lesbian Human Rights Commission (cited on 2010, July, 15) Available from : <http://www.iglhrc.org/site/iglhrc/> and Sodomy Laws online at <http://www.sodomylaws.org/> (visited on 15/7/2010).

¹⁰ Gender-related claims for asylum, Report (Reference to committee: Doc. 11679, Reference 3484 of 29 September 2008.)

In some countries of asylum, people risk facing the same or similar persecution that they fled if their sexual orientation were to become known. In other countries of asylum, their claims are often wrongly denied. In cases where they may not have expressed their sexual orientation openly in the past, decision-makers say that they should be able to keep their sexual orientation from the attention of those authorities and private individuals from whom they otherwise would be at risk.¹¹

The human rights situation of sexual minorities around the world also continues to be repulsive. Many Countries maintain severe criminal penalties for consensual sex between persons of the same sex, including the death penalty.¹² Laws criminalising homosexuality encourage the dehumanisation of lesbians, gay men, bisexual people and transgender people (LGBTI) as their very identity is criminalised.¹³ In several countries, restrictions have been imposed on the freedoms of expression and association of sexual minorities. While in others homosexuality and transexuality are perceived as crimes against religion, sexually deviant and immoral behaviours, mental disorders, or unacceptable challenges to gender-specific roles.¹⁴ Such egregious human rights violations have led some lesbian, gay, bisexual, and transgender (LGBTI) people to seek refuge in countries with better human rights protection.

Refugee claims based on differing sexual orientation contain a gender element. A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on

Committee on Migration, Refugees and Population Rapporteur: Mr Andrej ZERNOVSKI, "The former Yugoslav Republic of Macedonia", Alliance of Liberals and Democrats for Europe, Doc. 12350 ,26 July 2010 at pg.13(cited on 2011, January, 11) Available from <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12350.pdf>

¹¹ Documento - Los derechos humanos y la orientación sexual e identidad de género. Human Rights and Sexual Orientation and Gender Identity. (cited on 2011, January, 11) Available from <http://www.amnesty.org/es/library/asset/ACT79/001/2004/es/a406a106-d5fe-11dd-bb241fb85fe8fa05/act790012004en.html>

¹² For a survey of laws prohibiting same-sex sexual conduct, see Daniel Ottosson, Int'l Lesbian And Gay Ass'n, State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults (2008), (cited on July 13, 2009) Available from http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf. See also Press Release, *Int'l Lesbian and Gay Ass'n, World Day against Death Penalty: 7 Countries Still Put People to Death for Same-Sex Acts*.

¹³ Documento. *Supra* note 11

¹⁴ See Michael O'Flaherty & John Fisher, Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles, HRLR 8 (2008), 207^248 (cited on 2011, January, 11) Available from <http://www.yogyakartaprinciples.org/yogyakarta-article-human-rights-law-review.pdf>. See also Human Rights First, *Homophobia: 2007 Hate Crime Survey* 5-6 (2007), (cited on July 13, 2009) Available from <http://www.humanrightsfirst.info/pdf/07601-discrim-hate-crimes-web.pdf> ; Human Rights Watch, *Together, Apart: Organizing around Sexual Orientation and Gender Identity Worldwide* (2009).

account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals¹⁵, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.¹⁶

Even where homosexual practices are not criminalised, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.¹⁷

In recent years, both national judicial decision-making and academic writing have seen substantial progress in the analysis and interpretation of the concepts of sexual orientation and gender identity in the refugee law context.¹⁸ Issues arising with regards to qualification and substantive rights have only recently come to the fore.

Refugee Laws

At International Level

The Universal Declaration of Human Rights, passed by the United Nations General Assembly in 1948, recognised the right to seek asylum from persecution as a basic human right. The first major document formulating the criteria used in adjudicating persecution claims is the 1951 Convention Relating to the Status of Refugees.¹⁹ The Convention recognizes that

"many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position."²⁰ The Convention designates these individuals as "refugees," however; the Convention was limited in scope.²¹

Determined to give concrete expression to this right, 1951 United Nations Convention relating to the Status of Refugees, (known as the Geneva Convention,) defines 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 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 November 2008 after immense pressure the United Nations High Commissioner for Refugees (UNHCR) has directly addressed the issue by releasing the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity²². However, the legal responsibility to provide protection applies only if a person meets the definition²³ of a refugee as provided for in the Convention.

Persecution may be perpetrated either by (i) State actors²⁴, or by (ii) non-State (private) actors. A refugee claim can, thus, be established where the State is unwilling or unable to protect against violations committed by State or non-State actors. Instances where a State's inaction may be persecutory include failure of the police to respond to requests for assistance and refusal by the authorities to investigate, prosecute or punish individuals inflicting harm on LGBTI persons. Non-State actors, whether family members, neighbours, strangers or work colleagues, can either be directly involved in persecutory acts, including through physical abuse and forced marriage, or

¹⁵ Homosexuals are normal humans attracted to their own gender. Homosexuality (rarely Homophilia) is a sexual orientation or orientations characterized by romantic or sexual desire for, or sexual attraction towards member of the same sex.

¹⁶ Office of United Nations High Commissioner for Refugees, Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1a(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/01 (2002)" (cited on 2011, January, 11) Available from <http://www1.umn.edu/humanrts/instree/unhcrguidelines.html>

¹⁷ *Id.*

¹⁸ UNHCR Guidance Note, *Supra* note 9 at pg.4 F.N. 1. For an overview of jurisprudence and doctrine relating to the rights of LGBT persons, including human rights violations on grounds of sexual orientation, see International Commission of Jurists (ICJ), Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nations Human Rights System, 3rd updated edition, 2007, (cited on 2011, January, 11) Available from http://www.icj.org/IMG/UN_References.pdf; ICJ, Sexual Orientation and Gender Identity in Human Rights Law: Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union, October 2007, (cited on 2011, January, 11) Available from http://www.icj.org/IMG/European_Compilation-web.pdf; and ICJ, Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the Inter-American System, July 2007, (cited on 2011, January, 11) Available from http://www.icj.org/IMG/Inter-American_References.pdf.

¹⁹ Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 6260, 189 U.N.T.S. 138, 150 (affirming that "human beings shall enjoy fundamental rights and freedoms

without discrimination" and assuring "refugees the widest possible exercise of these fundamental rights and freedoms").

²⁰ *Id.* at 146.

²¹ See *Id.* at 152. (The Convention Relating to the Status of Refugees describes a refugee as someone who: as a result of events occurring before 1 January 1951 and owing to 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 to, or owing to such fear, is unwilling to return to it.) *Id.*

²² UNHCR Guidance Note, *Supra* Note 9

²³ As per the definition Persons seeking asylum must satisfy two main legal tests:

(1) They must demonstrate a well-founded fear of persecution; and (2) they must substantiate that the persecution they fear is on account of their race, religion, nationality, political opinion, or membership in a particular social group. In addition, refugee protection is conferred only if the claimant succeeds in showing that the country of nationality or habitual residence is unwilling or unable to offer protection.)

²⁴ For example, through the criminalization of consensual sexual relations between persons of the same sex, through physical or sexual violence, or degrading treatment inflicted by those under their direct control.

indirectly by exposing the individual concerned to harm, for example, by reporting his or her conduct or sexual orientation to the authorities.²⁵

Conventional Grounds and Claim of Sexual Orientation

Refugee determinations involve the most intensely narrative mode of legal adjudication. The hearing depends largely – sometimes entirely – on the story of the applicant.²⁶ It is an established principle that the refugee definition²⁷ must be given a gender-sensitive interpretation.²⁸ Refugee claims based on differing sexual orientation may only be justified where the claimant has been or may be subject to persecutory action on account of one or more Convention grounds.²⁹ These grounds are can be discussed as:

Fear of Persecution

What amounts to a well-founded fear of persecution depends upon circumstances of each individual case. Undoubtedly rape and other forms of gender related violence, such as female genital mutilation, domestic violence, dowry-related violence, and trafficking, are acts which inflict severe pain and suffering mental as well as physical. This counts persecution, whether perpetrated by State or Private Actor.³⁰ Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm, as assessed in light of the opinions, feelings and psychological make-up of the applicant.³¹ A pattern of harassment and discrimination could, on cumulative grounds, reach the threshold of persecution. While the element of discrimination is often central to claims made by LGBTI persons, they also frequently reveal experiences of serious physical and, in particular, sexual violence. Claims made by LGBTI persons often reveal exposure to physical and sexual violence, extended periods of detention, medical abuse, threat of execution and honour killing. These are all acts of harm and

mistreatment so serious in nature that they would, generally, reach the threshold of persecution within the meaning of the 1951 Convention. Criminal laws prohibiting same-sex consensual relations between adults have been found to be both discriminatory and to constitute a violation of the right to privacy.³² The very existence of such laws, irrespective of whether they are enforced and the severity of the penalties they impose, may have far-reaching effects on LGBTI persons' enjoyment of their fundamental human rights.³³ Even where homosexual practices are not criminalized by specific provisions, others directed at homosexual sex such as those prescribing "carnal acts against the order of nature" and other crimes, such as "undermining public morality" or "immoral gratification of sexual desires", may be relevant for the assessment of the claim.³⁴ Penal prosecution, under a law which per se is not inherently persecutory or discriminatory, may in itself amount to persecution, for instance, if applied to particular groups only or, if it is arbitrary or unlawfully executed.³⁵

