

Persecution and neglect

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Abstract

Why do we see relatively few transgender asylum seekers among LGBT-persons fleeing from persecution? Does this indicate a relatively low level of persecution? Does it indicate a relatively low number of transgender persons? Seeking out information on persecution and discrimination of transgendered people around the world – including Europe – this paper first sets the scene for the analysis before focusing on a number of cases of transgender asylum seekers in Denmark.

Observations are made of the similarities and distinctions between asylum seeking of transgendered persons and other groups of LGBT asylum applicants. Furthermore, recommendations are made on how to counter systemic inequalities within the processes.

The majority of LGBT asylum cases concern gay men, and there is quite some focus on persecution of gay men as evidenced when Ugandan LGBT-rights activist David Kato was murdered in January 2011. Within hours it was known to the world within hours. Not only in LGBT networks but also in mainstream media, and politicians of the highest ranks commented on the deed.

It is, of course, very satisfying that the world at large cries out against the abhorring murder of a gay activist.

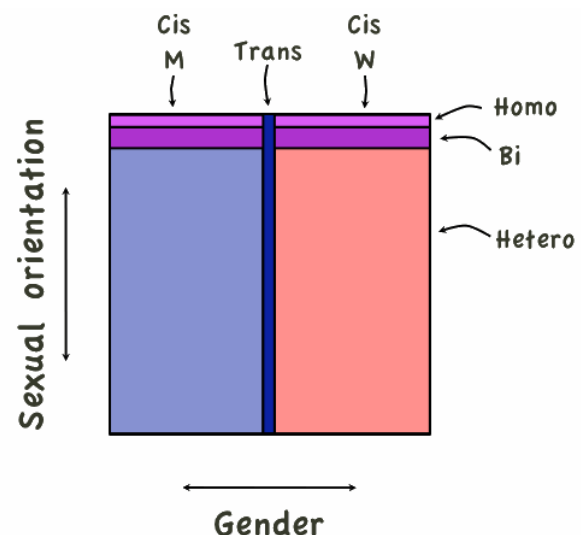
But where was the outcry when Lorenza Alexis Alvarado Hernandez was stoned to death in Comayagüela (Honduras), or when Kirat Pal had her throat slit in Greater Noida (India), or when Irem Okan was stabbed to death in Bursa (Turkey)¹, just to mention a few, who have been murdered while we have been working on the *Fleeing Homophobia* project.

Between January 2008 and March 2011 the number of reported murders on trans persons worldwide was 539. That is approximately one every second day. Out of these victims 22 were killed in EU countries².

Evidently trans persons are met with violence and severe persecution throughout the world. But we see them relatively seldom in the asylum system.

Cisheteronormativity

First a few words on gender identity and sexual orientation³. If we ask a large number of people to distribute themselves on a square aligning themselves in one direction according to sexual orientation and in the other direction according to gender, they might end up filling the square something like this.



¹ http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/tmm-march-2011/tables-and-name-lists-march-2011-update.htm

² http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/tmm-march-2011.htm

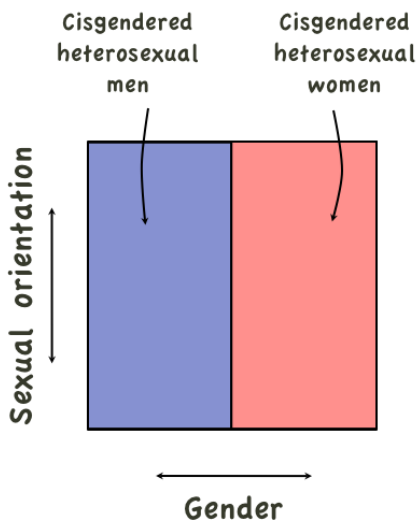
³ This presentation is based on The Little Green Book on LGBT, http://www.lgbt.dk/fileadmin/site/om_foreningen/TheLittleGreenBookOnLGBT.pdf.

In the sexual orientation dimension most people will be in the section representing heterosexuals, a small section will contain those identifying of homosexual, and between the two there will be a section where we will find those identifying as bisexual.

