

BOARDING TO SOMEWHERE OVER THE RAINBOW: CANADA AS A SHELTER FOR LGBT ASYLUM-SEEKERS

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Abstract

From the Global South, sexual minorities are fleeing from persecution based on sexual orientation and gender identity, seeking for asylum on the Global North, despite having no explicit protection in international treaties. In the context of expanding the scope of the protection envisaged in the 1951 Refugee Convention, Canada is considered a pioneer in the eligibility and admissibility of sexual orientation to grant refugee status, establishing a precedent for sexual minorities. Having in mind the significance and relevance of the topic, this study intends to explore the international forced migration of the LGBT people to Canada.

To elaborate on the contributions, challenges, vulnerabilities and particularities of the asylum-seeking process and the Canadian protective system, this article starts with a brief definition of sexual minorities that will be considered for the study, and the emergence of protection for sexual minorities, contextualizing the violence under a global approach, with specificities of the type of persecutions, the violence infringed, identification of the migration flow, and the countries of origin.

In session three, we will explore the international legal framework: international treaties, conventions, guidelines, notes, and other documents that contribute to the discussions. The 1951 Convention and the 1967 Protocol is the starting point in this discussion, with special attention to the “membership of a particular social group” and how, under this category, sexual orientation and gender identity have been granted international protection under the 1951 Convention.

In session four, we will explore the characteristics of the Canadian system and how the reputation exploited by the media, the exceptional management of migration, and the multicultural environment can foster conditions to make Canada a suitable destination. In addition, we explore the particularities of the Canadian system and landmark cases that contributed to the development of sexual minorities' rights.

In session five, we will elaborate on the protection system for LGBT asylum-seekers: the contributions, risks, particularities, main criticisms, and conclusions.

Keywords: LGBT rights, asylum seekers, refugees, Canada, international protection.

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List of Abbreviations

Acronym	Meaning
APA	American Psychological Association
ICJ	International Commission of Jurists
ILGA	The International Lesbian, Gay, Bisexual, Trans and Intersex Association
INLA	Irish National Liberation Army
IRB	Immigration and Refugee Board
IRPA	Immigration and Refugee Protection Act
LGBT	Lesbians, gay, bisexual and trans
LGBTQIA+	Lesbians, gay, bisexual, trans, queer, intersex, asexual, and “+” represent the possibility of expansion with more orientations/identities
MPSG	Membership of a particular social group
RHRP	Refugee and Humanitarian Resettlement Program
SOGIE	sexual orientation and gender identities and expressions
UK	United Kingdom
UN	United Nations
UNCHR	United Nations High Commissioner for Refugees
US	United States of America

1. Introduction

In recent decades, LGBT rights have achieved a high level of exposure, present in the speeches of UN High Commissioners for Human Rights (such as Navi Pillay and Ban-Ki Moon; (Moon, 2015; Pillay, 2014), statesmen, politicians (Clinton, 2011), and government officials in international forums around the world. This is an important step to raise awareness, an achievement in recognition and representation.

Despite the strong exposure and recognition, the challenges of universalization of LGBT rights are hindered by cultural relativism, criminalization of LGBT people and the allegation of sovereignty of certain countries. Tradition, and local legal codes are a countervailing force in the universalization of human rights, as claimed by countries or groups where religion still has a predominant force in the habits and laws of society.

Sexual minorities are migrating from the Global-South and Middle East to the Global-North, particularly to the Euro-American axis, which also includes the Oceania region (New Zealand and Australia). The flow usually originates from underdeveloped or developing countries, where all the fertile conditions can be found: patriarchal and moralist culture, gender inequality, remnants of Western imperialist laws, strong role of the religion in the daily life, and strong influence of morality, religion and tradition in the production of legal norms. Furthermore, these countries are perceived as failed (or have issues) in human rights protection, not only for the LGBT community, but in general.

When we think of contemporary migratory movements, we immediately think of the movement that occurs from poor countries to rich countries, caused by wars, ethnic cleansing, terrorism, state collapse, and the negative effects of globalization. Albeit little reported by the mainstream media, there are ongoing migratory movement that result from gender violence and sexual discrimination. The notions envisaged in the Convention Relating to the Status of Refugees (hereinafter: 1951 Convention, the Refugee Convention, or Geneva Convention) have had their limits expanded and rediscussed, giving rise to broader interpretations and underpinning refugee policies that are increasingly inclusive, due to growing cases of family violence, female genital mutilation, discrimination against people with disabilities, people with chronic diseases (as the HIV stigmatization), and homo/transphobia.

The violence against sexual minorities assumes many different forms, in many countries mostly in the Global South, the LGBT population suffers constant embarrassment, physical and psychological abuse, arbitrary arrest, corrective rape, forced pregnancy/marriage, and in some territories, death penalty.

Up to the north, Canada has been one of the main destination countries of these asylum-seekers, as it is known worldwide for its work in the area of human rights, sensitive to gender issues, family reunification, refugee resettlement, and LGBT issues. It is also recognized in the development of policies and affirmative action for sexual minorities, through jurisprudential¹ understandings and diplomatic efforts, establishing a refugee determination system, rules, and guiding documents that are widely disseminated among the agencies responsible for processing these requests.

Having in mind the significance and relevance of the topic as discussed above, this study intends to explore the international forced migration² of the LGBT people to Canada, specifically the following issues:

- 1) Global overview of the violence against LGBT, identifying the migrating flow: where are these migrants fleeing from and where they are seeking asylum;
- 2) The international protection system;
- 3) Main features that make Canada a chosen country for sexual minorities;
- 4) The Canadian determination system of refugees, implementing the international system and landmark cases;
- 5) Risks, challenges, vulnerabilities, and critics of the asylum-seeking process in the Canadian system.

The study of the Canadian protective system of sexual minorities can be taken as a reference for comparative purposes with the current situation of sexual minorities in Europe: Belarus, Lithuania and Russia have developed what is called “anti-gay propaganda” provisions claiming that same-sex relations exposed in the media and in public might represent a harm to children and minors in general. Similar attempts to restrict LGBT issues content can be found in Turkey, Armenia, Hungary, Latvia, Moldova, Poland, Romania and Ukraine (ILGA, 2020).

¹ Outlining the notion of jurisprudence: when a Court, not based on a pre-existent act, but based on other sources of law (international principles or doctrine) come to decisions that establishes a new precedent, usually referred to as “landmark cases” or “precedent cases”. By “jurisprudential understanding” we want to bring this specific situation, the scope of the refugee was expanded to sexual minorities not based on explicit protection granted, but based on challenges posed by real-life cases, forcing the judges to reinterpret the norm to a more inclusive understanding, as a result, establishing that sexual minorities are eligible to apply for refugee status under the 1951 Convention.

² Forced migrations are usually triggered by grave breaches in human rights and/or armed conflicts. In addition, these flows can be influenced by other reasons as (1) poverty; (2) marginalization; (3) environmental issues; (4) problems related to fragile democratic institutions (Feller, 2006). Transnational crime, ethnic conflicts, armed conflicts, and wars is also mentioned by Adamson (2006). The migration of LGBT is defined as forced by some authors as Lee (2019) and Fobear (2015) to mention some.

These measures are perceived by the other members of the Europe Union as a setback and a breach of rights (Eder & Burchard, 2021), affecting the right to expression, right to assembly and right to freedom just to mention some. Furthermore, it contributes to marginalize gender expressions, identities and sexual orientations that diverge from the heterocisnormative norm, a situation that can escalate and instigate migration flows in the future within the European region and to other parts of the world (Porterfield, 2020; Pronczuk, 2021).

2. The definition of sexual minorities

There is no consensus regarding the definition of minorities in general in legal international documents. Different authors and sources may present a variety of definitions with only minor differences, in general terms, the same characteristics can be found: (1) residing in a State that recognize minority status; (2) numerical size; (3) non-dominant position; (4) sense of community among other members; and (5) a common will to preserve their language, religion, ethnicity and culture (Petričušić, 2005)

The other important aspect to identify a minority group is the cultural approach and their perception of identity. Normally, majoritarian groups are not perceived as distinguished by their common characteristics, however, minorities are easily identified by the majoritarian groups by their own way of living, culture and other features. In addition, these traits develop a important role in minority groups, perceived as particular and unique of their own people (Petričušić, 2005).

The same controversy persists in the definition of sexual minorities, if it is a question of being numerically inferior, position, power, representation in the community or other factors. Being necessary to assess how it is depicted in legal documents and in academic sources.