³² See *Toonen v. Australia*, CCPR/C/50/D/488/1992, 4 April 1994 (Human Rights Committee), paras. 8.6–8.7, (cited on 2011, January, 13) Available from <http://www.unhcr.org/refworld/docid/48298b8d2.html>. Finding a violation of Article 17 of the ICCPR, the Committee noted that while the applicant had not yet been prosecuted under the Tasmanian Criminal Code, the "criminalization of homosexuality in private has not permitted him to expose openly his sexuality and to publicize his views of reform of the relevant laws on sexual matters", and that the relevant sections of the Criminal Code interfered with the author's privacy, "even if these provisions have not been enforced for a decade". See also, *Dudgeon v. United Kingdom*, Application No. 7525/76, 22 October 1981 (ECtHR), (cited on 2011, January, 13) Available from <http://www.unhcr.org/refworld/docid/47fdaf7d.html>. (visited on 22/7/2010)

³³ See, further, *Case of Norris v. Ireland*, Application No. 10581/83, 26 October 1988 (ECtHR), para. 38, (cited on 2010, July, 14) Available from <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbk m&action=html&highlight=10581/83&sessionId=12354864&sk in=hudoc-en>.

³⁴ See also, *RRT Case No. 071862642* [2008] RRTA 40, 19 February 2008 (RRT of Australia), (cited on 2010, June, 14) Available from: <http://www.unhcr.org/refworld/docid/4811a7192.html>. The applicant was found to be in need of international protection even in the absence of a specific law criminalizing homosexual acts in the country of origin.

³⁵ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, re-edited January 1992, (cited on 2010, June, 22) Available from: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>, paras. 57, 59; UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002, (cited on 2010, June, 20) Available from: <http://www.unhcr.org/refworld/docid/3d36f1c64.html>. "*UNHCR Guidelines on Gender-Related Persecution*", para. 10; See UNHCR *Guidelines on Gender-Related Persecution*, above footnote 2, paras. 6–7. See also UNHCR, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee*

²⁵ UNHCR Guidance Note, *Supra* note 9 at 13

²⁶ Jenni Millbank, "The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21(1) *International Journal of Refugee Law* at pg.1. (cited on 2011, January, 11) Available from: <http://www.ijrl.oxfordjournals.org/content/21/1/1.full>

²⁷ This does not mean that all persons with a certain sexual orientation (for example, homosexuals) are automatically entitled to refugee status.

²⁸ See UNHCR, "Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees" (April 2001) paragraphs 2 to 6. See also Executive Conclusion No.87(1999) para.(n)

²⁹ *Advisory Opinion By UNHCR To The Tokyo Bar Association*, United Nations High Commissioner For Refugees. (cited on 2011, January, 11) Available from: <http://www.unhcr.org/refworld/pdfid/4551c0d04.pdf>

³⁰ Katja Luopajarvi "Gender-related Persecution as Basis for Refugee Status: Comparative Perspectives" Institute for Human Rights Åbo Akademi University December 2003 at F.N. 86 (cited on 2011, January, 11) Available from [www.abo.fi/instut/imr/norfa/Katja_Genderrelated_persecution.p df](http://www.abo.fi/instut/imr/norfa/Katja_Genderrelated_persecution.pdf).

³¹ See, for instance, *HS (Homosexuals: Minors, Risk on Return)* Iran v. Secretary of State for the Home Department [2005] UKAIT 00120, 4 August 2005 (UK Asylum and Immigration Tribunal (AIT)), (cited on 2010, July, 13) Available from <http://www.unhcr.org/refworld/docid/47fdafef0.html>, (regarding the impact of the persecutory acts on the individual.)

LGBTI applicants who have concealed their sexual orientation in the country of origin might not have experienced harm in the past sufficient to amount to persecution. It is possible that their conduct was not a voluntary choice and was modified precisely to avoid the threat of being persecuted. As noted by the High Court of Australia: "it is the threat of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly."³⁶ Additionally, LGBTI persons, who have left their country of origin for a reason other than their sexual orientation and/or have "come out"³⁷ after arrival in the country of asylum, could qualify for refugee status if they can demonstrate a well-founded fear of future persecution.³⁸

The Persecution on Account of their Race, Religion, Nationality, Political Opinion, or Membership in a Particular Social Group

The Convention grounds contained in the refugee definition are not mutually exclusive and may overlap. As such, the transgression of social or religious norms, including by expressing one's sexual orientation or identity, may be analyzed in terms of political opinion, religion or membership of a particular social group. This opinion, belief or membership may also be imputed or attributed to the applicant by the State or the non-State agent of persecution.³⁹

For the purposes of the 1951 Convention, the term "political opinion" may include opinions on sexual orientation and gender identity, particularly in countries where sexual orientation (other

than heterosexuality) is viewed as contrary to the core of the country policy.⁴⁰

Further religion may be a relevant 1951 Convention ground where the attitude of religious authorities towards LGBTI people is hostile or discriminatory or where being LGBTI is seen as an affront to religious beliefs in a given society, because he or she is seen as not conforming to the interpretation given to a particular religious belief.⁴¹

Claims relating to sexual orientation have most often been considered within the "membership of a particular social group"⁴² ground.⁴³ Many jurisdictions have recognized that homosexuals (gays and lesbians) may constitute a particular social group.⁴⁴ While claims relating to bisexuals and transgender people have been less common, such groups may also constitute a particular social group.⁴⁵ It has furthermore

⁴⁰ See further UNHCR Advisory Opinion to the Tokyo Bar Association, *supra* note 30 para. 6.

⁴¹ UNHCR Guidance Note, *Supra* note 9

⁴² 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.

i. Paragraph 77. "A particular social group normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, *i.e.* race, religion, or nationality."

ii. Paragraph 78. "Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the government or because the political outlook, antecedents or economic activity of its members or the very existence of the group as such, is held to be an obstacle to the government's policies."

iii. Paragraph 79. "Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership is sufficient ground to fear persecution." UN High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, January 1992, (cited on 2011, January, 11) Available from: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>

Claims Based on Sexual Orientation, 3 September 2004, paras. 4, 10. , (cited on 2010, July, 14) Available from <http://www.unhcr.org/refworld/docid/4551c0d04.html>.

³⁶ Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs [2003] HCA 71, 9 December 2003 (High Court of Australia), para. 81, (cited on 2010, June, 26) Available from: <http://www.unhcr.org/refworld/docid/3fd9eca84.html>, para. 43.

³⁷ For the purposes of this Note, the term "come out" refers to the process in which an individual acknowledges and accepts his or her own sexual and gender identity and feels able to inform others about it.

³⁸ UNHCR Handbook, *supra* note 35: "Fear refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution" (para. 45).

³⁹ UNHCR Advisory Opinion to the Tokyo Bar Association, *supra* note 30 para. 5. See also Kwasi Amanfi v. John Ashcroft, Attorney General of United States, A01-4477 and 02-1541, 328 F.3d 719, 16 May 2003 (US Court of Appeals, Third Circuit), (cited on 2010, June, 26) Available from <http://www.unhcr.org/refworld/docid/47fd9b2c1a.html>, where the Court recognized persecution on account of imputed membership in a particular social group (*i.e.* homosexuals), even if the applicant was not gay. See also DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica v. Secretary of State for the Home Department CG [2005] UKAIT 00168, 28 November 2005 (UK AIT), para. 78, (cited on 2010, June, 26) Available from <http://www.unhcr.org/refworld/docid/46836aa80.html>. para. 71.

⁴³ See European Union, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 19 May 2004, Art. 10(1)(d), (cited on 2010, June, 24) Available from: <http://www.unhcr.org/refworld/docid/4157e75e4.html>.

⁴⁴ See, for instance, Matter of Toboso-Alfonso, 20 I& N. Dec 819, 12 March 1990 (US Board of Immigration Appeals), (cited on 2010, July, 22) Available from: <http://www.unhcr.org/refworld/docid/3ae6b6b84.html>; Toboso was designated "as precedent in all proceedings involving the same issue or issues", Attorney General's Order No. 1895-94, 19 June 1994.

