



LGBTQIA+ asylum: From recognition to data provision in Brazil

OÑATI SOCIO-LEGAL SERIES VOLUME 13, ISSUE 2 (2023), 563–588: INNOVACIÓN LEGISLATIVA EN TIEMPOS DE EXCEPCIONALIDAD

DOI LINK: [HTTPS://DOI.ORG/10.35295/OSLS.IISL/0000-0000-0000-1369](https://doi.org/10.35295/OSLS.IISL/0000-0000-0000-1369)

RECEIVED 24 MARCH 2022, ACCEPTED 28 NOVEMBER 2022, FIRST-ONLINE PUBLISHED 9 DECEMBER 2022, VERSION OF RECORD PUBLISHED 1 APRIL 2023

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Abstract

LGBTQIA+ asylum is a reality in Brazil, although it is not expressly included in the convention. Starting with historical research, the article shows how LGBTQIA+ asylum has been consolidated in International Law and, specifically in Brazil, as a country where there are also cases of homophobia and transphobia, LGBTQIA+ asylum is guaranteed, even if the information requested from the Federal Police and the National Committee for Refugees from Brazil do not currently indicate whether the number of concessions specifically for these groups has increased or decreased. Addressing the cliquet effect, it demonstrates the impossibility of retroaction in terms of Human Rights, preventing the denial of the granting of asylum in Brazil to this people, which is the distinctive focus of the research. The deductive method, combined with qualitative analysis of primary sources, such as official documents, and bibliographical sources were used to achieve the results.

Key words

LGBTQIA+; asylum; the Yogyakarta Principles; UNHCR; human rights

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Resumen

El asilo LGBTQIA+ es una realidad en Brasil, aunque no esté expresamente incluido en la convención. Partiendo de una investigación histórica, el artículo muestra cómo el asilo LGBTQIA+ se ha consolidado en el Derecho Internacional y, específicamente en Brasil, como país donde también se dan casos de homofobia y transfobia, el asilo LGBTQIA+ está garantizado, aunque las informaciones solicitadas a la Policía Federal y al Comité Nacional de Refugiados de Brasil no indican actualmente si el número de concesiones específicamente para estos grupos ha aumentado o disminuido. Abordando el principio de prohibición de regresividad en materia de derechos humanos, se demuestra la imposibilidad de retroacción en términos de derechos humanos, impidiendo la negación de la concesión de asilo en Brasil a este pueblo, que es el foco distintivo de la investigación. Para alcanzar los resultados se utilizó el método deductivo, combinado con el análisis cualitativo de fuentes primarias, como documentos oficiales, y fuentes bibliográficas.

Palabras clave

LGBTQIA+; refugio; Principios de Yogyakarta; ACNUR; derechos humanos

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1. Introduction

The asylum is not new in international practice, at the beginning of the 20th century it was already possible to see its application within the context of the League of Nations. With the atrocities of the Second World War, and its large flows of refugees, and the creation of the United Nations, new mechanisms arise to deal with these internationally displaced populations, which is the subject of the 1951 Convention and its 1967 Protocol.

Although LGBTQIA+ people are not specifically included in the list of the 1951 Convention, the interpretation of the concept of “social group” may allow them to be framed as refugees and, therefore, holders of this right, even though it is not mandatory to be attached to this concept. Thus, although not all signatories of the Convention accept it, some States do, as is the case of Brazil.

In recent years, Brazil has received several requests and granted asylum to people from countries where being LGBTQIA+ is considered a crime by local laws and who have their lives persecuted in their countries of origin. The constant fear of violence, whether physical or psychological, forces these people to seek asylum in countries where it is believed that treatment will be more beneficial and that their rights will be respected and guaranteed. This article seeks to explore which are these countries of origin of the majority of the LGBTQIA+ population that seeks asylum in Brazil and what is the reason, whether political or legal, of the structure of these countries that makes the flow of refugees so large. At the same time, Brazil, despite being a destination for this population seeking asylum, is also, historically, due to homophobia and transphobia, a country of origin for refugees who seek their protection elsewhere.

The increase in the sense of insecurity of the LGBTQIA+ population in recent years has led to considerations about the possibility of the country to change its understanding in welcoming LGBTQIA+ refugees. This could happen because it is not specifically within the scope of the 1951 Convention or its 1967 Protocol, on the contrary, it starts from a positive interpretation of the groups to which these documents are addressed. As it will be shown, since 2018 elections, fear of persecution has been constant.

It remains, therefore, the question of whether a hypothetical change in the way of interpreting the groups protected by the asylum institute in international documents, restricting what once had a more comprehensive interpretation, would be allowed by International Human Rights Law. The so-called *cliquet* effect in Human Rights would not allow setbacks, given that in this matter, once advances have been made, these can only be expanded, never restricted.