Issues concerning the terminology can be found in the international documents pertinent to this study. The UNHCR Guidelines on International Protection No. 9 (2012) provides explanations assuming the group as composed by lesbian, gay men, bisexual, transgender and intersex, referring to the group as LGBTI.

The Chairperson's Guideline 9, a guideline of the Canadian domestic system, refers to the group as SOGIE: sexual orientation and gender identity and expression, referring to the group as LGBTIQ+.

According to James Wilets, "sexual minorities" means "all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or gender identity.", excluding people who define their identity in non-consensual

relations (Wilets, 1994), it refers to people who establish affective and sexual ties with people of the same sex and/or people who do not identify themselves with the roles socially linked to biological sex. It includes lesbians, gays, bisexuals (of both genders) and transgender, which includes transsexuals and transvestites (LaViolette, 2007; Lee; Brotman, 2011).

In regard of the terminology, the LGBTQIA+ (hereinafter: LGBT) comprises both sexual orientation and gender identity and expression (the notion of SOGIE), and it is an acronym in constant development, with new identities and expressions being integrated in the group (queer, asexual, demisexual, two spirit, agender, nonbinary, etc). Therefore, the subject of this study is the whole group of people who identifies themselves apart of the heterocisnormative orientation/identity, and that suffers intolerance and persecution for that reason.

Intolerance practices are always based on a dichotomous hierarchy: civilized/barbaric, religious/heretical, nobility/peasants, bourgeoisie/proletariat, and so on, the element of difference is a marker, a stigma of inferiorization, marginalization and illegitimacy of rights. The most serious violations have already been committed in this same logic, as sexism, classism, slavery, nazism, racism, xenophobia and homophobia (Piovesan, 2018)

2.1. Global overview of violence against sexual minorities

It is important to take into a global overview of the violence against sexual minorities around the world. This is a blatant explanation of why we have LGBT people crossing the borders to seek protection in countries like the US, Canada, Australia, New Zealand, the UK and in the Europe Union. It is also important to say that even in these destination countries, there is still records of violence, discrimination, prejudice and homo/transphobic records.

In 2020, the consensual same-sex sexual acts is expressly punished with death penalty in Brunei, Iran, Mauritania, Nigeria (twelve states) Saudi Arabia and Yemen. This list of countries have legal provisions envisaging death penalty in penal or criminal code. Some other five countries have no legal provisions expressly condoning the same-sex sexual act, but the death penalty can be imposed interpreting the local provisions, these countries are Afghanistan, Pakistan, Qatar, Somalia and United Arab Emirates (ILGA, 2020).

In Afghanistan, in addition to the legal condemnation of same-sex acts, we have some extrajudicial mechanisms operating. In parallel of the traditional system, which is perceived as corrupted and ineffective, some regions present local dispute-settlement mechanisms and it is

important to mention the presence of insurgent groups as Taliban that may impose extrajudicial punishment to sexual minorities (ILGA, 2020).

After 20 years of Western presence, the abrupt exit of NATO and American troops and the takeover of Kabul and other main regions by Taliban is certainly a threat to sexual minorities and gender rights, and a setback, given that in these 20 years of state-building, gender issues have progressed and a certain layer of rights has flourished, a scenario unimaginable under the Taliban rule. What remains uncertain is to which extent the rights are going to be repressed and the level of oppression (Grant, 2021; Westcott, 2021)

Brunei joined this list of countries in 2018, when a new legal provision was created. The consensual same-sex acts were always condemned by the legal system, with whipping penalty for men and women. In 2019, the legal provisions were changed allowing the death penalty to be imposed for the muslims who commit sodomy, adultery, same-sex intercourse or sex for non-reproductive purposes. This alteration caused a strong international reaction from many non-governmental organizations (Human Rights Watch and Amnesty International), UN commissions, human rights bodies, UN authorities, State authorities and celebrities (ILGA, 2020).

In Iran, since the 1979 Islamic Revolution, it is said that the judiciary apparatus has been moved against political enemies of the regime, some vague and imprecise criminal definitions may be evoked as “enmity against God” or “spreading corruption on Earth”. These legal provisions can be used to persecute sexual minorities, in addition, the Iranian Penal Code provides a detailed description of same-sex acts with different thresholds and penalties for male homosexual acts, lesbianism and sexual acts for non-reproductive purposes. The most reported way of applying death penalty in Iran is by hanging (ILGA, 2020).

Despite the official data found by ILGA, in 2007, the President Mahmoud Ahmadinejad denied the existence of homosexuals in the Iranian territory, as he said “In Iran we don’t have this phenomenon.” (Reuters, 2007), others authorities are more aggressive assuming a blatant hate speech against sexual minorities, as Mehrdad Bazrpash, member of the Iranian Parliament has stated that “It is a great honor for the Islamic Republic to violate homosexuals’ rights.” Reports from the NGO 6RANG reports that hate speech is widespread and it is in the official discourse of many public authorities (6rang, 2017).

In regard of the legality of same-sex acts, it is considered legal in 64% of the globe, which means that 36% of the world have some legal provisions criminalizing consensual same-sex. Only Europe and North America are 100% legal in this sense. Most of the countries that

criminalize are located in Africa (31 nations), Asia (22 countries), Latin America (9) and Oceania (6) (ILGA, 2020).

In regard of legal provisions applied to block freedom of expression on sexual and gender diversity, we have 42 nations with some type of legal barriers. In Europe, only 4 countries have some non-explicit legal barriers: Belarus, Lithuania, Russia and Turkey (ILGA, 2020).

The three first countries of these list have developed some “anti-gay propaganda” provisions. Same-sex relations is treated as something that could influence children or minors in general, in order to protect family values and public morality, these provisions aim to restrict public content related to LGBT issues in general. In Turkey, LGBT events were banned from the capital and from the university life. In other European countries some other attempts are on-going or have failed to restrict sexual minorities rights and their right to have a freedom of expression, similar events took place in Armenia, Hungary, Latvia, Moldova, Poland, Romania and Ukraine. Most of these countries are trying to develop an “anti-LGBT propaganda” in their legal jurisdiction to restrict LGBT freedom of expression (ILGA, 2020).

In regard of the right of assembly and the right to register civil society organization to work sexual and gender issues and advocate in favour of sexual minorities, there are 51 countries in the world that pose some restriction or are blocking the registration of organization for this purpose, most of these countries are in Africa and Asia. In Europe, only two countries present some legal restriction to it: Belarus and Russia (ILGA, 2020).

3. The International Protection of Refugees

In this section we will study the main international legal documents that cover the protection of sexual minorities: the 1951 Refugee Convention and its 1967 protocol, the Handbook on Procedures and Criteria for Determining Refugee Status, UNCHR Guidelines on International Protection N. 9, and the Yogyakarta Principles.

We shall start with the *Universal Declaration of Human Rights* (1948), that establishes in its Article 14 the *right to asylum*: “(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”. It follows from the above that the right of asylum cannot be invoked when the person is persecuted for committing a common crime, although the concept of crime will vary from country to country, and according to each country's legal system. In other words, every human being has the right to freedom and not to suffer persecution, as well as the right not to be forcibly returned to their country of origin because of serious risks to life and to their integrity.

According to Article 1 of the *1951 Convention Relating to the Status of Refugees*, a refugee is a person, who “due to a well-founded fear of persecution 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, lacking a nationality and outside the country of his former habitual residence, is unable or, because of such fears or for reasons that are not merely of personal convenience personal, is unwilling to return to it” (emphasis added). It is important to mention that, originally, a temporal restriction was posed by the original Convention (in 1951) which was drafted to deal specifically with those who were fleeing or victimized by events until that date. This restriction was removed by the *1967 Protocol Relating to the Status of Refugees*, taking into consideration that despite the end of the II World War, new conflicts and situations ongoing in the world were causing forced migration. For that reason, the 1967 Protocol applies the same protection of the 1951 Convention for those who became refugees in events that took place after 1951.