⁴⁵ See Decision Ourbih No. 269875, 15 May 1998 (CRR, France), finding that transsexuals may constitute a particular social group. This position was affirmed in Decision M. MB,

been well established that sexual orientation can be viewed as either an innate and unchangeable characteristic, or as a characteristic that is so fundamental to human dignity that the person should not be compelled to forsake it.⁴⁶

LGBTI as Members of a Particular Social Group

Gender-related claims have often been analysed within the parameters of this ground. A person seeking refugee status under the social group category must demonstrate that:

- A particular social group exists.
- The applicant is a member of the particular social group.
- The applicant has a well founded fear of persecution owing to such membership.⁴⁷

Claims for Conventional refugee status based on sexual orientation⁴⁸ under the social group category emerged at the beginning of the 1980's⁴⁹ and still represent a small part of the total claims under "membership of a particular social group" as a whole.⁵⁰

It is widely accepted in State practice that an applicant need not show that the members of a particular group know each other or associate with each other as a group *i.e.* there is no requirement that the group be "cohesive."⁵¹ An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a

particular social group.⁵² The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A (2). This is true as well for cases arising under the other Convention grounds.

Issue of Credibility

LGBTI (Considered as Homosexuals too) face additional burdens in seeking to establish the credibility of their claims, corroborate their fears of persecution and submit evidentiary information. They are often unable to provide sufficient documentation to support their allegations of persecution.⁵³ In UK⁵⁴ a refugee had to undergo an anal examination by a medical doctor in order for the adjudicator to determine whether the applicant was really homosexual.⁵⁵ A lack of documentation of persecution of homosexuals by mainstream human rights groups and a general mistrust by the courts of information produced by gay and lesbian organisations makes it relatively difficult for homosexuals to produce reliable evidence of persecution.⁵⁶

Self-identification as LGBTI should be taken as an indication of the individual's sexual orientation. While some applicants will be able to provide proof of their LGBTI status, for instance through witness statements, photographs or other documentary evidence, they do not need to document activities in the country of origin indicating their different sexual orientation or gender identity. Where the applicant is unable to provide evidence as to his or her sexual orientation and/or there is a lack of sufficiently specific country of origin information the decision-maker will have to rely on that person's testimony alone. As the UNHCR Handbook has noted "if the applicant's account appears credible, he or she should unless there are good reasons to the contrary, be given the benefit of the doubt."⁵⁷ In the same vein, the United Kingdom Asylum and Immigration Tribunal stated: "There is the full, consistent detail and the plausible noting of small points, unlikely to be observed or recounted by a person who had not had the experiences described."⁵⁸

Since gay, lesbian, bisexual, transgender and intersex claimants generally assert that they are members of a 'particular social group', one of the legal elements to be satisfied is the claimant's membership in that group.

Sur Place Claims & Credibility

Some claimants may not have identified as gay or lesbian before their arrival in the country of refuge, or consciously decided not to act on their sexual orientation in their country of origin. The fear of persecution may arise while they are in the country of refuge, if they have now come out or come to terms with their sexuality. Such a situation would make a claimant a

No. 496775, 15 February 2004 (CRR, France). See further, *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000), 24 August 2000 (US Court of Appeals, Ninth Circuit), (cited on 2010, June, 24) Available from: <http://www.unhcr.org/refworld/docid/3ba9c1119.html>, (where the Court recognized that "gay men with female sexual identities" constituted a particular social group.)

⁴⁶ See, UNHCR Guidelines on Membership of a Particular Social Group, *Supra* note 9, footnote 47, para. 6. See also, *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, *Supra* note 9 footnote 35, (where the Court noted that "the sexual identities [of homosexuals] are so fundamental to their human identities that they should not be required to change them" (p. 10483)). See also, *Refugee Appeal No. 74665*, *Supra* note 9, footnote 6. (The Authority recognized that there is a "broad consensus that all five Convention grounds refer to characteristics which are either beyond the power of the individual to change, or so fundamental to individual identity or conscience that they ought not to be required to be changed" (para. 81)).

⁴⁷ Elena Research Paper on Sexual Orientation as a Ground For Recognition Of Refugee Status (cited on 2011, January, 11) Available from: <http://www.eure.org/files/orient.pdf>

⁴⁸ Sexual orientation encompasses 3 factors: 1. Sexual behaviour. 2. Sexual orientation. 3. Sexual identity.

⁴⁹ The first case was in the Netherlands Judgement of Aug 13 1981 *Afeling-Rechtspraak* (Judicial Commission of the Council of State) No A-2.1113 *Rechtspraak Vluchtelingenrecht* No 5 1981

⁵⁰ Elena Research Paper, *Supra* note 47

⁵¹ See UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992), paragraphs 66-67, 77; and see also Summary Conclusions – Membership of a Particular Social Group, no. 3.

⁵² HCR/GIP/02/02 7 May 2002

⁵³ Elena Research Paper, *Supra* note 47

⁵⁴ Appeal No. HX/0517/94 Special Adjudicator 28 April 1995:

⁵⁵ *Id.*

⁵⁶ Elena Research Paper, *Supra* note 47

⁵⁷ UNHCR Guidance Note, *Supra* note 9 at 16.

⁵⁸ *Id.* See, *HS (Homosexuals: Minors, Risk on Return) Iran v. Secretary of State for the Home Department* [2005] UKAIT 00120, 4 August 2005 (UK Asylum and Immigration Tribunal (AIT)), (cited on 2010, June, 24) Available from: <http://www.unhcr.org/refworld/docid/47fdafef0.html>, regarding the impact of the persecutory acts on the individual.

refugee sur place⁵⁹. In such cases, particular credibility concerns may arise, and an in-depth examination of the circumstances and genuineness of the applicant's sexual orientation will be necessary. The UNHCR urges decision-makers to carefully consider all the circumstances of sur place claims in assessing whether a sexual minority claimant has a well-founded fear of persecution on return.⁶⁰

One other problem comes with Transgender persons who have applied for asylum sometimes face problems in detention and reception centers from fellow asylum seekers (often from their home country) and there is a serious risk of re-traumatization for transgender asylum-seekers.⁶¹ Sometimes transgender persons are not placed in the men's/women's living quarters they wish to be in, leading to potentially dangerous situations, including heightened risk of sexual violence, harassment and other ill-treatment. There is a need to create an environment in such centers to avoid harassment of transgender persons. Another problem is the lack of access to health care which can lead to an interruption of the continuous hormonal treatment some transgender person's need.⁶²

Regional Laws

Sexual orientation is a fundamental part of human identity. Conventional ground of membership of a particular social group may also be linked to other grounds, notably political opinion and religion, depending on the circumstances. This has been affirmed by courts and tribunals in various jurisdictions, including Australia, Canada, France, Germany, New Zealand,

Sweden, United Kingdom and the United States.⁶³ The laws and judicial verdicts on the issue at regional level are as follows-
USA

In the last fifteen years there have been important advances in aspects of American immigration law that protect lesbian, gay, bisexual, and transgender (LGBTI) persons, who may have been victims of gender-based violence in their home countries. Earlier immigration law legally excluded lesbian and gay men because the medical and psychiatric communities believed homosexuality was a disease.⁶⁴ The Immigration Act of 1917 excluded individuals from entering the United States who were found "mentally defective" or afflicted with a "constitutional psychopathic inferiority."⁶⁵ This legislation⁶⁶ banned homosexuals⁶⁷ from entering the United States because of the Public Health Service's classification of homosexuals as "mental defectives or psychopathic inferiors."⁶⁸ Furthermore, Congress added "sexual deviation" to the list of medically grounded exclusions, making explicit its intent to bar homosexual aliens from entry into the United States.⁶⁹ Until the Immigration Act of

⁵⁹ See Nicole LaViolette, The UNHCR'S Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, ASIL Insight, July 30, 2009, Volume 13, Issue 10 at pg. 5. See also, Refugee Appeal No. 75576, 21 December 2006 (New Zealand RSAA), para. 78, (cited on 2010, June, 24) Available from: <http://www.unhcr.org/refworld/docid/477cfbc8d.html>, regarding the situation of homosexuals in Iran and change of circumstances. (A sur place claim for refugee status may arise as a consequence of events which have occurred in the applicant's country of origin since his or her departure, or as a consequence of the applicant's activities since leaving his or her country of origin.)

⁶⁰ UNHCR Guidance Note, *Supra* Note 9 ¶¶ 39-40.

⁶¹ See for example research conducted by the Helsinki Citizens Assembly and the Organisation for Refugee, Asylum & Migration (ORAM): Unsafe haven – the security challenges facing lesbian, gay, bisexual and transgender asylum seekers and refugees in Turkey (2009).

⁶² Similar problems are faced by transgender people in prison who may face periods of time without hormone therapy. This may result in a long time without treatment and may cause serious health problems, such as the development of osteoporosis in transsexual men, and irreversible physiological changes to take place such as the development of baldness in transsexual women. Transsexual people will frequently face difficulties in accessing assessment, hormone therapies, or surgery as many prisons or prison systems feel they do not have the facilities to manage transsexual prisoners, or in some cases they are seen as forging their right to such treatments because of their conviction. Human Rights and Gender Identity, CommDH/IssuePaper (2009)2 Original version, Strasbourg, 29 July 2009 at pg. 16 (Paper is available on the Commissioner's web-site: www.commissioner.coe.int).