Similarly for the gender dimension: in one side of the square the men will be found, and in the opposite side of the square the women will be found. Between the two there will be an intermediate section – this will be the trans persons. The non-transgendered person is cisgendered.

In the same way heterosexual is the main position for sexual orientation, cisgendered is the main position for gender. Because of this, societal structure, administration and law is predominantly centred around cisgendered, heterosexual subjects. This is the cisheteronormativity.

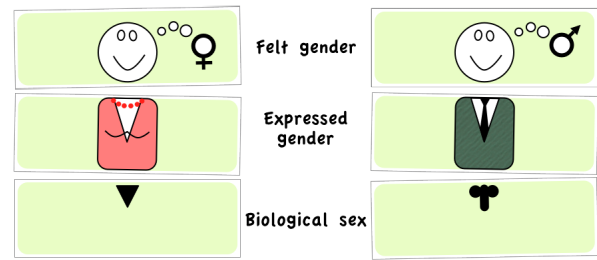
If the illustration above exemplify the true society, the following illustration exemplify the cisheteronormative view of society.



Gender identity

There are many different definitions of the terms related to gender identity. Here we shall use a very simple an operational definition.

First, there are different kinds of gender:



- The biological sex is on genetic level – which cannot be changed – as well as on anatomic level, which can be adjusted.
- A person expresses gender is terms of clothing, hairstyle, manners etc.
- The felt or sensed gender is the gender a person feels.

All three can be female or male or mixed/indistinct.

Now, the definition we will use here is as follows:

Cisgender

Consider biological sex as well as expressed gender and felt gender. If all three are male or all three are female then the person is cisgendered.

Transgender

Anyone who is not cisgender.

There are many different types of transgender categories

As *transsexual* one feels, that the body is wrong and opposite to ones felt gender. Thus one may be interested in having different kinds of gender affirming procedures, maybe even a full gender reassignment. (MtF: Male-to-Female. FtM: Female-to-Male)

As *transvestite* one wish to express a gender opposite to ones biological sex.

As *intersex* ones biological sex is mixed or indistinct. It may be variations in chromosomes and/or variations in the anatomical or physiological characters.

As *queer* one wish to dissolve the bipolar gender.

These are but a few of many variations.

It should be stressed, that this is a simple but operational definition. In gender studies much more comprehensive and elaborated understandings of gender is found.

The expressed gender as well as the felt gender is social gender. Social gender is the collective understanding of gender. It is the norms and understandings of gender, which build in a society - the idea that within a culture some gender expressions are considered feminine while other are considered masculine. Thus the social gender is the result of all individuals communicating with each other on gender.

Biological, social and legal

The law recognises two genders, male and female. Each individual will be identified as either a woman or a man. Typically the legal gender has been defined based on the biological sex.

It is worth noting the similarity between the gender terms and family terms: in the majority of families the biological parents, the social parents and the legal parents are the same, but in LGBT families with children this is often not the case:

1. Gender

- 1.1. Biological sex
 - 1.1.1. Genetic sex
 - 1.1.2. Anatomic sex
- 1.2. Social gender
 - 1.2.1. Expressed gender
 - 1.2.2. Felt gender
- 1.3. Legal gender

2. Parent

- 2.1. Biological parent
 - 2.1.1. Genetic parent
 - 2.1.2. Birth parent
- 2.2. Social parent
- 2.3. Legal parent

Much LGBT emancipation is about getting more legal emphasis on the social aspect than on the biological aspects.

LGBT in Denmark

In 2009 a large survey was made in Denmark⁴. A massive questionnaire was sent to a representative sample of the population (sample size: 27.323 persons. 15.356 responded). Due to the large number of no responses it is difficult to estimate absolute figures. It is possible, though, to estimate relative numbers.