To reach the main conclusions, the deductive method is used, and the methodology used will start from the analysis of primary sources (such as reports and documents from the United Nations and its agencies related to the asylum institute and its evolutionary history) and secondly by bibliographical sources on the themes listed, with quantitative analysis of the data collected.

Thus, starting from general arguments to particulars, initially looking for the history of the asylum institute from the beginning of the 20th century, highlighting the importance of the work of Fridtjof Nansen and the United Nations Convention on the Status of Refugees. Afterwards, notes on the persecution of LGBTQIA+ in Brazil and on their reception as refugees in the country are described. Thus, seeking a logical relationship,

the condition of LGBTQIA+ is described in the countries responsible for the largest influx of refugees from this community to Brazil. In this sense, seeking to reach formal conclusions from the logic of the established premises, as primary sources, the United Nations Convention on the Status of Refugee, laws of the countries analyzed subsidiarily, as well as the studies and reports raised were used. As secondary sources, there are the doctrines pointed out especially in the first two topics of the article.

In addition, in order to obtain more accurate information about LGBTQIA+ people asylum seekers in Brazil, through the Access to Information Law, the Federal Police Department and the National Committee for Refugees (CONARE) were asked to provide information on the specificities of refugees from this community in Brazil. The requests were made to the Federal Police Department, as it is responsible for the refugee recognition request forms, as well as to CONARE, as it is the body responsible for consolidating the information regarding the asylum institute in Brazil. The complete panorama of the quantitative analysis remained impaired, especially due to the precarious response provided by CONARE and Federal Police Department, which is quite symptomatic of the moment that Brazil finds itself.

With the information received from the Brazilian public agencies, we have tried to understand the current status of granting asylum to LGBTQIA+ people in Brazil, at the same time as the number of LGBTQIA+ people from Brazil who seek to flee from situations of violence due to their sexual orientation or their gender identity increases, becoming asylum seekers.

2. Historical synthesis of the institute of asylum until the convention and its current practice

At the beginning of the 20th century, due to the high number of people fleeing the political conflicts that would form the Union of Soviet Socialist Republics (USSR), the treatment of these migrants began to gain greater notoriety. These people, in vulnerability, who we currently recognize as refugees, received assistance from the International Red Cross Movement. However, it was only in 1921, when the League of Nations established the High Commissioner for Russian Refugees (HCRR) that there can be considered as the starting point for the international protection of refugees.

Under the command of Fridtjof Nansen, a Norwegian explorer and humanist, HCRR developed activities such as defining the legal status of refugees, their repatriation or resettlement, or even providing assistance to those people. With the increase of the individual flows who began to seek protection, the agency's competence was expanded to other groups, including the Armenians (Ramos 2016, 88).

In addition, in 1926, still under Nansen's coordination, the Agreement for the issuance of an identity certificate for Russian and Armenian refugees was signed, a specific identification document for refugees, which became known as the Nansen passport. In 1927, the competence of the HCRR was expanded so that it could also receive requests from Assyrian,¹ Chaldean Assyrian, Turkish and Montenegrin refugees.

¹ Shortly after this date, in 1932, the League of Nations made an effort to assist twenty thousand Assyrians, Chaldean members of the Nestorian Christian Church, living in a semi-autonomous community within the Ottoman Empire, to leave Iraq. The Assyrians had fought, under British command, against the Iraqi

Finally, in 1929, a last change was made in order to subordinate the HCRR to the League of Nations, preventing the body from being extinct in 1931, as it was provided in its statute (Jubilut 2007, 75–76).

Nansen's death in 1930 and the creation of the League of Nations are two milestones for International Refugee Law. As a result of both facts, the Nansen Office for Refugees emerges and one among its greatest achievements is the 1933 Refugee Convention where it is possible to find a provision on the principle of *non-refoulement*, which prohibits the return of refugees or asylum seekers to a territory in which his/her life or physical integrity is at risk (Convention, 1933, 04).

In that same decade, more specifically in 1936, with the rise of extremism in Germany, new groups of people began to need the protection granted by the refugee institute, notably German Jews, and for that, the High Commissioner for Jewish Refugees from Germany was created, which gained an extension of its competence in 1938 to protect Jews from Austria (Jubilut 2007, 76–77).

Bearing in mind that the deadline for closing the Nansen Office for Refugees and the High Commissioner for Jewish Refugees from Germany was scheduled for the end of 1938 and given the still necessary international protection of people in refugee situations, Norway proposed the unification of the treatment of refugees and the creation of a single international body to coordinate this action. Therefore, it was approved the creation of the High Commissioner of the League of Nations for Refugees (HCLNR) (Jubilut 2007, 77).