⁶³ UNHCR Guidance Note, *Supra* note 9 at 6

⁶⁴ See Alan G. Bennett, Note, The "Cure" that Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution, 29 GOLDEN GATE U. L. REV. 279, 279 (1999) (citing Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 3, 39 Stat. 874, 875 (1917)). In 1990, Congress removed this impediment from the law in the Immigration Act of 1990. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990). The statute simply eliminated "sexual deviants" from its list of classes of excludable aliens. *Id.*

⁶⁵ The Immigration Act of 1917, Pub. L. No. 64-301, Ch. 29, § 3, 39 Stat. 874, 875 (1917) (repealed by the Immigration and Nationality Act, Pub. L. No. 82-414, Ch. 477, § 403(13), 66 Stat. 279 (1952)).

⁶⁶ See *id.* (listing among the classes of aliens excluded from admission to the United States are "persons of constitutional psychopathic inferiority... [and persons] being mentally or physically defective").

⁶⁷ See James D. Wilets, Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective, 60 Alb. L. Rev. 989, 990 n.1 (1997) at 990 n.1 (defining homosexual as "an individual of either sex with a predominant or exclusive attraction to members of the same sex").

⁶⁸ Jin S. Park, Comment, Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians under U.S. Immigration Policy, 42 UCLA L. Rev. 1115, 1118 (1995).

⁶⁹ See Immigration and Nationality Act, amendments, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (1965) (superseded 1990) (listing "sexual deviation" as a bar to aliens from entering the United States); 8 U.S.C. § 1101(a)(3) (2000) ("The term 'alien' means any person not a citizen or national of the United States."); Laurie M. Cochran, Note, The Changing Tide of Immigration Law: Equality For All?, 26 Ga. J. Int'l & Comp. L. 673, 677 (1997) (recounting a report of the Senate Committee on the Judiciary stating that "the provisions for the exclusions of aliens afflicted with psychopathic personality which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals").

1990, which eliminated the sexual deviation category, the exclusion of homosexual aliens remained in force.⁷⁰

The recent trend of accepting homosexual immigrants under asylum laws reflects an evolution in asylum norms⁷¹ that take into consideration the 1948 Universal Declaration of Human Rights.⁷² In 1967 the United Nations adopted the Protocol to the Status of Refugees.⁷³ While adopted the definition of refugee from the Convention and Protocol in the 1980 Refugee Act.⁷⁴

Judicial-Verdicts in USA

The first successful sexual orientation based asylum case in the United States involved an asylum claim by *Fidel Toboso-Alfonso*, a gay man from Cuba.⁷⁵ His efforts to gain refugee status based on sexual orientation began with the Mariel boat lift

of 1980.⁷⁶ On March 12, 1990, the court granted Toboso-Alfonso refugee status, finding that the "applicant's freedom was and is threatened within the meaning of § 243(h) (1)."⁷⁷ This landmark case led Attorney General Janet Reno to issue an Order in 1994 declaring the decision "as precedent in all issues involving the same issue or issues."⁷⁸ The Toboso-Alfonso decision makes clear that sexual orientation qualifies as membership in a particular social group within the meaning of United States asylum law.⁷⁹

In 1993, after a widely publicized asylum case, a gay Brazilian man, *Marcelo Tenorio*, also won his asylum claim on the basis of his sexual orientation.⁸⁰ Tenorio was placed in proceedings where the E.O.I.R. concluded that "sexual orientation is arguably an immutable characteristic, and one which an asylum applicant should not be compelled to change."⁸¹ On July 26, 1993, Immigration Judge Phillip Leadbetter granted Tenorio asylum.⁸²

Another highly revealed decision involving an asylum claim based on sexual orientation is of *Alla Pitcherskaia*.⁸³ Pitcherskaia was a Russian lesbian who entered the United States in March of 1992 with authorization to remain for six months.⁸⁴ Pitcherskaia's claim for asylum rested on grounds that "she was persecuted and feared future persecution on account of her political opinions in support of lesbian and gay civil rights in Russia, and on account of her membership in a particular social group."⁸⁵ She testified at her hearing that she was often detained by the militia, interrogated, beaten and forced to attend therapy sessions.⁸⁶ Pitcherskaia feared that the militia would carry out

⁷⁰ Fatima Mohyuddin, "United States Asylum Law In The Context Of Sexual Orientation And Gender Identity: Justice For The Transgendered?" *Hastings Women's Law Journal*, Summer 2001 (12 *Hastings Women's L.J.* 387, *388). Pub. L. No. 101-649(d), 8 U.S.C. § 1182(a)(1)(A)(ii) (2000) (removing "physical or mental disorder" from the former nineteen health-related exclusionary categories).

⁷¹ John A. Russ, *The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum Standards*, 4 *U.C. Davis J. Int'l L. & Pol'y.* 29, 47 (1998).at 47 (interpreting United States asylum law as "recognizing the humanity of gay people and the legitimacy of their desire to escape oppression").

⁷² See G.A. Res. 217 (III) A, U.N. Doc. A/14(1), at 138 (1948) (establishing "that everyone has the right to seek and to enjoy in other countries asylum from persecution"); see also *id.* at 136 (proclaiming that "everyone has the right to life, liberty and the security of person").

⁷³ See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 268, 19 U.S.T. 6223, 6225 ("Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,... equal status should be enjoyed... irrespective of the dateline 1 January 1951.... hereto without any geographic limitation..."); See Brian F. Henes, Comment, *The Origin and Consequences of Recognizing Homosexuals as a "Particular Social Group" for Refugee Purposes*, 8 *Temp. Int'l & Comp. L.J.* 377 (1994), at 381 (explaining that "the main effect of the Protocol was to remove the timeline limitation, thereby leaving the international community with a more generic refugee agreement.").

⁷⁴ Fatima Mohyuddin, *supra* note 70 (12 *Hastings Women's L.J.* 387, *390). Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in 8 U.S.C. § 1101(a)(42)(A) (2000)) (incorporating race, religion, nationality, membership in a particular social group or political opinion as a basis for protection).

⁷⁵ See Fatima Mohyuddin, *supra* note 70 (12 *Hastings Women's L.J.* 387, *401). In re *Toboso-Alfonso*, 10 I. & N. Dec. 819 (B.I.A. 1990) (affirming In re *Toboso-Alfonso*, No. A23-220-644 (Immigr. Ct. Feb. 3, 1986)). The original immigration judge denied asylum because of the claimant's two convictions for crimes committed in the United States, but found him eligible for mandatory withholding of deportation to Cuba because of the persecution he would face as a gay man if forced to return.

⁷⁶ In re *Toboso-Alfonso*, 10 I. & N. Dec. 821 (B.I.A. 1990) (receiving parole after the boat lift and subsequently placed in exclusionary proceedings).

⁷⁷ See *Id.* at 823 (noting that the INS does not contest the applicant's homosexuality as an immutable characteristic rendering him a member of a particular social group).

⁷⁸ *Id.* at 819; see also Attorney General Order No. 1895-94 (June 19, 1994).

⁷⁹ Jin S. Park, *supra* note 68 at 1121 (demonstrating that the U.S. may finally grant asylum to homosexuals on account of persecution as a social group).

⁸⁰ See In re *Tenorio*, No. A72-093-558 1, 17 (Immigr. Ct. July 16, 1993) (holding that a reasonable person in the applicant's circumstances would not stop fearing persecution).

⁸¹ *Id.* at 14 (Immigr. Ct. July 16, 1993) (holding that "there exists a voluntary associational relationship among the members, and a common characteristic that is fundamental to their identity as a member of the social group... thus, homosexuals are considered to be members of a particular social group.").

⁸² See Fatima Mohyuddin, *supra* note 70 (12 *Hastings Women's L.J.* 387, *402). *Id.* at 16 (indicating that "the government of Brazil does little to prevent violence against homosexuals by organized anti-gay groups").

⁸³ *Id.* See *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) (reversing the B.I.A.'s denial of the applicant's claim for asylum and withholding of deportation).

⁸⁴ See *Pitcherskaia Id.* at 643 (stating that Pitcherskaia applied for asylum in June of 1992).