⁴ *Equal and Unequal?*, full report available in English and Spanish, <http://www.casa-analyse.dk/default.asp?Action=Details&Item=387>

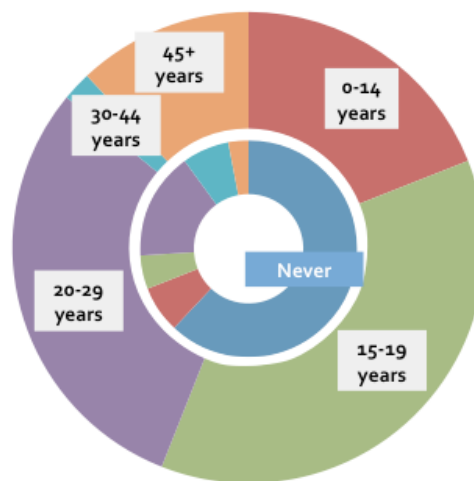
One finding was, that there is approximately twice as many persons identifying as homosexual than persons identifying as transgender. Or in other words: the number of trans persons approximates the number of gay men.

It was also found, that the vast majority of transgendered persons are heterosexual.

One of the most stunning results concerned age. The following illustration shows this⁵.

The outer ring shows the answers to the question, when the transgendered respondents began realising they are transgender. As seen, the vast majority began to think about it before the age of 30, a fifth even before the age of 15.

Now, the inner circle shows, when the respondents first talked with others about it. Two thirds never spoke to anybody about it. The first time they communicate it is when filling in a questionnaire from a statistical institute.



Outer ring: When did you first time you considered if you are transgender
Inner ring: First time you talked with others about it

This explains why trans persons are less visible than, say, gays and lesbians. Most live their lives according to common societal expectations and never tell anyone.

⁵ The illustrations are from a presentation at ILGA Europe's Annual Conference 2009, <http://www.lgbt.dk/fileadmin/site/politik/menneskerettigheder/LivingConditions.2009.pdf>

The survey also showed, that those who are out living in their preferred gender are subject to significantly higher levels of discrimination than the rest of the population, including the homosexual segment.

The reason for showing these figures here is not to state, that the findings can necessarily be extrapolated to countries of origin of asylum seekers. It is rather to illustrate the lack of understanding and inclusion in the potential country of asylum. Even to many in the LGBT segment – the present author included – the results were surprising.

Possibly having eschewed perceptions of transgender persons even in our own societies may bias investigation, analysis and decisions of cases.

Transgendered asylum seekers in Denmark

There are but very few cases of transgendered applicants among the Danish cases.

In *Disturbing Knowledge*⁶, which reviews LGBT cases decided by the Danish Refugee Appeals Board – the tribunal – between early nineties and 2008 there are three cases: Russia (2003), Slovakia (1999) and Turkey (2000). There are a number of appalling similarities between the cases: the applicants were subject to massive stigmatization and exclusion in society, and to brutality and sexual abuses by the police. And they were all rejected by the tribunal.

Russian case

Decision of the Refugee Appeals Board, 2003 **Rejected**

The applicant is transgendered. In 1994 she started in an agricultural college, but left because of constant verbal harassment and degrading treatment. During military service she was humiliated, beaten and sexually abused on a daily basis by common soldiers, and she was raped once. Furthermore, she was humiliated by officers. She didn't report this out of fear.

⁶ *Disturbing knowledge*, Decisions from asylum cases as documentation of persecution of LGBT-persons, Søren Laursen, LGBT Denmark, Mary Lisa Jayaseelan, Danish Refugee Council (2009), <http://www.lgbt.dk/uploads/media/DisturbingKnowledge.PA.01.pdf>

The applicant had to leave a hospital prematurely after an operation for appendicitis after the staff realized she was transsexual.

In 1998 the applicant had breast implants inserted illegally by a medical student. Gender reassignment operations are very difficult and expensive to get officially.

Since 1997 she was detained numerous times for ID-control, sometimes several times a day. At the different police stations she was harassed, humiliated and sexually abused. She was offered to other police officers for oral sex. She was raped twice by police officers while in police custody.

Twice the applicant was attacked by groups of young persons in the building, where she rented a room.

The Board found, that according to background information there was no reason to expect systematic persecution of transgendered persons in Russia, neither by private persons nor by the authorities.

The Board thus referred the applicant to seek the protection of higher authorities in Russia and suggested she move to a larger city, where it could be expected there would be a possibility to find a community of persons with her sexual orientation (sic.), and where it is less likely the applicant be victim to illegal abuse by the police.

