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**ANALYSIS OF THE LACK OF PROTECTION OF LESBIAN AND BISEXUAL
WOMEN WITHIN THE SPANISH ASYLUM SYSTEM: A CLOSER LOOK INTO
AND FROM THE PRIVATE SPHERE**

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ABSTRACT

The dichotomy public/private sphere serves as a mechanism to maintain the subjection of women and sexual dissidences and their relegation to the Ostracism, both as individuals and as citizens.

Lesbian and bisexual women are placed in the margins of the margins, not being their realities recognised nor legitimised, thus being their identities denied. Being the systems created from an androcentric perspective, their realities must fit the androcentric standards when entering the structural and institutional processes. This way, lesbian and bisexual female asylum seekers find great social, political, economic and legal obstacles to benefit and even to access a system that was built to protect human rights. However, whose human rights? The asylum system does not equally protect lesbian and bisexual women, having been built from and looking into the public sphere, it does not consider those realities tied to the family, the domestic and the private spheres, in which persecution takes a different form, ignored from the political realm.

The grounds under which international protection can be applied for are in need of reconfiguration, as well as current notions about persecution and violence, and the processes and procedures of this system, effectively considering the female realities and the intersecting aspects that may generate differences between applicants, in a way that experiences and realities are understood as heterogeneous.

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INTRODUCTION

“El hecho de pasar desapercibidas para la mayoría de la gente que nos rodea, aunque nos da un amplio margen de actuación sin quedar expuestas a reacciones contrarias, tiene un enorme coste social. Siempre que no rompas los márgenes, más allá de los cuales no hay posibilidad de confusión, de pasar desapercibida, puedes vivir relativamente tranquila, nadie *sospechará* que eres lesbiana. Pero, ¿a cambio de qué? De que tu invisibilidad sea tan total que, en realidad, *no existes*. Algo así como: lo que no debe existir, no existe” (Pineda, Lesbiana, yo soy lesbiana, porque me gusta y me da la gana 2007).

When we are not named, we do not exist, which means that, even if we do exist in our own world, our intimate world -deep within the private sphere-, the moment in which we *dare* to present that existence and live by it out in the political sphere, we are then seen as an Other, both by the civil society and by State actors. This naming is not inherent to the existence, it emerges as a consequence of the naturalisation of the existence, of the Otherness, as an acknowledgement of the existence and of the reality of the Other, the same way in which that Other acknowledges ours and its own. Or it may be possible that this naturalisation of the Otherness arises as a consequence of its naming, of giving or granting it the space where the naming and naturalisation of realities begins. If so, where is this space? Is it the public or the private sphere? Is State cover necessary to understand a reality as valid regardless of its belonging to the Otherness? Perhaps this legitimisation of the existence begins with oneself, by the understanding of the diversity of realities, to then sharing it with the Other, and for the Other to share their own, and thus create this State cover in the public from the private. However, what happens when, within the intimacy, there is no acknowledgement of the mere possibility of the existence because the public rigidly marks the limits of existence and reality? What happens when this permeates the private sphere and there is no possibility of existing in the public either because of a lack of awareness of its possibility or because of actual limitations or barriers such as moral or legal norms, fear of violence, or fear of the non-belonging?

State recognition is essential to the belonging of society, as a citizen and as an individual, for emotional reasons but also for material ones. However, recognition should also imply self-recognition as a way of fully enjoying one's individuality and identity. These two realities or spheres are not isolated from one another but are rather interdependent.

That which constitutes the norm and that which constitute the Otherness fluctuate and transform, following the movements and transformations in and of societies. If there is no formal recognition that protects and acknowledges those realities and existences that fall out of the norm, discrimination, in both spheres, emerges as a form of protection of that which is the norm, and the Other-lesbian and bisexual women- are placed in the margins -in the cases in which that space is *granted*, not as a rightfully obtained space. This protection of what constitutes the norm can lead to persecution, which can take different forms, depending on the nature and the acts of the persecution itself, the actors of persecution, and the response of the State actors towards said persecution.

The aim of the present paper is to analyse the need to be named and seen in order to be granted integral recognition in State terms, and the importance of this recognition regarding the individuality of lesbian and female bisexual citizens, not of a specific State -Spain in this case,

but in global terms, given the current functioning of the nation-State system. This analysis is carried out by examining the realities of lesbian and female bisexual applicants for asylum on the account of their sexual orientation, with regard to the real (un)recognition of their reality within the Spanish asylum procedure, and how this influences, transforms and builds the opportunities and limitations of these women as international protection seekers.

The dichotomy of the public versus the private sphere not only exists in political terms regarding State action and civil life, but it is also inherently present in the different forms of violence existing. How and by whom these are perpetrated, suffered and condemned changes significantly from one gender to another, from one sexual identity to another, and from one national system to another. The object and subject of the violences exercised and perpetrated within the private sphere are more than often kept in that space, and very few times are analysed and looked into by the public sphere, that is, by State actors. Throughout this research, I will analyse how this latter fact is a consequence of the once-again subjection of women by the androcentric construction of the asylum system in relation to human rights, being based on and built upon the experiences suffered or more likely to be suffered by male applicants, and how all of this influence lesbian and bisexual women's asylum applications.

I. Objectives

1. The Universal Declaration of Human Rights recognises universal equality, and human rights law defines these rights as innate to humans. The same is applied to the right of asylum and its procedures. However, the formal recognition of this equality and these rights does not mean that they are being equally respected and provided for all. In fact, this formal recognition in legal texts and some jurisprudence does not mean the actual recognition of equality if there are no effective institutions and instruments that watch and guarantee for the fair and equitable processes in its implementation.

Article 14 of the Spanish Constitution sets the equal treatment of men and women. In addition, article 9.2 sets obligations on State institutions so that they promote conditions for the liberty and equality of individuals to be real and effective and to remove the obstacles that limit them to fully enjoy these rights. This means that, in regard to the matter of asylum, those institutions and instruments that constitute the asylum system shall provide and function for the effective assessment of the asylum claims.

Thus, with this essay, the first question developed and analysed is whether the existing instruments and resources for promoting and providing equality of opportunities are being equally effective, in regard to the assessment of asylum claims made by lesbians and bisexual women on the account of their sexual identity under a gender perspective.

2. If Spain recognises different sexual realities in its legal system as an equal system, is it coherent that lesbian and female bisexual asylum seekers shall demonstrate or justify their sexual orientation as a requirement for the addressing of their claim, previous to their demonstration of the well-founded fear of the persecution they suffer? Throughout the paper, an analysis of the fairness of the credibility assessment in regard to these applicants

is carried out considering the particularities of their context as women and as lesbians and/or bisexuals.

3. Within the dichotomy private-public spheres, States do not have responsibility over acts perpetrated by private agents (in this case, individuals within the private sphere). However, they are responsible of exercising due diligence, providing measures and taking actions to minimise, reduce, avoid and mitigate discriminatory actions taken by private agents that constitute persecution in itself or that may lead to persecutory acts. In this sense, some acts can be indirectly supported by the State, or the State's indifference over the discriminatory act, justified by the ambiguity of the extension of the State's legitimacy to intervene in the private sphere and the private agents' actions. Therefore, an analysis of the State's responsibility linked to private actors' acts and conducts when addressing and analysing the persecution suffered by lesbian and bisexual women as asylum seekers is conducted in the present paper.
4. It is also examined whether there is a need to reconsider and recodify the ground of membership of a particular social group as one of the five grounds recognised under the 1951 Convention relating to the Status of Refugees. This examination aims at questioning the efficiency and fairness of the existence of a ground with such a wide and ambiguous interpretative nature.
5. As a consequence of the examination and analysis of the previous objectives, the question of whether lesbian and bisexual women are fully considered as equal citizens under international law and by the nation-State narrative in the context of Spain emerges.

II. Methodology

The present project aims to research and analyse the situation of lesbian and bisexual women that seek asylum in Spain because of their sexual identities. Under a qualitative research, it is intended to analyse the differences of current legal and political systems, both at a domestic level, analysing the Spanish asylum system, and at an international level, given the fact that the Spanish one is based on the pillars of the international order.

During the development of this project, preference has been given to materials and analysis produced by female authors and transfeminism-based papers, all under a sensible and critical perspective. This is so as a personal revindication for the inclusion and promotion of female analysis and of those developed under the gender perspective in the academic sphere.

The materials used can be divided into three types according to their content: primary sources, that will consist mainly in legal texts, jurisprudence and literature; secondary sources specialized in the different realities and realms examined; and tertiary sources for technical, precise and founded arguments. Each of them will have marked differences due to their different nature, which will make the methodology used to analyse them different and equally useful to answer the different questions that arise.

Throughout the paper, various fields will be discussed due to the complexity of the topic and as a reflection of the diversity of areas that intersect in this reality. Firstly, the text will briefly examine the migration situation from an international prism and how it has influenced the Spanish system together with its compliance with international law and human rights law. This will be followed by a contextualisation of the legal framework that regulates the asylum system at the international, regional and national levels, and by the technical dissection of the refugee status determination grounds, paying special attention to the ground of membership of a particular social group, which will be analysed in accordance with its relation to gender and sexual orientation issues and international protection claims. Afterwards, the Spanish procedure for asylum applications will be reviewed.

The following chapter will introduce the political philosophy over which the current political and legal systems are based, together with the recognition of citizenship and what this entails; the way this affects certain subjects differently, focusing on women and lesbian and bisexual women, and the danger of this reality related to the right to apply for asylum. Throughout this chapter, an analysis of the construction and influence of morality linked to sexuality, culture, politics and law will be carried out, followed by an examination of the sexual hierarchies' impact on the asylum procedure. Lastly, the consequences of the sexual hierarchies regarding lesbian and bisexual women are examined in relation to an essential aspect of the asylum procedure: the credibility assessment.

CONCEPTUAL FRAMEWORK

Spain has consolidated its position as a host country for foreign immigrants since the 1980s, coinciding with the country's transformations due to economic and social improvements. Currently, despite the variations in the volume, motivations and protagonists of migrations, depending on a wide range of factors and contexts, Spain remains a popular and attractive destination, ranking tenth in the world among the main destination countries¹. The articulationist theory, so named by Joaquín Arango, is the one that best fits the contemporary migratory phenomenon, paying more attention to the complexity of migrations and positioning itself between the macro- and micro-structural visions². The current migratory phenomenon is thus understood in terms of the multiplication of places of destination and origin, with the strengthening of controls on their flows. We are thus faced with a social phenomenon in which migratory networks are to a large extent the basis (and reason) for migrations, hence social relations and community spaces acquire great relevance, giving rise to the concept of transnationalism.

Recently, immigration in Spain has been increasing, with an uneven geographical distribution, concentrated in large urban centres with employment and leisure opportunities, and with a variety of origins; immigrants no longer come only from countries with historical links with Spain, such as Latin American countries, Morocco, Equatorial Guinea and the Philippines, but also from countries such as Romania, the United Kingdom, China and Nigeria.

The motivations for migratory movements are not only economic, but can also be related to work, studies, international protection, family reunification, violence, etc.

Violence and discrimination against the LGBTQ community is a worldwide reality. The existence of its members is more than often considered by societies, both at a social and at an institutional levels, a threat for the the dominant norms that regulate gender and sexuality over which the society's order is built. As a result, the members of the community become victims of violence towards them through State or non-State agents. Many of them are forced or feel forced to flee their countries of origin looking for places in which their identities and intimate lives are respected and can be fully developed, freely and safely. In this sense, Spain is also an attractive destination for asylum seekers that seek some sort of transparency and democratic values in their ways of living.

According to the ILGA-Europe Annual Europe Rainbow Map³, Spain is among the most LGBT-friendly countries of the European Union, holding the 8th position of the general ranking with a score of 61.74% of acceptance of the LGBTI realities⁴. This shows that Spain is a tolerant and open State towards sexual diversity, in line with a legal framework that includes laws that grant protection, recognition or legal cover to a certain degree of these realities, such are the cases of the *Law 13/2005, of July 1, 2005, amending the Civil Code relating to the right to marry*⁵, by which same-sex marriage was legalized in Spain and homosexual couples became

¹ CES. "La inmigración en España: efectos y oportunidades". Madrid, 2019.

² Arango, Joaquín. "La explicación teórica de las migraciones: luz y sombra." *Migración Y Desarrollo*, no. 1 (2003): 1–30.

³ ILGA-Europe, the European Region of the International Lesbian, Gay, Bisexual, Trans & Intersex Association. "Rainbow Map." Rainbow Europe, 2023. <https://www.rainbow-europe.org>.

⁴ The "all categories-map" uses 7 indicators or categories to analyse laws and policies that have a direct impact on the human rights of members of the LGBT+ community of each State: asylum; family; equality and non-discrimination; hate crime and hate speech; legal gender recognition; bodily integrity; and civil society space.

⁵ Spain. "Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio". Boletín oficial del Estado (BOE-A-2005-11364), 2005.

able to jointly adopt; the *Law 4/2023, of February 28, for the real and effective equality of trans people and for the guarantee of the rights of LGTBI people*⁶; and the *Law 12/2009, of October 30, 2009, regulating the right to asylum and subsidiary protection*⁷, which makes an express mention, in its Article 7, of sexual orientation and sexual identity as potential characteristics constitutive of the ground of persecution for reasons of membership of a particular social group, not specified in the 1951 Convention relating to the Status of Refugees. This is reflected as well in the Europe Rainbow Map using only the indicator of asylum, by which it is shown that Spain is the 5th E.U. State with the highest rate of asylum-related laws and policies with a direct positive impact on LGBT+ realities.

Asylum is recognised in article 14 of the Universal Declaration of Human Rights⁸ and in the later-developed 1951 Convention relating to the Status of Refugees and its Protocol -the leading legal texts for the protection of refugees- as a fundamental right, thus entailing responsibilities and obligations on States.

Spain became a party of the 1951 Convention relating to the Status of Refugees by its ratification on August 14th, 1978⁹, by which each State party, the primary protectors of fundamental rights and freedoms, reflects its will to implement asylum and refugees-related practices and policies in line with the international community, reflected in the recognition of the right of asylum in article 13.4 of the Spanish Constitution¹⁰ and the development of this in the above-mentioned Law 12/2009. In the same line, as a member of the European Union, Spain is part of the Common European Asylum System (CEAS), that aims at developing a common criteria for procedures and policies, and cooperation between the State parties in order to ensure equal and fair treatment when addressing asylum claims, based on the full and inclusive application and interpretation of the 1951 Convention.

However, the right to asylum is not conceived as an individual right, focusing on the migrant reality, but as a concessionary right of the State, from the doctrine of the nation-State's sovereignty and, increasingly, from the prism of national security under the perspective of us vs. the Other. This is due to the constitution of the nation-State as the primary source of law and the individual as a subject of the State, not so much as a subject of law¹¹. Therefore, citizenship emerges as a contraposed subject of individuality in those cases in which this individuality calls into question or limits the sovereignty of the State, entailing, among other things, the exclusion of the foreigner, the non-citizen. This is why asylum is universally recognised as the right of the individual to seek and enjoy it, being limited to the sovereignty and will of the State.