⁸⁵ *Id.*

⁸⁶ See *Id.* at 644 (detailing that on two separate occasions she was arrested while in the home of gay friends and taken to

their previous threats and forcibly institutionalize her if she returned.⁸⁷ Pitcherskaia appealed the B.I.A.'s denial of asylum to the Ninth Circuit Court of Appeals.⁸⁸ This denial was issued on grounds that the Soviet Union had changed socially and politically, making it unlikely that she would be subject to persecution upon her return.⁸⁹ The Ninth Circuit addressed the issue of whether the Immigration and Nationality Act requires "an alien to prove that her persecutor harbored a subjective intent to harm or punish."⁹⁰ In reversing and remanding the *B.I.A. decision*, the Court held that "the fact that a persecutor believes the harm he is inflicting 'good for' his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution."⁹¹

Aside from these well-known sexual orientation asylum cases, there have been over sixty other unpublished grants of asylum to homosexuals since 1994, when the Attorney General announced that such claims could be grounds for approval.⁹² One such case involved two gay men who fled Russia in 1990, spent two weeks in France and arrived in Washington, D.C. on tourist visas.⁹³ Their claim for asylum rested on allegations of threats, occurring in the 1980's, by the KGB and local police, who maintained a "pink list" of homosexuals.⁹⁴ Another case concerned *Yaraslov Mogutin*, an openly gay Russian journalist,

who fled Moscow in 1995 with his American partner after facing criminal charges of "malicious hooliganism with exceptional cynicism and extreme insolence."⁹⁵ Mogutin received asylum in New York.⁹⁶ In another successful asylum case, a twenty-three-year-old *Armenian man, Fedetov*, fled to Mexico in December of 1995 and was arrested by the INS while walking across the California border en route to Los Angeles.⁹⁷

In this decade, gays and lesbians as well as transgender peoples are successfully receiving asylum in the United States.⁹⁸ The issue of transgendered applicants has arisen in a few United States asylum cases.⁹⁹

There is an important case of an intersexed applicant from Pakistan¹⁰⁰ who was a well-known female athlete from the North West Frontier Province of Pakistan.¹⁰¹ In 1989, the applicant entered the United States on a visitor visa and had a sex change operation in order to become a male.¹⁰²

The applicant feared being classified as a member of the neuter or "hijra" class upon returning to Pakistan. In an advisory opinion on this applicant's asylum request, the United States Department of State wrote a letter to the INS detailing their findings on the status of hijras.¹⁰³ Following this, a preliminary assessment made by the INS discussed the issues surrounding the classification of the hijras as members of a particular social

prison overnight while her former lover was institutionalized and given electroshock treatment).

⁸⁷ See *Id.* at 645 (explaining that she did not respond to recent "Demands for Appearance" from the Russian militia).

⁸⁸ See *Id.* at 643, see also Laurie M. Cochran, Note, *The Changing Tide of Immigration Law: Equality For All?*, 26 Ga. J. Int'l & Comp. L. 673, 677 (1997) (recounting a report of the Senate Committee on the Judiciary stating that "the provisions for the exclusions of aliens afflicted with psychopathic personality which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals"). (stating that this is the first time that a federal appeals court heard an asylum case based on sexual orientation).

⁸⁹ See Pitcherskaia, 118 F.3d at 643 (stating that "times have changed for gays in Russia in the years since Pitcherskaia left... moreover treatments were intended to 'cure' her, rather than to punish her....").

⁹⁰ *Id.* (finding that the B.I.A. erred in defining persecution).

⁹¹ See Fatima Mohyuddin, *supra* note 70 (12 Hastings Women's L.J. 387, *403.). *Id.* at 648 (remanding the case from the Ninth Circuit to the B.I.A. to determine whether Pitcherskaia's claims are valid under political opinion or membership in a particular social group);

⁹² See William Branigin, *Gays' Cases Help to Expand Immigration Rights; More Than 60 Homosexuals Claiming Persecution Have Been Granted Asylum in U.S.*, Wash. Post, Dec. 17, 1996, at A1 (relaying that by law, "asylum applications and proceedings are kept confidential unless that applicant agrees to release them," in order "to protect the individual's privacy and safeguard relatives and associates in the country of origin"); see also International Gay & Lesbian Human Rights Commission and Lambda Legal Defense & Education Fund, *Asylum Based on Sexual Orientation: A Resource Guide*, § IV, at 3 (representing statistics current through Oct. 15, 1996, of successful asylum claims).

⁹³ *Id.* (receiving asylum in November of 1996).

⁹⁴ See *Id.* (recounting incidents of being harassed, beaten and repeatedly interrogated by police in Russia).

⁹⁵ *Id.*

⁹⁶ See *Id.* (reporting that Mogutin received "anonymous death threats and was branded by a presidential commission as a 'corrupter of public morals'").

⁹⁷ See Fatima Mohyuddin, *supra* note 70 (12 Hastings Women's L.J. 387, *403.) See *Id.* (stating that the police repeatedly harassed and beat him, and that "I knew I could not survive as an Armenian gay in Yoshkar-Ola"); see also Cochran, *supra* note 88, at 673 (describing the contents of Fedetov's affidavit that contained detailed accounts of persecution against homosexuals in Russia).

⁹⁸ See Russ, *supra* note, at 72 (noting that the United States has "granted asylum based on a person's transgendered identity").

⁹⁹ 12 Hastings Women's L.J. 387, *405.

¹⁰⁰ See Jamison Green, Human Rights Comm'n City and County of San Francisco, Investigation into Discrimination against Transgendered People 8 (1994) at 63-64 (defining intersex as a person born with the (full or partial) sex organs of both genders, or with under-developed or ambiguous sex organs). The term intersex replaces the politically incorrect term, hermaphrodite. See *id.*

¹⁰¹ Declaration of X, July 16, 1991. Hijra communities contain both individuals who are born hermaphrodites, and those who undergo an emasculation operation (surgical removal of the penis and testicles). See Serena Nanda, *Neither Man nor Woman: The Hijras of India* xv (1990) (mentioning that his name frequently appeared in the national newspapers under the caption of "Wonder Girl of NWFP").

¹⁰² *Id.*

¹⁰³ See Letter from George B. High, Acting Director, Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs, to Director, Asylum Unit, Immigration and Naturalization Service, International Gay & Lesbian Human Rights Commission (July 6, 1992) (reporting that the hijras can be considered a social group within the meaning of the INA, but concluded that it would be unlikely that the applicant would be forced to join the hijra community if returned to Pakistan).

group for purposes of asylum.¹⁰⁴ This preliminary assessment concluded that hijras are a social group within the meaning of the Immigration and Naturalization Act as a "cognizable group sharing common physical characteristics of being born with genital defects/dual sexuality." In 1992, he was officially granted asylum.¹⁰⁵

In a case of a Transsexual Applicant¹⁰⁶ from Egypt¹⁰⁷: As a post-operative male-to-female transsexual woman. Under Egypt's Islamic law, the applicant as a transsexual faced the same threats targeted against homosexuals.¹⁰⁸ She was granted asylum in 1998 because of her well-founded fear of persecution based on status as a transsexual who received male-to-female gender reassignment.¹⁰⁹

Europe

In accordance with the 1951 Convention on the Status of Refugees (Art.1A(2)), and the Council Directive 2004/83/EC, LGBTI persons seeking asylum due to persecution on grounds of sexual orientation in the EU Member States can be recognised as refugees as belonging to 'a particular social group'.¹¹⁰

The legal framework in the EU Member States thus provides for the possibility that LGBTI persons persecuted on grounds of sexual orientation or gender identity are recognised

as refugees and granted asylum. Subsequently, several LGBTI persons have been granted asylum on these grounds in EU Member States.

The available data shows that asylum has been granted to LGBTI persons in Austria, Belgium, Denmark, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain, Sweden, Czech Republic and the United Kingdom. However, this list is not necessarily exhaustive, since no Member State provides a statistical overview of the number of cases where asylum is granted on grounds of sexual orientation or gender identity. In some Member States (for example Cyprus, France, Germany and Slovakia) official figures do not exist, and immigration authorities in Estonia and Latvia¹¹¹ state that there have been no asylum claims on grounds of sexual orientation or gender identity.¹¹²

Data speaks about the existence of a number of cases in member states. As per that in Belgium at least 116 cases were handled in 2006 (and 33 persons were granted refugee status) and at least 188 in 2007 (and 60 persons were granted refugee status). In Sweden, Migrationsverket [The Swedish Migration Board] estimated in 2002 the number of asylum applicants on grounds of sexual orientation or gender identity to be approximately 300 per year. The Swedish Parliament decided in 2005 that people at risk of persecution on the basis of sex or sexual preference could be granted refugee status (Government Bill 2005/06:06).¹¹³

Britain's approach to refugee claims by lesbians and gay men is notably hostile in comparison with other Western refugee receiving nations. For many years decision makers in the UK refused to accept that those fleeing persecution on the basis of sexual orientation were even capable of being refugees under the terms of the Refugees Convention.¹¹⁴ While receiving nations such as Germany, the USA, Canada, New Zealand and Australia accepted sexual orientation and gender identity as aspects of the particular social group category of the Refugees Convention in the late 1980s and early 1990s¹¹⁵ and the United Nations High

¹⁰⁴ See Assessment Sheet, International Gay & Lesbian Human Rights Commission (stating the questions implicated in this case: "1) Is an individual that is born a hermaphrodite, initially identified socially as a female and later as a male, considered a 'Hijra'? 2) Can the Hijra be considered a social group within the meaning of the INA? 3) Is there a pattern or practice of persecution on account of membership in this social group?").