The situation of the applicant could be summed up like this:

- The applicant decided to live in her preferred gender in 1997.
- Even before that she was harassed during education resulting in the applicant giving up education.
- Also during military service 1995-97 she was constantly abused and once raped.
- After coming out as transgender she was beaten up by her brothers and ousted from the family.
- Her access to medical care was impeded by her gender identity.
- Transgender health care was not considered accessible, and the applicant had an illegal operation by a medical student.
- The applicant had to change address and job because of her gender identity.

- While in police custody the applicant was harassed, subject to humiliating treatment and twice raped.
- The applicant was attacked near her home by private parties.

The logic of the decision is, that

1. COI gives no reason to expect systematic persecution by private persons or authorities
2. The applicant was living in the same town after the rape in custody and could have complained to higher authorities.
3. The applicant is not expected to become subject to persecution, humiliating treatment or torture as stated in the Danish Foreigners Act regarding asylum.
4. In regard to this some weight is given to the fact, that the home town of the applicant is a provincial town, and the applicant could be living in a larger Russian town, where it is expected she could find a sub-culture and where she is less likely to be victimised by the police.

Thus, it seems, that the tribunal offers a rejection and a counselling how to live in Russia as a transgender person.

Slovakian case

Decision of the Refugee Appeals Board, 1999 **Rejected**

The applicant is transsexual. In the communist time she had her birth certificate changed from male to female gender.

She and her partner live in a small town. For eight years they were bullied and humiliated by police. The harassment was intensified during 1998-1999. Several times the applicant and her partner were forced to undress in public places or on the police station. Once the partner was chained to the radiator during the detention. In one case the applicant was undressed and made run around a table at the police station while police officers poked her and slapped her genitals with a stick which was subsequently forced into her rectum.

They tried to report the incidents to the chief of police but after this the harassment got worse.

The application was rejected by the Board. The applicant was referred to seek protection by higher authorities in her home country.

The case actually deals with a couple, one person identifying as a gay man, and his partner identifying as a transgender woman. None of them could maintain jobs because they were dismissed due to their sexual orientation and gender identity. In some cases it was the police who informed the employer about their identities.

The logic of the decision is, that

1. The applicant got her legal gender changed.
2. The applicants complained only once to the higher authorities. It is not to be expected, that such complaints are futile.
3. The things the applicants have experienced are not of a character which can result in asylum.
4. The tribunal don't consider the applicants in risk of persecution in the sense of the Foreigners Act regarding asylum.

Turkey

Decision of the Refugee Appeals Board, 2000 **Rejected**

The applicant is transsexual. He wants a male-to-female gender reassignment operation. The applicant does not want to enter into military service. According to the applicant transsexuals and homosexuals are persecuted and sent to the turbulent areas of South East Turkey to be killed. Many of the friends of the applicant have served in the military and have been submitted to rape and sexual harassment.

He has experienced many arbitrary detentions. He was living with transsexuals in Turkey who were all sex workers.

In 1996 the applicant was arrested by three police officers, who took her to a deserted area and raped her for almost an hour. In 1998, while the applicant was living with a transsexual friend, two police officers entered the apartment and there raped both. It was common behaviour by the police in that area which housed many transsexuals.

The application was rejected by the board. The applicant was referred to seek protection by the higher authorities in her home country.

In brief

- Identify as transsexual but expresses male gender until a gender correcting surgery.
- The applicant is afraid of military service because of maltreatment of transsexuals.
- The applicant is ousted by his family and marginalised on the labor market.
- The applicant got an education and expresses the concern, that he cannot get more education if he gets a sex change.
- As a trans person almost only job opportunity is sex worker, which is illegal and therefore hosted by organised crime.
- The applicant is living with other trans persons. It is almost impossible to get an apartment as transsexual – it is usually only possible through associations to the sex industry.
- Trans persons are abused and raped on a regular basis by police officers. The applicant has been a victim of such.

