The Nebulous Nexus Between Sexual Orientation and Membership in a Particular Social Group

Benjamin Perryman, Deborah Morrish, and Abbas Kassam[1]

Prepared for the Human Rights Nexus Working Group meeting at the 10th World Conference of the International Association of Refugee Law Judges, Tunis, Tunisia, October 22-24, 2014.

Introduction

Globally, LGBTQ persons are frequently subject to violence, involuntary institutionalization, shock therapy, penal punishment, and death.[2] These acts of persecution are often perpetuated by state officials or with the implicit acquiescence of the state.[3] As a result of this persecution, many LGBTQ persons are forced to flee his or her home state in search of safe haven.

The refugee protection regime is one migration option available to LGBTQ persons. However, "refugee law requires that there be a nexus between who the claimant is or what she believes and the risk of being persecuted in her home state."[4] Neither the *1951 Refugee Convention Relating to the Status of Refugees* (Refugee Convention) nor the *1967 Protocol Relating to the Status of Refugees* (Refugee Protocol) include sexual orientation as an explicit nexus ground.

Nonetheless, in a significant number of states, refugee jurisprudence has advanced to recognize LGBTQ persons as "members of a particular social group." This establishes the necessary nexus and allows for LGBTQ persons to potentially make successful refugee claims where all the other components of the definition of refugee are met. These changes in refugee law are a relatively recent

1 Perryman is a JSD candidate at Yale Law School. Morrish is Acting Deputy Chairperson at the Refugee Appeal Division of the Immigration and Refugee Board of Canada. Kassam is a Law Clerk at the Federal Court (Canada). All errors are the authors' own.

2 Suzanne B. Goldberg, "Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men," (1993) 26 *Cornell Int'l LJ* 605, 605-606.

3 *Ibid*.

4 James C Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014), 362.

part of a broader recognition of LGBTQ rights in international law and the constitutional jurisprudence of a number of states. While the nexus between sexual orientation and refugee status is now firmly established in a number of states,[5] discord remains on what nexus ground should apply and how some grounds, specifically "membership of a particular social group," should be defined.[6]

The purpose of this discussion paper is to examine the somewhat nebulous nexus requirement in LGBTQ refugee claims. Part I of the paper briefly reviews the historical recognition of LGBTQ rights in international law, more generally, and the advancements that have been made to include protections for sexual orientation. Part II explicates the meaning of "membership of a particular social group" found within the Refugee Convention, and discusses the different interpretations of this phrase that have emerged in refugee law. Part III comparatively examines the leading case law in this area from a selection of states. We end with a discussion of the problems posed by current interpretations of "social group." We argue that interpretations of the meaning of "social group" should return to a focus on innateness or that which it is unreasonable to ask a person to change. We also suggest that there may be room to use other nexus grounds, such as political opinion or religion, to ground LGBTQ refugee claims.

Part I – The Increasing Recognition of LGBTQ Rights Under International Law

The Universal Declaration of Human Rights (UDHR) declares that all the rights and freedoms set forth in it are enjoyed by everyone "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[7] Sexual orientation is not mentioned in any of the foundational documents of international human rights law.[8] That being said, historically, sexual orientation has been included under other grounds and there is a relatively recent trend towards the increased protection of LGBTQ persons. In this part of the

5 Alice Edwards, "X, Y and Z: The 'A, B, C' of Claims based on Sexual Orientation and/or Gender Identity?" (Paper presented at the Expert Roundtable on asylum claims based on sexual orientation or gender identity or expression, Brussels, Belgium 27 June 2014).

6 Erik D Ramanathan, "Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence" (1996) 11 *Geo Immigr LJ* 1.

7 Universal Declaration of Human Rights, G.A. Res. 217 A (Ill), U.N. Doc.A/RES/217A(III) (Dec. 10, 1948).

8 Douglas Sanders, "Human Rights and Sexual Orientation in International Law" *International Journal of Public Administration*, (2002) vol. 25, iss.1. pp. 13.

paper we provide a brief and selective overview of sexual orientation protection in international law. Our focus is on three sources of international law: (1) treaties, specifically the *International Covenant on Civil and Political Rights*, (2) statements made at international conferences and statements or resolutions made at meetings of United Nations Bodies or the United Nations General Assembly, and (3) regional human rights treaties and jurisprudence. As will be seen, international law provides less than complete protection to LGBTQ persons as a human right.

International Covenant on Civil and Political Rights (ICCPR)

The *ICCPR* offers various civil and political rights protections. States that have signed on to the treaty are required to make periodic reports to the United Nations Human Rights Committee (Committee) reporting on their compliance with the provisions of the *ICCPR*. If states have signed onto the Optional Protocol, then individuals can send a "communication" to the Committee alleging a breach of *ICCPR*.[9]

Hertzberg v. Finland (*Hertzberg*)[10] was the first decision of the Committee with respect to sexual orientation. Mr Hertzberg alleged that Finnish law interfered with the right of freedom of expression and information, as laid down in article 19 of the *ICCPR,* "by imposing sanctions against participants in, or censoring, radio and TV programmes dealing with homosexuality." At the heart of the dispute was a Finnish penal law that prohibited the encouragement of indecent behaviour between persons of the same sex. Finland argued that the law reflected the prevailing moral standards in Finland. The Committee found that freedom of expression was limited by Finish law but that it was within Finland's allowable discretion given that "...public morals differ widely [and] [t]here is no universally applicable common standard."

In 1994, two years after *Hertzberg* was decided, Nicholas Toonen brought a challenge to the criminal prohibitions of homosexual activity in Tasmania. All of the other jurisdictions in Australia had decriminalized homosexual activity, and the government of Australia was critical of the Tasmanian law. Mr. Toonen argued that the criminal prohibition was contrary to privacy and equality rights provided for in articles 17 and 26 of the *ICCPR*. Since "sexual orientation" was not an enumerated

9 Sanders pp. 29-30.
10 *Hertzberg et al v. Finland*: Communication No. 61/1979, UN Doc CCPR/C/15/D/61/1979 (1982).

ground under article 26[11] it was argued that it could fall under "other status" or "sex" which were enumerated grounds because one of the laws discriminated against only gay men and not lesbians. Tasmania argued a moral basis for the laws. It also argued that the laws were "partly motivated by a concern to protect Tasmania from the spread of HIV/AIDS, and that the laws are justified on public health and moral grounds."

The Committee quickly rejected the HIV/AIDS argument in *Toonen v. Australia (Toonen)*[12] because the Australian government conceded that criminalizing such behaviour would likely hinder public health programs. The Committee found for Mr. Toonen on the basis of paragraph 1 of article 17 which provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." The Committee found that adult consensual sexual activity in private is covered by the concept of "privacy," and that Mr. Toonen was affected by the continued existence of the Tasmanian laws, which continuously and directly interfered with his privacy, despite their lack of recent enforcement. Moreover in contrast with its decision in *Hertzberg* the Committee retreated from the moral standards defence:

> The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy.

Since the Committee found a violation of article 17, it did not need to consider whether there was also a violation of article 26, but it did state that "sexual orientation" would fall under "sex" in article 26.