Considering the unification, the HCLNR's performance inaugurates the change from the identification made by collective criteria, to an individualized identification. Thus, it is no longer analyzed only the origin, nationality and ethnicity of the person in refugee situation, regardless of the demonstration of the ongoing situation of persecution, it started to analyze aspects of the person, such as life characteristics and the persecution they have suffered (Jubilut 2007, 77).

In this sense, as remarked, the right of asylum is no longer linked to certain groups, nor to the idea that it is something temporary. There is, therefore, an analysis of requests individually made, different from the previous form of analysis, where the fact of belonging to that collectivity granted the prerogative of requesting recognition as a refugee. This form of analysis is the one that prevails in international law nowadays.

Also in 1938, the Intergovernmental Committee for Refugees was created, under the influence of the United States of America in view of the fragility of the League of Nations, since it was not a member state of this organization. With a complementary role to the HCLNR, one of the Committee's major contributions was the celebration of the Evian

nationalists and, with the independence of Iraq, the new regime, with a Muslim majority, denied citizenship to the Assyrians. In October of the same year, a British company proposed to settle the entire Assyrian population in a territory in the State of Paraná – in the south of Brazil – in a region with many immigrant settlements. Initially they were accepted and seen as welcome by the regime installed by President Getúlio Vargas, who considered that the arrival of Assyrians would help to populate a relatively deserted area in the country and that they would be easily incorporated into the country due to the fact that they were Christians. Unfortunately, sectors of Brazilian society were against the arrival of these Assyrians and pressured the Vargas regime not to accept them in the country (Lesser 2015, 194–196).

Conference later that year, where the causes of refugee flight were mentioned, conditioning the granting of asylum to the existence of one of these (Jubilut 2007, 78).

The extinction of the League of Nations in 1946 made the High Commissioner of the League of Nations for Refugees also cease to exist in the midst of a crisis of legitimacy, as this body did not have its own funds, being responsible for managing private funds. This situation hindered her from performing its tasks with the increase of refugees, especially from the First and Second World War, which, respectively, were responsible for 4 million and 40 million refugees (Jubilut 2007, 78).

As a result, the Intergovernmental Committee for Refugees became responsible for the functions of the extinct body until 1947, when it was also extinct, having the functions assigned to the Preparatory Commission of the International Organization for Refugees of the United Nations (UN) which could act until 1950, when its extinction was predicted (Jubilut 2007, 78).

Although the limit of action of this Organization was foreseen for 1950, its operation has only ended in 1952, due to the need to prepare a new competent body. Faced with this transition period, the United Nations High Commissioner for Refugees (UNHCR)² was established in 1950 which is the body responsible for the protection of refugees until the present day.

In this context, on July 28, 1951, the United Nations Convention relating to the Status of Refugees was adopted, which had as its scope the situation of refugees in Europe after the Second World War, victims of events that occurred before January 1, 1951 (Convention, 1951).

Since the Convention focused on events that took place before 1951 (Article 1), and, in the face of new conflicts and consequently new emergencies, the protection of the new refugee flows within the Convention was not granted. To this end, a Protocol on the Status of Refugees was prepared, which entered into force in 1967. The ratification of the Protocol by the countries meant that the provisions relating to refugees began to apply regardless of geographical limitations and without closing date. Until today, the importance of the 1951 Convention, and its protocol, is due, among other things, for defining who becomes a refugee (Article 1), as well as for clarifying the rights and duties between refugees and the countries that host them.

According to the Convention, a refugee is considered to be a person who is unable or unwilling to avail himself of the protection of the country of his nationality 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”. In addition, it is noteworthy that article 33 prohibits expulsion or rejection (Convenção, 1951), demonstrating the importance of the principle of *non-refoulement*³ and the achievements since Fridtjof Nansen's time.

² In Portuguese it is called ACNUR – Alto Comissariado das Nações Unidas. A great amount of the material used in this article was offered by the Brazilian based UNHCR, therefore, sometimes it will be used the acronym ACNUR for the references.

³ “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (Convention 1951).

The Convention was ratified and promulgated in Brazil in 1961 through the Decree No. 50,215. The 1967 Protocol, in turn, was ratified and enacted in 1972, through the Decree No. 70,946. Also, in 1977, UNHCR established itself in Brazil with a permanent mission to aid refugees.

In view of the above, the importance of UNHCR is verified, as well as the fact that both the 1951 Convention and the 1967 Protocol ensure that anyone can exercise the right to seek and receive asylum if they are in need.

3. LGBTQIA+ persecution and their reception as refugees in Brazil

Although article 1 of the 1951 Convention defines those who may become refugees: people persecuted on grounds of race⁴, religion, nationality, political opinion or social group – the LGBTQIA+⁵ population is increasingly being understood as liable to receive asylum.