The interpretation of a “well-founded fear of persecution” is based on facts, it takes into consideration the individual perspective and the contextual facts on a given case. If the country of origin is not transparent, it is hiding information about homo/transphobic laws in force, not being possible to know precisely to which extent this represents a persecution, then other means

may be taken to evaluate the situation in a given country, for example, a generalized atmosphere of persecution, a constant risk of exposure with grave consequences to the victim and the “witchcraft hunt” effect. Governmental statements as the denial of the existence of LGBT people within a country’s population or the declaration that LGBT members constitute a threat to the national identity are other examples (UNHCR, 2012)

For some, the identification of what represents violence, persecution, the causal-link and the evidential matters in the context of sexual minorities might be inconsistent or hard to be defined. For that reason, the UNHCR Guidelines on International Protection No. 9 (2012) provides some orientations to the decision-makers.

Violence in many means (psychological, physical and/or sexual) can be considered sufficient to meet the persecution criteria. Rape can be considered a form of torture, and other forms of intimidation to induce a person to change his/her sexuality, such as forced sex-reassignment surgery, electroshock therapy and hormonal therapy. Any medical procedure, forced or taken without consent of the person, or with medical experimentation purposes, will be considered torture as well (UNHCR, 2012).

The existence of laws criminalizing consensual same-sex relations, even if not applied regularly, can foster a hostile and oppressive atmosphere, a context similar to a “witchcraft hunt” effect, a layer of legitimacy to expose and persecute people based on their sexual orientation. Blackmail and extortion are other types of violence and persecution found in the aforementioned scenario. In this context, State protection is severely deteriorated, lacking credibility (UNHCR, 2012).

In regard of the causal-link, it has to be clear that the dismissal of a job, for instance, *per se* cannot be considered as persecution. The perception may change if the applicant can prove that being a LGBT in a given context, in a given country, can represent a threat and it can trigger future dismissals (UNHCR, 2012).

In regard to the evidential matters, the applicant may be asked to provide evidence to back up his argument, to prove a “well-founded fear of persecution”, provide evidence that can attest the existence of a relationship, persecutions perpetrated by former employers, community members or even his/her own family. Unfortunately, in most of the cases, material evidence will not be possible to be provided, the decision-makers shall accept the own statement as the only “evidence” (UNHCR, 2012).

An LGBT asylum-seeker shall never be asked to provide intimate evidence, prove his sexuality, neither shall be asked to submit to “medical” testings, given that all these requests are grave violations of human rights (UNHCR, 2012).

In the absence of material evidence provided by the applicant, the decision-makers may take into consideration country reports, material produced by the media, NGOs, UN reports and any documentation that can testify regarding the deterioration of human rights, and the situation of persecution for sexual minorities in a given country (UNHCR, 2012).

In more detail, the Handbook on Procedures and Criteria for Determining Refugee Status (1992) points out the five categories envisaged:

1. *Race*: we should extend the concept to cover the full range of ethnic groups. Mere membership in a group is not sufficient for this category. What is needed is the causal link that racial discrimination arising from membership in this ethnic group affects the most fundamental and basic human rights;
2. *Religion*: the right to freedom of thought, conscience and religion is envisaged in the Universal Declaration of Human Rights, which includes the freedom to manifest one's religion in public, as well as the freedom to change one's religious creed. Discrimination on religious grounds generally includes practices imposed on community groups not to profess their faith in public;
3. *Nationality*: refers to an individual's membership in an ethnic, linguistic group, which can be confused with the category Race;
4. *Member of a particular social group*: includes individuals who suffer persecution for sharing experiences, habits, social status, or merely belonging to a particular social status or the mere belonging to a well-defined and specific social group;
5. *Political opinion*: not only disagreeing with the authorities, the political opinion needs to be critical of the government's policies and methods of government, and there must be a feasible risk of persecution.

It is important to mention that the state has not only contributed to the persecution of the refugee, but has also failed in its institutional role of providing protection, leaving no other option for the individual, driven by the desire to maintain his own life, but to seek protection in another state. Therefore, it is a category that should not be confused, under any circumstances, with that of the immigrant, who seeks to settle in another country to develop, study or business, while the refugee is suffering a systematic violation of several guaranteed rights.

Being a refugee is a judicial status, a distinct legal personality granted by international law. These peoples are suffering systematic persecution, fleeing from inhumane conditions faced in their home countries, where the most basic human rights are at risk, including their own lives, for that reason, refugees can rely on United Nations bodies to assist in their needs

and of an endorsed and renowned international protection system to advocate in their favour. Migrants are moving to improve their economic, social, educational and other life standards.

The implications of confusing the two concepts can trigger serious problems, given that they have judicial and political implications. The refugees topic has been securitized, but is above all else a matter of human rights. Whereas migration is considered a multilateral topic that can involve many areas dealt with by international organizations (labour, health, human rights, crime and the like) (Feller, 2006).

Refugee status shall be a transitory condition in nature. Once there is a resolution to the situation that gave rise to this condition, it shall result in: 1) repatriation, always on a voluntary basis; 2) local integration with nationalization; 3) resettlement in other countries (Piovesan, 2018).

The 1951 Convention and the 1967 Protocol have received a number of criticisms, in particular for ignoring gender issues. This provoked the UNHCR to produce guidelines and a document in 2002, in 2008 and 2012 to address issues such as persecution based on gender, persecution based on sexual orientation/gender identity, and to detail the category of "membership of a particular social group". Countries such as Canada, the UK, and the US have provided great contributions to this category and to gender issues (Imran, 2015).

3.1 Recent developments: The Yogyakarta Principles (2006) and The Yogyakarta Principles plus 10 (YP+10, 2017)

Sexual minorities constitute a group being persecuted and targeted all over the globe, suffering severe and reiterated human rights violations of all sorts and perpetrated by many different actors and for many different purposes. Given that international documents rarely grant express protection for this group, and that the understanding between the sexual minorities' rights connected with the international treaties could be a challenging gap for the fulfillment of these rights, a group of international human rights experts decided to produce a specific norm to shed some light and respond to the following question: how the international human rights law shall be applied in relation to sexual orientation, gender identity and expression?

Despite its non-binding character, the Yogyakarta Principles constitutes orientative guidelines and recommendations to the States on how the international norms shall be interpreted by judges and how international law norms shall be address and applied locally, in domestic or regional systems. The following principles have special importance in the context of asylum-seekers:

Principle 3) *Right to recognition before the law*: the right to be recognized as a subject before the law is a personal right that shall be recognized immediately, and not dependent on any abusive treatment for legal recognition. Medical procedures as sex reassignment surgery, sterilisation or hormonal therapy shall not be considered a requirement to recognize a subject before the law. The States shall ensure the legal capacity in civil matters are not dependent on the recognition of marriage or others' relative approval of any kind. And ensure the State-issued identity documents (passport, ID, birth certificates, driving licenses and other documents for identification purposes) reflects the person's self-defined identity towards gender/sex.

Principle 7) *Right to freedom from arbitrary deprivation of liberty*: no one shall be under arrest or detention based on sexual orientation and gender identity. To be informed of the reasons of the arrest is a right of all persons. The States shall ensure that sexual orientation or gender identity are not a ground for arrest or detention.

Principle 18) *Protection from medical abuses*: no one shall undergo unethical or involuntarily medical or psychological treatment of any kind based on sexual orientation or gender identity. Given that a person's gender expression or sexual orientation are not medical conditions, it shall not be used as a justification to treat a person as a patient and force him/her to submit him/herself to abusive treatment, or to be classified as treated, cured or suppressed.

Principle 23) *Right to seek asylum*: a person has the right to seek asylum in other countries, the persecution suffered by the asylum-seeker includes the type related to sexual orientation or gender identity. A State shall not invoke non-refoulement right to expel, block entry or extradite a person, sending the asylum-seeker back to any country where he/she may be in serious danger to receive a cruel or inhuman treatment, punishment or life threat based on sexual orientation and gender expression. The States must review and reform their domestic systems to recognize persecution based on sexual orientation as a ground for granting refugee status and asylum.

The Additional Protocol establishes that States must assure that the asylum-seekers shall received protection from violence, discrimination and any other harm, while they are applying for refugee status and their claims are still being analysed by the immigration boards or judicial courts. The notion that a person can avoid persecution being discreet or changing the sexual orientation is unacceptable and shall never be considered as a valid recommendation or a final decision.

In addition, the States shall accept the self-identification regarding sexual orientation or gender expression of the applicant as valid and reliable, shall accept late disclosure, taking into consideration the context of fear and lack of freedom in their homelands to reveal such intimate characteristics and that it should not affect negatively the evaluation of the case. The States must provide sensibility and cultural trainings for state agents and immigration officers that work in the frontline and that will be the first person that a LGBT asylum-seeker must find to register his requirement for asylum, being trained and prepared to deal with this type of request in a non-discriminatory and in a professional manner. The detention of a LGBT asylum-seeker must be avoided, applied only as a last measure and for the shortest possible time.