It has been said that *Toonen* was the first recognition of sexual orientation rights on a truly international level[13] and that the Committee had explicitly recognized that sexual rights were human rights worthy of protection.[14] However, others have observed that the decision is of limited value.

---

11 Article 26 provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

12 *Toonen v. Australia: Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992* (1994).

13 Sarah Joseph, "Gay rights under the ICCPR: Commentary on Toonen v. Australia". *University of Tasmania Law Review*, (1994) vol.13, iss. 2, pp. 392-410.

14 Lucy Morgan. "Sexual and Gender Rights and the United Nations Human Rights Framework: Towards a Resolution of the Debate?" (Aug. 3, 2009) (M.A. dissertation, The University of Sydney) pp 8, available at

Willet argues that by protecting sexual orientation rights under privacy rights, no new rights were created and no effort was made to address the social nature of LGBTQ rights.[15] He observes that *Toonen* did not expand sexual orientation rights to the public sphere or create a separate ground of protection for sexual orientation.

Arguably sexual orientation rights took a significant blow on the international stage in 2002 with the Committee's decision in *Joslin et al v. New Zealand* (*Joslin*).[16] In *Joslin*, a lesbian couple challenged New Zealand's prohibition of same-sex marriage. The communication was brought under articles 23 (right to marry) and 26 (equality) of the *ICCPR*. The Committee held that the language of article 23, "The right of men and women of marriageable age to marry and to found a family shall be recognized," only required states to recognize opposite-sex and not same-sex marriage because the treaty used the specific phrase "men and women" rather than general language found elsewhere in the text. The Committee also held that the law prohibiting same-sex marriage did not amount to discrimination under article 26 as infringing equality.

In 2003, the equality protection in article 26 was used as a valid ground of protection of sexual orientation rights in *Young v. Australia* (*Young*).[17] In *Young*, the Committee held that Mr. Young faced discrimination on the basis of sexual orientation when he was denied his deceased same-sex partner's pension. It held that Australia had failed to provide a reasonable and objective reason for the discrimination. Of interest, the Committee compared and contrasted Mr. Young and his same-sex partner with unmarried heterosexual partners in reaching its decision finding that there was no basis for entitling non-married heterosexual couples while excluding non-married same-sex couples.

International Conferences, Statements, and Resolutions

Sexual orientation rights have also increasingly been at the forefront of UN World Conferences. In 1993, at the UN World Conference on Human Rights held in Vienna, LGBTQ organizations for the first time became accredited to participate in such forums.[18] In drafting the final statement on the

---

http://ses.library.usyd.edu.au//bitstream/2123/5323/1/DISSERTATION_LMorgan.pdf

15 Graham Willett, "Liberalism and its Limits". In *Living Out Loud: A History of Gay and Lesbian Activism in Australia* (St. Leonards: Allen & Unwin, 2000) pp. 19-30.

16 *Joslin v. N.Z.*, No. 902/1999, U.N. GAOR Hum. Rts. Comm., UN Doc. CCPR/C/75/D/902/1999 (2002).

17 *Young v. Austl.*, No. 941/2000, U.N. GAOR Hum. Rts. Comm., U.N. Doc. CCPR/C/78/D/941/2000 (2003).

18 Wayne Morgan and Kristen Walker, "Tolerance and Homosex: A Policy of Control and Containment". *Melbourne*

Vienna conference, a committee from Canada proposed adding "sexual orientation" to an equality paragraph that listed enumerated grounds of discrimination. This proposal was met with opposition, and the final statement only included a general prohibition on discrimination without enumerated grounds.[19]

The Vienna conference statement did address the importance of eliminating violence against women, including all forms of sexual harassment.[20] The statement goes on to condemn many forms of sexual violence including systematic rape, sexual slavery, and forced pregnancy. Although there is no explicit mention of sexual orientation, this statement is considered by some to be a progression on the international stage, as it includes sexual rights as part of human rights.[21]

This trend continued at the 1994 International Conference on Population and Development in Cairo. In the Platform of Action at the Cairo Conference, an acknowledgement of the "diversity of family forms" was included, which has been interpreted as an implicit understanding that family units can go beyond heterosexual partnerships[22] though this interpretation has been met with serious opposition.[23]

Sexual orientation rights were again considered at the Fourth World Conference on Women held in Beijing in 1995. Canada again proposed including "sexual orientation" as a ground of discrimination against women. This sparked heated debate, leading to the first real substantive discussion of sexual orientation in a UN forum.[24] Ultimately, explicit mention of sexual orientation as a ground of discrimination was not included.[25]

In 2003, Brazil presented a resolution on sexual orientation and human rights to the then, UN Commission on Human Rights. The resolution was met with considerable backlash and was eventually

---

University Law Review, (1995) vol. 20, pp. 214.

19 Sanders pp. 27.

20 "Vienna Declaration and Program of Action". *World Conference on Human Rights*, 14-25 June 1993, Vienna, Austria. Office of the United Nations High Commissioner for Human Rights.

21 Rosalind Petchesky, "Sexual Rights: Inventing a Concept, Mapping an International Practice". In Parker, R., Barbosa, R. M. & Aggleton, P., *Framing the Sexual Subject: The Politics of Gender, Sexuality and Power,* (Berkeley: University of California Press, 2000) pp. 84.

22 "Program of Action of the International Conference on Population and Development". *International Conference on Population and Development*, 5-13 September 1994, Cairo, Egypt. United Nations Population Fund; Morgan pp. 11

23 Morgan pp. 12.

24 Elizabeth Kukura "Sexual Orientation and Non-Discrimination". *Peace Review* (2002) vol. 17, pp. 183.

25 Sanders pp. 28.

abandoned in 2005. The failed resolution did however increase awareness around sexual orientation rights and encouraged NGOs to engage in UN processes.[26]

In response to the failed resolution New Zealand called upon states to issue a joint statement recognizing and condemning discrimination on the basis of sexual orientation. The statement was supported by 54 states, and marks the first statement acknowledging sexual orientation and gender rights at the UN.[27]

In 2007, a group of human rights experts met in Yogyakarta, Indonesia to discuss a statement on sexual orientation and gender rights. The outcome of the meeting was a statement known as the Yogyakarta Principles, which purports to be a set of international legal principles dealing with human rights violations on the basis of sexual orientation and gender identity.[28]

The Yogyakarta principles include legal frameworks on human rights, non-discrimination, human and personal security, economic, social, and cultural rights, freedom of expression, and freedom of movement and asylum. The Yogyakarta Principles also contain recommendations for UN bodies and NGOs.

In 2008, the UN General Assembly issued a declaration entitled the Statement on Human Rights, Sexual Orientation and Gender Identity (SOGI Statement).[29] The SOGI Statement represents the first statement of its kind at the UN General Assembly level. It contains statements regarding the civil, political, economic, social and cultural rights of LGBTQ people. Sixty-six countries signed onto the SOGI Statement, and fifty-seven states issued an anti-LGBTQ statement.[30]

In 2011, the UN Human Rights Council issued a "Joint Statement on Ending Acts of Violence Related to Human Rights Violations Based on Sexual Orientation and Gender Identity."[31] Eighty-four

---

26 Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles". *Human Rights Law Review*, (2008) vol. 8, iss. 2, pp. 230.