This happens due to the vulnerability of this group in the societies in which they find themselves. They may fall under the concept of a “specific social group”,⁶ that is a group of people who share at least one common characteristic, in addition to the risk of being persecuted, or who are perceived as a group by the societies to which they belong. This characteristic must be immutable, relative to past experiences or in any other way fundamental to their identity, conscience or exercise of their human rights.

The United Nations High Commissioner for Refugees (UNHCR) states on its guidelines on international protection – which is a non-binding document that intend to provide legal guidance for governments, UNHCR staff, legal practitioners, decision-makers and the judiciary – that a social group may be consisted of persons with protected characteristics (innate, unchangeable, fundamental to human dignity to that group members)⁷ or a group with cognizable characteristics which allows them to perceive themselves as a group or set them apart from the society – what is called social perception (UNHCR 2019, 94–95).

It is important to remark that for the UNHCR there is no need of cohesiveness inside the group, nor all the members must be at risk of being persecuted, the simple fact that a shared characteristic is the focus of the persecution may grant protection (UNHCR 2019, 96). However, as the guidelines are a non-binding document it leaves great discretion for governments and States to interpret what a “social group” is as it has loose definition in the 1951 Convention relating to the Status of Refugees. Some countries may recognize LGBTQIA+ people as a “social group” under the 1951 Convention while other countries may ignore it.

Therefore, currently, both UNHCR and some countries recognize that LGBTQIA+ persons may qualify as members of a specific social group for the purpose of ask for

⁴ As used in the Convention: “race”.

⁵ Acronym that addresses lesbian, gay, bisexual, transvestite or transsexual people, asexual, intersex, queer people, among others. The use of the “+” sign fits the other groups not specifically mentioned.

⁶ But not only, as it could be granted grounded on political opinion, in some cases, such as LGBTQIA+ human rights activists.

⁷ A group of persons who share a common characteristic other than the risk of persecution.

asylum thus recognizing asylum based on a well-founded fear of persecution based on sexual orientation or gender identity (ACNUR 2017, 04).

People belonging to this group suffer from persecution due to their sexual orientation or gender identity, according to the annual report of the International Association of Lesbians, Gays, Bisexuals, Trans and Intersex people (ILGA), an entity that acts as a federation of more than 1700 member organizations in at least 160 different countries. Operating since 1978, ILGA has obtained ECOSOC consultative status at the United Nations.⁸

In view of the abuses and violations of rights suffered by this group of people, a group of 29 experts was invited to prepare a document, signed in November 2006, in Gadjah Mada, in Yogyakarta, Indonesia.

The Yogyakarta Principles, which would later be added by the Yogyakarta Principles +10, are not intended to bring new rights to the LGBTQIA+ community, only to clarify human rights, demonstrating that they are also extended to members of this community, focusing on obligations that States must fulfill in order to grant the application and the protection of basic human rights to this group without discrimination (Alamino and Del Vecchio 2019, 648–649).

The first document, Principles of Yogyakarta (2007), brings in its body several natural guarantees for human beings, regardless of their sexual orientation or gender identity, since they are all born free and equal in dignity and rights (Principle 1), owing to them the rights of peaceful assembly and association (Principle 20), remarking that, if they are persecuted for whatever reason, but also because of their orientation or identity, they have the right to seek and enjoy asylum in other countries to escape from this danger or from the threat of danger (Principle 23).

In addition, the Yogyakarta Principles +10 (2017) grants them freedom from criminalization or sanction arising directly or indirectly from their sexual orientation, sex or gender identity and expression (Principle 33).

Even with these guarantees, which are nothing more than the crystallization of the protection of human rights that corresponds to everyone, regardless of their sexual orientation or gender identification and expression, there is still persecution in several countries of the world against individuals who belong to LGBTQIA+ groups.

In some countries, one can find criminalization for consensual conduct, imprisonment sentences, and even capital punishment. LGBTQIA+ people can suffer active harassment, discrimination and arbitrary detention by government authorities based on their intrinsic characteristics. In their countries of origin, they can even suffer from discrimination, rejection and violence within their community or family (ACNUR 2017, 6).

The annual survey carried out by ILGA indicates that Brazil, even with cases of discrimination and violence against LGBTQIA+ individuals, has, at its legislation, better grounds to preserve and grant the human rights of these individuals than compared to other States in South America and Africa.

⁸ According to data available on its own website: <https://ilga.org/about-us>

In its latest report on state-sponsored homophobia, from December 2020, the association provides data on states that still penalize consensual acts between people of the same sex. The report also gives access to information on protection and guarantees of rights in all States, which is instrumentally important to shed light on the data collected by the survey of asylum requests by LGBTQIA+ people in Brazil, carried out two years earlier, given that the problems that motivated asylum requests continue to occur.