The logic of the decision is

- The applicant has a medical declaration of transsexualism.
- This was used to apply for not being drafted for military service. The application was denied. The applicant was drafted but did not show up.
- The tribunal does not reject the explanation that the applicant was twice raped by some police officers. The applicant has not complained to the Turkish authorities regarding this.
- Transsexuality is not illegal in Turkey and it is possible to have gender correcting surgery.
- The tribunal does not consider the abuse and harassment persecution in the sense of the Aliens Act on asylum.
- To be transsexual cannot result in asylum: it is a larger, visible group in major cities and there is a media coverage of transsexuals.
- Draft evasion is not a reason for asylum.

Discussion

The decisions above generally states, that 1) it is not illegal to be transgendered, and 2) rape and abuse by police is a criminal act, which should be prosecuted in the country of origin.

Why is it important in LGB cases whether or not homosexuality is criminalised in the country of origin? It is because the applicant may become subject to punishment, and it is not possible to obtain police protection against private persons and gangs etc.

In *Disturbing Knowledge*⁷ it is well documented, that in Denmark, as soon as homosexuality was decriminalised in Russia in 1993, asylum claims of gay men from Russia were rejected en bloc referring to protection by the higher authorities. This practice may be criticised considering the tribunal did not consider impunity and did not produce an analysis of the likelihood of obtaining such protection.

The trans cases differ from the gay cases in the sense it is not illegal to be transgendered. However, the marginalisation is massive, and often there will be no alternative to become a sex worker. In many countries it is illegal to be a sex worker, often creating dependencies to organised crime.

When the Danish tribunal suggests an applicant move to a larger city to be more safe, it basically suggests an internal flight alternative. There are more problems with this.

An IFA is used, when the agents of persecution are confined to a part of the country of origin making it possible for the applicant to live somewhere else where he or she will not encounter these. But in the case of transgender persons, the agents of persecution typically are police and society at large. It may be true, that in the larger cities, it might be possible to meet other LGBT-people, but that would not lower the risk. Maybe the reasoning is, that living with access to some kind of sub-culture makes it possible to isolate one-self from the surroundings, or that persecution is less hard on you when you have someone to share it with.

Furthermore, it is probably safe to say, that in many places in the world the sub-culture, a trans person

⁷ Ibid., p. 6

is likely to encounter in larger cities, is the sex industry.

Thus, when a decision body uses the connotations of improved safety in the larger cities, it illustrates a lack of understanding of the situation of transgender persons.

The present author is currently counselling in a case with an applicant from Central America. In this part of the world, there are massive killings, including massive killings of trans persons. The applicant works in an organisation, fighting for the rights of transgender people. One of her co-activists was killed, allegedly by police officers. The applicant later was threatened by police officers telling her to stop her work for T-rights. The applicant was rejected in the first instance decision, requesting her to complain to higher authorities.

Now, for the last decade UN has been evaluating the levels of violence in the country, and the findings are clear: Killings are massive, police is corrupt and often involved in the killings, and the situation is deteriorating, the level of violence increasing. The situation has been addressed by many parts including numerous other countries through the Universal Periodic Review. There is a massive critique of the police and of the extremely high level of impunity. Thus, in spite of international pressure from the highest places, the situation is not improving. In contrary, it gets worse. And yet, the Danish decision was, the applicant should seek protection from the higher authorities – a task which UN and others have not been able to solve to any degree.

Is the tribunal able to obtain relevant information? To some extent they can. But the country of origin information (COI) may be misleading or biased.

Extract from UNHCR Guidance note⁸:

16. Transgender persons, *as even a smaller group*, will often have distinct experiences of persecution. [...]

It is true, that when looking at LGBT asylum seekers gay men constitute the major part, and in this sense transgenders constitute a smaller group. But when considering the LGBT group at large, the G and the T segments might actually be of comparatively same size as is the case in Denmark, cf. above.

⁸ www.unhcr.org/refworld/docid/48abd5660.html

In Denmark the tribunal is exceptionally reluctant to identify anything as a special social group. Only one gay case has resulted in convention status in Denmark. All other LGB-cases, which have resulted in asylum, have been given secondary status (protection status). Thus it is not likely, that a T-case would be given convention status. Consequently the case analysis will focus on criteria for identifying persecution.