Principle 30) *Right to state protection*: it is a State duty protected its citizens from violence, discrimination or any harm of any kind, perpetrated by State agents or other individuals. The States shall create a framework to enact legislation to investigate, prosecute and punish perpetrators, whether they are State or non-state actors.

Principle 31) *Right to freedom from criminalisation and sanction on the basis of sexual orientation, gender identity, gender expression or sex characteristics*: the right to be free from criminalisation and any legal provisions willing to punish a subject based on their sexual orientation or gender expression. The States must prevent that legal provisions independently on the sources (customary, explicit, religious or indigenous norms), derived from colonial eras, and the application of such laws under morality, decency or propaganda purposes are unable to criminalise sexual orientation and gender expressions, and are unable to establish any form of

sanction against these minorities. Notwithstanding, the States must assure that criminal records based on the aforementioned crimes shall be erased, and any on-going criminal conviction, and discriminatory law being applied currently, shall be ceased and have their legal effects blocked.

3.2 Membership of a particular social group

From now on we will discuss the specific category of "membership of a particular social group" (hereinafter: MPSG). The 1951 Refugee Convention provides generic and scarce explanations about who would be the subjects of this category, because it is a subjective and vague expression, there is a strong interpretative bias, flexible and amorphous.

According to the 1951 Convention, the candidate to this category must prove the following requirements:

- 1) A particular social group exists;
- 2) The applicant is a member of this group;
- 3) The applicant has a well-founded fear of being persecuted due to the membership in this group.

Unlike the other categories (race, nationality, religion and political opinion), there is a strong interpretive, contextual and social bias concerning the assessment of belonging to a specific group. Further clarification of what constitutes a socially particular group have been under debate since the 1990, and it has been accompanied by an increased number of applications in this category (European Council on Refugees and Exiles, 1997).

The five categories of the 1951 Convention are not mutually exclusive, which means that depending on the contextual scenario of the applicant, the refugee claim may meet two or more categories of the Convention. The expression of a non-dominant sexual orientation or identity may be interpreted as posing a threat or challenging the status quo, the dominant social norm, culture and traditions. For instance, a human rights activist that is suffering persecution for advocating in favour of LGBT rights, can be categorized in the Political Opinion, Religion and MPSG (UNHCR, 2012)

This vagueness and ambiguity has instigated some authors to debate about what belonging to a specific social group means and what the real intention of the drafters was when they set this category in the Convention.

Grahl-Madsen was one of the first scholars to initiate this debate in the 1960's, he has defined two socially specific groups: those to which membership is voluntary on the part of the individual (organizations or associations), and those whose membership is involuntary (such as

nobility or mother tongue). Years later, Guy Goodwin-Gill points out that groups can be perceived by ethnicity, cultural and linguistic origin, education, family ties, economic activity, shared values, and aspirations (European Council on Refugees and Exiles, 1997).

In the definition of a particular group, not only innate traits or shared values are taken into consideration but also external factors such as widespread and pervasive discrimination, legal distinctions and a documented shared history of persecution, most notably the treatment that a given group receives from the government (European Council on Refugees and Exiles, 1997; LaViolette, 1997).

Complementing the two authors cited above, James Hathaway defines three groups that can be classified as specific social groups (European Council on Refugees and Exiles, 1997; LaViolette, 1997). 1) Groups defined by *innate and unalterable characteristics* (a group to which the author would classify homosexuals and bisexuals, of both genders, since they have fundamentally immutable characteristics) would also cover requests based on gender; 2) Groups derived from a temporary or voluntary status; 3) Existing groups defined by the will of their members, such as associations.

Arthur Helton believes that the category requires a broad, liberal interpretation, that is, any group that suffers persecution or is likely to suffer persecution can be included in this category, as long as it is supported by international human rights norms (LaViolette, 1997).

Besides being considered by some scholars as ambiguous and unclear, often the refugee requests that fall under this category also fall into other categories. In some countries, refugee claims based on sexual orientation are processed under the category of Political Opinion, while in other countries they are possibly processed under the category of Religion, since in certain countries, sexual orientation is a true political statement, while at the same time represents a threat to the religious traditionalism.

The approaches recognized in the international system to the assessment of MPSG are (UNHCR, 2012):

1) protected characteristics: define a group based on innate or immutable traits or a characteristic that is inherently related to human dignity and should never be asked to renounce;

2) social perception: a given group is identified when common and shared traits can distinguish a group uniquely apart from the rest of the community.

4. Domestic Determination System

In this section, we will discuss the particularities of the Canadian protective system, the forms of entry, and the particularities of the refugee claim processing, which will inevitably lead to approval or denial of the claim. As well as, the main limitations, criticisms and their contributions.

Very briefly, it is important to outline the atmosphere of openness, multiculturalism³ and the role developed by the Government and the strong support of the public option to immigration that is found in Canada and might contribute to asylum-seekers to base their decision when looking for protection in this nation.

It is considered by the Multicultural Policy Index⁴ (2020) as the 2nd most multicultural country. It was the first Western country to adopt an official multiculturalism policy toward immigrant origin ethnic groups, and it remains the only country in which multiculturalism is enshrined in the Constitution. The policies consists in affirmative actions taken to assure media representativity and employment to disadvantage groups. In addition, it recognizes dual citizenship and provides language trainings programs free of charge aiming to help the immigrant to overcome any barriers to become a member able to participate in any aspects of the canadian society (Kymlicka, 2012).

The Canadian selection procedure is based on a point system, the idea is to evaluate the potential of a candidate based in some categories as educational background, work experience and age. Each category grants points to the applicant, the higher scores he/she reaches, the most likely it is to be granted permanent residency. The economic migrants are those who submit themselves to the aforementioned system, and they correspond to 59% of the total migrants in 2001 until 2010, followed by Family reunification (26%) and refugees (11%) (Bloemraad, 2012).

³ Outlining the meaning of a multicultural approach in this paper, far beyond the superficial level (a celebration of cultural diversity or “cuisine, clothing, and music”). Multiculturalism aims to shake old hierarchy, power structures, and exclusionary social models, designing new models ruled by human rights, democratic value, civil participation, integration, and inclusion (Kymlicka, 2012).

⁴ The Multiculturalism Policy Index, created and published by Queens University, is monitoring the implementation and development of multicultural policies in 21 western countries, from the 1980 until 2020. The areas evaluated are: 1) Constitutional, legislative, or parliamentary affirmation of multiculturalism; 2) Adoption in school curricula; 3) Ethnic representation/sensitivity in the media; 4) Exemptions from dress codes, either by statute or by court cases; 5) Allowing of dual citizenship; 6) Funding of ethnic group organizations to support cultural activities; 7) Funding of bilingual education or mother-tongue instruction; 8) Affirmative action for disadvantaged immigrant groups.

The public opinion in general is highly pro-immigration, and the immigrant is constantly pictured as a national hero, responsible for boosting the Canadian economy (Bloemraad, 2012). However, some critics of multiculturalism believe that the geographic isolation and the occasional waves of illegal migrants are the main reasons for this optimistic perspective (Kymlicka, 2012). In fact, the number of illegal migrants is estimated in 3% to 6% of the population, which is considered very low comparing to the US and European standards (Bloemraad, 2012).

The “exceptionalism” in the management of migrants (Bloemraad, 2012) can be attributed to a desecuritized approach of the topic (politicians tend to assume neutral position and recognize the contribution of the migrants to the community), diverse origin of migrants (no predominance of nationalities, no dominant groups), State efforts concerned not only with immigration but supportive to integration, responsibility shared with employers, civil society, and other non-state agents (Hiebert, 2016), and the development of multicultural policies (Kymlicka, 2012, Hiebert, 2016).

The Canadian pursuance for national identity revolves to the 1960’s and 1970’s when they were trying to reaffirm themselves, and in the definition of their identity, looking to differentiate themselves from the North-Americans and British peoples, the idea of a multicultural nation suits well, given that they wanted to address the separatist intentions of Province of Quebec, giving a national cohesion ideology. During the 1970’s and 1980’s, we have the development of immigration and integrative policies (Bloemraad, 2012).