Despite having been redefined from a humanitarian perspective in accordance with the new migratory needs that arose after the Second World War, which called for multilateral coverage of the dignity of the individual as the recognition of individualism as an essential part of the citizens, the lack of protection of human rights by States has provoked one refugee crisis

⁶ Spain. "Ley 4/2023, de 28 de febrero, para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI". Boletín Oficial del Estado (BOE-A-2023-5366), 2023.

⁷ Spain. "Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria". Boletín Oficial del Estado (BOE-A-2009-17242), 2009.

⁸ UN General Assembly. "Universal Declaration of Human Rights" (217 A (III)). United Nations, 1948.

⁹ UNHCR. "Convention relating to the Status of Refugees: States parties, including reservations and declarations, to the 1951 Refugee Convention" (United Nations, Treaty Series, vol. 189), p. 137.

¹⁰ Spain. "Constitución Española". Boletín Oficial del Estado (BOE-A-1978-31229), 1978.

¹¹ Horrillo, Silvia Concha. "El derecho estático de las personas en movimiento: derecho de asilo por motivo de género y orientación sexual." Bilbao: Universidad del País Vasco, 2017, pp. 86-92.

after another, in a way that this has become a constant reality and has resulted in a crisis of the right to asylum.

States are increasingly reluctant to receive refugees and to recognise them as such, imposing new bureaucratic, physical and legal barriers, among others, so that they do not even apply for international protection, and do not even meet the minimum standards established by international law to which they must comply. This way, the principle of non-refoulement is not respected, as are other principles and precepts established to guarantee the protection of migrants and the guarantee of the right to asylum. Originally created as an effort by States to provide for international protection, the right to asylum is being transformed into a conception of migration and the treatment of the right to asylum as a threat to national and regional security and public order. This leads States and regions, such as Europe, to establish more restrictive migration policies and legal frameworks, such as the externalisation of borders through the 2015's EU-Turkey Joint Action Plan¹²; repressive ones, such as the controversial border controls and contentions at Spain's southern border; and even punitive ones, such as refoulement or expulsions, or the criminalisation of humanitarian aid organisations.

On paper, States provide the coverage established as necessary in international law. This coverage is based on legal frameworks committed to human rights and in line with European and international standards on asylum and integration. However, in practice, the reception systems established to ensure the rights and obligations set out in these legal frameworks are deficient and problematic. This is due to the development of policies that are insufficient, unrealistic, or that lack enforcement tools, as well as the implementation of these policies in an inefficient, inept, or under-resourced manner. Asylum seekers are thus often denied their formally recognised rights and obligations¹³, leaving them unprotected.

In recent years, the number of asylum applications within Spanish territory has increased annually, reaching a record in 2022. This is due to the absence of legal and safe channels, as well as reinforced border controls. Furthermore, difficulties persist in initiating the asylum process even after gaining access to Spanish territory, which is practically the only way to file an application for international protection. CEAR (Spanish Commission for Refugees, Comisión Española de Ayuda al Refugiado in Spanish) and other non-governmental organisations report difficulties in accessing the international protection system, making the right to apply for international protection almost impossible. The Ministry of Interior's appointment system for applying for international protection is an administrative barrier to applying for asylum. The absence of appointments and transparency in their publication hinders asylum seekers from applying for asylum within the required timeframe. In 2022, individuals seeking international protection in Spain had to wait an average of eight months to secure an appointment through the appointment system, merely to access the process. In many cases, they accessed it through mafias that benefit from the institutional limitations. Furthermore, after obtaining an appointment and declaring their intention to apply for international protection, these applicants had to wait an average of eight more months for their applications to be formalised¹⁴. This greatly exceeds the one-month deadline for processing applications submitted within Spanish territory and the four-day deadline for applications submitted at the border.

Although there has been a 6% increase in favourable international protection decisions in Spain from 2021 to 2022, the rate is still well below the European average. In 2022, the

¹² De Lucas, Javier. "Sobre el proceso de vaciamiento del derecho de asilo por parte de los Estados de la UE." *AIS: Ars Iuris Salmanticensis* 4, no. 1 (2016): 21–27.

¹³ Pasetti, Francesco (coord.). "Sobre los solicitantes y beneficiarios de protección internacional: Informe Nacional para España, NIEM 2020." *CIBOD. NIEM*, 2020, p. 17.

¹⁴ CEAR. "Informe 2023: Las personas refugiadas en España y Europa." Madrid, 2023, p. 73.

Spanish rate was 16.4%, compared to the 38.5% European average for the same year¹⁵. It is important to note that the majority of favourable decisions have been those recognising subsidiary protection. In 2022, the percentage of refugee status recognition decreased by 0.2% to 7.7% compared to the previous year. It is worth noting that subsidiary protection provides fewer rights and benefits than refugee status recognition.

This is a form of limiting the rights of these migrants, complying to a certain level with international standards but not effectively processing the applications. Nevertheless, not only the Spanish State uses international law as it pleases, it also plays with the limits of its legitimacy and its power. Spain is bound to ensure means for the entry and effective processing of asylum seekers. However, the situation on Spain's southern border is well-known for its severity. Many attempts to enter the Spanish State by potential international protection seekers take place there, and numerous violations of human rights law -including the right to apply for asylum- and international law occur, by which the Spanish State has been repeatedly accused of. This has led to situations where legitimate violence is used by the State to avoid addressing the issue. The tragedy of El Tarajal of 2014 and the tragedy of the Melilla's fence of June 24th, 2022 are clear examples of violations of the right to seek asylum and other human rights by the Spanish State. In both cases, there were numerous violations of human rights and international law, including excessive use of force by the State security forces, the violation of the non-refoulement principle, lack of healthcare, and lack of access to formal procedures. Tragically, both incidents resulted in the deaths of dozens of migrants who were not allowed access to the asylum procedure in an attempt to content the entry of migrants into Spanish territory. The common European frontier established in order to allow for the free movement of persons within the European Union has led to a restriction of the access to asylum, as these cases reflect¹⁶. This poses a restriction on the refugee status determination and the recognition of asylum, vulnerating the asylum as an institution created for the protection of human rights.

Not only are international law and human rights law violated in frontiers, the CIEs (Immigrants Detention Centers, Centros de Internamiento de Extranjeros in Spanish) have been repeatedly denounced by civil society organisations and NGOs for violating the rights of the interned migrants, including minors, and for violating fundamental rights and international law¹⁷. These centres are a reflection of the defensive and restrictive nature of current migration policies. The internment of migrants in CIEs limits their rights. Despite being defined as non-penitentiary centres in article 89 of the Criminal Code, they operate as penitentiary centres in practice due to their lack of internal regulation, and this ambiguity allows for a wide range of actions, some of which are sometimes contrary to international and human rights law.

The actions or omissions of CIE's officials have led to numerous cases of institutional violence, resulting in violations of the rights of interned migrants. Tragically, this has led to loss of lives, such as in the case of Marouane Abouobaida, a 23-year-old Moroccan man who violently died while interned in the CIE of Zapadores in Valencia, and other forms of violence not ending in the deaths of the interned migrants. To this day, there has been no clarification of his death, nor of the tragedy of El Tarajal. It is important to investigate and address these incidents to prevent further harm to vulnerable individuals or groups. The CIEs significantly restrict communication for detainees, often failing to inform them of their right to seek asylum,

¹⁵ Ídem, p. 70.

¹⁶ Arenas Hidalgo, Nuria Cinta. "La desprotección del refugiado o de la Europa insolidaria." In *La desprotección internacional de los derechos humanos: a la luz del 50 aniversario de la Declaración Universal de los Derechos Humanos*, coordinated by Pablo Antonio Fernández Sánchez, 123–190. Huelva: Universidad de Huelva, 1998.

¹⁷ Bosch, Ana, Josetxo Ordóñez, and Josep Buades. "Informe CIE 2021: Territorio Hostil. Formas diversas de hostilidad en los CIE." *SJM*, 2022.

making it difficult for them to apply, receive updates on their application status, or obtain legal advice, together with insufficient medical assistance and under the imminent threat of expulsion. This implies direct or indirect violations of the fundamental rights of the detainees by State officials and the Spanish State itself, as reported by the campaign CIE No in 2020¹⁸, in addition to a tricky treatment of the international protection system.

I. Understanding refugee status determination

The primary aspect to be considered in an asylum claim is the determination of the (well-founded fear of) persecution suffered by the applicant. The term persecution has not been defined in universally accepted terms. The Geneva Convention and the complementary texts that follow it use a wide definition that does not fix the term but that infer that those threats to life or freedom for the reasons specified in the Convention -race, political opinion, nationality, religion, membership of a particular social group- is universally accepted persecution, in addition to other serious violations, actions or threats, depending on the circumstances of each claim¹⁹. The persecution suffered by the applicant must be analysed and understood within the meaning of the Convention. For this purpose, the objective and the subjective elements of the persecution are assessed.

The objective element of persecution, that is, the acts through which persecution is perpetrated, is established in Law 12/2009 and in Directive 2011/95 of the European parliament and of the Council²⁰, in addition to the open definition above-mentioned given by the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention. Article 6 of the Spanish Law establishes as persecutory acts those that are sufficiently severe in nature, of reiterative nature, or a compilation of both in order to be considered violations of fundamental rights. Some of the acts considered persecutory following the interpretation of the Convention, as established in this article, can be, among others: those involving physical or psychological violence, official policies that are discriminative whether in nature or in its application, disproportionate or discriminatory penalties or prosecution, and acts of sexual nature affecting both adults and minors. The persecutory acts defined in this article shall be related to the reasons of persecution provided by the Convention for the determination of refugee status.

The reasons or causes of persecution, or the subjective element of persecution, are, as set in the Refugee Convention, the Spanish Law 12/2009 and the Directive 2011/95, race, religion, nationality, political opinion and membership of a particular social group. When analysing asylum claims, the actual recognition or identification by the applicants of one or more of these causes as reasons of their suffering of persecution should be irrelevant in the

¹⁸ Campaña CIEs No. “CIE de Zapadores: sin derecho a tener derechos: Informe 2020 de la Campaña por el Cierre de los Centros de Internamiento para Extranjeros y el fin de las deportaciones CIE NO.” Valencia, 2020.

¹⁹ UNHCR. “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” (HCR/IP/4/Eng/REV.1). United Nations, 1992.

²⁰ European Union, Council of the European Union. “Directive 2011/95 of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. Official Journal of the European Union” (No 32011L0095), December 13, 2011.

assessment. The mere association of the applicants with the reasons of persecution by the actors of persecution shall be enough to move on with the assessment of the claim, regardless of the actual possession of the applicants of the racial, political, national or religious characteristic or of their actual belonging or membership of a particular social group that would attract the persecution being assessed.

The agents of persecution are those that perpetrate it or that impose the well-founded fear of persecution. Persecution and well-founded fear of persecution can either be perpetrated or imposed by State actors or by non-State actors. The former include the State and all parties or organisations that control the State or a considerable part of the territory of the State; while the latter are those outside of the direct control or management of the State, when the State actors, including international organisations, are unwilling or unable to provide protection for the reasons stated above.

While the agents of persecution can be both State and non-State actors, the agents responsible for providing protection against persecution or serious harm are only State actors, being the State the structure that oversees for the security and defence of the citizens and their rights. Protection is recognised to exist only when State actors employ procedures and policies through the legal and judicial systems, being these reasonable and effective, to prevent persecution or situations that may lead to it, and the later competent assessment of asylum claims. This means that protection must be effective and of non-temporary nature.

II. Persecution for membership of a particular social group

Article 1.A(2) of the 1951 Convention relating to the Status of Refugees of the UNHCR (hereinafter the 1951 Convention, the Refugees Convention, or the Geneva Convention) defines the term refugee as applying to any person who “As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. [...]” (UNHCR, 1951).

Although the Convention does not specify the groups that constitute the ground or category of “membership of a particular social group”, the “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”²¹ or “the Handbook”, complements the Convention by developing its terms in order to work as a discussive and interpretative text of the 1951 Convention, and it does explain that women and homosexuals may conform a particular social group under specific circumstances.

In addition, the UN High Commissioner for Refugees issued several reports as guidelines on international protection in order to facilitate the interpretative nature of human rights law and the application of the Refugee Convention so as to adapt to the dynamics of the

²¹ UNHCR. “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” (HCR/IP/4/Eng/REV.1). United Nations, 1992.

new social realities. More specifically, the UNHCR issued the texts “Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”²², “Guidelines on International Protection: Gender-Related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”²³, and “Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”²⁴, among others. These texts were designed as legal instruments providers of legal interpretative guidance for institutions and bodies carrying out refugee status determination, such as governments, in relation to claims based on the two mentioned reasons of persecution stated in Article 1.A(2) of the Geneva Convention. These texts imply a concretisation and specification of the protection of certain groups, subjects or collectives in such a way that it implicitly recognises a differentiation of these subjects with respect to those who do not belong to these categories in certain situations in which they become vulnerable²⁵.

Membership of a particular social group is the most ambiguous ground of the five reasons of persecution enumerated in the Refugee Convention, due to the lack of clarity and precision of the term, not existing a specific list of social groups nor a certain pattern to follow when attributing this ground to a claim. For this reason, this ground is often attributed to claims in which the persecution analysed does not fit in the other four categories recognized in the Convention.

This is the most unclear category of the Convention, leaving dangerous room for interpretation and subjectivity when determining the status of refugee. When considering the ground of membership of a particular social group as a reason of persecution within the Refugees Convention, State practice, including Spain as is set in Law 12/2009, uses a wide range of interpretations based on two main approaches: the immutability approach and the social perception approach²⁶.

The immutability approach or protected characteristic approach is based on the notion that the members of a particular social group share an immutable characteristic or an intrinsic aspect in human dignity that should not be required to be changed or forsaken, more in line with the promotion and protection of human and fundamental rights. The latter approach defines the ground on the basis of whether the group in question is perceived by its own society or environment or by society as a whole because of a common characteristic that makes it or the members cognisable.

²² UNHCR. “Guidelines on International Protection: «Membership of a particular social group» within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (HCR/GIP/02/02). United Nations, 2002b.

²³ UNHCR. “Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (GCR/GIP/02/01). United Nations, 2002a.

²⁴ UNHCR. “Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (HCR/GIP/12/09). United Nations, 2012.

²⁵ Trinidad Nuñez, Pilar. “La evolución en la protección de la vulnerabilidad por el derecho internacional de los derechos humanos.” *Revista Española de Relaciones Internacionales*, no. 4 (2012): 125–168.

²⁶ UNHCR. “Guidelines on International Protection: «Membership of a particular social group» within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (HCR/GIP/02/02). United Nations, 2002b.

The UN High Commissioner for Refugees adopted a standard definition for the ground of membership of a particular social group that integrates both approaches: “a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights” (UNHCR, 2002). The State parties to the Convention, although free to develop their own legal frameworks and procedures on international protection and the right to asylum, shall take this definition as reference and basis when analysing asylum cases related to this category.