In 2018, UNHCR and the National Committee for Refugees (CONARE)⁹ launched a survey with data based on the period from 2010 to 2018 that allows a study of the number of LGBTQIA+ people who have applied for asylum in Brazil (ACNUR and CONARE 2018).

This investigation, which is scarce at global level, is a highlight for the country that recognized asylum linked to sexual orientation for the first time, only in 2002, to a Colombian couple who lived in an area marked by homophobia practiced by armed groups (Mantovani 2018).

In the aforementioned study, input data up to the year 2016 were used, reflecting the situation on July 22, 2018, owing to the increase in requests from the neighbouring state of Venezuela, due to the humanitarian crisis experienced by that South American country.

The study indicates that, in the selected period, the Brazilian government received 369 requests, with the largest number of cis men requesting making up a total of 321 requests. Most of these requests were made by young people between 18 and 39 years old, comprising a total of 334 individuals.

Brazil is not the only state that receives LGBTQIA+ refugees. Countries such as Germany, the United Kingdom, among others, also grant rights to LGBTQIA+ people, at risk of suffering violence, imprisonment, inhumane treatment due to sexual orientation or gender identity, to seek protection in their territory.

NGOs such as *Lesben- und Schwulenvorband in Deutschland* (LSVD),¹⁰ or *Rainbow Refugees in Frankfurt*, offer support to LGBTQIA+ people in Germany (Bierbach 2020), ensuring a supportive environment, as well as providing material that helps LGBTQIA+ refugees throughout the asylum application process, providing information on the necessary documents that must be presented with the application, how the asylum application procedure works, the internationally protected rights that provide the basis for the claim, among others.¹¹

⁹ It is important to stress that CONARE is, by the 9474/1997 Law, formed by a representative from the Ministry of Justice, one representative from the Ministry of Foreign Affairs, one representative of the Ministry of Labour, one representative of the Ministry of Health, one representative of the Ministry of Education and Sports, one representative of the Federal Police and one representative of an NGO related to refugees.

¹⁰ In free translation: Lesbian and Gay Federation in Germany.

¹¹ The LSVD maintains a website with manuals to help applicants for the LGBTQIA+ refuge, with versions in English, Turkish, Russian, Arabic, Urdu, Serbian, Farsi, among other languages; see LSVD 2022 (last updated).

In the United Kingdom, although it is a country that also recognizes the possibility of requesting asylum due to the persecution of LGBTQIA+ people, NGOs such as *Stonewall*, in a 2010 report, state that 98% of claims were denied (Zappulla 2018).

On the other hand, more recent information, from 2017, informs that in the period 2009–2014, there was a 400% increase in the number of requests made in the United Kingdom, with 200 cases in 2009 and 1.115 in 2014, mostly, from African countries such as Nigeria and Ghana,¹² even though the largest number of requests do not originate in an African country, but from Pakistan (Pinknews 2017).

In the Brazilian study, the high number of requests from individuals coming from African countries stands out. The main State of origin is Nigeria with 121 cases, followed by Ghana with 45 cases, Cameroon with 43 cases, Sierra Leone with 25 cases, Togo with 21 cases and the Democratic Republic of Congo and Angola, with 18 cases each.

The presented survey shows requests, data with sexual orientation and gender related to each country of origin, in addition to the units of the federation that have received the most requests.

It shows a huge imbalance in relation to the state of São Paulo, where the Guarulhos International Airport is located, the largest airport in South America and consequently the largest entry point for applicants, with 284 requests, followed by Rio de Janeiro, however, with a very striking difference, only 28 requests.

Brazil, although not free from crimes linked to homophobia and its congeners, is, to a large extent, an important country attracting LGBTQIA+ refugees, having in September 2018, with the increase in the flow from Venezuela, opened the Casa Miga, a shelter to these refugees, coordinated by the NGO Manifesta LGBTI+ and with the support of UNHCR in the capital of Amazonas, Manaus (Prestes 2018).

Although it is not a manifestation of the Brazilian government, but of private legal entities, it is an advance for the society, which highlights the country in the scenario of LGBTQIA+ refugees.

The survey carried out by UNHCR and CONARE showed that Brazil received asylum seekers mainly from African countries but also from countries in the region, such as Argentina, Colombia, Cuba and Venezuela, with the latter standing out as the main origin of Latin Americans LGBTQIA+ who have requested asylum in Brazil, with 8 people, all of them cis people.

It is also interesting to note that during the analyzed period, Brazil have received only two trans women, both from Angola, and no trans men.