27 *Ibid.*

28 Yogyakarta Principles (2007). *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity.

29 U.N. GAOR, Statement on Human Rights, Sexual Orientation and Gender Identity, U.N. Doc. A/63/635 (Dec. 18, 2008).

30 *U.N.: General Assembly Statement Affirms Rights for All,* Amnesty International (Dec. 18, 2008), http://www.amnesty.org/es/library/asset/IOR40/024/2008/en/269del 6 7 -dlO 7 -11 dd-984efdc7ffcd27a6/ior400242008en.pdf. *243 Statement on Human Rights,*

31 Press Release, U.S. Dep't of State, Joint Statement on the Rights of LGB Persons at the Human Rights Council, (Mar.

states signed on to the statement. Later in 2011, the Council passed a resolution on "Human Rights, Sexual Orientation and Gender Identity."[32] The Resolution passed by a vote of twenty-three to nineteen, with three abstentions.

In 2012 the UN General Assembly passed a resolution "Condemning Extrajudicial Summary or Arbitrary Executions."[33] The resolution offers protection from extrajudicial, summary or arbitrary executions on the basis of sexual orientation and gender identity. This resolution passed by a vote of one-hundred-and-eight to one, with sixty-five abstentions.

In September of 2014, the UN Human Rights Council passed another resolution expressing "grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity".[34] The Resolution called for the UN High Commissioner for Human Rights to update a 2012 report on "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity." The Resolution passed by a vote of twenty-five to fourteen, with seven abstentions.

These statements and resolutions show a general trend at the international level of increased protection of LGBTQ people. But they are by no means perfect. The SOGI Statement was very comprehensive; however, it is only a statement, not a resolution and was met with considerable opposition. The 2011 Human Rights Council resolution was limited in its support and only represented the views of the states who were part of the Council. The 2012 UNGA resolution is limited because of its very narrow scope of protection for LGBTQ people (essentially, just protection from violence).[35] The 2014 Human Rights Council resolution is again a step in the right direction, but only calls for the updating of a report.

22, 2011), http://www.state.gov/r/palprs/ps/2011/03/158847.htm.

32 Human Rights Council Res, 17/19, Human Rights, Sexual Orientation and Gender Identity, 17th Sess., May 30-June 17, 2007, U.N. Doc. A/HRC/RES/17/19 (July 14, 2011).

33 U.N. GAOR, Extrajudicial, Summary or Arbitrary Executions, 67th Sess., U.N. Doc. A/C.3/67/L.36,A/C.3/67/L.36 (Nov. *9,* 2012).

34 Human Rights Council Res, 27/L.27, Human Rights, Sexual Orientation and Gender Identity, 27th Session, Sept 8-26-, 2014, U.N. Doc A/HRC/27/L.27.Rev.1 (Sept. 24, 2014).

35 Xavier Persad, "An Expanding Human Rights Corpus: Sexual Minority Rights as International Human Rights" 20 *Cardozo J.L. & Gender* 337 2013-2014 pp 366-368.

Regional Human Rights Treaties and Jurisprudence

A selective review of the European Court of Human Rights jurisprudence shows a robust and progressive trend toward recognition of LGBTQ rights under the *European Convention on Human Rights*. The court appears to offer greater recognition and protection of minority sexual orientations than is available through the UN system.

In *Dudgeon v. United Kingdom,* the ECtHR struck down a Northern Ireland law that criminalized gay male sexual activity, based on a right to respect private life.[36] In *Smith and Grady v. United Kingdom,* the United Kingdom's ban on homosexuality in the military was successfully challenged, again citing a right to privacy.[37]

The ECtHR has also used the *European Convention on Human Rights* to protect the rights of transgender persons. In *B v. France*, the Court held that states must recognize transgender persons' new gender on everyday documents like identity cards, but not on other seldom-used official documents like birth certificates.[38] A decade later, the Court overturned the United Kingdom's refusal to alter birth certificates and marry transgender persons, under privacy and right to marry grounds.[39]

The Court has extended these individual rights to the protection of family relationships. In *Salgueiro Da Silva Mouta v. Portugal,* the Court overturned a denial of child custody that was made solely on the basis of the parent's sexual orientation.[40] In *E.B. v. France*, the Court overturned an earlier decision, finding that it was a violation of the Convention to deny adoption rights to a same-sex couple.[41]

However, the Court's jurisprudence has not resolutely backed LGBTQ rights claims in all situations. In *P.V. v. Spain*, the ECtHR upheld a Spanish court's decision limiting the relationship between a transgender parent and her child based on a psychologist's assessment of emotional instability caused to the child by the parent's male-to-female gender transition process.[42] In *Schalk and*

---

36 *Dudgeon v. United Kingdom*, (1981) 4 E.H.R.R. 149.
37 *Smith and Grady v. UK* (2000) 29 EHRR, 493.
38 *B v. France*, (1992) E.H.R.R. 1.
39 *Goodwin v. U.K.*, 2002-VI Eur. Ct. H.R. 588.
40 *Salgueiro Da Silva Mouta v. Port.*, 1999-IX Eur. Ct. H.R. 176.
41 *E.B. v. Fr.*, App. No. 43546/02, Eur. Ct. H.R. (2008).
42 *P.V. v. Spain*, App. No. 35159/09, Eur. Ct. H.R. (2010).

Kopf v. Austria, the Court upheld an Austrian decision to deny same-sex marriage rights.[43] As such, the court did not declare a European wide same-sex marriage right.

The European Union has also begun to recognize LGBTQ rights in its governance.[44] In 1999, the Treaty of Amsterdam was signed which enabled the EU to take actions to combat discrimination based on enumerated grounds that includes sexual orientation.[45] In 2000, the EU issued a directive banning employment discrimination on employment grounds and adopted a human rights treaty to protect against discrimination based on sexual orientation.[46] The protection from employment discrimination was extended by the European Court of Justice to include gender identity in *P. v. S. and Cornwall County Council*.[47] In 2006, the EU passed a Gender Recast Directive dealing with discrimination for persons who intend to undergo or have undergone gender reassignment.[48]

The Inter-American Court of Human Rights *IACHR*, to date, has only one decision dealing with sexual orientation, but it is a decision that has had significant effect in the region. In *Atala v. Chile* (*Atala*), the Court found that rights to equality, non-discrimination and private life were violated when a lesbian mother was stripped of custody of her three daughters.[49] Based on this decision, Mexico's Supreme Court of Justice found a state ban on same-sex marriage to be unconstitutional.[50] It is likely that the *Atala* decision will have precedential effect in other Latin American countries.

There is a paucity of case law in the African regional context. The only case that references sexual orientation, although not focused on that issue, is *Zimbabwe Human Rights NGO Forum and Zimbabwe*.[51] Importantly, the African Commission of Human and Peoples' Rights took the opportunity in that case to note that the terms "equality and non-discrimination" in the African Charter provides equal treatment, for all irrespective of sexual orientation.