Following either one or both of these approaches, both homosexuals and women separately have been recognized as particular social groups by administrative and jurisprudential practice in several cases depending on the social and political circumstances of the applications, starting with the UNHCR and its recognition in an advisory opinion of women and homosexuals as members of a particular social group²⁷.

In administrative terms, as already assessed, the Spanish Law 12/2009 explicitly includes sexual orientation as a common innate characteristic that may constitute a particular social group in its article 7 together with the express mention in article 3 of sexual orientation as one of the grounds for which an asylum seeker may fear persecution. However, Spanish jurisprudence often considers persecution by non-State actors as discrimination, not qualifying for refugee status determination and thus not granting asylum²⁸.

Although women do not constitute a *de facto* vulnerable group in contemporary society, they are discriminated against and subjected to violence on account of their gender or sex, and the power relations traditionally and historically established on this basis. In such instances, women become vulnerable to discrimination, since such forms of discrimination affect all women in various ways and in diverse areas, hindering equal opportunities and *de facto* equality between both genders or sexes²⁹. Thus, in such cases in which women become vulnerable to this discrimination or these violences, they may constitute a particular social group when it is contextualized under specific circumstances, based on persecution based on gender.

Gender-based persecution does not have a juridical nor legal meaning as such. It is a term used to englobe a series of claims and interpretations in which gender is or has been an essential aspect of the asylum application and determination of the status of refugee³⁰. Depending on the case, the persecution suffered or feared to be suffered by the applicant can fall under any of the categories recognized in the Convention when being based on gender. This is also reflected in Directive 2011/95/EU, in which article 10 recognises gender as an important aspect to be considered when addressing asylum claims.

In this sense, State practice and judicial decisions have accepted gender as a characteristic constitutive of a particular social group object of acts of persecution or omissions of protection.

²⁷ UNCHR. “Informe de la Sra. Radhika Coomaraswamy, Relatora Especial sobre la violencia contra la mujer, con inclusión de sus causas y consecuencias, presentado de conformidad con la resolución 1995/85 de la Comisión de Derechos Humanos: La violencia contra la mujer en la familia.” UN ECOSOC, 1999, p. 6.

²⁸ Jansen, Sabine, and Thomas Spijkerboer. *Fleeing Homophobia: Asylum claims related to sexual orientation and gender identity in Europe*. Vrije Universiteit Amsterdam (VU University Amsterdam), 2011, p. 72.

²⁹ 29 Trinidad Nuñez, Pilar. “La evolución en la protección de la vulnerabilidad por el derecho internacional de los derechos humanos.” *Revista Española de Relaciones Internacionales*, no. 4 (2012): 125–168..

³⁰ UNHCR. “Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (GCR/GIP/02/01). United Nations, 2002a.

A clear example of this is the case of the House of Lords in the Matter of *Islam; Ex Parte Shah*³¹ in 1999, by which the British Court did not recognise the persecution suffered by two Iranian women for reason of their gender. However, it did consider the fact that women constitute a particular social group based on circumstances related to gender, and later recognised that the omission to protect them by the Iranian State was based on the membership of this particular social group. This matter recognises the granting of international protection as well as a result of an omission by State behaviour rather than an act, as is the State's failure to protect³². This approach and interpretation was followed by the New Zealand Court in the Matter of *Refugee Appeal No. 71427/99*³³, by which the Court considered the Iranian State responsible for the protection of the applicant, an Iranian woman, and affirmed that, in regard to the claim, Iran allowed non-State actors to persecute a particular social group -women- by enforcing discriminatory gender-based policies with detrimental effects on women. This way, the Court recognised women as a particular social group towards which the State was being discriminatory, that led to persecution based on gender. This also manifests the fact that the Court recognised that persecution can emerge as a consequence of discrimination, being sometimes persecution an extreme form of discrimination.

The Australian Supreme Court in the Matter of *Minister for Immigration and Multicultural Affairs v. Khawar*³⁴ in 2002, also followed the decision and recognised women as members of a particular social group stating that “Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments. Neither the conduct of those who perpetrate domestic violence, or of those who withhold the protection of the law from victims of domestic violence, identifies women as a group. Women would still constitute a social group if such violence were to disappear entirely [...]” (High Court of Australia, 2002).

Spanish jurisprudence has also granted asylum on the basis of gender-based persecution, as is the case of the *Decision of the National Court of January 13, 2009*³⁵, by which the Court recognised the existence of persecution and membership of a particular social group of a female applicant, stating that it was the applicant's sex the determinant factor of the definition of a social group. The Court's decision accepted that women conform a particular social group because of their sex, the innate characteristic that generates differentiated treatments or policies in some countries towards women.

These are cases in which gender-based persecution or gender as a ground of membership of a particular social group is recognized and has set precedent for this ground. There is also jurisprudence that sets recognition for asylum cases regarding sexual orientation-based claims for reasons of membership of a particular social group.

The Matter of *In re Toboso-Alfonso*³⁶ was the first case to establish precedent for sexual orientation-based asylum claims that was followed by cases such as *Hernández-Montiel v.*

³¹ House of Lords. “Judgments - Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals): Opinions of the Lords of the Appeal for judgement in the cause”. UK Court of Appeal, 1999.

³² Jiménez Sánchez, C. (2017). La persecución de género en el Derecho Internacional de los Refugiados: Nuevas perspectivas. *Revista Electrónica de Estudios Internacionales*, 33, p. 21.

³³ New Zealand: Refugee Status Appeals Authority. (2000). *Refugee Appeal No 71427/99* (N.º 71427/99).

³⁴ High Court of Australia. (2002). *Minister for Immigration and Multicultural Affairs v Khawar* ([2002] HCA 14).

³⁵ Jiménez Sánchez, Carolina. “La persecución de género en el Derecho Internacional de los Refugiados: Nuevas perspectivas.” *Revista Electrónica De Estudios Internacionales*, no. 33 (2017), p. 27.

³⁶ United States Board of Immigration Appeals. “Matter of Toboso-Alfonso”; A-23220644, 1990.

*INS*³⁷, by which well-founded fear of persecution for the reason of sexual orientation within the ground of membership of a particular social group was considered to be the determining factor of persecution and thus qualifying for the determination of refugee status³⁸. These claims were based on the public sphere or public factors, as the agents of persecution were State-actors. In *In re Toboso-Alfonso*, it was the Government itself the one that perpetrated the persecution against the applicant, through unjustified police detentions, and disproportionate punishments, among other policies emanating from State actors that were targeted at him for his reason of homosexual. The *Hernandez-Montiel vs. INS* claim was based on acts of persecution that took place in the public sphere in which the State did not take action to provide protection. In Spain, the case of John Jairo Romero, a gay citizen, was the first to establish precedent for Spanish jurisprudence in 2004 in relation to asylum claims for reason of sexual orientation, together with the case of two lesbian activists threatened by paramilitary groups, that became refugees in Spain after applying for political asylum³⁹.

From all this doctrine and jurisprudence, it can be understood that lesbian asylum claims fall under the category of membership of a particular social group due to different factors. First of all, women are tied at a universal scale to certain behaviours, treatments and/or policies directed at them and differentiated for reason of their gender or for their sex, depending on the cultural concept of women. It has been recognised by State actors that this is an innate characteristic that can lead women to conform a particular social group towards which persecution may be exercised for reason of the mentioned sex or gender. Secondly, homosexuality has also been accepted by State institutions and recognised as a characteristic that makes homosexuals object to forms of persecution in certain regions or countries as a consequence of their sexual orientation as an essential characteristic for their fundamental rights which makes them cognizable by societies.

The Matter of *Pitcherskaia vs. INS*⁴⁰ is the only precedential decision regarding asylum claims made by lesbians for reason of sexual orientation on the ground of membership of a particular social group. Alla Pitcherskaia was a Russian citizen that applied for asylum in the U.S. on the basis of fear of persecution for political opinion. After being her application denied, she reapplied on the grounds of political opinion and membership of a particular social group: Russian lesbians. Having presented the relevant testimonies and evidences regarding the acts of persecution for her sexual identity, including threats of forced institutionalisation and forced “therapy” sessions that sought to “treat” her lesbianism, the Court denied once again her application without a specific conclusion about her credibility, arguing that she did not meet the requirements for refugee status although her testimony was credible. Her claim was also denied in a third appeal, on the ground that the intent of the persecutors was not to punish nor to harm the applicant, although it did recognize the acts perpetrated against her, contemplated as persecution in the 1951 Convention. There was only the opinion of a dissident judge, Chairman Schmidt, favourable to the applicant, who concluded that Pitcherskaia did establish a well-founded fear of persecution on the grounds of her membership of a particular social group. Nevertheless, the Court of Appeals, the final instance to which she appealed to, analysed whether the previous decision was based on the correct focus: the intent of the perpetrators. It

³⁷ United States Court of Appeals for the Ninth Circuit. “Geovanni Hernandez-Montiel v. Immigration and Naturalization Service” (225 F.3d 1084 (9th Cir. 2000); A72-994-275), 1999.

³⁸ Neilson, Victoria. “Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims.” *Stanford Law and Policy Review* 16, no. 417 (2005), p. 12.

³⁹ ALDARTE. “Lesbianas: derecho de asilo para las mujeres perseguidas por motivos de orientación sexual”. Bilbao, 2009, p. 14.

⁴⁰ United States Court of Appeals for the Ninth Circuit. “Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service” (No 95-70887), 1997.

concluded that it was not a determinant factor for the assessment of the claim and granted the application for asylum in the U.S. The motivations of the persecution are not relevant to the claims made by asylum seekers, only whether the acts perpetrated towards the applicant constitute persecution or not, and whether these acts are perpetrated because of the perceived characteristic of the applicant by the persecutor. This means that it is the objective acts of persecution and the characteristic of the applicant and not that of the alleged persecutor the relevant factors to consider when assessing the claims. This is a relevant asylum decision because of its focus on the analysis of the persecution and on the characteristic of the applicant as a potential member of a particular social group, promoting the necessary view that the claims shall be analysed on a case-to-case basis in order to better understand the context that surrounds the applicant and the application, not that of the persecutor. The decision is also relevant because of the understanding of persecution as objective, arguing that “persecution by any other name remains persecution” (*Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service*, 1997).

Although there are more cases in which asylum has been granted on the ground of membership of a particular social group in lesbian claims, the actual documentation of these claims, even if they are refused during the process, is quite insufficient, almost non-existent.

III. Spanish asylum system

Asylum in Spain can be a long process since the presentation of the application. Regulated by the already-mentioned Law 12/2009, asylum seekers can apply for international protection in the Spanish State both outside and inside the Spanish territory. Outside Spanish territory, they can do so at border posts, airports, or international ports, accompanied by a lawyer. Inside Spanish territory, they have the option to do so at authorised police stations, at the Foreigners' Office, or at the Office of Asylum and Refuge (OAR) on the one hand, or at Immigration Detention Centers (CIEs) on the other when being an immigrant in Spain in an irregular administrative situation that has been detained, also accompanied by a lawyer. In addition, although it is not possible to directly apply for international protection through diplomatic means, the norm establishes the plausible transfer of asylum seekers to the territory of Spain in which asylum can be applied for.

The process of applying for asylum follows the same logic both outside and inside Spanish territory, represented in the following graph (*Graph 1*).

On a general basis, the application must be submitted in person at the designated authorised offices or posts within one month of the date of entry into Spanish territory or from the occurrence of the events that justify the well-founded fear of persecution that leads to the application for international protection. The applicant is then informed about the procedure that follows the application, the rights and obligations it entails and the possibility of contacting the UN Refugee Agency or UNHCR or any other NGO recognised and authorised to advise and aid asylum seekers. The application then is formalised through a personal interview in which the applicant explains the facts and reasons of the persecution reportedly suffered and presents the necessary evidences. The interviewer will provide the applicant with information about the application process and any assistance needed to complete the formal application. After this, further interviews may be conducted if deemed necessary by the competent body. In this sense,

applicants cannot be expelled from Spanish territory until their application has been resolved or rejected for processing.

Once the application is formally submitted, it is then sent to the OAR (Office of Asylum and Refuge) for processing, which decides if the application is admitted for processing or not. If applied outside the territory of Spain or at a CIE, the applicant is notified within four days of the submission of their application of the decision on the admissibility or non-admissibility of the application for the next phase, or of the decision of refusal of the application. If refused or unadmitted, the applicant may file for a re-examination of their application within two days since being notified with the negative decision. Within another two days, the asylum seeker receives a notification with the decision: whether their application has been admitted for processing, whether it has not, or whether it has been refused. If unadmitted for processing, the applicant may challenge the decision by filing a contentious-administrative appeal or an appeal for reversal. If the application is neither unadmitted nor admitted, but refused, they may file for an appeal for review in addition to the previous two if new evidences appear.

In the case of applications presented within the Spanish territory, asylum seekers are notified within one month since their application of its admissibility or unadmissibility for processing, not existing the possibility of it being refused in this phase for these applicants. If the application is unadmitted for processing, the applicant may file for an appeal for reversal or a contentious administrative appeal for the review of the application.

The non-admission for processing of applications, whether for those submitted inside or outside Spanish territory, is based on two possible circumstances: the lack of Spanish jurisdiction or responsibility for the assessment of the applications, in accordance with the Council Regulation (EC) 343/2003 of 18 February 2003⁴¹ or in accordance with international conventions to which Spain is a State party, and the failure of the applicants to comply with the requirements set in article 20.1 of Law 12/2009.