Another highlight is that of the 369 asylum requests, 28 were made by cis heterosexual people. This fact is strange because they are not, at first sight, individuals eligible for LGBTQIA+ asylum, however, it is necessary to include, recognize and approve the request as they also suffer persecution in these countries (especially in countries with the highest influx of refugees – eight are from Nigeria, six from Ghana and four from Cameroon). This people face persecution for being activists for political causes

¹² Countries that are also the main origins of requests reported in the study carried out in Brazil.

defending the rights of LGBTQIA+ people or for being HIV positive or having contracted AIDS¹³.

This demonstrates that not only LGBTQIA+ people, but also those involved in the cause of human rights to all human beings, regardless of sexual orientation or gender identity or with diseases that, due to ignorance, are falsely attributed exclusively to people of that social group, suffer discrimination and persecution in the countries indicated, a fact that can lead, from the daily prejudice in civil society of those States to even the risk to their physical integrity or their lives.

Thus, we will move on to the analysis of the main countries, according to the study in question, responsible for the largest flows of refugees to Brazil seeking to protect the rights of the LGBTQIA+ community.

3.1. LGBTQIA+ refugees from Nigeria

Nigeria was responsible, according to the study, for the flow to Brazil of 121 asylum seekers, of these, 113 cis men, while only 8 cis women.

When analyzing these data in light of the report carried out by ILGA, we can understand that many of these cases are the direct or indirect result of the criminal laws of this country that do not allow the marriage of people of the same sex, in addition to criminalizing consensual same-sex intercourse.

Although there are differences in the application of punishments, depending on the regions of the country, and Nigerian criminal law is not condensed into a single code, but can be fragmented at national, regional and local levels, there are multiple forms of punishment in the country for consensual same-sex sexual acts. At the national level, the Nigerian Criminal Code has provisions against same-sex sexual acts as a crime against the natural order, providing imprisonment for up to 14 years.

In the northern region of the country, however, there are states that use penal codes based on Islamic Sharia law, being applicable to Muslims, with death penalty as a punishment for consensual sexual practices of people of the same sex. Death penalty by stoning is prescribed for adults who engage in consensual same-sex sex in twelve states of Nigeria: Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara (Mendos *et al.* 2020, 53).

In the south, however, although there are no Sharia-based penal codes, independent Sharia panels have been created in cities such as Lagos, Ibadan and Ijebu-Ode, which function as private arbitration panels, applying Islamic law to settle disputes between the parties which accept its jurisdiction. This is also of great concern, although the only documented case occurred in Oyo, in 2002, a punishment with flogging for extramarital sex (Mendos *et al.* 2020, 55).

It is noteworthy, however, that there are different types of punishment depending on the state and its respective penal code based on the Sharia in vogue and on the gender

¹³ For more information, the ACNUR-Brazil website, with the profile of asylum requests related to sexual orientation and gender identity, presents important information about this type of discrimination. Available at: <https://www.acnur.org/portugues/refugiolgbi/>

of the accused of having committed consensual sexual intercourse with a person of the same sex.

Same-sex sexual acts between adults is punished by stoning in the twelve states mentioned above, however, in the states of Gombe, Jigawa, Kano and Zamfara, if the accused is not married, the penalty is one hundred lashes plus one year in prison. The state that most differs is Sokoto, who recognizes that if the act is committed by a minor on an adult, with the adult being the passive party, the minor will undergo corrective punishment and the adult will receive up to one hundred lashes. On the other hand, in most of the twelve states marked, the punishment for lesbianism is usually 50 lashes plus imprisonment for up to five years, while in Kano and Katsina the penalty is death by stoning (Mendos *et al.* 2020, 65–66).

3.2. LGBTQIA+ refugees from Ghana

This African country is the home of 45 individuals who requested asylum during the period analyzed by the UNHCR and CONARE survey, 41 cis men and 4 cis women.

From the ILGA report, we can understand that these cases of refuge also originate, to a large extent, in the criminal laws of this country, since, in section 104 of the Criminal Code, sexual acts committed in an “unnatural” way are prohibited, punishing relations either between persons of the same sex (at least sixteen years old), or relations between human beings and animals. The penalties are varied, ranging, in cases of non-consensual sex, from five to twenty-five years in prison, although the same code defines the crime of rape (Criminal Code of Ghana, 1960, 47, 63).

In recent years, however, several adult arrests have been recorded, publicized by the media, causing psychological abuse in detainees, with the police being accused of attracting LGBTQIA+ people through social networks to carry out the act (Mendos *et al.* 2020, 117).

3.3. LGBTQIA+ refugees from Cameroon

This country is responsible for 43 asylum requests in Brazil, composed of 29 cis women and 14 cis men, reversing the asylum seekers pattern existing in the other two countries with the highest flow of LGBTQIA+ refugees in Brazil.