---

43 *Schalk & Kopf v. Austria*, App. No. 30141/04, Eur. Ct. H.R. (2010).
44 Persad pp 354.
45 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. (C 340).
46 Council Directive 2000/78, 2000 O.J. (L303) 16 (EC); Persad pp 354.
47 *P v. S & Cornwall Cnty*. Council,1996 E.C.R. 1-2143.
48 Council Directive 2006/54, 2006 O.J. (L204) 23, (EC).
49 *Atala v. Chile*, Case 12.502, Inter-Am. Comm'n H.R., Report No. 42/08,(2008); *See also Atla Riffo and Daughters v. Chile,* Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 239 (Feb 24, 2012).
50 Amparo en Revision 581/2012, Primera Sala de la Suprema Corte de Justicia [SCJN], Dec. 5, 2012 (Mex SC).
51 *Zimbabwe Human Rights NGO Forum v. Zimbabwe, Commc'n No. 245/02, Afr.* Comm'n on Hum. & Peoples' Rts. (2006).

Part II – The Nexus Requirement Under Refugee Law

The foregoing demonstrates that LGBTQ rights are increasingly protected by international law, especially in the regional context, but also that LGBTQ rights remain a contested matter for many states. This rights revolution and its domestic correlates are occurring at such a fast pace that some have called this "the fastest of all civil rights movements."[52] According to the US Attorney General, the recognition of LGBTQ rights is one of "the defining civil rights challenges of our time."[53] But this does not immediately lead to the conclusion that refugee law should also change to protect LGBTQ persons.

In order to obtain protection under the Refugee Convention claimants must have a well-founded fear of persecution "for reasons of" one of the enumerated grounds. It is not enough to be an actual or potential victim of human rights violations that rise to the level of persecution, the violations must also have a nexus to one of the Refugee Convention grounds. It is here that refugee claims based on sexual orientation get complex because the Refugee Convention does not include sexual orientation as an explicit ground. Instead, LGBTQ claimants must bring themselves within one of the other Convention grounds.

In this part, we review the meaning of "membership of a particular social group" found within the Refugee Convention because this is the traditional or most common nexus ground for LGBTQ refugee claims. However, successfully relying on the "particular social group" ground has become difficult for LGBTQ claimants because there is disagreement about the proper interpretation of the phrase. We discuss these divergent interpretations and explain how they influence the likelihood that LGBTQ persons will be able to bring themselves within the "particular social group" category.

The Meaning of Membership in a Particular Social Group

Neither the Refugee Convention nor the Refugee Protocol contains a definition of what constitutes "membership of a particular social group." Historical analysis of the *travaux préparatoires*

52 Mark Z Barabak, "Gays may have the fastest of all civil rights movements," (20 May 2012) LA Times, http://articles.latimes.com/2012/may/20/nation/la-na-gay-rights-movement-20120521.

53 Matt Apuzzo, "More Federal Privileges to Extend to Same-Sex Couples," (8 Feb 2014) NY Times, http://www.nytimes.com/2014/02/09/us/more-federal-privileges-to-extend-to-same-sex-couples.html?src=recg

does not add much clarity.[54] The social group category was introduced by the Swedish delegate, at the Conference of Plenipotentiaries, in response to the apparent under-inclusiveness of the working definition of refugee, but little explanation was given other than the tautological statement that some people are persecuted because they belonged to particular social groups.[55] The UNHCR Handbook provides little assistance in clarifying the meaning of "particular social group." It states:

> 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.[56]

Some argue that the ambiguity of the phrase, particularly when juxtaposed against the more precise nexus grounds found within the Convention, suggests that states intended for "social group" to have a broad, gap filling meaning under international law.[57] However, refugee adjudicators around the world have been left with the task of discerning what this suggestion means in practice.

Three Approaches to the Meaning of "Particular Social Group"

A proper interpretation of "particular social group," as with treaty interpretation in general, begins with reading the text in the context of the treaty and in light of the treaty's object and purpose.[58] At the core of the Refugee Convention is the principle of non-discrimination.[59] The object and purpose of the Refugee Convention is to provide surrogate protection in response to severe forms of discrimination that rise to the level of persecution. "[T]he Convention is concerned not with all cases of persecution but with persecution which is based on discrimination, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being."[60] What constitutes "discrimination" and the "right of every human being" is fluid.

---

54 Arthur C. Helton, "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status," (1983) 15 Col Human Rights L Rev 39.

55 Brian F. Henes, "The Origin and Consequences of Recognizing Homosexuals as a 'Particular Social Group' for Refugee Purposes," (1994) 8 *Temp Int'l & Comp LJ* 377, 380.

56 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: UNHCR, 1992).

57 T David Parish, "Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of Refugee" (1992) 92:4 *Columbia Law Review* 923; Atle Grahl-Madsen, *The Status of Refugees in International Law* (Leyden, NV: AW Sijthoff, 1966).

58 *Vienna Convention on the Law of Treaties,* Article 31(1).

59 Hathaway and Foster pp. 391; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007), pp. 70.

60 *Fornah*, UKHL, 2006, 430.

As a result of this fluidity and the inherent ambiguity of "particular social group," three different tests have emerged for defining what is meant by "particular social group" in refugee law. These tests can be called: (1) the *ejusdem generis* approach, (2) the social perception approach, and (3) the UNHCR amalgamation approach.

Ejusdem generis is a principle of statutory interpretation that holds that one interprets the meaning of a word or phrase by reference to the genus or class of words that precede the ambiguous phrase in question; this is what we understand in modern statutory interpretation as reading words in their context.[61] In *Acosta,* the US Board of Immigration Appeals (BIA) applied this principle, and held that the other enumerated grounds in the Refugee Convention describe "persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be change."[62] The Board of Immigration Appeals proceeded to find that a "particular social group" was one characterized by a common, immutable trait, regardless of whether that trait was present at birth (e.g. sex) or circumstantial (e.g. land owners).[63]

The *ejusdem generis* approach became the dominant way of interpreting the meaning of "particular social group." Hathaway argues that

> [b]y grounding interpretation of the social group ground in the underlying non-discrimination purposes of the Refugee Convention, the *ejusdem generis* test offers refugee decision-makers a standard that is capable of principled evolution but not so vague as to admit persons without a serious basis for claim to international protection.[64]

In our view, this argument has significant merit. The *ejusdem generis* approach maintains fidelity to the text of the Refugee Convention and statutory interpretation principles, while allowing refugee law to advance with changing conceptions of human rights and non-discrimination.

Around the time of the decision in *Acosta*, there was a related societal change in many states of social perceptions of homosexuality. These changes were the result, in part, of a number of studies confirming that homosexuality was neither deviant nor pathological in comparison to heterosexuality.

---

61 Hathaway and Foster pp. 426.
62 *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985, para. 233. 19 I&N Dec. 211 (BIA 1985).
63 *Ibid*.
64 Hathaway and Foster pp. 427.