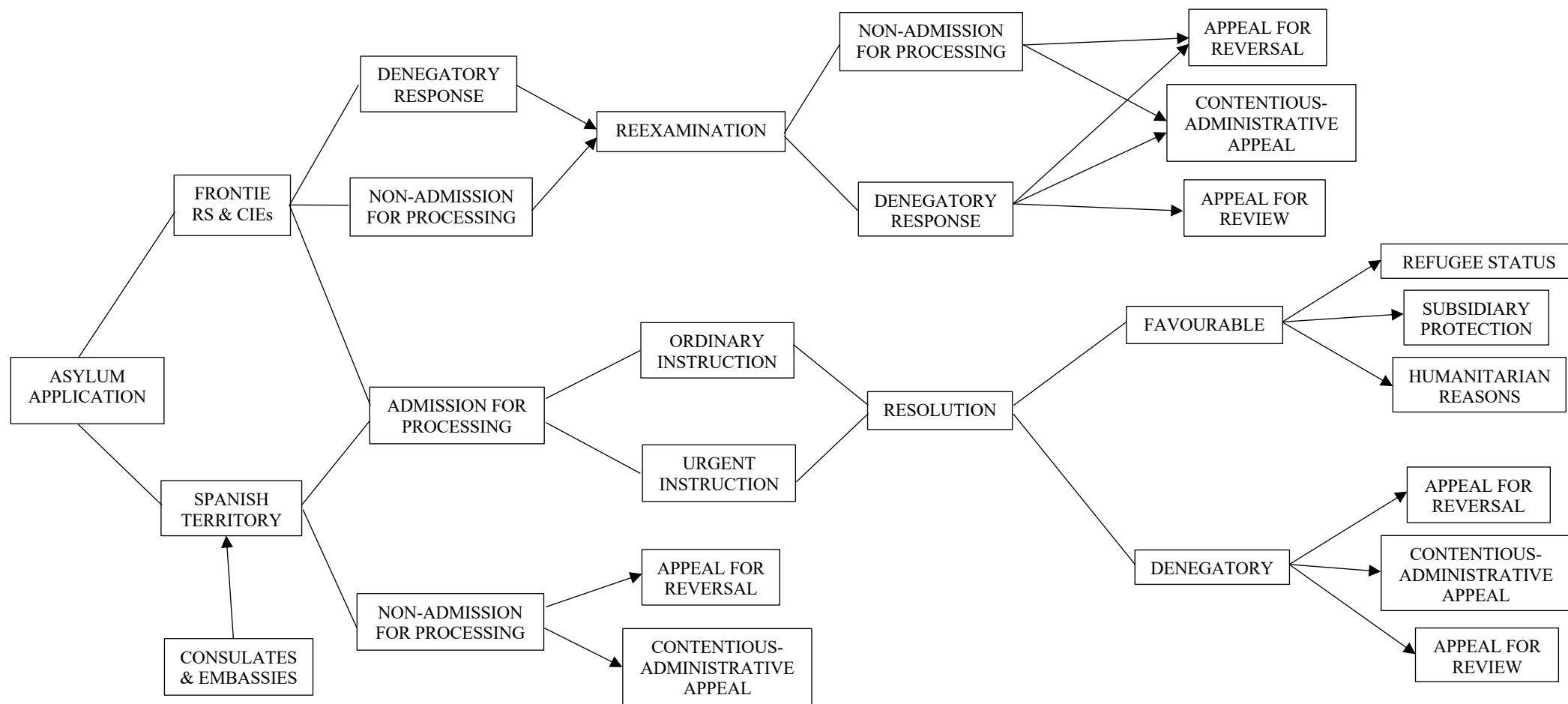
The refusal of the application is based, among other things stipulated in the Law, on the unfunded application by the formulated account or allegations that, after its analysis, are considered to be inconsistent, incoherent, contradictory, unrealistic or implausible, or insufficient; or that contradict verified information -by the interviewer- about the country of origin of the applicant. This issue will be further explored and discussed.

If the application is admitted for processing, either having been presented outside the territory of Spain or inside it, it is further analysed by the OAR, which later forwards it, along with its report, to the CIAR (Inter-Ministerial Commission on Asylum, Comisión Interministerial de Asilo y Refugio in Spanish). This process is known as the instruction of the case or the instruction of the application, which can be an ordinary procedure -with a maximum duration of six months- or an urgent procedure – takes a maximum of three months-, depending on the case and the circumstances that surround it. The report presented by the OAR to the CIAR considers a compilation of the account and allegations presented by the applicant in the interview that formalised their application, the evidences presented, and the information provided and later verified by the interviewer about the legal, political, social, economic and cultural context of the country of origin. After referring the OAR the application to the CIAR, the latter submits a proposal for resolution to the Ministry of Interior, which takes the final decision. This decision can be either a favourable resolution or a denegatory one. The former grants international protection, which can take the form of granting refugee status, granting

⁴¹ Council Regulation (EC) No 343/2003 of February 18th, 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

subsidiary protection, or denying refugee status but granting residence authorisation for humanitarian reasons. The denial resolution (as well as the non-admission for processing of an application) determines the return, refoulement, expulsion, compulsory departure from Spanish territory, or transfer to the territory of another State of the applicant. If the application is refused, the applicant may file for any of the three previously-mentioned appeals for a revision of their case: contentious administrative appeal, appeal for reversal, or appeal for review.

Graph 1: Spanish procedure for international protection



Source: own elaboration.

WELL-FOUNDED FEAR OF PERSECUTION UNDER AN ANDROCENTRIC SYSTEM

I. Public vs. Private Spheres: the margins of the margins

Current societies, political and social, are based on the dichotomy of the separation of the private sphere and the public sphere. While the public sphere encompasses the political or collective aspect of human socialisation, the private sphere comprises the individuality of citizens and their interactions and associations as individuals.

Individuals become citizens in the public sphere, constituting the political community of the State and participating in it through the collective association by exercising their rights and responsibilities. Individuality, in contrast, is kept in the private sphere, reserved for the individual's interests and the development of their autonomy. Thus, citizenship is exercised in the public sphere, where citizens influence and participate in the State and where there is a direct interaction between the State and the citizenry. The State is bound to be kept out of the private sphere in order for the individuals to develop and enjoy their autonomy, privacy and personal intimacy⁴². This way, the individual's dignity is preserved and protected from external intervention, constituting this separation of both spheres an equilibrium between the State and the civil society. Nevertheless, the limits between the spheres are not rigid nor express, but unclear and ambiguous, given the fact that the individual's development within the private sphere influences the public sphere, being the latter a space in which the individuals -now citizens- convey their values, ideas and worries developed or that take place in the private sphere. Similarly, the State can exert influence on the private sphere through its laws, policies, and their enforcement. This impacts citizens in their personal lives, that is, in the private sphere as individuals, by conveying and introducing the values and ideas that are debated in the political arena and their development and interactions as citizens with other fellow citizens and with the State itself.

In this sense, citizenship is the recognition of the individual and its political identity by the State and by the political identity of other -and the own- individuals, providing for compensation and protection through instruments and institutions, as are mental health recognition, respectability, legitimisation, legality, mobility, institutional support, material benefits, or political, civil, and human rights, among others. These latter rights emerge as an explicit recognition of the individuality of the citizen, acknowledging the fact that citizenship is only the for citizens of a State, being individuality and the right to privately enjoy it essential for the well-functioning of a democratic society. In this sense, the public or political sphere works as a space for the recognition and the legitimisation of citizens, which, at the same time recognises their individuality through the respect for the separation of the private sphere from the public one. This, then, means the recognition and legitimisation of the existence and the identity of the citizens and of those individuals that appear and have a voice in the public sphere.

However, whose existence and individuality is being recognised? Are all identities legitimised? Do all forms of existence have space in the public sphere?

⁴² Habermas, Jürgen. *Historia Y Crítica De La Opinión Pública*. 1994.

Hannah Arendt argues that political equality is built upon the result of mutual recognition within the public sphere⁴³. If the public sphere represents and encompasses all existences and realities, those that do not form part of the public sphere or that do not have the right to participate in it in the same degree as other fellow citizens, are not recognised and thus, do not fully exist, considering existence dependent on recognition. Judith Butler defines this as the performative exercise of the right to appear⁴⁴, to be seen and recognised within the public sphere, which is essential for self-recognition. John Berger⁴⁵ analyses this appearance in terms of the negative and the positive liberties of Isaiah Berlin. Berger argues that the female presence or appearance is limited and conditioned by the context, while the male appearance is only conditioned by its own power, not by exterior forces or actors. Examining the different forms of appearance and forms of being seen both in the public and in the private sphere, he argues that men *act*, being their appearance or presence inherent to their reality and being allowed to act because of this presence, while women *appear*, being this presence a granted right linked to the presence and the action of men.

At the end of the day, those who have the right to appear, who are part of or that participate in the public sphere are the ones that are taken into account by the State, thus validating their existences and experiences in the private sphere as well and protecting them, directly through the State and State actors such as through the law enforcement agencies, and indirectly through the development and implementation of policies and norms that recognise and watch over the rights of those kept in the ostracism or the private sphere. This exposes the dependence of individuals -and communities and societies- of the State and the support provided by structures, including the family, and the connection of the institution to the sense of belonging, that is, self-recognition within the State as a citizen and individual worthy of that recognition.

The dichotomy between the private sphere and the public sphere has a different and deeper impact on women, being these the personification of the private sphere. Gender norms or heteronormativity intervene in the ways individuals appear or take part in the public sphere, based on the established distinctions of the public sphere versus the private sphere that later constitute the political and social lives⁴⁶. The (hetero)norm regulates the public sphere according to its very nature: only certain citizens are or were allowed to participate in the public sphere -cisheterosexual men⁴⁷, not leaving space for dissident forms of relations and sexualities, and this is then conveyed into the private sphere, where this becomes the norm as well. Lesbianism and other sexual identities different to cisheterosexuality are not present in the public debate, given the systematic hierarchy and power structures that organise our societies. In the same line, within the public sphere, the State has the monopoly of violence, exercising it in certain circumstances through its law enforcement agencies in order to provide for stability and security among the State. Being the State exempt of intervening in the private sphere, it is men who have systematically had the monopoly of violence within this space, within the standards and limitations allowed by the State, as a result of its unresponsiveness towards violence perpetrated by men in certain situations in which power structures and dynamics have set women, lesbians and other dissident identities in a powerless position, such as in domestic,

⁴³ Arendt, Hannah. *La condición humana*. Paidós, 1993.

⁴⁴ Butler, Judith. *Cuerpos aliados y lucha política: Hacia una teoría performativa de la asamblea*. Translated by María José Viejo Pérez. 2015. Reprint, Planeta Colombiana, 2017.

⁴⁵ Berger, John. *Ways of seeing*. London: Penguin Modern Classics, 2008, pp. 45-47.

⁴⁶ Butler, Judith. *Cuerpos aliados y lucha política: Hacia una teoría performativa de la asamblea*. Translated by María José Viejo Pérez. 2015. Reprint, Planeta Colombiana, 2017, p. 41.

⁴⁷ Men who meet the established criteria, usually based on class, race and/or ethnicity.

homophobic or gender violence cases, justified by the conception that those are matters of the intimacy of the individuals over which the State has no control.

The social, political, legal and judicial processes that constitute the dichotomy public-private, reflect and reinforce power structures. This way, certain processes or activities are constitutive of the public sphere and some others of the private sphere, although these two influence each other. The common characteristic of the classification or conception of these constitutive activities of one of the two spheres is the attribution of less social, political and economic value to the ones that encompass and constitute the private sphere, including its main actor: women, together with other identities that exist in the margins⁴⁸, as are lesbian and bisexual women. If the State, and thus the citizenry as the ones that constitute and build the State, is the one that provides for the recognition of the identity, this means that it is participating in the public sphere what leads to the recognition and legitimisation of the existence and the identity. As a consequence, those identities that do not participate in the political space, have less value as citizens and hence as individuals, and may not even be recognised as full citizens worthy of public protection and recognition. In addition, this unrecognition of women and lesbians as citizens of the State, serves as a mechanism that legitimizes violence against them in order to enforce a structural, historical and systematic system of oppression, the patriarchy⁴⁹.

As a consequence of this dichotomy, within the public sphere, women can be said to be relegated to ostracism, being considered by the political space as an Other, as women have historically not had space in this sphere, being its monopoly exclusive of men and their experiences. Being in the margins of the margins from the public sphere perspective, leads to the lack of consideration of women experiences and desires when developing, applying or enforcing laws and cultural norms, both in the public and in the private spheres.

This dichotomy poses a great danger to those that find themselves enclosed or trapped in the private sphere, as, while the political life may evolve and transform into a more inclusive space thanks to the claims made by part of the society by pushing and driving the way forward for the public space, these transformations are more difficult to be effectively conveyed into the private life, as this is exempt to political intervention in respect to values and ideals. As a consequence, women and lesbians find themselves in a situation in which they have been left to their luck in a space that is rooted in hostility towards their identity and are relegated in the margins of the private sphere, the domestic realm.

The creation of the Declaration of the Rights of Man and of the Citizen in 1879 was the precursor legal text in human rights law, based on the idea that all men were subject to natural and universal human rights. However, the Declaration did not include women as subjects of human rights, as they were not part of the political life, they were kept in the private sphere, not being considered to have political identity nor autonomy, and minimising their existence through their relegation to a secondary space. These rights were attributed to citizens, those that had a claim to existing in the public or political life. Women, slaves and foreigners were not included, not being considered citizens with political experiences as a result of their identities and experiences not being politicised. This exposes that women, as well as slaves, were not considered citizens, but a property of men, and thus were not worthy of political rights. This conception of women as entities lacking political identity still remains in some societies, not being the case of Spain. The consequences of the developing of legal and political systems from

⁴⁸ Horrillo, Silvia Concha. "El derecho estático de las personas en movimiento: derecho de asilo por motivo de género y orientación sexual." Bilbao: Universidad del País Vasco, 2017, p. 206.

⁴⁹ Copelon, Rhonda. "Intimate Terror: Understanding Domestic Violence as Torture." In *Human Rights of Women: National and International Perspectives*, edited by Rebecca J. Cook, 116–52. Philadelphia: University of Pennsylvania Press, 1994.

this androcentric perspective is still present in the application and functioning of these systems, through subtle means.

The Declaration of the Rights of Woman and of the Female Citizen was developed as a response to the previous one as a critique to its hypocrisy and the exclusion of women as part of the community entitled to human and political rights. Being a satiric text developed as a political reivindication of and for women, it followed the structure and content of the male Declaration. Although this was not formally taken into account, it set precedent in regard to the non-existent presence of women in the political life. The Universal Declaration of Human Rights did universalise human rights including women; however, it did only include women formally, not effectively, as the extension of legal texts, instruments and institutions related to human rights are based on an androcentric perception from which the procedures, and ways of implementation and enforcement have been built. This is due to the fact that human rights law has traditionally focused on the violations of these rights within the public sphere⁵⁰, while women's human rights are fundamentally violated within the private sphere, more specifically in the domestic realm, that is, the family sphere. This poses the question of whether the term universalism has lost its meaning or if it ever had a real universal meaning and aim.

It was not until 1979 that the Convention on the Elimination of All Forms of Discrimination against Women⁵¹ (CEDAW) was developed as the first legal instrument to include and recognise in an explicit way the rights of women. Although there are instruments prior to the Convention that recognised women as subjects of human and political rights, such as the Convention on the Political Rights of Women⁵², the Convention on the Nationality of Married Women⁵³, or the Declaration on the Elimination of Discrimination against Women (precursor to the current CEDAW), these were instruments that comprised a general overview of women's rights. Differently, the CEDAW is the first legal instrument to recognise the private sphere as a realm of application of international and domestic law, not only being addressed to States and the public sphere.

In addition, article 2 of the Universal Declaration of Human Rights states that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]” (UN General Assembly, 1948). It can be understood -by those who accept the diversity of realities, that by *other status* the Declaration assumes that dissident sexual identities are included. Nevertheless, given the lack of recognition of these realities in many parts of the world, it becomes necessary to name them so as to provide some sort of recognition, as the LGBTQ+ community represents an important part of the population which is still suffering from unrecognition, taboos, invisibility and other forms of violence. It is important to note that within the framework of public international law, the only instrument specific for the LGBTQ+ community to recognise international standards regarding human rights and their applicability related to sexual orientation and gender identity are the Yogyakarta Principles⁵⁴. What is more, this instrument has not yet been accepted by the United Nations,

⁵⁰ Trinidad Nuñez, Pilar. “La evolución en la protección de la vulnerabilidad por el derecho internacional de los derechos humanos.” *Revista Española de Relaciones Internacionales*, no. 4 (2012): 125–168.