¹⁰⁵ Fatima Mohyuddin, *"United States Asylum Law In The Context Of Sexual Orientation And Gender Identity: Justice For The Transgendered?"* 12 Hastings Women's L.J. 387, *407.

¹⁰⁶ This applicant feared persecution upon returning to Egypt because the government refused to issue her new identification reflecting her new name and sex.

¹⁰⁷ See Jamison Green, Human Rights Comm'n City and County of San Francisco, Investigation into Discrimination Against Transgendered People 8 (1994) at 66 (defining a transsexual as "anyone who (1) wants to have, (2) has had, or (3) should have a sex change operation," and also including (4) nonsurgical transsexuals).

¹⁰⁸ See Summary of Asylum Claim and Documentation, 1, 3 (1996) (on file with author) (analogizing the situation of transsexuals to that of homosexuals because in Egyptian society both symbolize "a deviation from the sexual norm").

¹⁰⁹ See Fatima Mohyuddin, *supra* note 70 (12 Hastings Women's L.J. 387, *408).

¹¹⁰ Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States European Union Agency for Fundamental Rights (FRA), 2009 Part II: The Social Situation at pg. 96 (cited on 2011, January, 11) Available from: http://www.fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report_Part%202_en.pdf. With Denmark as the exception, as Denmark does not recognise homosexuals or transgender persons as 'particular social groups', insofar as the immigration authorities do not operate with the category of 'particular social group' in legal practice. However, it is possible to grant a residence permit with 'protection status' if the immigration authorities determine a 'risk of execution or inhuman or degrading treatment in the country of origin',

¹¹¹ In Estonia: The Citizenship and Migration Board. In Latvia: The Office of Citizenship and Migration.

¹¹² Homophobia and Discrimination, *Supra* note 110

¹¹³ *Id.*

¹¹⁴ The legal definition of a refugee is drawn from the refugee convention and adopted into domestic law of the receiving nations. Article 1A(2) of the Convention defines a refugee as any person who: "...owing to 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, is unable or, owing to such fear, is unwilling to return to it. 1951 Convention Relating to the Status of Refugees 189 UNTS 150, as amended by the 1967 Protocol Relating to the Status of Refugees 606 UNTS 267. For an overview of the social group category and sexuality in the UK, Canada, USA, New Zealand and Australia, see Walker, 2000.

¹¹⁵ Jenni Millbank (1995) 'Fear of Persecution or Just a Queer Feeling? Refugee Status and Sexual Orientation in Australia' *Alternative Law Journal* 20: 261-265. Kristen Walker (2000) 'Sexuality and Refugee Status in Australia' *International Journal of Refugee Law* 12: 175-211.

Commissioner for Refugees (UNHCR) concurred in 1995¹¹⁶ (UNHCR, 2001; note also the recent Council of Europe directive, 2003), the United Kingdom finally accepted eligibility only in 1999 after some strongly worded obiter was issued by the House of Lords in the gender and particular social group case of *Shah and Islam*¹¹⁷. Since the UK accepted that sexuality could formally qualify under the Convention ground, it has issued extremely restrictive decisions at Adjudicator, Tribunal and Court levels when compared with decisions of other countries such as Canada and Australia.¹¹⁸

UK decision-makers have repeatedly held that asylum seekers are under a duty to protect them by hiding their sexuality. British decision-makers have also been extremely reluctant to hold that criminal sanctions for gay sex are themselves persecutory. Moreover they have frequently failed to discern any relationship between violence against lesbians and gay men and the criminalisation of same-sex sexual relations in the sending country.¹¹⁹

The UK's initial refusal to accept that sexual orientation as an eligible status under the social group category was premised on the basis that sexuality was an association of a private and purely voluntary nature.¹²⁰ In an early decision, the Secretary of State argued that: Homosexuals...are a group but their only common characteristic is a sexual preference which, if it is revealed at all, is normally only revealed in private. A group cannot be a social group if its only common characteristic is so concealed.¹²¹

The Immigration Appeal Tribunal (IAT) has considered the homosexual question with regards to the social group category a number of times:

➤ A male homosexual from Iran raised the question of his homosexuality only when applying for leave to appeal to the Immigration Appeal Tribunal. The point was dismissed without representation.¹²²

➤ A male homosexual from Turkish Cyprus was denied refugee status on the grounds that per se homosexuals could not constitute a social group within the meaning of the refugee definition. The court remained confused on the definition of

certain terms, including the question of discretion and the level of discrimination required to constitute persecution.¹²³

➤ In *Golchin v SSHD*: the IAT found that homosexuals per se do not form a social group. The IAT did not accept that the drafters of the Convention had in their minds persecution suffered under the Nazis when adding particular social group to the definition, despite the fact that the Convention was written to deal with the post war refugee problem. Noting, that this contradicted findings by the German Federal Courts that homosexuals could claim to be a persecuted group in the light of the internment of homosexuals in concentration camps and the findings of the US Immigration and Naturalisation Service that the 1951 Convention was developed with a view to protecting those who had been persecuted by the Nazis, the IAT found that consistency of interpretation of the Convention between signatory states was not necessary, arguing that it was up to each country to decide asylum policy in its own way.¹²⁴ The IAT equated the meaning of social group with that of a minority group and went on to exclude homosexuals from the definition "We think that there is a close approximation of social group to minority group as the term is used in the Convention. Both terms, we think, require characteristics of an historical and cultural nature which homosexuals as a class cannot claim." The IAT thus essentially rendered the category of social group nugatory, as it had no other meaning than that of race or nationality.

➤ In *Vraciu v SSHD*¹²⁵: The IAT found that a male homosexual from Romania did belong to a social group. The tribunal looked at domestic law to decide whether homosexuals were afforded a civil or political status¹²⁶. Homosexuals are treated differently according to the criminal law; there is a great discussion as to the advisability of homosexuals in the armed forces. There is no doubt that there is both an internal and external recognition of those who are sexually orientated in such a way as to form a "group" so identified by that characteristic." The court added that "prosecution may amount to persecution depending on the focus of the prosecution.

➤ In *Jacques* case¹²⁷: In a decision decided the day after *Vraciu*, a differently constituted tribunal found that homosexuals in Jamaica did not constitute a social group. It did not accept that *Golchin* was wrongly decided.

➤ A male homosexual from Syria was granted refugee status on political grounds only, although it was accepted that sexual orientation would increase the risk of severe ill-treatment.¹²⁸

➤ A male homosexual from Iran was granted asylum on the grounds of social group membership.¹²⁹ So this is overall picture of Refugee status of LGBTI in EU members.¹³⁰ Next discussion on Australia.

¹¹⁶ UNHCR (2001) Protecting Refugees: Questions and Answers, (cited on 2011, February, 2) Available from: www.unhcr.ch.

¹¹⁷ *R v Immigration Appeal Tribunal ex parte Shah and Islam v Secretary of State for the Home Department* [1999] 2 AC 629; [1999] 2 All ER 545; [1999] 2 WLR 1015; [1999] Imm AR 283 ('*Shah and Islam*'). Mark Symes (2000) Case law on the Refugee Convention: The United Kingdom's Interpretation in Light of the International Authorities. London: Refugee Legal Centre. Derek McGhee (2001) 'Persecution and Social Group Status' *Journal of Refugee Studies* 14: 20-42.

¹¹⁸ Jenni Millbank, "A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation" 1989-2003, *Social and Legal Studies*, Vol. 14, pp. 116, 2005

¹¹⁹ *Id* at pg. 117

¹²⁰ *Id*. Derek McGhee (2001) 'Persecution and Social Group Status' *Journal of Refugee Studies* 14: 20-42

¹²¹ Jenni Millbank, *supra* note 118 at pg.123. *R v SSHD ex parte Binbasi*, Imm AR 595 [1989]

¹²² *Shewaish* (IAT No 6091) 11 October 1988:

¹²³ *R v Secretary of State for the Home Department, Ex Parte Binbasi* July 20 1989 (Imm AR 595 (QBD):

¹²⁴ (7623) 1991 5 Immigration and Nationality Law and Practice 97):

¹²⁵ (IAT No 11559) NOV 1994

¹²⁶ In the society of the UK, sexual orientation has not been recognised as identifying a person within a group having meaning in society

¹²⁷ (IAT No 11580) NOV 22 1994

¹²⁸ *Gelab v Immigration Officer Heathrow* No HX/75712/94 at 2 SEPT 5 1995:

¹²⁹ *Sadegh* No HX/75394/95 (Adjudicator OCTOBER 1995):

¹³⁰ Elena Research Paper, *Supra* note 47

Australia

Australia signed the 1951 Convention in 1954 and the 1967 Protocol in 1973 moreover incorporated it into national legislation in the Migration Acts of 1958 and 1990. The primary determination of refugee cases is by a case officer from the Department of Refugee Status, section of the Department of Immigration and Ethnic Affairs, with appeals to the Refugee Tribunal and then the judiciary. (The Refugee Review Tribunal replaced the Refugee Status Review Committee).¹³¹