Since the 1980s, Canada has been recognized for its work with refugees, receiving the Nansen Medal in 1986. Since then, changes in policies and the determination system have transformed Canada from a resettlement country to a host country of first choice for refugee applicants (Lacroix, 2004).

The Immigration and Refugee Protection Act (hereinafter: IRPA) (2001) envisages refugee protection in part 2., reassuring the Canadian “commitment to international efforts” and “upholding Canada’s respect for the human rights and fundamental freedoms”, aiming to provide a refugee program which is “the first instance about saving lives” and “to offer safe haven” for those who are suffering persecution in the 1951 Convention’s five categories.

Canada's internal determination system, regardless of the category in which the applicant wishes to apply, requires that you express your intentions in the refugee application, automatically gaining admission to the country until their application is evaluated. It is up to the applicant to fill out forms and send them to the Immigration and Refugee Board - the

body responsible for the decision-making process - which will be waiting for the appointment for an interview with the above-mentioned committee.

The request for asylum is address to the Immigration and Refugee Board (hereinafter: IRB). The applicant must write their life stories, their fears, violence and/or persecution experienced in their origin countries and to what risks they believe they are exposed in case of return. When hearing phases comes, the applicant may provide material evidence, where they must identify themselves as a SOGIE, and use any material as a evidence to back-up their stories: photos, letters, bank accounts, bills, police reports, medical documentation, and the statements from family members and friends to corroborate their request (Fobear, 2015)

After the hearing, the applicant receives a reply with the approval or rejection of the claim. If granted, the refugee gains the possibility to apply for permanent residency. If rejected, the applicant can make an appeal to the Supreme Court for a humanitarian review of his case. If denied at the appeal level, the refugee will be denied permanent residency and deportation path is the next step in the process (Lacroix, 2004).

There are three main pathways for asylum-seeker (LaViolette, 2012):

- Domestic System of Determination or Internal: apply for the visa, already in Canadian territory, submitting to the country's internal legislation, as described above, can be requested inland or in any ports of entry (habors, airports, border outposts).
- Resettlement: through diplomatic relations and governmental ties or support from civilian community groups;
- Family Reunification: dedicated to binational same-sex couples.

4.1 Resettlement

The resettlement mechanism is set to reallocate the applicant to a third country, as shown in the the documentary film A Jihad for Love, a group of muslims men are suffering persecution in Middle East and they request asylum in Turkey being moved to Canada afterwards under the resettlement (Sharma, 2008).

Canada operates the Refugee and Humanitarian Resettlement Program (RHRP) dedicated to people from outside the country who wish to begin the visa process.

It is estimated that the program is responsible for the resettlement of 10,000 to 12,000 people. Resettlement can be subsidized by the by the Canadian government, as well as privately, by institutes of organized organized civil society (LaViolette, 2012).

Associations of lawyers and civil agencies have been growing in Vancouver, Winnipeg, Toronto, Halifax, and Ottawa. In 2011, the government announced support for a lawyers' group in Vancouver, promising an investment of 100,000 Canadian dollars over three years. The group is charged with the responsibility of accommodating, instructing, and providing basic needs with food clothing, and integration for gays and lesbians coming from various parts of the world (LaViolette, 2012).

4.2. Family Reunification

IRPA sets the family reunification as part of the refugee program, “to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada” (2001).

Canada's Immigration Policy has long facilitated the reunification of separated families. This happens when citizens or authorized permanent residents seek to sponsor the arrival of other family members who stayed in their countries of origin, this category is called "family class immigrants". Until 2002, only heterosexual couples could benefit from the Canadian law to get the visa extension for their spouses and partners. Gay residents were restricted to applying only for family members and relatives, and same-sex spouses were not allowed to be included in the "family class" category. The change came in 2002, when stable civil unions were included in this category, and it now also include same-sex civil unions (LaViolette, 2004).

The main categories of immigrants are (LaViolette, 2004):

- Independent immigrants: selected based on specific criteria such as education, age, work experience occupational demand, and knowledge of English and French. Each criterion grants points to the candidate, who must reach an expected level to be eligible to receive the permanent residence visa;
- Business immigrants: selected based on the potential to the Canadian economy, establish, invest or start new businesses boosting the Canadian economy;
- Family Immigrants: seeking to reunite family members who have been separated, a foreigner may be selected in this category based on the criterion of having an emotional or family relationship with a Canadian citizen or a permanent resident.

In this process, documents are required to prove the marital relationship and the duration of the relationship: photos, stamped passports, letters, and other documents usually serve as

evidence for heterosexual couples who wish to reunite in Canada. For same couples, the same heterosexist parameters and criteria may not be Applied. In many regions, homosexual couples will keep their relationships in total secret, not being able to share or expose it in public, nor produce evidence such as photographs and written letters. In several countries, same-sex marriage is not allowed, making the process of proof more difficult and unequal (LaViolette, 2004; 2012).

Although Canadian law recognizes civil unions performed in other countries or states, the vast majority of applicants will not be able to use the registration of the partnership as proof of cohabitation for 1 year. This restricts the categories that these applicants can apply for (LaViolette, 2004).

One of the criticisms, is the evaluation that the immigration agent makes regarding proof of the relationship. The agents are oriented not only to evaluate considering the cultural, contextual, local and social reality of the applicants, but above all, not to apply heteronormative criteria. The equality of roles in a gay couple and the absence of well-defined gender roles must be taken into consideration, while many traditional heterosexual couples maintain a more defined division of roles one has a more active public role, as provider, and the other maintains a more private role, as a home caretaker; this configuration does not necessarily will be found in the same frequency in a homosexual couples, where there is a more equality of roles and the lack of a rigid separation of tasks. Another point is the loss of individuality such as sharing the same bank account may not be as frequent in same-sex couples as in opposite-sex couples (LaViolette, 2004).

Canada became a signatory to the 1951 Convention and the 1967 Protocol in June 1969, however, the acceptance of homosexual applicants would become a reality a decade later. It was in the 1990s that Canada reinterpreted the United Nations conventions by allowing refugee claims to be made on the basis of the sexual orientation of the applicants (Webster, 2009).

4.4. Landmark-cases and Canadian jurisprudence: the Ward and Sadeghi-Paru cases.

In this section, we will progress with the discussions taking the two main landmark cases that established a new horizon in the Canadian domestic system, shaping a system more inclusive for sexual minorities. First of all, it is important to note that the application of protection under the 1951 Convention was not granted based on the explicit norm, as noted by Imram (2015), the 1951 Convention was highly criticized for not being inclusive considering other vulnerable groups. Despite having no explicit protection in international treaties, in a context of scope expansion, real-life cases posed new challenges, forcing the Courts to come to new understandings – the evolutionary character of law – reinterpret the text based on other sources (for instance, principles and doctrine), comprising new realities that may have not been taken into consideration by its drafters of the Convention.

The watershed came in 1993 with the Canada (Attorney General) v. Ward case. When the Canadian Supreme Court was called upon to the case of Patrick Francis Ward, a former member of the Irish National Liberation Army (INLA), who participated in the escape of a hostage of the group, and feared that upon his return to his home country he would face persecution from the INLA.

The case, although it had no direct relation to gays and lesbians, helped to clear the understanding of the category of "membership of a particular social group". In deciding that an Irish terrorist should be covered by the 1951 Convention, the Canadian Supreme Court's decision established an understanding of the category, thus establishing that gays and lesbians could be covered as well, and apply from then on, for refugee visas in the same category.

The case itself provoked the debate about natural and immutable characteristics, such as race and sexual orientation, from other characteristics that derive from will and voluntary association (LaViolette, 1997; Webster, 2009; Imran, 2015; Sehaag, 2008).

The first refugee claims based on sexual orientation began to be registered in 1990, and are based on the argument that homosexuality as forming a particular social group, besides being an innate and immutable characteristic, which is independent of the will of the individual (Webster, 2009).

The IRB receives refugee applications based on sexual orientation since 1991, but it was in 1992 that Canada became one of the first countries in the west to grant refugee status based

on sexual orientation to an Argentine (Jenick; Wong; Lee, 2009; Lee; Brotman, 2011), a year later, the Supreme Court would hear the Ward case, which was emblematic and pacified the issue of MPSG in the Canadian legal system. In several cases, the convergent point was the belief in sexuality as an immutable characteristic beyond the control of the applicant, as a characteristic sufficient to place the applicant in the MPSG category and the protective system of the 1951 Convention.