⁵¹ UN General Assembly. “Convention on the Elimination of All Forms of Discrimination Against Women”. United Nations, Treaty Series, vol. 1249, p. 13. United Nations, 1979.

⁵² UN General Assembly. “Convention on the Political Rights of Women” (A/RES/640(VII)). United Nations, 1952.

⁵³ UN General Assembly. “Convention of the Nationality of Married Women” (A/RES/1040). United Nations, 1957.

⁵⁴ International Commission of Jurists. “Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity”, 2007.

reflecting the questionable will of the international community to work towards a multilateral and committed response towards the violences against the LGBTQ+ community.

Human rights were developed in order to provide for all citizens and human beings. Being women not perceived as citizens or as citizens with worthy political identity for a period of time⁵⁵ -let alone lesbians-, certain rights were not attributed to them because the construction of human rights law and the international protection system had an androcentric bias. Once women and lesbians were considered part of the public sphere and thus citizens, they were included in the attribution of human rights, making these latter universal. However, this universalisation of human rights has not been real, only theoretical in the most part, as the violation of women's rights are redirected towards men's experiences when assessing asylum claims, in order for these violations to be "properly" addressed under the international or national legal systems. The only way to address them, in this sense, is to try to fit the female experiences, including those that take place within the private sphere or the domestic realm, into the androcentric conceptions of legal and judicial standards built from the public sphere and based on male experiences- which take place in this sphere. This means the unreal consideration of women as citizens entitled to the enjoyment of human rights in an effective way.

All in all, women and lesbians are recognised as subjects of human and political rights -in the case of lesbians, only in some regions, as is in Spain-, but their experiences are not recognised, and this is visible in the construction of political and legal systems and in the implementation and interpretation of norms, as is the asylum system and the determination of refugee status, not having space for women and lesbians's experiences within its conceptions of persecution.

1. Family

The State is the entity responsible of managing the public sphere as the embodiment of the political life, but it is also present in the private sphere through legal and moral laws that set and influence the dynamics in the family as a structure and as a first form of association and collectivity.

The State has traditionally been inhibited to intervene in the private sphere and more specifically in the structure of family, being this considered to be part of the private and intimate aspect of citizens⁵⁶. This works as a way of protecting citizens and their private and intimate lives from external intervention in order to provide for a safe and free space for citizens. Not being the State responsible for the actions taken in the private sphere by private agents - individuals-, sets a wide range of freedom to the agents that enjoy more power in the private and domestic spheres, while leaving unprotected the less powerful- women-, as this separation of the private from the public sphere works as a platform to hide domestic, intrafamilial violence and violence against women taking place within this space. The aim is not to argue for unlimited State intervention in the private sphere, as this can result in totalitarianism, repression, or a lack

⁵⁵ Horrillo, Silvia Concha. "El derecho estático de las personas en movimiento: derecho de asilo por motivo de género y orientación sexual." Bilbao: Universidad del País Vasco, 2017, p. 91.

⁵⁶ ALDARTE. "Lesbianas: derecho de asilo para las mujeres perseguidas por motivos de orientación sexual". Bilbao, 2009, p. 7.

of individual freedom. However, it is crucial to consider the consequences of ineffective or non-intersectional policies regarding State protection and promotion of equality resulting from its nature.

The family has historically been the natural and fundamental element of society and thus of the political life, being the primary form of association and distribution of powers and roles that develops and ultimates in the collective and political association in the public sphere. This means that family is as political as the State, in which there is a relative lack of freedom from rules. Being the basis of society as a whole, an essential aspect of the family has always been its restrictive separation of the public sphere, not intervening the State and other State actors in the family, the main agent and structure of the private sphere. Nowadays this characteristic is opening with the evolution of the conception of the State as an agent with due diligence of caring for all citizens, through legal and moral norms as well as instruments and institutions that influence directly or indirectly the family as a structure and its members as individuals -and citizens at the same time⁵⁷. This means that the State is responsible for developing and implementing a series of policies, norms, and instruments to provide protection and guarantees for its citizens, both as citizens and as individuals, so that their dignity and autonomy as citizens and as individuals is protected and can be freely developed in both spheres.

Within the wide diversity of families that exist in the totality of societies, a common characteristic of the majority of them is the female place and role in the structure of family, being strongly rooted in religious ideas and values around sexuality, private life, family roles, violence and even female physiology, among other issues. In this sense, it is the family the first hierarchical system and structure to determine what constitutes the norm, based on heteronormativity and paternalism that leads to the construction of a productive family, and what constitutes that that falls out of the norm, being a deviation, and creating a common and almost universal idea and culture around the notion and conception of family and family roles. As a result, the structure of family serves as a mechanism to judge and stigmatise women and other identities that fall out of these imposed norms, if they do not follow the established morality around family and sexuality based on the heterosexual couple with established roles: that of men being to provide and that of women to provide offspring and to care for it, based on the continuity of the species. This leads to a domination of women set from the intimacy of the private sphere, before any formal establishment of law and separate from the State, but with its explicit or implicit compliance at the same time. In this sense, the lesbian identity questions the entire conception and basis of the traditional structure of the family⁵⁸. The family as a structure becomes indispensable for the State, working as an instrument that influences the private sphere -over which the State has no direct control- through implementing and conveying the moral, cultural norms that lead to the creation or acceptance of legal norms over which the State does have control. This is a way of translating the power structures and relations present in the public sphere into the private one, enforcing them in the private one by the movement of citizens into individuals and vice versa.

Being the family the structure in which cultural norms are more tangible, the interactions between the members of the family- and those that take place later in the public sphere- are based on norms and precepts that have direct consequences on them. The stigmas towards

⁵⁷ UNCHR. “Informe de la Sra. Radhika Coomaraswamy, Relatora Especial sobre la violencia contra la mujer, con inclusión de sus causas y consecuencias, presentado de conformidad con la resolución 1995/85 de la Comisión de Derechos Humanos: La violencia contra la mujer en la familia.” UN ECOSOC, 1999, p. 4.

⁵⁸ ALDARTE. “Lesbianas: derecho de asilo para las mujeres perseguidas por motivos de orientación sexual”. Bilbao, 2009, p. 4.

dissident identities and existences created from the family or that are enforced within this structure, make them morally undefendable, as it is understood and assumed that dissidences are not part of the legitimate identities worthy of State protection, and thus not worthy of private recognition and legitimisation provided by the fellow individuals. The imaginary of the family is transferred to the public sphere⁵⁹, in which the development of human rights law assumes, thus legitimises, the intimate hierarchies, leading to certain violences to go unpunished under the justification of culture and private actors intersecting in the private sphere, over which the State has no capacity or chooses to have no capacity considering these violences as domestic issues or family or personal matters⁶⁰. The interaction and interdependency of both spheres manifests that the State does have a right to choose whether to interfere or not in the private and domestic sphere in order to effectively treat and recognise women and lesbians as fully recognised citizens.

2. Sexuality

The existence of female autonomous sexuality has historically been denied, being constructed as something that circled and depended on male sexuality, as a continuity of the structure of family in its more traditional conception. Female sexuality was considered a property, given that women were part of the estate of men, usually that of the women's fathers, husbands, brothers or other male relatives. Violations on women were not considered to be aggressions on them as individuals, but as violations of the property of men. Moreover, violations on women that did not *belong* to any man were not considered crimes, as it was no-one's property⁶¹. Although this conception of women is not common in modern societies any more, especially not recognised in legal systems, this hierarchical system is still in place, either directly or indirectly. Systems evolve, and with them, their ideas, precepts, and foundations, adapting to new realities and their social and cultural trends. Although women in Germany are not considered part of a man's patrimony from quite a long time ago, marital rape was only recognised and criminalized in 1997, not so long ago. Similarly, in Spain, there is still no regulation in this respect, disregarding the reality of many women whose sexuality is conceived by their partners as something over which they have authority and power. This way, female sexuality was and in some aspect still is paternalised.

Being sexuality generally cornered into the private life as an intimate aspect of citizens and individuals, female sexuality has historically been out of the public sphere, only present in the political debate when concerning reproductive aspects. It has not been until relatively recently that women have been gaining -or *granted*- sexual and reproductive rights. Nevertheless, in many countries and societies women still do not enjoy these rights, and in those

⁵⁹ Romany, Celina. "State responsibility goes private: a feminist critique of the public/private distinction in international Human Rights Law." In *Human Rights of Women: National and International Perspectives*, edited by Rebecca J. Cook, 85–115. Philadelphia: University of Pennsylvania Press, 1994.

⁶⁰ Gender violence and honour crimes are still a reality not regulated in several societies. In some others it goes unpunished when families reach a consensus, exposing the lacking will of States to face women discrimination within their domestic lives, not recognising them as human rights subjects.

⁶¹ Harari, Yuval Noah. *Sapiens. De Animales a Dioses: Una Breve Historia de la Humanidad*. Barcelona: DEBATE, 2014, pp. 165-169.

in which they do enjoy them, their sexual and reproductive life is still limited to an extent to the male desire and to maternity⁶², not being seen as sexual beings and being refused any decision-making ability concerning their own bodies and sexuality⁶³. It is only object of political debate when it *needs* to be regulated so as to avoid the female ownership of their own sexual and reproductive lives, as is the case of the contraceptive methods or regulations, abortion, or the formal legitimisation of same-sex couples. As a result, if not even the female sexuality that circled around men's desire is object of political value, the female sexuality that circles around women themselves, their bodies or other women -that is, lesbians or bisexual women- is not even contemplated as something possible. This means that the cultural order permeates the State realm, that is, the structures, being reflected in its legal, judicial, and economic systems.

3. Invisibility as a form of discrimination and impunity

As a result, socially, lesbians did not exist -and in some places still don't- because women were not considered as individuals or entities with a say in their sexuality.

Sexuality is rooted in traditional and religious values, and it is visible in the criminalization of homosexuality and how it is portrayed in the legal texts of those countries that criminalise it, using phrases such as "inducement acts" or "acts against nature"⁶⁴, "sexual deviations"⁶⁵, "disgracing the honour"⁶⁶, or "gross indicency"⁶⁷, among others. This is a reflection of the baggage and influence of culture or religion in the legal and judicial systems of States, being rooted in the traditional conceptions of family, its roles, power relations and the purposes of the relationships of its members, usually being based on concepts related to nature, as a (natural) order established by a divine entity from which morality and ethics is built, either a God, nature itself or any other ideolised entity or process. Other countries such as Egypt do not explicitly criminalise homosexuality in its legal system, but selectively use it to target and punish certain sexual orientations through the negative correlation between them and prostitution, being the latter criminalised⁶⁸. The heterosexist construction of society is built in a way that makes of male homosexuality recognised and *accepted*, even if only to be punished and outlawed or criminalized. On the contrary, female homosexuality has historically not been taken into account, resulting in lesbianism being characterized by remaining invisible⁶⁹, so as to ignore the questioning it entails of the values and structures on which traditional societies are built from: family, its structures, its ends, power relations, and cultural and social imaginaries, reflected in other spheres, as are the legal, judicial and economic ones. This ignorance is

⁶² Pineda, Empar. "Mi pequeña historia sobre el lesbianismo organizado en el movimiento feminista de nuestro país". In *Lesbianas. Discursos y representaciones*, coordinated by Raquel Platero, 31-59. Melusina, 2008.

⁶³ ALDARTE. "Lesbianas: derecho de asilo para las mujeres perseguidas por motivos de orientación sexual". Bilbao, 2009, p. 4.

⁶⁴ Article 274 of the Guinean Criminal Code, 2016.

⁶⁵ Ethiopia's old Criminal Code, 1957.

⁶⁶ Article 408(4) of Libya's Criminal Code, 1976.

⁶⁷ Section 151 of Sudan's Criminal Code (Act No. 8), 1991.

⁶⁸ ILGA World. "Criminalisation of consensual same-sex sexual acts." ILGA World Database, 2024. <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts>.

⁶⁹ Villar Sáenz, Amparo. "¿Lesbiana? Enacantada, ¡¡es un placer!!: Representación de las lesbianas en Euskal Herria a través de los grupos organizados". In *Lesbianas. Discursos y representaciones*, coordinated by Raquel Platero, 61-84. Melusina, 2008.

translated into the non-existence of this reality and the obligation of staying and remaining in the margins of the margins.

That which deviates from the hegemonic reproductive model is seen as an Other, as a deviation, and placed in the margins. Gayle Rubin's proposes the circle diagram to graphically explain this hierarchy of the sex-gender system -by which societies transform biological sexuality into products of human activity through a set of arrangements, and in which these transformed sexual needs are satisfied- and the sexual value attributed by cultures and societies to different sexualities and sexual identities⁷⁰. According to her circle, some sexualities are conceived as "good, normal, natural and "sacred" while others are "bad, abnormal, unnatural, and dammed" (Rubin 1975). The former include the heterosexual, married, monogamous and procreative sexualities and relations, among others, framed within a first circle that represents the accepted sexualities. The latter sexualities are placed in an outer circle, that encompasses everything that fades away from the above-mentioned, linked to procreation and naturalness, the latter concept being strongly rooted in religious aspects.

Homosexuality has systematically been placed in the margins, as something that falls out of the norm, framed outside of Rubin's circle. However, this homosexuality has historically meant male homosexuality, giving it some kind of recognition for certain purposes, as already stated. This means that these margins have margins as well, due to the hierarchy of power structures that impregnates all spheres, in which male sexuality has higher value than the female one.

This invisibility of female sexuality and lesbianism is not only present in social and cultural terms, but it is reflected in legal systems as well⁷¹, in the creation of human rights norms and in criminal codes. While male homosexuality is often formally criminalised in several countries, female homosexuality is not formally regulated. Those are the cases of Kuwait⁷², Kiribati⁷³, Qatar⁷⁴, Sierra Leone⁷⁵, Sudan⁷⁶, Uzbekistan⁷⁷, and Yemen⁷⁸, among other States, especially in Africa and Asia. This does not mean the legal recognition nor the social acceptance of female homosexuality, but rather the opposite to the extreme, not being even imagined or understood as something possible nor conceivable, regardless of its sense of morality, as it does not even fit in the moral imaginary of these societies, their cultural and their legal systems. Thus, this silence and invisibility denies the existence of the lesbian reality⁷⁹ by State actors.

As a result, if State actors do not recognise certain realities in the public sphere, as is the lesbian one, it is no surprising that citizens -and individuals- do not recognize them either in the private sphere as their individual imaginary, becoming a cycle in which the public sphere and the State feed back discrimination against lesbians and sexual dissidents into the private sphere and vice versa.

⁷⁰ Rubin, Gayle. "The Traffic in Women: Notes on the 'Political Economy' of Sex." In *Toward an Anthropology of Women*, edited by Rayna R. Reiter, 157--210. New York: Monthly Review Press, 1975.