In December 2003 the High Court of Australia handed down its decision in S395 and S396, in which two Bangladeshi gay men were seeking refugee status on the ground of membership of a particular social group.¹³² S395 and S396 was the first decision of an ultimate appellate court anywhere in the world to deal with a claim to refugee status based on sexual orientation, and remains so to date.¹³³ By a narrow majority of 4 to 3, the High Court held that the tribunal decision-maker had erred in dividing the particular social group into two subsets of 'discreet' and 'open' homosexuals and in failing to consider firstly the future-focused question of what would happen if the applicants were in fact discovered to be gay and secondly whether the need to act 'discreetly' to avoid the threat of serious harm itself constituted persecution.¹³⁴ The majority emphatically rejected the notion that decision-makers could 'expect' or had any jurisdiction to 'reasonably require' refugee applicants to

¹³¹ *Id.*

¹³² Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473

¹³³ Article 1A(2) of the 1951 Convention Relating to the Status of Refugees, 189 UNTS 150, as amended by the 1967 Protocol Relating to the Status of Refugees, 606 UNTS 267 defines a refugee as any person who 'owing to 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, is unable or, owing to such fear, is unwilling to return to it'. Sexual orientation was accepted as the basis for a particular social group claim in most major refugee receiving nations by the mid-1990s: *See, e.g.,* Re R (UW) CRDD No 501 (Quicklaw) [1991], IRB Reference U91-03331 (7 October 1991); Ward v. Attorney-General (Canada) 2 SCR 689 (Canada) [1993]; Matter of Toboso-Alfonso, 20 I&N Dec 819 (BIA 1990) (USA); N93/00593 [1994] RRTA 108 (25 January 1994) (Australia); Applicant A v. Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 (Australia); Vraciu v. Secretary of State for the Home Department [1994] UKIAT 11559 (21 November 1994); R v. Immigration Appeal Tribunal, ex parte Shah [1999] 2 AC 629 (HL) (United Kingdom).

¹³⁴ Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473 per McHugh and Kirby JJ, para 18. The earlier levels of judicial review are: Kabir v. Minister for Immigration and Multicultural Affairs [2001] FCA 968 (Federal Court, 26 July 2001) and Kabir v. Minister for Immigration and Multicultural Affairs [2002] FCAFC 20 (Full Federal Court, 22 February 2002). The original tribunal level decision is RRT Reference N99/28381 and N99/28382 (Unreported, 5 February 2001), but this is not publicly available.

'co-operate in their own protection' by concealing their sexuality.¹³⁵

Prior to it the situation of granting asylum on the basis of sexual orientation was varies according to claim under grounds. Some time it was accepted¹³⁶ and other time it was denied.¹³⁷

In *Singh v. Minister for Immigration and Multicultural Affairs*¹³⁸ the Tribunal accepted that the applicant's homosexuality meant that he was a member of a particular social group within the meaning of Article 1A (2) of the Convention. That has been accepted by the Court on a number of occasions.¹³⁹

Indian Legal Stand

The status of sexual minority in India is no way near to respectful and it has been proved by many studies.¹⁴⁰ India has no definite data about the population of sexual minority, so that they often live in secrete world. More so Due to the law, societal values and mainstream culture being unfavorable towards sexuality minorities, very few can afford to be open about their (so called) 'illicit' sexual orientations.¹⁴¹

¹³⁵ Jenni Millbank, "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom", (2009) 13 (2/3) International Journal of Human Rights. Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473. The two majority judgments are by Gummow and Hayne JJ jointly and McHugh and Kirby JJ jointly.

¹³⁶ *Morato v Minister of Immigration, Local Government and Ethnic Affairs* 111 ALR 417 Fed Ct Austl 1992, *Chan v Minister for Immigration and Ethnic Affairs* 1989 169 CLR 379 (HCA) Refugee Appeal No 2254/94 Re HB 21 September 1994: N93/2240 21 February 1994 Sydney, RRT No N93/00846 Decision 8 March 1994 Sydney, RRT No N94/06573 Decision May 11 1995, RRT No BN94/03199 Decision of July 7 1995

¹³⁷ N93/00593 1 February 1994 Sydney: RRT No V95/02999 Decision 22 April 1995 Melbourne, RRT No N94/05400 Decision of September 28 1995, RRT No V95/03188 Decision of October 12 1995, Decision of 25 January 1996 RRT No N95/08735 at 6-7

¹³⁸ 27 November 2001.

¹³⁹ Advisory Opinion By UNHCR, *Supra* note 29. See also *Minister for Immigration and Multicultural Affairs v Gui* [1999] FCA 1496 ("Gui"); "*Applicant LSLs*" v Minister for Immigration and Multicultural Affairs [2000] FCA 211 ("*Applicant LSLs*"); *Minister for Immigration and Multicultural Affairs v "B"* [2000] FCA 930 ("*B*"); *Minister for Immigration and Multicultural Affairs v Guan* [2000] FCA 1033 ("*Guan*"); and *MMM v Minister for Immigration and Multicultural Affairs* [1998] 90 FCR 324 ("*MMM*"). The High Court (McHugh and Kirby JJ) also indicated acceptance of that proposition in *Guo Ping Gui v Minister for Immigration and Multicultural Affairs* (2000) 21(11 LegRep SL3b, when refusing special leave to appeal from the Full Court of the Federal Court in Gui.

¹⁴⁰ *See*, PUCL, Karnataka, Human Rights violations against the transgender community a study of kothi and hijra sex workers in Bangalore, India, September 2003 online at <http://pucl.org/topic/gender/2003/sexual-minorities.pdf> (visited on 11/1/2011), *See also*, Human Rights Violations against Sexual Minorities in India PUCL-K, 2001 A Report of PUCL-Karnataka (February 2001)

¹⁴¹ Human Rights Violations against Sexual Minorities in India PUCL-K, 2001 A Report of PUCL-Karnataka (February 2001)

Homosexuals are generally shunned, ostracized, harassed, and suppressed. A 2002 survey estimated that one-sixth of India's male and female population was homosexual. Although the more liberal sections of certain cities (such as Mumbai, Bangalore, Delhi and Kolkata) appear to be becoming more tolerant of homosexuality, generally gay life is still largely suppressed. Since marriage is highly regarded in India, it is believed that most gay people stay in the closet or risk being disowned by their families and society.¹⁴²

However, India has repeatedly declined to join either the Refugee Convention or its 1967 Protocol. In addition, India has resisted demands for a national legislation to govern the protection of refugees. In doing so, India has met the many refugee influxes into its territory through an ad hoc system of executive action which is determined by the government's policy towards the country of origin.¹⁴³

As no specialised statutory framework is there, India relies on the Foreigners Act, 1946¹⁴⁴ to govern the entry, stay and exit of foreigners' in India. Its continued application in independent India for more than sixty years after the end of the war can only be seen as an indication of the government's desire to retain almost absolute powers to deal with foreigners.¹⁴⁵

Constitution of India also protects the foreigners to some extent while in India. By providing protection of the equality under Article 14 and the protection given under Article 21.¹⁴⁶ In addition, foreigners are also entitled to the protection of some of the rights recognised in Article 20¹⁴⁷, Article 22¹⁴⁸, Articles 25 – 28,¹⁴⁹ and, Article 32.¹⁵⁰

Refugees who are not extended direct assistance by the Indian Government are free to apply to the UNHCR for recognition of their asylum claims and other assistance. To this end, the UNHCR is mandated by its parent Statute to conduct individual refugee status determination tests and issue certificates of refugee status to those who fulfill the criteria of the Refugee Convention. The Refugee Certificates issued by the UNHCR are not formally recognised by the Indian Government, making them legally unenforceable in India.¹⁵¹

The ambivalence of India's refugee policy is sharply brought out in relation to its treatment of the UNHCR. While no formal arrangement exists between the Indian government and the UNHCR, India continues to sit on the UNHCR's Executive Committee in Geneva. Furthermore, India has not signed or ratified the Refugee Convention. This creates a paradoxical and rather baffling situation regarding the UNHCR where India sits on its Executive Committee and allows the UNHCR to operate on its territory, but refuses to sign the legal instrument that brought the organisation into existence.¹⁵²

Thus, if claim based on sexual orientation comes for consideration, Indian laws are quite uncertain. On the issue of sexual orientation based Indian humanitarian law is quite silent and claims may be rejected due to rigid stereotyping mentality towards LGBTI. Therefore India needs to review its ambivalent refugee law policy, evolve a regional approach and enact rules or legislation to protect persecuted refugees. This is one step towards supporting a humanitarian law for those who need it. As a refugee-prone area, South Asia requires India to take the lead to devise a regional policy consistent with the region's needs and capacity to absorb refugees under the conditions of global equity.