Not unlike the other cases already listed, this African country also criminalizes same-sex consensual sexual relations. Although the first Cameroonian Penal Code did not criminalize same-sex intercourse, in 1972 there was an amendment that is currently found in art. 347-1 of the Code, criminalizing homosexuality, punishing anyone who commits sexual acts with people of the same sex with a penalty of six to five years in prison and/or a fine (Loi 2016/007, 133).

There are even reports that the Cameroonian police carry out forced anal examinations on suspects of having committed sexual acts with persons of the same sex. On the other hand, civil society, through activists, has been organizing itself since 2019 in order to pressure the State to reduce sentences for “homosexuality” or organizing donations to pay the fines directed at these people (Mendos *et al.* 2020, 114).

3.4. LGBTQIA+ refugees from Sierra Leone

This West African country was responsible for 25 asylum requests in the study presented by UNHCR and CONARE, all by cis men.

Sierra Leone is another country to introduce legislation against same-sex sexual practices. The Offenses Against the Person Act, of 1861, from British colonial origin, presents in section 61 of this Act, the criminalization that can lead to life imprisonment or periods of no less than ten years, related to the conviction for the crime of buggery¹⁴ (Mendos *et al.* 2020, 122).

The hostile socio-political setting remains for the LGBTQIA+ community, as shown by the same report of complaints made in 2019 by the family members of two men who were found having sex in their home. Luckily, they managed to flee, having left the country, before being arrested, which demonstrates the importance of granting asylum, even though their whereabouts are not known, nor if they entered any country via asylum.

3.5. LGBTQIA+ refugees from Togo

This African country, presented in the old Criminal Code of 1982 the penalty for publishing or distributing information against morality and public decency, which served, in good measure, to punish homosexuals, imposing barriers to freedom of expression.

In 2015, a new Criminal Code was approved, nevertheless, both articles 392 and 394 maintain restrictions. Article 392 defines that impudent or unnatural acts committed by individuals of the same sex must be punished.

The punishment, according to article 393, is one to three years in prison and/or a fine of one million to three million West African CFA Francs, which corresponds to a fine that can reach between 1500 and 4500 euros. The article 394, in turn, punishes, with imprisonment from six months to two years and/or a fine of five hundred thousand to two million West African CFA Francs,¹⁵ the distribution, dissemination and exhibition of material contrary to morality which may encourage this type of practice (Loi 2015-10, 76).

Fleeing from this scenario that harms the situation of the LGBTQIA+ population in the country, twenty-one people requested asylum in Brazil, according to the report presented. Nineteen of these are cis men, while two are cis women.

3.6. LGBTQIA+ refugees from Angola and the Democratic Republic of Congo

These two countries, although they have a great numbers of asylum seekers in Brazil, being Angola with 18 applicants – 10 cis men, 6 cis women and 2 trans women – and the Democratic Republic of Congo, a country with also 18 nationals who have requested

¹⁴ The crime of buggery, which is still in force in many of the former British colonies, comes from a law from the Modern Age (1533). The Buggery Act punishes with death penalty and loss of all property, sexual relations between men or sodomy between man and woman, or humans with animals (The Buggery Act, 1533).

¹⁵ Up to three thousand Euros.

asylum in Brazil during the years of the UNHCR and CONARE survey – 16 cis men and 2 cis women – they did not have laws that criminalize sexual conduct between people of the same sex, according to the 2019 ILGA survey (Mendos 2019, 527)

In the Democratic Republic of Congo, however, there are gaps in the protection of LGBTQIA+ people, such as the criminalization present in section IV of its Penal Code of public offenses against morals, especially with regard to article 176 that punishes acts contrary to decency with criminal servitude of eight days to three years and/or a fine (Code Pénal Congolais, 2004, p. 47), which has already led the United Nations Human Rights Committee to recommend the Democratic Republic of Congo the development of anti-discrimination legislation that makes it possible for LGBTQIA+ persons not to be occasionally processed due to article 176 (Mendos *et al.* 2020, 91).

In Angola, on the other hand, at the end of 2020, the New Angolan Penal Code was approved, ending a revision effort that began in 2004 (Mendos *et al.* 2020, 90).

This new code does not criminalize same-sex sexual conduct. It even contains article 212, which deals with the crime of discrimination, punishable by a penalty of up to two years or a fine for the refusal of contract or employment; conditioning or supply of goods or services; impediment or conditioning of the exercise of economic activity; punishment or dismissal of a worker; impediment or conditioning in the entrance to a public or private establishment due to sex or sexual orientation, in addition to being an aggravating factor the commission of crimes due to discrimination based on sexual orientation, according to article 71, §1, letter “c” (Lei 38/20, 5382, 5402).

Finally, the New Angolan Penal Code also brought article 380 – incitement to discrimination – with a penalty of six months to six years, criminalizing the incitement of hatred against a person or group of people, in public, because of their sexual orientation (Lei 38/20, 5426).