⁷¹ Soroeta Licerias, Juan (ed.). *Los Derechos Humanos de la Mujer: Cursos de Derechos Humanos de Donostia - San Sebastián. Volumen VIII*. Vol. 1. Álava: Universidad del País Vasco, 2008.

⁷² Article 193 of Kuwait's Criminal Code (Law No. 16), 1960.

⁷³ Sections 153 and 155 of Kiribati's Criminal Code, 1977.

⁷⁴ Article 285 of the Qatari Criminal Code (Law No. 11), 2004.

⁷⁵ British colonial offences Against the Person Act, 1861; still in force in Sierra Leone.

⁷⁶ Section 148(1) of Sudan's Criminal Code (Act No. 8), 1991.

⁷⁷ Article 120 of Uzbekistan's Criminal Code, 1994.

⁷⁸ Article 264 of the Yemeni Criminal Code, 1994.

⁷⁹ Viñuales, Olga. *Lesbofobia*. Bellaterra, 2002.

The main problem faced by women in this regard circles around the fact that their rights are violated within the private sphere and the persecution usually takes place within the family sphere, their job and community, spheres in which the State does not have direct competence or in which is not willing to interfere. This makes it difficult for them to seek help from State actors, being it common that their claims before police stations receive indifference, more violence or have negative consequences back within their private sphere.

As a result of the invisibility or the formal non-existence of lesbians, they find themselves in a situation of unprotection before the law and the State institutions suited to enforce it, being, for example, deprived of police protection when reporting crimes or acts of persecution against them, which are usually framed within the private sphere and exercised by private actors.

II. Lesbians as women and L

The system of sexual stratification is an interesting way of analysing discrimination against lesbian women, a system that constantly interacts with the gender system.

In some cases, the ground of membership of a particular social group, in this context, being a lesbian or bisexual woman, may converge with the ground of political persecution if the applicant's identity as homosexual or bisexual is perceived or considered by the State a political statement contrary to the State that is persecuted, criminalized, and/or suppressed⁸⁰, as is happening to Iranian women who are being persecuted for not wearing their veil, a mandatory piece of clothing for women, whose refusal to be wore is conceived as a rebellious act against the government, and which only affects women as a regulation directed only towards them, being a gender-based issue.

The fact of being relegated to the private sphere, makes it difficult if not impossible for them to acknowledge other forms of experiencing sexuality or different views and realities other than the one that has been imposed on them, the heteronormativity, whether their sexual and romantic desires adjust to it or not. This way, the only reality they know is the one that is built over them and the one that has been imposed upon them, especially for those with restricted access to information, mobility and education. This makes it a risk for them to even contemplate other realities, realities that they are part of even if they are not aware of it. Being a lesbian but not knowing that this reality exists makes it impossible for lesbians to see themselves as part of a social group⁸¹ and thus to categorise their claim under this ground when applying for international protection.

Lesbian asylum claims are to be analysed and considered as cases that do not fall within one single category, but that involve aspects of gender-based asylum claims as well as sexual orientation-based asylum claims that converge, understanding the latter within the framework of the ground of membership of a particular social group⁸². This is due to the fact that lesbians

⁸⁰ UNHCR. "Guidelines on International Protection: «Membership of a particular social group» within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (HCR/GIP/02/02). United Nations, 2002b, p. 2.

⁸¹ Platero, Raquel (coord.). *Lesbianas: discursos y representaciones*. Melusina, 2008.

⁸² eilson, Victoria. "Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims." *Stanford Law and Policy Review* 16, no. 417 (2005), p. 10.

are victims of what is called a multisystem of oppression, in which different oppressive aspects of different realities or systems intersect and converge. In the case of lesbian and bisexual asylum seekers, they are oppressed for their gender or sexual identity together with their sexual orientation, to which other aspects such as ethnicity, migratory status, or cast, among others, can aggravate their situation.

The forms of persecution suffered by lesbian or bisexual women for the reason of their gender and/or sexual orientation are different in nature from those suffered by other male applicants regardless of their sexual orientation.

This is why the ground of membership of a particular social group that includes women and homosexuals, is problematic, as it takes women as a homogeneous group as well as homosexuals. The latter is even more problematic due to the fact that the persecution suffered by gays is not comparable to the one suffered by lesbians, having the former certain degree of institutional protection for the mere fact of being men, with the right to enjoy political activity, the public sphere, and thus granting its existence certain recognition as male citizens.

Lesbian and bisexual women suffer, as mentioned, what is called multiple discrimination, being discriminated from different angles and for different reasons, as is their gender and their sexual orientation. Although politically the term multiple discrimination is more common and accepted⁸³, the different forms of discrimination that lesbians and bisexual women suffer intersect, becoming intersentional discrimination, by which different forms or grounds of discrimination intersect and become embedded with each other in a way that the discrimination becomes specific and distinct. This is different to multiple discrimination, by which the different forms or grounds of discrimination operate separately. In this sense, the understanding of lesbians and bisexual women as victims of multiple discrimination would mean that they are discriminated on the basis of their gender and their identity as women on the one hand *and* on the basis of their sexual orientation and identity as homosexuals on the other. While intersectional discrimination is a form of discrimination that encompasses different aspects of forms of discriminations jointly, thus recognizing intersectional discrimination against women would mean the factual recognition of the causes and consequences of the intersection of the discrimination against women *with* the discrimination against homosexuals and *together with* gender-based intrafamilial violence perpetrated against them and the distinct discrimination that results from this intersection.

As noted by the Special Rapporteur in her report on violence against women, its causes and consequences, submitted to the UN General Assembly by the Secretary-General⁸⁴, women's rights are not really included in human rights. She underlines the need to reconfigure both national and international legal frameworks, as they do not address violence against women in certain contexts, such as situations of "invisible violence" or the violence to which women are subjected as a result of social and structural notions and attitudes stemming from the concepts of family and marriage.

⁸³ The UNHCR in its *Guidelines on International Protection No. 9* (2012) relative to asylum claims based on sexual orientation and/or gender identity recognises that lesbians suffer multiple discrimination based on their gender, together with their social or economic status and their sexual orientation.

⁸⁴ ONU: Asamblea General. "Idoneidad del marco jurídico internacional sobre la violencia contra la mujer: Informe de la Relatora Especial sobre la violencia contra la mujer, sus causas y consecuencias sobre la idoneidad del marco jurídico internacional sobre la violencia contra la mujer," A/72/134, 2017, pp. 5-10.

III. Well-founded: the credibility assessment

This sexual hierarchy is sustained and even promoted by the State and State actors⁸⁵, through its regulations, policies and procedures, by judicial, criminal or bureaucratic means. This implies that not only are the legal rights and privileges guaranteed for the citizenry directly denied for homosexuals and other dissenting groups through legal regulations, but also that their access to these rights and privileges is restricted by bureaucratic procedures or by hindrances on the access to these procedures. For instance, the lacking access to the appointment system to apply for international protection or certain aspects of the asylum application procedure hinder both the access to the asylum application process and the effective processing of the application by unrealistic requirements, lack of understanding of the aforementioned realities, or insufficient material and social resources to competently analyse, assess and/or evaluate the applications.

In addition to this, the invisibility of the female homosexuality also influences the asylum processes of lesbian and bisexual women that apply for it for reasons related to their gender and their sexual orientation, placed within the membership of a particular social group category.

The Spanish asylum process is formalised by an interview in which the application is evaluated and analysed based on certain requirements and criterium, as is the credibility assessment, through which the applicant provides the relevant facts for founding their fear of persecution, an essential requirement for an international protection application. The credibility assessment's aim is to determine whether the facts provided by the applicant -or any other expert, family member or witness able to assist in the claim-, in the form of statements or any other oral or documentary evidence, can be accepted based on whether they can be believed⁸⁶.

The assessment not only depends on the applicant, but also on the interviewer or decision-maker, who shall gather the relevant facts by recognising and adjusting the potential challenges that may arise during the process for the assessment of the claim and providing the relevant means for the assessment to be fairly and rigorously conducted.

The credibility assessment is one of the main obstacles faced by lesbians and bisexual women that seek asylum during the processing of their application⁸⁷.

UNHCR's Handbook states that the applicants' statements during the assessment of the claim and the presentation of the facts, shall be "coherent and plausible, and must not run counter to generally known facts" (UNHCR, 1992)⁸⁸. In this sense, the credibility assessment is based on three aspects of the statement made by the applicant during the interview: coherence, plausibility and non-contradiction.

Coherence or consistency has different levels. There is an internal coherence that refers to the lack of discrepancies, contradictions and variations on the material facts alleged by the applicant, relative to the objective element of the persecution: the acts of persecution suffered

⁸⁵ Horrillo, Silvia Concha. "El derecho estático de las personas en movimiento: derecho de asilo por motivo de género y orientación sexual." Bilbao: Universidad del País Vasco, 2017, p. 58.

⁸⁶ Odofin, Clara (coord.). "Beyond Proof: Credibility Assessment in EU Asylum Systems." Brussels: UNHCR, 2013, p. 27

⁸⁷ Pasetti, Francesco (coord.). "Sobre los solicitantes y beneficiarios de protección internacional: Informe Nacional para España, NIEM 2020." *CIBOD*. NIEM, 2020, p. 55.

⁸⁸ UNHCR. "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" (HCR/IP/4/Eng/REV.1). United Nations, 1992, para. 204.

or feared to be suffered⁸⁹. The applicant is expected to describe the persecution suffered in a detailed and precise manner, presenting the relevant facts to assess their claim. However, this requirement ignores the fact that the applicant may not be able to recount the events according to this logic as the memory is not static nor logic, but influenced by numerous factors that can lead the applicant to forget or remember certain aspects of the story at different moments, especially those of traumatic event, thus being inconsistency and even some degree of contradictory statements somehow natural without being the applicant necessarily lying. Trauma has a deep impact on one's memory, and according to modern psychology traumatic events are difficult to recall as an account of lived events. Nevertheless, not only trauma and the recalling of the events is a limitation of the applicants' interview. UNCHR also warns that asylum seekers may be frightened, disoriented or anxious about the asylum procedure and the authorities, influencing the way the interview is conducted and the way the statements or evidences are provided, hence impacting the credibility assessment⁹⁰. There are other factors that hinder the lesbian applicants to found their fear of persecution.

Firstly, social limitations impact women different to men, limiting their access to information, knowledge and participation in certain events and endeavors. It is not rare in female asylum claims that the female applicants are not confident when communicating with figures of authorities, especially those that are men, in the same way that they lack experience and are not used to interacting with strangers and people in authority positions because of their lives marked by social marginalisation or seclusion. In several societies, women are not to speak in public, being men, usually a male relative, who speaks on their behalf. Similarly, some women do not have the required identity documents or any other documentary evidence to sustain their claim, as a result of the lack of political rights for women in their country of origin or the lack of access to their personal documentation, guarded by a male relative.

What is more, lesbians and bisexual women that apply for asylum in Spain are required to reveal at the very beginning of their application their sexual orientation⁹¹. This is often difficult for them for a number of reasons. Sexuality is an extreme intimate and private aspect of the applicants, and in several cases sexuality is conceived as a taboo in the societies of their countries of origin, even more those sexualities that do not follow the cisheteronorm. The applicant may have interiorised homophobia and deny- and even hate- her lesbian or bisexual identity⁹², making it difficult for them to present the relevant facts of persecution, and being unable or unwilling to be open about their sexuality for specific reasons. In addition, it is acknowledged by judicial bodies and international jurisprudence that fear or lack of trust in the authorities as a result of their experiences in their country of origin may take place during the asylum claims. As a result, the applicants may not easily disclose their personal experiences and the relevant facts. This fear can be for their own person or for people that stay in the country of origin and that the applicant may fear to endanger if discloses certain persecutory facts or aspects. The applicants may also be afraid of the consequences of exposing their sexual orientation, which may lead to abusive consequences for State or non-state actors, but may also lead to social rejection and isolation. Lesbian asylum seekers whose country of origin

⁸⁹ Díaz Lafuente, José. "El derecho de asilo por motivos de orientación sexual e identidad de género." *Revista de Derecho Político*, no. 89 (2014): 345–88.

⁹⁰ Odofin, Clara (coord.). "Beyond Proof: Credibility Assessment in EU Asylum Systems." Brussels: UNHCR, 2013, p. 33.

⁹¹ Pasetti, Francesco (coord.). "Sobre los solicitantes y beneficiarios de protección internacional: Informe Nacional para España, NIEM 2020." *CIBOD*. NIEM, 2020, p. 56.

⁹² UNHCR. "Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (HCR/GIP/12/09). United Nations, 2012, p. 2.

criminalises homosexuality are more likely to fear the State authorities in the country in which they apply for asylum, fearing the punishment or new aggressions perpetrated by them, or, accustomed to the State indifference towards their violences, they may not consider their sexual orientation as something worth or important to disguise in order to help their claim. Moreover, lesbian and bisexual women may not be able to report in the country of origin the acts of persecution they suffer for their sexual orientation because of the shame and stigma it would bring upon them or even their family members if revealed their identity as homosexuals, being a reality not accepted by legal or cultural norms. In the same way, it is not easy to accuse or report a family member to violate or perpetrate abuse on them, because of a variety of reasons. Family bonds can be difficult to betray, especially in communities or societies in which family as a political structure is strongly rooted in the community's culture and politics. Other cases involve the lack of knowledge of lesbian and bisexual applicants of the relevance of their identification as such in order to facilitate their applications' process and the understanding of their claim and their circumstances. In the same way, some applicants whose sexuality and access to information has been controlled and limited are not aware of the possibility of their reality to be named, that is, of their recognition and identification as lesbians, bisexuals or any other naming that validates their sexual identity and orientation. In any case, lesbians that seek asylum for reason of their sexual orientation have been obliged to conceal, hide and/or deny their sexual orientation, that is, their identity, in the public and/or in the private spheres of their countries of origin in order to avoid violations of their human and fundamental rights, discrimination, harassment, abuses and marginalisation, both by State and non-State actors. As a result, some of them will not easily disclose their identity and thus the real reason of their claims, affecting the credibility assessment of their claim, especially in those cases in which their sexual orientation is not disclosed in the primary interview⁹³. Based on the Qualification Directive and the Asylum Procedures Directive, the CJEU together with the UNHCR defend the importance of considering by the interviewer and the decision-makers both the general and personal circumstances that surround a claim in order to effectively process and evaluate it. In this sense, the applicant's vulnerability is included and acknowledged, understanding in this context that sexuality is an extreme intimate sphere of a person and that it is plausible that the applicant is reluctant to disclose any information regarding it without a safe and comfortable atmosphere. Therefore, the applicant not manifesting her sexual orientation at the beginning of the procedure shall not be ground for lack of credibility.