On the basis of this research, health organizations, such as the American Psychological Association and the World Health Organization, began removing homosexuality as a category of disorder, disease, or health problem.[65] Legal decision-makers followed suit, for example, the Constitutional Court of Colombia held that "homosexuality is not a disease, nor a harmful conduct; it represents a variation of human sexual orientation. Therefore, the traditional visions of homosexuality as a disease or an abnormality that must be cured medically are not acceptable in contemporary pluralistic societies."[66] Other studies emerged finding a genetic explanation of homosexuality.[67]

Once societies in different states began to accept that homosexuality was both normal and partially (or fully) innate, laws regulating homosexual conduct began to change, and societal conceptions of non-discrimination—the core, as previously mentioned, of refugee law—also began to change. This is hardly surprising, as Rehaag explains:

> [O]nce sexual orientation becomes seen as an innate psychosocial characteristic-better yet, a biological characteristic-its legal regulation runs afoul of several central norms in the major western legal traditions. Perhaps the most notable of such norms is the prohibition on criminal sanction for matters beyond an individual's control. In addition to violating this principle that links legal and moral responsibility, sanctioning a person on the basis of an innate characteristic seems about as useful as "punishing" water for running downstream. Even more significant is that such sanctions conflict with an important and familiar narrative of liberal progress. This narrative recounts the gradual expansion of the list of ascriptive characteristics on the basis of which differential treatment is prohibited, beginning with feudal status, and moving to wealth, race, gender, and beyond.[68]

Indeed, as the comparative review of LGBTQ refugee case law (below) demonstrates, *Acosta* was the start of increased acceptance that LGBTQ persons are members of a "particular social group" precisely because sexual orientation is an innate psychosocial characteristic, and in some cases, possibly even a biological characteristic.

In *Applicant A*, however, the Australian High Court rejected the *ejusdem generis* approach in

---

65 International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law: Practioners Guide No. 4* (Geneva: ICJ, 2009), 12-13.

66 Constitutional Court of Colombia, Judgment No. C-481-98 of 9 September 1998, para 11.

67 See for example, Dean Hamer, Stella Hu, Victoria Magnuson, Nan Hu and Angela Pattatacci, "A linkage between DNA markers on the X chromosome and male sexual orientation". (1993) *Science* 261 (5119): 321–7.

68 Sean Rehaag, "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada" (2008) 53 *McGill LJ* pp. 82.

favour of a more literal, textual interpretation of "particular social group."[69] The Court held that "[a] particular social group...is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large."[70] In a subsequent case, the Court outlined a three-part test for determining whether a refugee claimant was a member of a "particular social group":

> First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large.[71]

Hathaway critiques this test on the basis that the first criteria is tautological, the second criteria is merely a negative definition of what is not a "social group," and the third criteria is vague with respect to the question of who determines whether a group is distinguished from society.[72]

According to Hathaway, the disagreement, over the proper test for determining what constitutes a "particular social group," led the UNHCR to propose an amalgamated approach that allowed for refugee adjudicators to use either the *ejusdem generis* approach or the social perception approach.[73] In guidelines issued in 2002, UNHCR stated:

> 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.[74]

This, unfortunately, led the European Union to pass a directive that combined the alternative approaches into a more rigorous amalgamated approach that required both an innate or fundamental characteristic *and* social perception.[75] The amalgamated approach has also been adopted by a majority of the Circuits of the United states Court of Appeal, though there have been strong dissents by Third

---

69 Hathaway and Foster pp. 428.
70 *Applicant A*, Aus HC, 1997.
71 *Applicant S*, Aus HC, 2004, 400.
72 Hathaway and Foster pp. 429.
73 *Ibid*.
74 UNHCR, Guidelines on International Protection No. 2: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/02/02 (May 7, 2002).
75 Hathaway and Foster pp. 430.

and Seventh Circuits.[76] Moreover, the social perception element of the amalgamated approach has morphed into a "social visibility" test where a claimant must now establish that the innate or fundamental characteristic is also visible in a manner that distinguishes him or her from other members of society.[77]

Perhaps in response to the increasingly divergent interpretations of "particular social group," UNHCR released a "Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity"[78] which states that sexual orientation and gender identity can fall under grounds of social group, political opinion or even religion. The Guidance Note was followed by full-fledged guidelines entitled "Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" which state:

> 40. The five Convention grounds, that is, race, religion, nationality, membership of a particular social group and political opinion, are not mutually exclusive and may overlap. More than one Convention ground may be relevant in a given case. Refugee claims based on sexual orientation and/or gender identity are most commonly recognized under the "membership of a particular social group" ground. Other grounds may though also be relevant depending on the political, religious and cultural context of the claim. For example, LGBTI activists and human rights defenders (or perceived activists/defenders) may have either or both claims based on political opinion or religion if, for example, their advocacy is seen as going against prevailing political or religious views and/or practices.
> …
> 45. The two approaches – "protected characteristics" and "social perception" - to identifying "particular social groups" reflected in this definition are *alternative*, not cumulative tests. The "protected characteristics" approach examines whether a group is united *either* by an innate or immutable characteristic *or* by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. The "social perception" approach, on the other hand, examines whether a particular social group shares a common characteristic which makes it cognizable or sets the group's members apart from society at large.
>
> 46. Whether applying the "protected characteristics" or "social perception" approach, there is broad acknowledgment that under a correct application of either of these approaches, lesbians,

---

76 R George Wright, "Persecution of Particular Social Groups and the Much Bigger Immigration Picture" (2014) 62 Clev St L Rev 163.

77 Fatma E Marouf, "The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender" (2008) 27:1 *Yale Law & Policy Review* 47.

78 U.N. High Comm'r for Refugees, *Guidance Note on Refugee Claims Relating to Sexual Orientation & Gender Identity,* (Nov. 21, 2008), available at http://www.refworld.org/docid/48abd5660.html.

gay men, bisexuals and transgender persons are members of "particular social groups" within the meaning of the refugee definition. Relatively fewer claims have been made by intersex applicants, but they would also on their face qualify under either approach.[79]

Part III – Sexual Orientation Claims Under Refugee Law

According to Wessels, "refugee claims relating to sexual orientation started to emerge at the beginning of the 1990s. Although especially in early cases such claims were based on political opinion or religion, sexual orientation was accepted as the basis for a particular social group claim in most major refugee-receiving nations by the mid-1990s.[80]

In the United States, asylum on the basis of sexual orientation was first granted to an individual in 1994 and the number of accepted claims has since increased slowly but steadily. This trend is paralleled to different degrees in other countries that grant asylum to LGBTQ applicants, including Australia, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, New Zealand, Thailand, and the United Kingdom.[81]

In this part, we review leading cases, from a number of jurisdictions, concerning the nexus requirement under refugee law, especially those that involve LGBTQ claims. Given time constraints and reasonable length requirements for this discussion paper, our review does not attempt to be exhaustive, instead we focus on decisions from the United States of America, Canada, New Zealand, Australia, Israel, and the European Union.

USA

The leading case in the USA, on the meaning of "particular social group," remains *Acosta*.[82] There, a Salvadoran taxi driver was targeted by antigovernment guerrillas because of his membership in a cooperative of taxi drivers. In defining the phrase "particular social group," the BIA held that:

---

79 U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (October 23, 2012), available at http://www.unhcr.org/509136ca9.pdf.