Often COI concerning trans persons treat the LGBT segment as one group. It must be considered, however, that often there is exclusion even within the LGBT segment, not the least because it encompasses the two different dimensions, gender identity and sexual orientation.

It must be stressed, that it is not possible to extrapolate the findings concerning LGB to the situation of transgender people.

There is an increasing focus on gender identity among key players in Europe, cf. e.g. Hammarberg's Issue Paper on gender identity⁹, the European Council report on discrimination¹⁰ and the reports by Fundamental Rights Agency¹¹. But it takes time for such sentiments to sieve through the systems, and often COI has been written with very little attention on transgender issues.

Furthermore, transgender persons will often be excluded from common employment and end up as sex workers. In this sense they may again be dissimilar from the LGB segment.

As mentioned above trans persons are murdered on a regular basis. A very large number of these murders are on sex workers.

Being excluded from family network and labour market results in a difficult socio-economic situation making it difficult for a person to improve living conditions, let alone flee from the country.

⁹ Human Rights and Gender Identity, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, Strasbourg, 29 July 2009
CommDH/IssuePaper(2009)2

(<https://wcd.coe.int/wcd/ViewDoc.jsp?id=1476365>)
¹⁰ Discrimination on grounds of sexual orientation and gender identity in Europe, Council of Europe Publishing
(http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf)

¹¹ The European Union Agency for Fundamental Rights, Lesbian, gay, bisexual and transgender rights
(http://fra.europa.eu/fraWebsite/lgbt-rights/lgbt-rights_en.htm)

This is probably the same reason why women in vulnerable situations, e.g. lesbians, have difficulties fleeing.

Being without networks, the transgender applicants who are sex workers in their country of origin may wind up in the sex industry in the country of asylum.

The fact that transgender persons often end up as sex workers may pose them in an unfavourable light in the asylum system. In Denmark, and expectedly in other European countries, foreign sex workers, probably often trafficked, wind up in the asylum system. These are, in general, not recognised as refugees.

The above discussion to some extent concerns only transgender people, who are out and living in their preferred gender. As mentioned above, in Denmark 2/3 of transgender people never spoke to anyone about it. The situation of such a person would be similar to a homosexual who is not out, or a bisexual who is in a relation with someone of the opposite sex. They are 'invisible', but may have good reasons to fear persecution if coming out/being outed.

Another important issue concern the treatment of the applicant. LGB-applicants typically blend in with the other asylum seekers keeping their sexual orientation secret from other applicants.

Transgender persons living in their preferred gender cannot hide and are thus prone to harassment in the living quarters. In one of the cases above, and in a current case, that applicant was sexually harassed in the camp during the case. This, of course, is an intolerable situation, but the risk is high considering an asylum camp is the home of a great many men in stressful life situations without partners.

Conclusions

We are living in a time of changes. There is an increasing focus on the situation of transgendered people. This is evidenced e.g. by the initiatives of Council of Europe and the European Union Agency for Fundamental Rights.

This does not mean, however, that laws, processes and decision bodies are up to date with a proper understanding of the topic. There need to be a thorough mainstreaming of gender identity

throughout the legal framework, from law making to judges and lawyers, and to NGOs.

The situation across Europe is diverse. In Denmark, for instance, there is no mentioning of gender identity in the equal treatment laws, which speak only of sexual orientation. (In contrary, the Serbian equal opportunities law, for instance, includes sexual orientation as well as gender identity.) This means, that it is not likely, that the lawyers, judges etc. in an asylum case have ever dealt with gender identity in a legal context. It is thus of paramount importance to make them acquainted with the topics.

- First, ensure the parties have an understanding of what gender identity is. It should be easy comprehensible and operational, e.g. something along the lines of The Little Green Book on LGBT.
- Address the problem of anticipation, e.g.
 - Anticipation that cases concerning gender identity are similar to cases concerning sexual orientation.
 - Anticipation that large cities are safe havens for transgender people thus applicable as internal flight alternatives.
- Address the levels of violence and levels of impunity.
- Attention should be made to the situation of the applicant in the camp considering the possible lack of personal safety.