The external coherence refers to the consistency of the statements and any other evidence provided by the applicant with the general known facts of the country of origin together with the specific information or expert evidence relevant to the claim. This implies a comparison of the applicant's testimony with the information of the country of origin (hereinafter COI) possessed by the country of reception. This information shall be precise, objective and up-to-date in order for the examiner to understand the context and circumstances that may surround the claim. In order to do so, said information shall come from different sources, including the UNHCR and international human rights organisations⁹⁴ so as to have a deep and realistic knowledge of the social, cultural, economic, legal and political contexts of the country, the effective application of norms and rules, and the potential persecution that may arise because of these⁹⁵. As a result, the facts regarding legal and political frameworks are

⁹³ Odofin, Clara (coord.). "Beyond Proof: Credibility Assessment in EU Asylum Systems." Brussels: UNHCR, 2013, pp. 65-73.

⁹⁴ European Parliament, Council of the European Union. "Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)". Official Journal of the European Union (No 32013L0032), June 16, 2013, Art. 10.3(b).

⁹⁵ Horrillo, Silvia Concha. "El derecho estático de las personas en movimiento: derecho de asilo por motivo de género y orientación sexual." Bilbao: Universidad del País Vasco, 2017.

gathered separately from the information relative to the social and cultural spheres. However, lesbian and bisexual asylum claims are seriously hindered by the fact that there is little to no data and documentary information about women's situation, female sexuality, and the LGBTQ+ community in several societies. This is a consequence of the lack of reports made by the victims for a variety of reasons but also by the lack of interest by State actors to monitor the violences perpetrated within their territory to some of their citizens. As a result, not only the applicants themselves find it difficult to provide evidence of their persecution other than their account, for which the COI becomes essential, but also the examining personnel have difficulties gathering specific information relative to the situation and treatment of lesbians and bisexual women, as a result of a lack of this specific information regarding women on the one hand and the LGBTQ+ community on the other. Several sources that do provide certain information about the community -as displayed- do in fact only provide information regarding gay men. In addition, it is common for the COI to treat the LGBTQ+ community as a homogenous group, as a community whose members have general experiences and needs, ignoring the diversity of factors that influence each member, as is gender, race, socioeconomic status, religion, sexual orientation, gender identity, etc.⁹⁶ Therefore, it is usual that documentary evidence to sustain claims made by lesbians and bisexual women do not exist, not being possible to validate or even contrast their alleged persecution with other cases or claims, given the almost inexistence of data relative to lesbian and bisexual asylum claims and their situation on their countries of origin, and being jurisprudence one of the limited resources to base decisions, which leaves these decisions to dangerous interpretative processes based on custom and the subjectivity of the decision-maker background. This lack of information is often understood by State asylum personnel as evidence of the lack of persecution in the country of origin, directly dismissing the claims in question⁹⁷.

Plausibility is an indicator of credibility not defined, hence it is not clear nor reliable. It refers to the fact that the facts presented shall be *believable*, which is confusedly understood as credible. Its use in the assessment of asylum claims has been rejected by the UNHCR due to its lack of scientific base, its ambiguity, and the wideness of its implications, leading to risky evaluation of claims based on their plausibility according to *common sense*. As a consequence, resorting to the common sense of the examiner or the decision-maker implies a dangerous degree of subjectivity to the assessment of the claim, given that common sense varies depending on the social, cultural and political context of the examiner and decision-maker, and can even be contrary to the obligation of applications to be objectively assessed. The cultural, social, ideological, sexual or religious personal context and background of the decision-makers builds and transforms their common sense, therefore influencing their decisions and not being this an objective indicator. Given that Western systems, including Spain's, is based on cisheteronormativity and androcentrism, the decision of the decision-maker will be influenced by their stereotypes and prejudices, their known social structures and their values, based on cisheteronormativity, androcentrism and Western imaginaries. As a result, many claims depend on globalised sexual and gender ideas and stereotypes that frame the examiner's analysis of the experiences of lesbians and bisexual women as women and as female homosexuals and bisexuals.

The objective of the credibility assessment is not to judge the veracity of the facts presented by the applicant, although these shall be true to be taken into account for the

⁹⁶ EASO (European Asylum Support Office). "Researching the situation of lesbian, gay and bisexual persons (LGB) in countries of origin: EASO Practical Guides Series," 2015, p. 10.

⁹⁷ Peña Díaz, Francisco de Asís. "Credibilidad de los solicitantes de asilo y estereotipos heterosexistas: en busca del 'refugiado LGTBI por antonomasia'." *Congreso Internacional 70 Aniversario Declaración Universal de Derechos Humanos*, no. 39. Cuadernos Electrónicos de Filosofía del Derecho (2019): 271–291.

determination of qualification for refugee status. Instead, the aim of the assessment is to determine the relevant information presented by the applicant to be considered for the assessment of their claim⁹⁸. As such, it is not a matter of whether the Spanish State believes or not lesbian and female bisexual asylum seekers' evidences and testimonies, but whether these are taken seriously enough considering the different backgrounds and realities of these applicants as homosexual and bisexual women in order to effectively have an equitable process for founding their fear of persecution⁹⁹. A clear example of the failure of the Spanish asylum system to do so, is the case of a Cameroonian lesbian asylum applicant whose claim was dismissed in 2009 under the argument that her relate was not credible, considering the examiners and decision-makers it not possible that she was a lesbian while being pregnant at her arrival to Spain. This manifest the little, if none, competent understanding of the Spanish asylum system personnel of the subjugation of women, their bodies and their sexuality to men in certain circumstances nor of the variations of contexts and circumstances due to the diversity of factors that have an impact on persecution, the fleeing migratory process, and the experiences of lesbians and bisexual women, which circle mainly around their inner and intimate lives and their sexuality and reproductive lives.

The androcentric structure of the asylum system leads to the assessment of female and lesbian claims through the perspective of the male experiences that fall into the accepted categories of acts and fear of persecution, mainly taking place in the public sphere, not adapted to the different needs and circumstances of the diversity of applicants. This leads to the fact of not taking into account under the Geneva Convention the experiences and violences that take place in the private sphere, not recognizing them as constitutive of acts or fear of persecution under the accepted grounds or definitions of the Convention, and thus leaving unprotected lesbian and bisexual asylum seekers. If this situation is combined with the impossibility of the applicant to provide evidences that sustain their claim, their assessment is based on the credibility of the allegations made by the applicant, which depends on the subjectivity of the person in charge of the interview or the decision-maker.

Gender roles impact how men and women encounter persecution and serious harm, thereby influencing their asylum claims. Women may face persecution distinct from the challenges experienced by men, the same way that lesbians suffer different acts of persecution that those suffered by gays, despite being both members of the LGBTQ community. The differences are not only present in the acts and nature of persecution, nor in the spheres and forms in which this persecutory acts take place, but also in the protection -or lack of this- provided by State actors.

As analysed in the previously-examined jurisprudence of section *II. Persecution for membership of a particular social group*, the forms of violence suffered by male homosexuals or bisexuals mostly take place in the public sphere, in an explicit way and even perpetrated by State actors. This allows for them to contribute to their cases by providing evidence that sustain their applications of a well-founded fear of past or current persecution. In addition, this violence or these aggressions are usually perptetrated by agents not intimately linked to the victims or applicants. Differently, lesbians and bisexual women usually suffer abuses within the private sphere in the form of sexual violence, involving "corrective" violations, forced marriages,

⁹⁸ Odofin, Clara (coord.). "Beyond Proof: Credibility Assessment in EU Asylum Systems." Brussels: UNHCR, 2013, p. 28.

⁹⁹ The Matter of *Pitcherskaia vs. INS* is relevant for lesbian asylum seekers' radiography for the irrefutability of the facts accounted by the applicant. However, although her statements and evidence were not dismissed, her claim was rejected because it was not considered enough to sustain her claim as a result of the lack of adaptability of the asylum system to female (homosexual) claims.

forced pregnancies, marital rape, forced institutionalisation and diverse forms of harm perpetrated in the name of the family “honour” by family members, among others. This honour crimes, generally committed by male family members¹⁰⁰, are usually linked to sexual conducts that are considered to be inadequate, constituting a transgression of the conduct code imposed by the community¹⁰¹, established by the traditional structure of the family that dictates morality and dynamics. Lesbians and bisexual women are at high risk of suffering these violations of their rights given the systematic gender inequalities that aggravate more explicitly in certain areas, where autonomy in decision-making regarding their sexuality, reproduction and family dynamics is restricted and controlled¹⁰².

IV. Translating non-existence into justification of the existence

Although not as usual as before, the discretion principle or the “stay in the closet”’s State response was common for dismissing asylum claims made by members of the LGBTQ+ community. States argued that LGBTQ+ people would not have a founded fear of persecution if they adopted a discrete attitude regarding their sexual orientation or their gender identity and did not publicly live by their sexuality or identity. This response is a clear violation of their dignity and thus of their human and fundamental rights and was object of UNHCR’s specific directive that condemned the principle as a limitation of the free exercise of rights concerning the freedom and identities of the applicants recognised under the Convention¹⁰³. Not only for the very disrespect this entails for the applicants’ dignity but also for their rejection of their application based on this principle, that is itself contrary to the minimum standards required by international texts, such as the UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status and the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. The use of this principle is a clear marginalisation of the community, dismissing their reality and refusing to recognize them and their identities, promoting the invisibilisation of their identities and thus placing them, once again, in the margins in order for them to live without disturbing the public moral order, which is not a reason for the dismissal or denial of international protection applications according to the Geneva Convention and international human rights law.

¹⁰⁰ Human Rights Watch. “Integration of the Human Rights of women and the gender perspective: Violence Against Women and ‘Honor’ Crimes: Human Rights Watch Oral Intervention at the 57th Session of the UN Commission on Human Rights,” 2001.

¹⁰¹ Morán Blanco, Sagrario. “Capítulo 10. Los crímenes de ‘honor’ y su persistencia en la sociedad internacional actual: acción de los Estados y de la comunidad internacional.” In *El Derecho Internacional, Los ODS y La Comunidad Internacional*, coordinated by Carlos R. Fernández Liesa, Eugenia López-Jacoiste Díaz, and J. Daniel Oliva Martínez, 257–284. Madrid: Dykinson, 2022.

¹⁰² UNHCR. “Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (HCR/GIP/12/09). United Nations, 2012, p. 8.

¹⁰³ López-Sala, Ana. “Los refugiados LGTBI en España: buscar protección en tiempos de control migratorio.” *Anuario CIDOB De La Inmigración*, no. 2020 (2021): 198–219.

Lesbian's and bisexual women's asylum claims have been refused and dismissed as a result of the conception that homosexuality is not a reason of persecution or fear of persecution, being the applicants able to live a fruitful life if they hide their sexual orientation. This means that lesbian and female bisexuals applicants are refused asylum not because the Spanish asylum system does not recognise the existence of homophobia or biphobia, but because this would not have to take place if the person hides their identity. This leads to the unrecognition of lesbians and bisexual women as citizens with the same rights as those citizens that fit in the cisheteronorm, being forced to live in the margins of their own community.

In addition, if lesbians and bisexual women, in certain circumstances, are not able to define themselves as such because of the fear they feel to be discovered in the country of origin, because of the lack of knowledge of the existence of the lesbian or bisexual reality -therefore their own reality-, or because of the formal non-recognition of their lesbian identity in their country of origin, it is extremely cruel to expect someone to *found* the fear they suffer in the established androcentric terms that frame the asylum system. Moreover, the 1951 Convention and the EU directives establish that it is not necessary for the applicant to be aware of the reasons of the persecution they suffer nor is their identification with the particular social group they are or may be part of and which may be the reason of their persecution by the persecutor's associations, whether they are part of it or not. It is the bodies in charge of analysing and evaluating the claims the ones that should have competent and specific training and understanding of their realities in order to understand and address, not in a paternalistic way, the potential reasons of the persecution suffered by the applicant even if they do not address it directly or name it as it is, and the ones that should provide for the necessary means to facilitate the applicants to present the relevant facts. In order to do so, it is essential that women and the LGBTQ+ community, separately, are considered as heterogeneous groups, understanding the diversity of factors that influence and intersect in both groups.

CONCLUSIONS

The present paper has examined the invisibilisation of lesbians and bisexual women's experiences in the private and the public spheres and its consequences on the international protection system.

As with children, women have been considered immature and therefore the property of male relatives -who are, or have historically been, mature enough to enjoy their own guardianship and the guardianship of their own lives and rights- or of the State, but have often not been considered subjects of rights and have not been considered in the processes of the creation of norms. On the contrary, the rights relating to their lives, their bodies, their sexuality, their reproduction and their intimate relations have been paternalised and guarded, either by members of their families or by the State. This paternalisation of women's lives has led to the construction of human rights law leaving them behind, given that human rights law mainly focuses on violations of human and fundamental rights that take place in the public sphere, while women's rights, including lesbian and bisexual women's, are essentially violated within the private and domestic spheres.

It is in this spheres in which ideals and morality about sexuality, relations, power relations and hierarchies emerge, being later transferred into the public sphere, in which the

State and the citizenry validate and formally legitimise them. Throughout these processes and synergies, the lesbian and the female bisexual identities have traditionally been left out one way or another. As dissident identities, they have been relegated to the margins of societies. However, these margins and dissident groups are also stratified according to a number of factors, including gender, race, sexual orientation, sexual identity and class, and according to their relationship and convergence with each other. This way, certain dissident identities are permitted a place in the public sphere, not on the basis of their dissident identity *per se*, but rather on the grounds of their partial normativity within that dissidence, which is validated and recognised in a certain way, such as the masculine and cissexual identities. Lesbian and bisexual women do not fit this exception, being already relegated to the margins because of their female identity, but also positioned in the outer margins because of their dissident sexuality, one that questions the traditional structure of family, constituting this a danger to the construction and functioning of the State as a macro reflection of the ideals, institutions and power relations that emerge from the family as the primary source of political or collective association, and that leads to the dichotomy of the private and the public spheres, resulting in a synergy that conditions societies.

Having been international law and human rights law built based on the public sphere and thus under an androcentric basis, those identities not recognised in this sphere have not been formally considered from a structural perspective. As a result, human rights have not been efficiently recognised for lesbian and bisexual women. Their particular context as women and as homosexuals or bisexuals and the convergence and intersection of their gender -and what it entails in current societies- with their sexual orientation -and what this entails- has been ignored in the public sphere. This is due to their relegation to the private sphere over which the public -the State, has no capacity -or chooses to not interfere in, which leads to their invisibility and to their violences to go unregulated and formally unaddressed.

This is reflected not only in those legal systems that actively criminalise homosexuality and bisexuality, but also in those systems created for the promotion and defence of human rights, as is the asylum system and the asylum process. Firstly, the grounds under which international protection can be applied for are based on public activity, that directly related to the State, as are nationality, political opinion and even religion in some applications in which the State is a religious one or in which religion has great power, or that related to a recognised identity aspect of the citizen, as is race. The ground of membership of a particular social group, under which lesbian and female bisexual applications fit for reasons of sexual orientation and/or gender, is recognised to be the most ambiguous one, not existing a specific pattern recognised to assess and categorise the applications that may constitute a particular social group. As a result, lesbian and female bisexual applicants encounter a process in which their intimacy is fully disclosed, judged and assessed by authorities related to a nation-State system that has ignored, allowed, and even promoted the violences perpetrated against them in that same intimacy, without recognising them as violence worthy of State attention because of the dichotomisation of the society and their relegation to the realm in which the State has chosen not to interfere to the extent in which it is able to.