In some judicial decisions, in addition to being considered immutable, sexuality has also been considered a fundamental protection of individuality, because even if understood as mutable, an individual cannot or should not be asked to change such a particular characteristic in order to protect others basic human rights (LaViolette, 1997; Jenick; Wong; Lee, 2009).

In the same way that some cases were judged as well-founded, there were also cases in which homosexuality was not understood to be covered, these judges have based their decision on the absence of express protection of sexual orientation in international standards, personal morality, religion, and the lack of evidence to prove that discrimination against sexual minorities was in a level of persecution (LaViolette, 1997).

After the judgment of the Ward case, starting in 1993, homosexuality in the legal system as an innate and immutable characteristic of the human being. Innate means that it is not altered by conscious and action except at an unacceptable cost. This assumption has legal consequences and has been extremely debated in the academic and legal spheres. There is no consensus in the human or biological sciences about what permeates human sexuality, and in what way it is conditioned or determined, or whether it would be in the sphere of psychology or biology. Like race, ethnicity and biological sex, sexuality is a deep-rooted, intrinsic characteristic of the individual.

On the subject, the American Psychological Association (2021) states that “There is no consensus among scientists about the exact reasons that an individual develops a heterosexual, bisexual, gay or lesbian orientation. Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. Many think that nature and nurture both play complex roles; most people experience little or no sense of choice about their sexual orientation.”

Although the immutability thesis is understood and accepted in Canada, there are other streams in this debate that contradict and influence decision-makers in other countries, resulting in legal consequences different from those we have in Canada. For example, the social constructivism stream, which believes that homosexuality is the result of a social, historical,

and cultural interactions, and less biology. In other words, this thesis poses the individual as the responsible for his or her sexuality and takes the issue out of the realm of human rights, treating the subject as a choice, an option or a lifestyle. This trend was responsible for influencing decisions in the USA, where there are records of denials in the granting of refuge based on the idea that sexuality is something changeable (LaViolette, 1997).

Some authors such as Halley and Willets found a point of intersection between the thesis of biological determinism and social construction, they argue that the manifestation of homosexuality is influenced by the social and historical context, changing over time and according to the cultural norms of each society, but the identity characteristic of sexuality would remain unchanging, in other words, homosexuality is not a social construct, only its manifestation (European Council on Refugees and Exiles, 1997).

Another landmark case is the *Sadeghi-Paru v. Canada (Min. of Citizenship and Immig.)* in 2015, when the Supreme Court granted protection to a claim rejected. The previous decision considered that this Cameroon applicant could avoid persecution concealing her sexual orientation – applying the discreet criteria – what was considered by the Federal Court a unreasonable decision and a breach of rights.

Canadian jurisprudence is also known for its contribution to international refugee law, particularly with regard to gender issues, since Canada was the first country to create a specific guidebook on the subject in 1993 (Imran, 2015)

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5. The LGBT Refugee Protection System in Canada

If in the 2000s, Canada was considered, in the words of the Canadian journalist David Graham "a reference in tolerance and human dignity" for these refugees, the scenario used to be quite different a couple of decades ago. The Canadian immigration policies have changed over the decades, from total obscurantism in 1950 (Webster, 2009), where the Immigration Policy was openly anti-LGBT, not only for immigration issues, but also applied to the treatment of tourists in general. At that time, sexual orientation would be used as an argument to deny entry or apply deportation if the individual had already entered the country but had manifested sexual conduct deviating from heterosexuality (LaViolette, 2004, 2012).

This stance lasted until the mid-1970s, when the Immigration Act of 1952, was amended. From then on, sexuality would no longer be a reason to deny a tourist or immigrant entry. However, only heterosexual couples could apply for visas for their spouses/partners (LaViolette, 2004). Changes were perceived from 1980 onwards, with the reinterpretations of the United Nations conventions for human rights, as well as the central role that immigration has for the country as a nation-building factor, economic importance, and the important humanitarian role it plays, considerable changes were made in policy until we reached the current state of recognition (Webster, 2009; Lacroix, 2004).

Canada is a country internationally known for its openness to gender issues and sensitivity to sexual minorities, despite having registered, in the past, cases of violence and hate crimes against the LGBT population, currently, all Canadian urban centers have very visible and well-defined communities, and there is openness for leaders, academics, politicians and celebrities to have the freedom to expose their sexuality in the media (Rehaag, 2008a).

In 2017, the Immigration and Refugee Board has published the Chairperson's Guideline 9 to provide guidelines and help the decision-makers, border agents, immigrant staff about the challenges, particularities and hardships faced by sexual minorities. The document is dedicated to educate the frontline staff that will be handling with LGBT applicants.

In this document, sexual minorities is referred as "sexual orientation and gender identities and expressions" (hereinafter: SOGIE). It recognizes the lack of consistency that may occur in some cases, for instance, late disclosure or the lack of "corroborative or additional evidence", having the applicant's statement the only evidence to be taken.

The documents points out the particular level of vulnerability and circumstances, bringing a list of mental health issues that a SOGIE might experience: “depression, post-traumatic stress disorder relating to past physical or sexual violence, anxiety, suicidal tendencies, dissociation, decreased capacity for trust” in addition to “internalized homophobia, sexual stigma or oppression” (IRB, 2017).

The decision-makers shall accept the applicant’s self-declaration as valid and credible. Inconsistencies and contradictions might occur in any asylum-seeker hearings, but it shall not be taken based on stereotypes and biases. For instance, the association of specific mannerisms and behavior as feminine or masculine roles, expect that SOGIE would have specific occupations, have or have not children, expect that transgender women would undergo surgical or hormonal procedures and many other questions related to the sexual and intimate life of the applicant (IRB, 2017). Fobear (2015), scholar and LGBT rights activist, reports having contact with applicants who had their requests rejected by the IRB agents based on “not looking gay” or not having a relationship with the same sex.

In all the categories mentioned above, in order for the applicant to receive the refugee visa provided for in the Convention, it is necessary to prove fear of persecution in one or more of the five possibilities envisaged in the Convention and an inability to find protection in his or her country of origin. That is, it is necessary to establish that a situation of persecution exists and that there is a causal link between this persecution and the individual's civil or political status (LaViolette, 2015).

The notion of persecution plays a central role in defining this procedure for gauging the applicant's status, and requires that the threat be persistent, repetitive, or systematic. The individual not only suffers discrimination, but the threat has evolved to infringe on the most fundamental human rights. The applicant goes through a long process of exposure and conversations with various state and civil actors: customs officers, visa officers, interpreters consultants, resettlement staff, civilian agencies, and a diverse range of people from different backgrounds, the possibility of discrimination and prejudice on the part of one of these decision-makers or influencers of the process is a reality, especially if these participants are insensitive to LGBT causes or base their decisions on stereotypes or well-defined gender roles, or even have a homophobic or heteronormative approach, undermining the applicant's experience and sensitive situation of the applicant (LaViolette, 2012).

Homophobia and heterosexism can lead decision makers to decision makers in the following ways: 1) diminish the importance of sexual orientation; 2) diminishing the importance of sexual orientation and gender identity in a refugee applicant's feelings and

experiences; 3) assuming that an opposite-sex marriage excludes the possibility of the applicant being homo or bisexual; 4) categorizing homosexuals into discrete and non-discrete or into stereotypes (LaViolette, 2012; LaViolette, 2013). Canada has adopted cross-cultural and sensitivity trainings with responsible borders staff. However, LaViolette points out (2013), it is not enough to overcome structural deficiencies of the asylum system: an unfair and partial system.

To avoid this type of situation, the UNHCR Guidelines provide that LGBT applicants should be interviewed and have the process conducted by trained staff and informed in the specific issues facing LGBT people. The document also mentions that, for many applicants, a Border Agent or a Immigration Officer might be the first time that the applicants are assuming their own sexuality to another person, and therefore, it is common to have some situations of late disclosure, given these specific situations to treat such personal and private matters with a stranger, as it is expected that there will be distrust and suspicion.

It is also expected that there will be distrust towards these agents, since in their home countries homosexuality is watched and persecuted by the state (LaViolette, 2008, 2012). Lee & Brotman (2011) describe the complexity that the Canadian system encounters when proposing an assessment of sexual minorities in a refugee acceptance process, where there are multidimensional factors and there is the junction of the issues of migration and sexuality. The analysis is contextual and needs to assess the conditions that each individual finds in his/her country of residence.