80 Janna Wessels, "Sexual orientation in Refugee Status Determination", April 2011, Refugee Studies Centre, Oxford Department of International Development, University of Oxford. http://www.refworld.org/pdfid/4ebb93182.pdf

81 Swetha Sridharan, "The Difficulties of U.S. Asylum Claims Based on Sexual Orientation", October 29, 2008, Migration Policy Institute, p.1. http://www.migrationpolicy.org/article/difficulties-us-asylum-claims-based-sexual-orientation

82 *Acosta* para. 233.

> …persecution on account of membership in a particular social group refers to persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of membership become something comparable to the other four grounds of persecution under the Act, namely, something that is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing "persecution on account of membership in a particular social group" in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

One of the first cases in the US, and indeed globally, to recognize sexual orientation as included within the "particular social group" category was *In re Toboso-Alfonso*.[83] There, a Cuban national was told that if he did not leave Cuba, he would be imprisoned in a forced labour camp for being homosexual. Before an immigration judge, the Immigration and Naturalization Service argued that deportation should not be stayed because homosexuals were not part of a particular social group. The judge held that homosexuals were part of a particular social group and this decision was upheld by the BIA. Following this case, the Attorney General ordered that the BIA's decision be considered precedential for future similar cases.[84]

Subsequently, U.S. courts developed three tests to help determine whether applicants are members of a particular social group:[85]

> (1) the immutability rule (the characteristics defining an applicant's membership in a particular social group cannot be changeable);
>
> (2) the association rule (courts look for association with other individuals who belong to

83 *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).
84 Monica Saxena, "More than Mere Semantics: The Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims" (2006) 12 *Mich J Gender & L* 331.
85 *Ibid,* p.9.

this social group and share the characteristic that is the basis of the asylum application); and

(3) the recognizability rule (individuals in the social group in question must possess characteristics recognizable to others).

Wessels suggests that US immigration judges usually employ the associational and recognizability tests, leaving aside the immutability rule and leading to a 'flawed' analysis. For example, she points to the BIA's 2004 decision in *Matter of Soto Vega* noting that the government argued that he would be able to reside safely in Mexico if he concealed his homosexual identity. She goes on to state that material proof of sexual identity is frequently unavailable and that "With severe penalties — even death — in place for homosexuality, and facing social ostracism and community violence, many LGBTQ applicants conceal their sexual identity in the countries of origin. For these same reasons, gay or lesbian organizations are not easily formed in these countries, and it is challenging for homosexuals to establish public social ties with one another.[86]

The courts often look for proof that fits American conceptions of sexual identity.[87] In denying Jorge Soto Vega's asylum claim, an immigration judge stated, "I don't see anything in his appearance, his dress, his manner, his demeanor, his gestures, his voice, or anything of that nature that remotely approached some of the stereotypical things that society assesses to gays, whether those are legitimate or not." In another example, an immigration officer rejected the asylum claim of an Iranian man (who asked for his name to be withheld as he was interviewed for a law journal article) because the applicant was "not feminine in any way" and therefore could not be gay. The immigration court then argued that the man should be able to return to Iran since he was able to conceal his homosexual identity. The Iranian petitioner's claim was successful only upon the reopening of the circuit court case, when he submitted a number of affidavits attesting to his engagement in activities that were in line with American conceptions: his membership in LGBTQ groups, his subscriptions to gay magazines, and his participation in gay pride events. In short, the courts tend to focus on identity rather than conduct.[88]

86 Wessels.
87 Sridharan.
88 *Ibid, p.6.*

Canada

The 1993 Supreme Court of Canada (SCC) decision in *Ward*[89] is seminal to the interpretation of "membership in a particular social group." The appellant, Patrick Francis Ward, a resident of Northern Ireland, joined the INLA, a para-military terrorist group. He had been assigned the task of guarding hostages but instead secured their escape. Upon learning this, the INLA tortured him and sentenced him to death. The appellant managed to escape but was charged with forcible confinement by Irish police and sentenced to three years in jail. Fearing further retribution by the INLA, upon his release, he made his way to Canada where he claimed Convention refugee status.

The Court, per Justice La Forest, began by noting the international community's commitment to basic human rights without discrimination, a principle that underlies the Convention. The Court went on to review case law created in those early days which attempted to delineate the scope of "particular social group." The Court cited *Acosta* with approval, and went on to identify three categories of claimants that fall within the "social group" category:

> (1) groups defined by an innate or unchangeable characteristic;
>
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.[90]

The Court, in *obiter*, explained that

> The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.[91]

More than twenty years ago, when this decision was written, sexual orientation was expressly included as a "particular social group" because membership in this group can be described as an innate or immutable characteristic. Inherent in this consideration is the concept that the membership in the

89 *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.
90 *Ibid*, 739.
91 *Ibid*.

group must be governed by an individual's identity and not by his or her actions - by who one is, not what one does.

Canadian jurisprudence has enshrined these three particular social group categories since they were articulated in *Ward*. Furthermore, the IRB of Canada's *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution,*[92] which has been in effect since November 1996, reinforces the concept that sexual orientation is defined by the first category, together with gender or linguistic background, as held in *Ward*.

The Canadian courts' focus on innateness has led to a rejection of the argument that LGBTQ persons do not face a well-founded risk of persecution if they can conceal his or her sexual orientation. For example, the Federal Court dismissed the notion of discretion in *Fosu v. Canada.*[93] The court set aside a decision which denied refugee status to a Ghanaian gay man, rejecting the RPD's "finding which requires the claimant to deny or hide the innate characteristic which forms the basis of his claim of persecution.[94] Furthermore in *Sadeghi-Pari v. Canada*, the Federal Court was clear that requiring a person to conceal or suppress his or her sexual orientation amounts to persecution:

> The meaning of persecution, as set out in the seminal decisions of *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 and *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, is generally defined as the serious interference with a basic human right. Concluding that persecution would not exist because a gay woman in Iran could live without punishment by hiding her relationship to another woman may be erroneous, as expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution.[95]

New Zealand

The leading case on LGBTQ refugee claims in New Zealand is *Re GJ*.[96] There, an Iranian national appealed a decision of the New Zealand Immigration Service declining to grant him refugee status on the basis, *inter alia*, of his sexual orientation. The Refugee Status Appeals Authority (Authority) had not previously considered whether sexual orientation could bring a claimant within the

92 Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution, Immigration and Refugee Board of Canada, November 13, 1996.
93 *Fosu v. Canada (Citizenship and Immigration),* 2008 FC 1135, 335 FTR, 335 FTR 223 [Fosu].
94 *Ibid*, par. 17.
95 *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration),* 2004 FC 282 at para 29, 37 Imm LR (3d) 150.
96 *Re GJ*, Refugee Appeal No. 1312/93 (30 August 1995).

particular social group category.

The Authority began its analysis by favourably reviewing the decision of the Supreme Court of Canada in *Ward*. The Authority noted that particular social group was not to be interpreted so broadly that it would include everyone, but found that international legal principles of non-discrimination clearly brought LGBTQ claims within the ambit of the Refugee Convention.

The Authority then reviewed decisions from Germany, the Netherlands, Sweden, and Denmark that had all rejected LGBTQ claims within the social group category. The Authority chose to follow the Canadian-American approach of recognizing homosexuality as an immutable characteristic and therefore sufficient for bringing a claimant within the social group category.