Their realities are not recognised, not even to be rejected in many cases, meaning an actual non-recognition of the existence of these realities and thus a denial of said existence. As a consequence, the realities of lesbians and bisexual women remain outside of the spheres.

Not being formally acknowledged by the public sphere and thus not being legitimised, the lesbian and bisexual realities have no space within the private sphere, for which they are concealed, denied or fixed through different forms of violence, although this denial is already violent. In the same way, the refusal to accept lesbian and bisexual women's identities as valid

and morally acceptable leads to the transposition of the unrecognition from the private sphere to the public one by the conveyinh of ideals and morality of individuals into the political and collective space as citizens.

The system established to protect and promote human rights, as is the right to asylum, is biased in its construction, being the reality that it only advocates for and protects those subjects whose realities and existences are legitimised both at the public and the private level. The Spanish system formally recognises lesbian and bisexual women as subjects of law, formally and expressly legitimising their existences. However, in practice, these subjects are not fully recognised. Spanish Law 12/2009 even recognises gender and sexual orientation as a potential reason for the concession of the refugee status. However, this concession is based on restrictive and limited resources or opportunities, both by the applicant and by the decision-maker. The lesbian and bisexual women that seek asylum in Spain for reason of their sexual identity or gender encounter a system that ignores their realities as ones being tied to the private sphere. The violences perpetrated against women and against the LGBTQ+ community that take place within the private sphere are not acknowledged by the public sphere, and not having been these violences considered and addressed in the creation of human rights law and the international asylum system other than in interpretative terms, these violences are not considered as forms of the accepted persecution under the international and national standards for the determination of refugee status and thus their applications are dismissed, denied or unadmitted.

This manifests the lack of equality impregnated in the human rights system and in the asylum and refuge as institutions. Asylum claims are not effectively addressed if the lesbian and bisexual applicants' persecution is not understood as such because of the definitions of said persecution has a cisheterocentric and androcentric basis. The credibility assessment is a reflection of this inefficiency of the asylum process. It is not socially just to address a claim that is mainly based on the relate of the female applicant or victim under the androcentric standards of the credibility assessment, not because there are not more indicators over which to analyse the claim, but because these indicators cannot be used in several occasions due to a lack of resources to obtain COI and a lack of possibilities for the female applicants to present evidences to sustain their claim, being the assessment limited for certain applicants.

The ignorance of the private sphere and the dynamics within the family allows for the continuity of morally justified discrimination and violence towards lesbians and bisexual women. In this sense, the dichotomy of the private-public spheres legitimizes and shields the violences and the persecution suffered by women, allowing the State an ambiguous freedom to private actors to perpetrate these violences.

It could be said that the Geneva Convention's ground of membership of a particular social group offers a space for the reconsideration and inclusion of the dissident realities. However, the wideness and ambiguity of this ground may in some cases be counterproductive, functioning as a channel of complying with the unrecognition and unnamng of the Other, the dissident realities. It is therefore imperative and necessary to expressly include, under a transfeminist analysis, the grounds of gender and of sexual orientation as grounds for applying for international protection in the Geneva Convention.

Being the particularities of their violences ignored from the legal and institutional base, built from an androcentric perspective, and also ignored through the application of legal and political processes, it becomes necessary the formal recognition through a reinterpretation of norms and systems of the realities and violences of and against women and acknowledging the diversity within the female realities, as are the lesbian and bisexual ones, looking from and into the private sphere. In this sense, the current international standards on which domestic standards

are based are in need of an urgent but effective reconfiguration in a way that all realities are acknowledged. Otherwise, this evaluation of lesbian and bisexual women's realities from the androcentric public sphere will only lead to the continuity of their relegation to the private sphere and to the invisibility so as to avoid taking responsibility for them, to avoid their acknowledgment as full citizens and as individuals whose human and fundamental rights are recognised and protected.

REFERENCES

BIBLIOGRAPHY

- ALDARTE. “Lesbianas: derecho de asilo para las mujeres perseguidas por motivos de orientación sexual”. Bilbao, 2009.
- Arango, Joaquín. “La explicación teórica de las migraciones: luz y sombra.” *Migración Y Desarrollo*, no. 1 (2003): 1–30. <https://doi.org/10.35533/myd.0101.ja>.
- Arenas Hidalgo, Nuria Cinta. “La desprotección del refugiado o de la Europa insolidaria.” In *La desprotección internacional de los derechos humanos: a la luz del 50 aniversario de la Declaración Universal de los Derechos Humanos*, coordinated by Pablo Antonio Fernández Sánchez, 123–190. Huelva: Universidad de Huelva, 1998. <http://rabida.uhu.es/dspace/handle/10272/15728>.
- Arendt, Hannah. *La condición humana*. Paidós, 1993.
- Berger, John. *Ways of seeing*. London: Penguin Modern Classics, 2008.
- Bosch, Ana, Josetxo Ordóñez, and Josep Buades. “Informe CIE 2021: Territorio Hostil. Formas diversas de hostilidad en los CIE.” SJM, 2022.
- Butler, Judith. *Cuerpos aliados y lucha política: Hacia una teoría performativa de la asamblea*. Translated by María José Viejo Pérez. 2015. Reprint, Planeta Colombiana, 2017.
- Campaña CIEs No. “CIE de Zapadores: sin derecho a tener derechos: Informe 2020 de la Campaña por el Cierre de los Centros de Internamiento para Extranjeros y el fin de las deportaciones CIE NO.” Valencia, 2020.
- CEAR. “Informe 2023: Las personas refugiadas en España y Europa.” Madrid, 2023.
- CES. “La inmigración en España: efectos y oportunidades”. Madrid, 2019.
- Copelon, Rhonda. “Intimate Terror: Understanding Domestic Violence as Torture.” In *Human Rights of Women: National and International Perspectives*, edited by Rebecca J. Cook, 116–52. Philadelphia: University of Pennsylvania Press, 1994.
- De Lucas, Javier. “Sobre el proceso de vaciamiento del derecho de asilo por parte de los Estados de la UE.” *AIS: Ars Iuris Salmanticensis* 4, no. 1 (2016): 21–27.
- Díaz Lafuente, José. “El derecho de asilo por motivos de orientación sexual e identidad de género.” *Revista de Derecho Político*, no. 89 (2014): 345–88.
- EASO (European Asylum Support Office). “Researching the situation of lesbian, gay and bisexual persons (LGB) in countries of origin: EASO Practical Guides Series,” 2015. <https://doi.org/10.2847/055108>.
- Habermas, Jürgen. *Historia Y Crítica De La Opinión Pública*. 1994.
- Harari, Yuval Noah. *Sapiens. De Animales a Dioses: Una Breve Historia de la Humanidad*. Barcelona: DEBATE, 2014.
- Horrillo, Silvia Concha. “El derecho estático de las personas en movimiento: derecho de asilo por motivo de género y orientación sexual.” Bilbao: Universidad del País Vasco, 2017.
- Human Rights Watch. “Integration of the Human Rights of women and the gender perspective: Violence Against Women and ‘Honor’ Crimes: Human Rights Watch Oral Intervention at the 57th Session of the UN Commission on Human Rights,”

2001. <https://www.hrw.org/news/2001/04/05/item-12-integration-human-rights-women-and-gender-perspective-violence-against-women>.

Jansen, Sabine, and Thomas Spijkerboer. *Fleeing Homophobia: Asylum claims related to sexual orientation and gender identity in Europe*. Vrije Universiteit Amsterdam (VU University Amsterdam), 2011.

Jiménez Sánchez, Carolina. “La persecución de género en el Derecho Internacional de los Refugiados: Nuevas perspectivas.” *Revista Electrónica De Estudios Internacionales*, no. 33 (2017). <https://doi.org/10.17103/reei.33.05>.

López-Sala, Ana. “Los refugiados LGTBI en España: buscar protección en tiempos de control migratorio.” *Anuario CIDOB De La Inmigración*, no. 2020 (2021): 198–219.

Morán Blanco, Sagrario. “Capítulo 10. Los crímenes de ‘honor’ y su persistencia en la sociedad internacional actual: acción de los Estados y de la comunidad internacional.” In *El Derecho Internacional, Los ODS y La Comunidad Internacional*, coordinated by Carlos R. Fernández Liesa, Eugenia López-Jacoiste Díaz, and J. Daniel Oliva Martínez, 257–284. Madrid: Dykinson, 2022.

Neilson, Victoria. “Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims.” *Stanford Law and Policy Review* 16, no. 417 (2005).

Odofin, Clara (coord.). “Beyond Proof: Credibility Assessment in EU Asylum Systems.” Brussels: UNHCR, 2013.

ONU: Asamblea General. “Idoneidad del marco jurídico internacional sobre la violencia contra la mujer: Informe de la Relatora Especial sobre la violencia contra la mujer, sus causas y consecuencias sobre la idoneidad del marco jurídico internacional sobre la violencia contra la mujer.” A/72/134, 2017.

Pasetti, Francesco (coord.). “Sobre los solicitantes y beneficiarios de protección internacional: Informe Nacional para España, NIEM 2020.” *CIBOD*. NIEM, 2020.

Peña Díaz, Francisco de Asís. “Credibilidad de los solicitantes de asilo y estereotipos heterosexistas: en busca del ‘refugiado LGTBI por antonomasia’.” *Congreso Internacional 70 Aniversario Declaración Universal de Derechos Humanos*, no. 39. Cuadernos Electrónicos de Filosofía del Derecho (2019): 271–291.

Pineda, Empar. “Lesbiana, yo soy lesbiana, porque me gusta y me da la gana.” In *Ética y Activismo. Primera Plana: La Construcción de Una Cultura Queer En España*, 318–39. Egales, 2007.

Pineda, Empar. “Mi pequeña historia sobre el lesbianismo organizado en el movimiento feminista de nuestro país”. In *Lesbianas. Discursos y representaciones*, coordinated by Raquel Platero, 31-59. Melusina, 2008.

Platero, Raquel (coord.). *Lesbianas: discursos y representaciones*. Melusina, 2008.

Romany, Celina. “State responsibility goes private: a feminist critique of the public/private distinction in international Human Rights Law.” In *Human Rights of Women: National and International Perspectives*, edited by Rebecca J. Cook, 85–115. Philadelphia: University of Pennsylvania Press, 1994.

Rubin, Gayle. “The Traffic in Women: Notes on the ‘Political Economy’ of Sex.” In *Toward an Anthropology of Women*, edited by Rayna R. Reiter, 157--210. New York: Monthly Review Press, 1975.

Soroeta Licerias, Juan (ed.). *Los Derechos Humanos de la Mujer: Cursos de Derechos Humanos de Donostia - San Sebastián. Volumen VIII*. Vol. 1. Álava: Universidad del País Vasco, 2008.

Trinidad Nuñez, Pilar. “La evolución en la protección de la vulnerabilidad por el derecho internacional de los derechos humanos.” *Revista Española de Relaciones Internacionales*, no. 4 (2012): 125–168.

UNCHR. “Informe de la Sra. Radhika Coomaraswamy, Relatora Especial sobre la violencia contra la mujer, con inclusión de sus causas y consecuencias, presentado de conformidad con la resolución 1995/85 de la Comisión de Derechos Humanos: La violencia contra la mujer en la familia.” UN ECOSOC, 1999.

Villar Sáenz, Amparo. “¿Lesbiana? Enacantada, ¡¡es un placer!!: Representación de las lesbianas en Euskal Herria a través de los grupos organizados”. In *Lesbianas. Discursos y representaciones*, coordinated by Raquel Platero, 61-84. Melusina, 2008.

Viñuales, Olga. *Lesbofobia*. Bellaterra, 2002.

WEBGRAPHY

ILGA-Europe, the European Region of the International Lesbian, Gay, Bisexual, Trans & Intersex Association. “Rainbow Map.” Rainbow Europe, 2023. <https://www.rainbow-europe.org>.

ILGA World. “Criminalisation of consensual same-sex sexual acts.” ILGA World Database, 2024. <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts>.

UNHCR. “Convention relating to the Status of Refugees: States parties, including reservations and declarations, to the 1951 Refugee Convention” (United Nations, Treaty Series, vol. 189). <https://www.unhcr.org/5d9ed32b4>

NORMATIVE FRAMEWORK

Spain. “Constitución Española”. Boletín Oficial del Estado (BOE-A-1978-31229), 1978.

Spain. “Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio”. Boletín oficial del Estado (BOE-A-2005-11364), 2005.

Spain. “Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria”. Boletín Oficial del Estado (BOE-A-2009-17242), 2009.

Spain. “Ley 4/2023, de 28 de febrero, para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI”. Boletín Oficial del Estado (BOE-A-2023-5366), 2023.

European Union, Council of the European Union. “Directive 2011/95 of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. Official Journal of the European Union” (No 32011L0095), December 13, 2011.

European Parliament, Council of the European Union. “Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)”. Official Journal of the European Union (No 32013L0032), June 16, 2013.

International Commission of Jurists. “Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity”, 2007.

UN General Assembly. “Universal Declaration of Human Rights” (217 A (III)). United Nations, 1948.

UN General Assembly. “Convention on the Political Rights of Women” (A/RES/640(VII)). United Nations, 1952.

UN General Assembly. “Convention of the Nationality of Married Women” (A/RES/1040). United Nations, 1957.

UN General Assembly. “Convention on the Elimination of All Forms of Discrimination Against Women”. United Nations, Treaty Series, vol. 1249, p. 13. United Nations, 1979.

UNHCR. “Convention and Protocol relating to the Status of Refugees”. United Nations, 1951.

UNHCR. “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” (HCR/IP/4/Eng/REV.1). United Nations, 1992.

UNHCR. “Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (GCR/GIP/02/01). United Nations, 2002a.

UNHCR. “Guidelines on International Protection: «Membership of a particular social group» within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (HCR/GIP/02/02). United Nations, 2002b.

UNHCR. “Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (HCR/GIP/12/09). United Nations, 2012.

JURISPRUDENCE

High Court of Australia. “Minister for Immigration and Multicultural Affairs v Khawar” ([2002] HCA 14), 2002.

House of Lords. “Judgments - Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals): Opinions of the Lords of the Appeal for judgement in the cause”. UK Court of Appeal, 1999.

New Zealand: Refugee Status Appeals Authority. “Refugee Appeal No 71427/99” (No 71427/99), 2000.

United States Board of Immigration Appeals. “Matter of Toboso-Alfonso”; A-23220644, 1990.

United States Court of Appeals for the Ninth Circuit. “Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service” (No 95-70887), 1997.

United States Court of Appeals for the Ninth Circuit. “Geovanni Hernandez-Montiel v. Immigration and Naturalization Service” (225 F.3d 1084 (9th Cir. 2000); A72-994-275), 1999.