The progress that certain countries have made in recent years has made it more difficult for granting refugee visas to claimants from these countries, such as in Latin America and Eastern Europe. Albeit it is recognized that there have been great achievements in the legal aspects of LGBT rights in some countries, these achievements do not always materialize in the daily life of the community, there is a huge gap (or an abyss) between the norm formalized and prescribed, the Constitution and the decisions of the Superior Courts judges in comparison to the real life experience, continuing to motivate a migration movement to countries where LGBT rights are already consolidated.

For decision-makers, the analysis involving homophobia persecution involves a high level of complexity and it is quite challenging. The core of the analysis lies in assessing a complex process involving the social, political, religious, and family factors. Where the production of evidence to be presented is often beyond the applicant's means. Policy makers must analyze not only the legal progress made but also the presence and impact of NGOs in the region and the news concerning to cases of violence and hate crimes, which circulates in the

media (LaViolette, 2015), something that Al Imran (2015) called "country reports," i.e., violence monitoring reports, from several different sources, as an example, we can cite the reports released by Amnesty International and Humans Rights Watch.

The mere existence of criminal legal provision for homosexual practice is not a sufficient, but it is necessary to prove that the punishment is effectively put into practice. As stated in the UNHCR Guidelines, laws criminalizing homosexuality can lead to an intolerable situation for an LGBT person, to the point where persecution breaks out. A existence of certain laws violates severe restrictions on individual freedoms, in order to avoid suffering extortion, embarrassing exposure, bullying, unlawful detention, discrimination at work and in the family, among other forms of threat, can also impel LGBT people to seek protection from the state (LaViolette, 2015).

Not only in the public arena, but especially in the private arena, is where complex forms of persecution can be found. Violence translates into the inducement in forced marriages and pregnancies and in the various forms of psychological violence, physical violence, and coercion of the individual to conform to gender roles traditionally tied to biological sex. The violence that lesbians suffer is typically the violence suffered by women: they are forced to marry, separated from their children, and induced into a situation of subordination, denied reproductive rights, labor freedom, health care, and access to public areas and to public life in general. The complexity of these forms of violence is that they are not perpetrated by state agents or suffered by the individual in public, but perpetrated by the victim's own families (LaViolette, 2004; 2015).

As such, lesbians suffer double persecution, for being women and for being homosexual. In patriarchal cultures, to publicly assume oneself as a lesbian is an act of transgression to the social role of subvenience of the women, making them exposed to several types of violence, for defying the normative roles. The same applies to intersex and transgender individuals, since in sexist societies, non-conformity to well-defined gender roles can motivate threats and persecution (LaViolette, 2015).

One of the most controversial points in this process, is the proof or evidence of sexuality and the subjective nature of assessment that permeates the entire process. Applicants need to prove that they belong to a socially specific group, and the burden of proof is on them. Some applicants may provide photographs, documents proving stable unions and other types of documentary proof, others will rely on their declaration as the only proof. In many countries, a public display of affection is prohibited by law, or homophobic culture intimidates those who exposes the relationship in public, so that recording it in photographs or other types of records

becomes impractical, not to say impossible. Another point is the tendency of decision-makers to categorize sexuality based on parameters of behavior that are more effeminate for men or more masculine for women. This situation exposes a lack of training, sensitivity, and a Westernized understanding of human sexuality, as denounced in countries such as Australia, the U.S, UK, and Canada itself (LaViolette, 2012; Jenick; Wong, Lee, 2009).

Evidence of the threat of persecution is another point. If one hand, in some countries there is no monitoring body for this type of violence, on the other hand, when there is data from NGOs in defense of gays and lesbians, the information is considered biased and discredited. The availability of information is another big challenge, because in many countries, violence caused by homophobia is not documented and is not reported, erasing the problem from official statistics (LaViolette, 2012).

The Canadian media reports on the progressiveness of the domestic legal system, and constantly portrays Canada as a "paradise" and a "beacon of hope" for LGBT minorities in the world (Jenick; Wong; Lee, 2009; Lee, 2019).

Albeit there is no official data released on the amount of requests based on sexual orientation, in 2002, the newspaper The Globe and Mail reported that between 1999 and 2001, 2,500 people from 75 different countries were seeking for refuge status, claims based on sexual orientation in Canada. In 2004, the IRB publicly reported that 1351 refugee claims based on sexual orientation were decided in the country, 81% of these applicants were male and only 19% women, out of a total of 40,408 refugee applications in the same year (LaViolette, 2012; Lee, Brotan, 2011; Sehaag, 2008), which allows us to conclude that sexual minorities represent approximately 3% of the total number of applications processed.

In 2007, Sean Rehaag resorted to legal instances to request more information to the IRB via freedom of information claims. The raw data was shared publicly related to the year 2006 and we have the following findings: the system processed 651 SOGIE claims from 89 different countries. As shown on Table 1, claims based on sexual orientation and gender identity were the top 5th highest type of asylum claims.

We had 51,46% or 335 applicants who were granted refugee status successfully, 37,17% have failed and 11,21% were classified as abandoned/withdraw.

Table 1. Claim type in 2006

Claim Type	Number of Claims	%
Nationality / Ethnicity / Race / Religion	3092	28,04%
Political Opinion / Organization	2656	24,09%
Criminality / Corruption	2283	20,71%
Gender / Domestic Violence	1624	14,73%
Sexual Orientation / Gender Identity	651	5,90%
Other	428	3,88%
Prosecution	203	1,84%
State / Military Services	61	0,55%
Health Conditions	28	0,25%
Total	11026	100,00%

Table 1: Made by the author based on Rehaag, 2008b.

On Table 2, it is presented the country of origin of the SOGIE category, only 8 out of 89 countries converges 60% of the LGBT applications. The top countries were: Mexico that leads the 2006 ranking with 184 claims or 28,26%, followed by Nigeria (6,30%), two European countries Ukraine and Russia (6% and 4,92% respectively), Iran and Pakistan (both with 3,84% each), and two Caribbean countries Jamaica and Saint Vincent (3,69% and 3,23% respectively). Other countries with less than 2% of total LGBT claims that are worthy mentioning are in Africa (Uganda, Cameroon, and Kenya), Europe (Albania and Belarus), in Asia (India, Georgia, Malaysia, and Mongolia), in Latin America (Brazil, Guyana, and Saint Lucia) (Rehaag, 2008b).

Describing per continent / region of origin, we have the North American continent as the highest (185 applications), being Mexico que responsible as the top 1 country of origin, and only one application from the US. Secondly, the African continent with 114 applications: Nigeria, Uganda, Cameroon, Kenya, Congo, Ghana, Botswana, Senegal, Tunisia, Guinea, Namibia, Cote d'Ivoire, Liberia, Zambia, Somalia, Gambia, Egypt, Sudan, Ethiopia, Angola, Algeria, Sierra Leone and Mauritania.

Table 2. SOGIE claims in 2006, per Country of Origin		
Country of Origin	Number of Claims	%
Mexico	184	28,26%
Nigeria	41	6,30%
Ukraine	39	5,99%
Russia	32	4,92%
Iran	25	3,84%
Pakistan	25	3,84%
Jamaica	24	3,69%
Saint Vincent	21	3,23%
Uganda	12	1,84%
Albania	12	1,84%
Cameroon	10	1,54%
Kenya	10	1,54%
India	10	1,54%
Georgia	8	1,23%
Malaysia	8	1,23%
Saint Lucia	8	1,23%
Mongolia	7	1,08%
Guyana	7	1,08%
Belarus	7	1,08%
Brazil	7	1,08%
Ghana	6	0,92%
Congo	6	0,92%
China	6	0,92%
Other Countries	136	20,89%
Total	651	100,00%

Table 2. Made by the author based on Rehaag 2008b.

Thirdly, the European continent (82 applications), predominantly countries from the Central Eastern Europe (as Ukraine, Belarus, Moldova, Lithuania, Latvia, Hungary) and the Balkans (Albania, Bulgaria, Romania, Macedonia, Serbia and Montenegro, Bosnia-Herzegovina, Greece and Croatia), only one application from the Western region, Portugal.

Central America and the Caribbean region (73 applications), followed by Middle-East (39), South America (35), Russia (32), and Oceania with only one application.

Table 3. SOGIE claims in 2006, per Applicants' Sexual Orientation

Sexual Orientation	Number of Claims	%
Gay	469	72,04%
Lesbian	120	18,43%
Bisexual	50	7,68%
Other	12	1,84%
Total	651	100,00%

Table 3. Made by the author based on Rehaag 2008b.