Having found that LGBTQ persons were members of a particular social group within the appellant's country and that the country conditions evinced a real chance of persecution for being overtly homosexual, the Authority considered whether the appellant could properly be expected to conceal his homosexuality in order to avoid persecution. The Authority held "that to expect of him the total denial of an essential part of his identity would be both inappropriate and unacceptable."

The approach in *Re GJ* has been followed in subsequent cases in New Zealand. For example, in *AO (Pakistan)*,[97] a Pakistani national claimed refugee status on the basis of his sexual orientation and the mistreatment he had received growing up in Pakistan. The Immigration and Protection Tribunal (Tribunal) noted that Pakistan criminalized homosexual sex. The Tribunal noted that "[t]he existence of laws criminalising same-sex sexual activity does not in itself mean that homosexuals are at risk of being persecuted. However it does colour the context within which the predicament of homosexuals in Pakistan is assessed."[98]

After reviewing the country conditions facing LGBTQ persons in Pakistan, including the meagre efforts of the state to protect LGBTQ persons from discrimination, as well as the possibility of violence against LGBTQ persons, the Tribunal considered the appellant's predicament.

> The appellant seeks to live without having to conceal his sexuality. He does not seek to overtly draw attention to himself, but wishes to be able to express himself fully, and to seek the company of others of his choice, irrespective of his or her sexual orientation.

97 *AO (Pakistan)*, [2013] NZIPT 800322 (17 April 2013).
98 *Ibid*, para 60.

> He has been, and would in the future be, unable to do so in Pakistan, where the taboo surrounding sexual orientation is underpinned by civil condemnation and Islamic law. In real terms, there is sufficient public and state antipathy towards homosexuals that the appellant would be forced to suppress his sexuality, just as he has in the past. It is possible that he could keep any knowledge about his true self from his family and local community for a time, though that is increasingly unlikely, given his age and the fact that he remains unmarried. It is unlikely that he would avoid questions about his marital status.
>
> If his sexuality were to become apparent it is clear from the country information that there is a real chance that he would be exposed to serious harm. It may be in the form of assault or arbitrary detention. It could be worse.

The Tribunal then held that Articles 2, 17, and 26 of the *ICCPR* entitled the appellant not to have to suppress his sexuality in order to avoid persecution, allowed the appeal, and confirmed that the appellant was a refugee.

Australia

The leading case in Australia is *A v. Minister for Immigration & Ethnic Affairs*.[99] There, the claimants, both Chinese nationals, sought refugee protection, arguing that they faced persecution in China for violating the One Family One Child policy. The High Court of Australia applied a much more textual statutory interpretation approach to the Refugee Convention, concluding that

> A particular social group...is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within his or her society.

Hathaway contends that the Australian courts have been somewhat "careful to emphasize" that the focus of the enquiry is the distinction from society as a group and not society's external perception of the group; however, it is less than clear how refugee adjudicators are supposed to determine whether LGBTQ persons are distinct from society.[100]

Despite these concerns, Australian courts have found the LGBTQ persons qualify as members of a particular social group. For example, in *Matter No S395/2002*, the Refugee Review Tribunal

99 *A v. Minister for Immigration & Ethnic Affairs*, [1997] HCA 4.
100 Hathaway and Foster pp. 428.

determined that LGBTQ persons fall within the social group category, but rejected the claimant's claim on the grounds that he could conceal his sexual orientation, thereby limiting his risk of persecution. The High Court of Australia rejected the notion that LGBTQ persons could be expected to conceal his or her sexual orientation in order to avoid persecution.[101] The Court stated:

> The purpose of the Convention is to protect the individuals of every country from persecution on the grounds identified in the Convention whenever their governments wish to inflict, or are powerless to prevent, that persecution. Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to State sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a "particular social group" if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality.[102]

The Court went on to emphasize that "[s]exual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity."[103] The Court held that the Refugee Review Tribunal had erred in focusing on the availability of sexual conduct in private rather than the panoply of behaviour that the claimant would do if they could openly be themselves in public without facing a risk of persecution. The Court further held that the proper question to ask is whether there is a well-founded fear of persecution should claimants openly express their sexual orientation in the full gamut of sexual and asexual ways that humans express themselves publicly.

101 *Matter No S395/2002*, [2003] HCA 71.
102 *Ibid*, Para 40.
103 *Ibid*, Para 82

European Union

The leading case in the European Union is the recent decision of the Court of Justice of the European Union (CJEU) in *X, Y, Z v Minister voor Immigratie en Asiel*.[104] In that case, the applicants were homosexual claimants from Sierra Leone, Uganda, and Senegal who applied for refugee status in the Netherlands. A 2004 European directive imported the Refugee Convention definition into European Law. The national court in the Netherlands sent a reference to the CJEU asking: (1) if LGBTQ persons fall within the "particular social group" category and (2) if the possibility of imprisonment, for homosexual conduct, in the claimants' home states, was persecutory?

The Court employed what was effectively a two-part test. At the first stage, the Court found that sexual orientation was so fundamental that a claimant should not be forced to change it. This is the second "social group" category identified in *Ward*. At the second stage, the Court found that criminalization of homosexual activity was evidence of societal perception that LGBTQ persons were different. On this two-step basis, the Court concluded that the claimants were members of a particular social group. On the second question, the Court found that criminalization of homosexuals will only amount to persecution where there is a real chance that the criminal law will be applied and the punishment is severe to the point of including incarceration.

In commenting on *X, Y, Z*, Edwards, the Chief of the Protection Policy and Legal Advice Section with the UNHCR, notes that the decision largely tracks UNHCR guidance on LGBTQ refugee claims. The one principal critique that Edwards makes of the decision is that the CJEU focused too much on sexual conduct rather than sexual identification.

Israel

Not all countries are prepared to recognize LGBTQ persons as members of a particular social group. Israel, for example, continues to oppose recognizing sexual orientation within the "social group" category.[105] A recent joint report of the Refugee Rights Clinic at Tel-Aviv University's Buchmann Law Faculty and the Organization for Refuge, Asylum, and Migration, provides translations of a

104 *X, Y, Z v. Minister voor Immigratie en Asiel*, C-199/12 - C-201/12, European Union: Court of Justice of the European Union, 7 November 2013.

105 Organization for Refuge, Asylum & Migration & Refugee Rights Program, *No Shelter Protection Gaps in Israel Facing Refugees Fleeing Gender-Based Persecution* (Tel Aviv: Refugee Rights Clinic, 2011).

number of anonymized decisions by Israel's Refugee Advisory Committee.[106]

In one case, the lesbian claimant alleged that her husband, who was a senior bureaucrat, beat her after discovering her sexual orientation. In rejecting the claim as a "family problem," the Committee stated:

> Your case as explained and stated by you does not fall under the mandate of the 1951 Geneva Convention Relating to the Status of Refugees for the following reasons: You described acts of violence and threats from your husband due to your relations with another woman. After thorough review of your personal situation, it has been decided that your claim for asylum is in connection with family problems. Based on the above mentioned elements, your claim cannot be established in regard to the 1951 Refugee Convention and the 1967 Protocol. Therefore your refugee claim is rejected.[107]

In another case, the Chairperson of the Committee expressed a willingness to consider LGBTQ persons as a potentially persecuted group, based on "the jurisprudence in many countries in the world."[108] The remainder of the Committee rejected the inclusion of LGBTQ persons as members of a particular social group, and the entirety of the Committee found, in any event, that the claimant had not been subject to persecution.