Human Rights of Refugees

Although freedom of sexual orientation is not explicitly recognized as an international human right, it is now well established that LGBTI persons are entitled to all human rights on an equal basis with others. The Preamble to the 1951 Convention reiterates the principle that "human beings shall enjoy fundamental rights and freedoms without discrimination". The principle of non-discrimination is also enshrined in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights¹⁵³ ("ICCPR"), and in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights¹⁵⁴ ("ICESCR").

The recognition of gender identity as one of the universally protected discrimination grounds has also been voiced by the UN High Commissioner for Human Rights: "Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bisexual, and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights".¹⁵⁵

¹⁴² Refugee Review Tribunal (RRT) Research Response, Research Response Number: IND31979, India, 16 July 2007, (cited on 2011, January, 24) Available from: <http://www.unhcr.org/refworld/pdfid/4b6fe234d.pdf>. (India: Lonely Planet Travel Survival Kit 2003, Lonely Planet Publications, pp 121-2)

¹⁴³ Bhairav Acharya "The Law, Policy And Practice Of Refugee Protection In India", (cited on 2011, February, 24) Available from:

<http://www.pambazuka.org/images/FRLANNovember2010.pdf>

¹⁴⁴ Section 2(a) of the Act defines a 'foreigner' as "a person who is not a citizen of India", thus covering all refugees within its ambit as well.

¹⁴⁵ *Id.*

¹⁴⁶ Right to life & liberty. Constitution of India

¹⁴⁷ The Right against Prosecution Under Retrospective Penal Law; The Right Against Double Jeopardy; and, The Right Against Self-Incrimination. Constitution of India

¹⁴⁸ Rights upon Arrest or Detention. Constitution of India

¹⁴⁹ The Right to Freedom of Conscience and The Free Practice and Propagation of Religion

¹⁵⁰ The Right to Move the Supreme Court for Enforcement of the Rights given under Article 14, 21, 20, 22, 25-28.

¹⁵¹ Bhairav Acharya, *supra* note 143

¹⁵² *Id.*

¹⁵³ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49. (cited on 2011, February, 25) Available from: <http://www2.ohchr.org/english/law/ccpr.htm>.

¹⁵⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27 (cited on 2011, February, 25)) Available from: <http://www2.ohchr.org/english/law/cescr.htm>.

¹⁵⁵ Statement of the Office of the UN High Commissioner for Human Rights to the International Conference on LGBT human rights, Montreal 26 July 2006, (cited on 2011, February, 25))

UN Special Procedures and treaty bodies have also applied this approach in their work. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has highlighted several cases of killings of transgender persons and the Special Rapporteur on torture has reported serious abuses against transgender individuals in various country reports. The UN Committee against Torture has specifically addressed the issue of abuses against transgender activists. Moreover, the UN High Commissioner for Refugees has addressed problems transgender persons encounter when applying for asylum or being recognised as a refugee, for example on occasions where a transgender individual is asked by the authorities to produce identity documents and his or her physical appearance does not correspond to the sex indicated in the documents.¹⁵⁶

The special procedures, treaty bodies and the High Commissioner for Refugees have requested states to take into account persecution on the grounds of sexual orientation and gender identity in the process of determining refugee status.¹⁵⁷ In a large scale international effort to promote international standards on sexual orientation and gender identity, a group of distinguished experts in international human rights law published in 2007 the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity.¹⁵⁸ Principal 23¹⁵⁹ exactly related to asylum rights.

Available from:
www.unhcr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C?opendocument.

¹⁵⁶ UNHCR Guidance Note, *Supra* Note 9

¹⁵⁷ Sexual Orientation and Gender Identity in Human Rights Law, References to Jurisprudence and Doctrine of the United Nations Human Rights System, at pg. 13, ISBN: 92-9037-114-5 Geneva, October 2006 Switzerland (cited on 2011, February, 25)) Available from:
http://www.icj.org/IMG/UN_References.pdf.

¹⁵⁸ The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2007, (cited on 2011, February, 27) Available from:
http://www.yogyakartaprinciples.org/principles_en.htm

¹⁵⁹ Principle 23: The Right to Seek Asylum: Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity. States shall: Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum; Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity; Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person's sexual orientation or gender identity, (cited on 2011, February, 27) Available from
http://www.yogyakartaprinciples.org/principles_en.htm

Violence taking place in some countries against lesbian, gay, bisexual or transgender (LGBTI) persons, including killings, "social cleansing", torture and ill-treatment, impairs the right to life, the right to be free from torture and cruel, inhuman or degrading treatment or punishment, and the right to security and is also a matter of concern of treaty bodies and special procedures of the former Commission. Victims of criminal offences suffer from discrimination because of their sexual orientation and gender identity, as they are often perceived as less credible by law enforcement agencies and police officials frequently show prejudice towards such persons.¹⁶⁰

The development of this sexual orientation and gender identity-related human rights legal doctrine can be categorized as follows: (a) non-discrimination, (b) protection of privacy rights and, (c) the ensuring of other general human rights protection to all, regardless of sexual orientation of gender identity.¹⁶¹

As a humanitarian globe, we should not be ashamed to paraphrase the words of Emma Lazarus by saying: Give me your gays, your lesbians and your victims of gender violence yearning to breathe free of sexual persecution; "I lift my lamp beside the golden door."¹⁶²

Conclusion

Doctrinally, International human rights instruments protect everybody without discrimination. But neither laws nor society protect Lesbian, Gay, Bisexual, Transgender and Intersex persons. More so, in most of the national laws and society both do not understand the difference between Sex, Gender and phenomenon related to that. Recoganzation to binary gender system *i.e.* male and female, frequently result in violence against those who dare to step outside of the strict "gender binary." Many countries around the world continue to criminalize same-sex sexual relations.

As paper clearly reflects that otherwise different sexual orientation people *i.e.* LGBTI, face hardship, persecution, threats and often death when they try to break (Sex/Gender Binary) socio-legal norms. They are subjected to abuse, attacks, and torture, experience a high degree of discrimination, intolerance and outright violence and indeed killings because of who they are or are perceived to be. The stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. However, ill-treatment of persons due to their different sexual orientation and gender identity continues to be seen as a highly personal or hidden form of persecution.

International and National developments in sexual orientation case laws clearly show that LGBTI persons may be

¹⁶⁰ Statement of the Office of the UN High Commissioner for Human Rights, *Supra* note 155

¹⁶¹ Michael O'Flaherty & John Fisher, *Supra* note 15 at pg. 214

¹⁶² In 1903, the following poem by Emma Lazarus was inscribed at the base of the Statue of Liberty:

"Give me your tired, your poor,
 Your huddled masses yearning to breathe free,
 The wretched refuse of your teeming shore.
 Send these, the homeless, tempest-tost to me.
 I lift my lamp beside the golden door!"

Leonard Birdsong, (2008) "A Legislative Rejoinder To "Give Me Your Gays, Your Lesbians, And Your Victims Of Gender Violence, Yearning To Breathe Free Of Sexual Persecution..." William Mitchell Law Review, Vol. 35:1, pp 197-225

recognized as a “particular social group” and, as such, are entitled to protection under the 1951 Convention. Refugee laws should give recognition to their plight and provide them with a safe home.

Refugee claims based on sexual orientation often rests on the credibility of the applicant and it is difficult for them to provide related proof.

It is, thus, crucial that assessments of such claims be conducted in a sensitive and appropriate manner by decision-makers, those who specifically trained on these issues. Although homosexuals continue to face great difficulty in meeting the strict standards for obtaining asylum, the developments in asylum law during this decade reveal increasing recognition for their human rights. Greater awareness of issues such as sexual orientation and gender may also require.

Suggestion:

1. Rigid sex and gender binary system should be broken down and more flexible & scientific system should be adopted to identify individual sexual/gender identity and orientation.
2. Presently, LGBTI protection seekers are invisible, so the need for a clear and transparent asylum system is required.
3. There is a need for practical instructions as to how asylum claims are processed from persons who are persecuted because of their Sexual orientation/gender identity. Such instructions should give direction to concerning asylum officers how to conduct interviews in a LGBTI sensitive way. Such guidance is

also needed for situations in which a transgender person arrives with an identity document which does not indicate the preferred gender.¹⁶³

4. Countries should develop guidelines for the treatment of LGBT asylum seekers and for the handling of issues of sexual orientation/gender identity in the procedures. In this respect authorities can be guided by the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity published on 21 November 2008, which is particularly useful.¹⁶⁴

5. Countries should ensure that the public officials who handling LGBTI immigrants and asylum seekers are aware of issues of sexual orientation and gender identity and appropriately trained to deal with these persons.

6. Countries should pay particular attention to the special needs and issues of LGBTI persons held in detention centers.¹⁶⁵

¹⁶³ Human Rights and Gender Identity, *Supra* note 62 at 16.

¹⁶⁴ Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States European Union Agency for Fundamental Rights (FRA) Part II: The Social Situation at 16 (cited on 2011, February, 27) Available from: http://www.fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report_Part%202_en.pdf.

¹⁶⁵ *Id.*