As shown on Table 3, per SOGIE, the claimants are predominantly gay (469 applicants or 72%), followed by lesbian (120 claims or 18,43%), almost 8% declared themselves as bisexual and less than 2% as others identities (Rehaag, 2008b). As shown on Table 4, per gender of the applicants, the male applicants are more significant, representing 78,49%.

Table 4. SOGIE claims in 2006, per Applicants' Gender

Gender	Number of Applicants	%
Male	511	78,49%
Female	140	21,51%
Total	651	100,00%

Table 4. Made by the author based on Rehaag 2008b.

Given that the data is not released on a regular basis, nor is its measurement methodology, it is not possible to define the success rate for sexual minorities: some authors report high rates above the national average, between 52% and 69% (LaViolette, 2012; Lee, Brotan, 2011).

5.1. Criticisms and vulnerabilities of the Canadian Protective System:

As for the Canadian determination system, the main criticisms are:

- 1) Lack of continuous disclosure of official data by the competente organ (IRB) and transparency regarding the treatment of cases;
- 2) Lack of objective criteria in the decision-making process, leaving margins for subjectivism;
- 3) System shaped by stereotypation and western gender role notions;

The lack of official statistical data published on a regular basis hinders severely the efforts of the scholars to comprehend this phenomenon. The disclosure of detailed data could clarify many questions that are now unknown to the public: the LGBT ratio, the success rate of a sexual minority applicant, increases and decreases throughout the years, and the identification of trends and patterns that should ground policies for specific groups (Millbank, 2012).

We can take as an example Belgium and Norway which publishes LGBTI asylum decisions on a yearly basis as a comparative (Spijkerboer, 2011).

Without official data, the scholars are taking unofficial data collected by NGOs and by the media to further their studies. The latter has a special role in this topic, some cases receive special attention from the newspapers, especially when the applicant comes from Middle-East or Africa, or any country that includes inhumane punishment or death penalty, the media usually covers the case from the start of the application until the last instances (if rejected in a first attempt, until the appeal on the Supreme Court) (Lee, Jenick, Wong, 2009).

The narrative pictured in the media is highly criticized by Lee (2019): Canada is associated with an image of progressiveness, defender of human rights, antagonizing with the image of the origin country where the asylum seekers are fleeing from, being pictured as a setback in human rights, “primitive and tribalistic”.

Lee et al (2019) criticize the superficiality in which the problem is explored. The narrative focus on the antagonism between Global North and Global South, North developed and South in need, but it ignores the complex relations and the particular circumstances that each case involves, in addition, ignores the colonialistic relations in some cases, for instance, the discrimination experienced in some countries remains as a legacy of the anti-sodomy laws imposed by the British Empire in the past.

The authors (Lee et al, 2021; Lee, Jenick, Wong, 2009) criticize the convenience of how this image is constructed and pictured in the media, convenient to the Canadian reputation of “human rights defender” as if Canada was the last shelter of the LGBT asylum seekers, the utmost “Promisedland” of the sexual minorities around the world. Despite the “pioneerism” (Fobear, 2014; Jenick; Wong; Lee, 2009; Lee; Brotman, 2011) in taking sexuality as a ground for granting asylum, Canada is not the only option that an applicant can seek for protection, other countries share the same understanding and have developed similar protective systems. However, comparisons between these legal systems are rare in the literature (see Millbank, 2004; Rehaag[NN1] [GL2] , 2009; Imran, 2015).

The other critics lie in the fairness of the system and the objective criteria. The risks of discrimination are present in the whole asylum-seeking process. In summary, a system highly influenced by stereotypical perceptions of gays and lesbians, and Western notions of gender roles (LaViolette, 2007; Rehaag, 2008a).

The decision-making system requires a broad and open knowledge about sexuality and multiculturalism, subjects that are strongly influenced by religion, morals, tradition, and culture of each country. The challenge that hangs over the domestic system is: how can decision-makers, and influencers in the process, refrain from their conceptions of morality and sexuality, limited to their reality, and comprehend that the applicant may have other referential. Given that Canada is a majority white and Christian country, will suffer strong influence and bias from the Western Euro-American vision about sexuality, in the categorization of well-defined profiles of sexual minorities, which does not necessarily apply to gays and lesbians coming from all parts of the globe.

6. Conclusions

Violence against sexual minorities is widespread all over the globe, assuming many different forms: from the torture camps in Chechnya, the extermination groups in Brazil (Otto, 2017; O'Brien, 2013), the “witchcraft hunt” in Uganda and Kenya (Landau, 2014), to the anti-LGBT propaganda laws in China, Russia, and Central Eastern Europe (Porterfield, 2020). As Nicole LaViolette (1994) claimed, there is “no safe haven” for sexual minorities in this world; after 27 years, this statement is still appropriate. However, some progress has been reached throughout these decades in raising awareness.

Canada is perceived as a successful case study in the management of migration. The geographic isolation and less frequent migrant waves (in comparison with Europe and the US) could explain the predominance of the public opinion pro-immigration. Not only these reasons, but immigration is also comprehended as carrying a social role, to boost the economy and contribute to multiculturalism, a value upheld to the constitutional level, and an essential part of the state-building process (Bloemraad, 2012; Kymlicka, 2012).

Moreover, the defense of sexual minorities' rights is part of the Government agenda (TheGuardian, 2017). The environment is perceived as tolerant, open, and sensitive to minorities issues, and strong and well-organized LGBT communities can be found in the great metropolitan areas (Rehaag, 2008a). The combination of all these aforementioned factors, in addition to the high living standards, can contribute drastically to making Canada one suitable destination for asylum-seekers.

In a world full of violence, of constant persecution and new forms of violence and attempts to restrict rights are ongoing (ILGA, 2020), one of the great contributions of the Canadian case is the possibility to be taken as reference, a model. Aligned with its high reputation in the protection of minorities, human rights, and its pioneerism in LGBT/gender issues, sharing this experience could help other countries to develop similar systems. However, a model not necessarily means static or perfect, the system presented in this paper is not exempted from criticisms, that should be explored and addressed, as we will elaborate in the following paragraphs.

One of the main challenges of this asylum-seeking process is certainly the burden of proof (UNHCR, 2012) of such an intimate characteristic and the perception “no proof less credible claim” that might influence the decision-makers. Given that in most of these countries of origin, there is no freedom to express themselves without suffering severe consequences (ILGA, 2020).

Other challenges include the lack of corroborative material (UNHCR, 2012), that could be provided by institutions, monitoring bodies, and support the claimant to contextualize the territory of violence (Imran, 2015) or the material to be used as a proof. In cases of State violence, documents as medical records, or police reports, could endorse the claim and help to characterize the persecution. However, in some cases, the violence is perpetrated by the most inner social circle of the applicant in a highly complex manner: the own community, colleagues, neighbors, or the own family members, in cases where a person is submitted to forced marriage, force pregnancy, corrective rape, blackmail, and extortion.

The risks involved in the asylum-seeking process include suffering discrimination by the staff team and the decision-makers (border agents, interpreters, administrative staff, and judges). The system is highly influenced by western conceptions of gender roles, traditional understanding regarding sexuality, and the stereotyping of gay men and lesbians (LaViolette, 2007; Rehaag, 2008a), unfair, and unprofessional, leaving the asylum-seekers to a staff incapable to identify and deal with LGBT issues. Despite the efforts of the Canadian authorities to professionalize the system (in cross-cultural and sensitivity training), and the guidelines to reduce the level of “subjectivity” and “vagueness”, it is not enough to overcome the structural gaps and deficiencies of the system (LaViolette, 2013).

Deportation is another important risk (LaViolette, 2004, 2012; Lacroix, 2004), we found no evidence in the literature that, in case of a claim being rejected, other solutions could be offered to these groups to avoid deportation. Given that, in some cases, these individuals upon return are vulnerable to suffering grave breaches of human rights, the deportation can represent a high risk of a death sentence.

Another problem identified in this study is the invisibility of certain groups of the LGBTQIA+ community: the great majority of the studies focuses mostly on gay and lesbian realities, with a few studies focusing on trans, queer (Logie et al. 2016, Lee, 2009) and bisexual experiences (Rehaag, 2008a; 2009). We found no experiences of intersex (Lee et al., 2021), two-spirit, gender fluid, and the many other identities and gender expressions also comprised as sexual minorities.

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