In a petition to a Professional Advisory Committee—a body set up to hear humanitarian claims from Palestinians who are barred from making asylum claims in Israel—the Committee rejected the petition of a homosexual Palestinian petitioner who argued that he would be persecuted because of his sexual orientation if he were removed from Israel. The Committee held that the persecution the petitioner potentially faced was merely a product of the conservative society in from which he had fled and not a product of persecution that triggered the legal obligations of Israel:

> We should assume that the percentage of gays in the Palestinian society is similar to the percentage of gays in other societies. There are societies which are more open than the Palestinian society in this matter—fortunately, Israeli society is mostly more open—and there are societies which are more conservative than Palestinian society on this issue. We may accept the proposition, and the special Humanitarian Committee has pointed to this in its decision which is challenged in this petition—that the conservatism of the Palestinian society did not make the life of the petitioner easy or comfortable. But this is the situation of many gays who live in the Palestinian Authority and in other conservative societies. This fact does not trigger a legal obligation on Israel to accept to

106 *Ibid*.
107 *Ibid*, 19.
108 *Ibid*, 20.

> its territory any foreigner, whose society in which he lives is not tolerant to his lifestyle.[109]

At the time of the aforementioned report, this decision was under appeal to the Supreme Court of Israel.

Conclusion

The rights of LGBTQ persons under international law have undergone a remarkable evolution over the past two decades. While there is not universal agreement, LGBTQ rights are increasingly recognized in a number of different international legal sources, especially in the regional context.

Transformations of refugee law have been a part of this evolution. The Refugee Convention and Protocol did not include sexual orientation as an enumerated ground. Nonetheless, it is now firmly established in a number of states, and the majority of those reviewed for this paper, that sexual orientation is a ground upon which people can be persecuted for the purposes of refugee law. Sexual orientation based claims are now very much part of refugee jurisprudence.

There remains, however, a striking discord on how to define "particular social group" for the purposes of adjudicating refugee claims made by LGBTQ persons. Part of the reason for this discord is the ambiguity of the Refugee Convention itself. Efforts by some refugee advocating organizations to harmonize different approaches have instead resulted in further permutations of the appropriate definition and indeed more difficult tests for LGBTQ claimants.

Another tension is that societal understandings of "gender" and "sexuality" are dynamic and under change in various states. Conceptually, there appears to be some disagreement about whether the persecution of LGBTQ persons is because of his or her innate characteristics or whether it is because of how those characteristics challenge societal norms. As LaViolette explains:

> Social, political, and legal disapproval of homosexuality is more often a reaction to the noncompliance of gender and social roles than a simple expression of contempt for the sexual practices of homosexuals. Generally, gender roles are based on a heterosexual orientation. Non-conformance with gender norms by gay men, lesbians, and transgendered persons implies a refusal to behave in ways dictated by their biological

109 *Ibid*, 22.

sex and social classification.[110]

It is unsurprising then that some adjudicators have incorporated the subjective perceptions of society into the test for determining whether LGBTQ persons are "members of a particular social group." This is positive to the extent that it allows for identity to be imputed—an approach that is crucial for persons at risk of persecution because of how they are viewed by their persecutors rather than by what they are objectively able to prove to be. Such "soft immutability" is particularly important for transgendered persons since it "reduces the need for scientific or biological proof through static characteristics by way of chromosomal makeup, sex organs, or the sexual identity assigned at birth; rather, transgender asylum seekers can seek protection based on traits adopted over time yet integral to identity."[111] But there are also problems with incorporating societal perceptions into the interpretation of "social group."

One problem with incorporating a visibility requirement is that it ignores the fact that an LGBTQ person may be covering or hiding his or her true self precisely because he or she fears persecution. It would appear that a number of jurisdictions have rejected the argument that LGBTQ persons are not at risk of persecution if concealment minimizes the actual chance of harm. Nonetheless, societal perceptions continue to be relevant for determining the boundaries of "social group" and adjudicating claims in practice.

Neilson argues that an approach to membership in a particular social group that relies on social visibility "contravenes the immutability standard because it relies on variable social and cultural perceptions of what actions characterize homosexuality.[112] Moreover, refugee adjudicators have been shown to use various stereotypes of LGBTQ persons to make erroneous credibility assessments.[113] Rehaag suggests that adjudicators often take essentialist views of sexuality and this poses challenges where an individual's sexual orientation story does not fit within the traditional view.[114]

While a social perception approach is not theoretically destined to suffer from essentialism and

110 Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19:2 Int'l J Refugee L 169, 185-186.

111 Joseph Landau, "'Soft Immutability' and 'Imputed Gay Identity': Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law" (2004) 32 Forhan Urb LJ 237, 250.

112 Fadi Hanna, "Punishing Masculinity in Gay Asylum Claims," (2005) 114:4 Yale LJ 913, 920.

113 Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations," (2009) 21:1 Int J Refugee Law 1.

114 Rehaag pp. 59.

a lack of nuance, what has emerged is a jurisprudence based on the type of LGBTQ claims that adjudicators regularly see. In both Canada and the US, for example, there are significantly fewer claims made by lesbian or bisexual applicants and their grant rates are lower when compared to those of homosexual men.[115]

> This phenomenon is the result of both the fact that fewer women than men seek asylum in the United States generally and the fact that sexual orientation-based jurisprudence has been built on a male model of public activities resulting in public persecution, a paradigm that the facts of lesbian asylum claims do not often follow. Instead, lesbian asylum seekers may find that the persecution they suffer fits more squarely within precedents for gender-based asylum seekers than for predominantly male, sexual orientation-based asylum seekers.[116]

By relying on social perception, refugee adjudicators often end up applying a one-size-fits-all approach to LGBTQ claims that may offer preference to certain sexual minorities over others. Social perceptions as to what may or may not constitute "immutability" may, for example, disadvantage claimants identifying as bisexual.

Incorporating social perception into the interpretation of "particular social group" also violates the *ejusdem generis* principle because it incorporates a test that is not also applied to other enumerated grounds within the Refugee Convention.[117] While social perception may be relevant for assessing the type and risk of persecution that an LGBTQ claimant may face, in our view, it should not be incorporated into determining what constitutes a "particular social group." Instead, we suggest that there is an arguable case for returning to an interpretation that is based on sexual orientation as a fundamental human right in the same manner that political opinion and freedom of religion are considered fundamental rights. In this respect, it is irrelevant whether sexual orientation is characterized as an innate trait or as a trait fundamental to human dignity. In either case, persecution of LGBTQ persons, because of who they are and/or how they challenge societal conceptions of gender and sexual normativity, violates the principle of non-discrimination that underscores refugee law.

---

115 Victoria Neilson, "Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims," (2005) 16 Stn L & Pol'y Rev 417; Sean Rehaag, "Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia" (2009) 13:2 International Journal of Human Rights 415.

116 Neilson.

117 Marouf pp. 105.