In order to summarize the number of asylum requests and provide a summarized view of criminal legislation, the following table is presented:

TABLE 1

Country	Law	Asylum request in Brazil	Men	Women	Trans
Nigeria	Provisions against same-sex sexual acts as a crime against the natural order, providing imprisonment for up to 14 years	121	113	8	0
Ghana	Sexual acts committed in an “unnatural” way are prohibited, punishing relations either between persons of the same sex (at least sixteen years old), or relations between human beings and animals	45	41	4	0
Cameroon	Criminalization of homosexuality, punishing anyone who commits sexual acts with people of the same sex with a penalty of six to five years in prison and/or a fine	43	14	29	0
Sierra Leone	Criminalization that can lead to life imprisonment or periods of non-less than ten years, related to the conviction for the crime of buggery	25	25	0	0
Togo	Punishment for impudent or unnatural acts committed by individuals of the same sex is one to three years in prison and/or a fine	21	19	2	0
Angola	Penalty of six months to six years, criminalization of the incitement of hatred against a person or group of people, in public, because of their sexual orientation	18	10	6	2
Democratic Republic of Congo	Criminalization of public offenses against morals, especially with regard to article 176 that punishes acts contrary to decency with criminal servitude of eight days to three years and/or a fine	18	16	2	0

Table 1. LGBTQIA+ in Brazil: asylum requests, countries and criminalization.

These new provisions may, in the coming years, reverse the existing situation, with the need to seek asylum on the grounds of sexual orientation or gender identity in the country.

4. Data requested from CONARE and the Federal Police of Brazil

Seeking to complement the data obtained in the survey carried out by UNHCR and CONARE, in 2018, two requests for information were made, in 2021, through the Brazilian Government Platform called “Fala.BR”¹⁶ regarding asylum requests made by LGBTQIA+ people by the Access to Information Law (Law No. 12,527 of 2011).

¹⁶ The platform consists of a system that allows any citizen to forward requests for public information that may not be available to the public. However, when requested, they can be sent to the applicant also through

The first request was directed to the Federal Police Department, and the second request – containing the same questions of the first – was sent to the National Committee for Refugees (CONARE), both linked to the Ministry of Justice and Public Security (MJSP).

The reason for choosing these two bodies is because CONARE is responsible for consolidating information related to requests, deferrals, denials, filing and asylum status loss in Brazil, as well as the Federal Police which is the department where, as a rule, asylum requests are addressed in Brazil.

4.1. The Federal Police Department

The request for information was sent to the Federal Police Department on January 11, 2021, and the response with the denial of information was received on January 13 of the same year, on the grounds that the consideration of the causes of recognition and the decisions to grant or not asylum in Brazil, are of the responsibility of the National Committee for Refugees.¹⁷

Faced with the refusal, on January 14, an appeal was sent to the Federal Police Department to obtain information, having as reasons of the appeal the responsibility and competence of this body for receiving requests for asylum in Brazil, explaining that the information requested was focused on aspects such as nationality and gender.

It so happens that the appeal of the request for information was again denied on January 19, on the grounds that the appellant was not right, because the request for information was not available to this Federal Police.¹⁸

4.2. The National Committee for Refugees

The request for information to The National Committee for Refugees – CONARE – was also made on January 11, 2021, and it was answered on January 18 without the need for an appeal, sending, however, vague and inconclusive answers, without the information requested.

The requested information was provided through the following questions:

1. How many asylum requests were made for LGBT¹⁹ reasons in Brazil from 2018 onwards?
2. What is the total number of requests that have already been made on an LGBT basis?
3. What is the total number of requests that have already been accepted on LGBT basis?
4. What is the main reason for refusing these requests? What are the nationalities?
5. What is the proportion between men and women?

the platform, generating a file not available to the public (Controladoria-Geral da União n.d.). In this sense, it is clarified that, if necessary, information can be requested from the authors of this research.

¹⁷ According to the original: “apreciação das causas de reconhecimento e as decisões de concessão ou não de refúgio no Brasil, são de atribuição do Comitê Nacional para os Refugiados”

¹⁸ According to the original: “não assiste razão à recorrente, dado que formulou pedido de informações não disponíveis a esta Polícia Federal.”

¹⁹ Although the acronym LGBTQIA+ has been used throughout this text, the historic acronym LGBT was used for communication with the Federal Police and CONARE.

6. Were there requests from cis, straight people seeking asylum for LGBT reasons since 2018? If so, how many?
7. What are the top 10 applicants' nationalities?²⁰

For questions 1 to 6, the content of the response was based on the following justification: The National Committee for Refugees (CONARE) does not have compiled information on the reasons of the requests for recognition of refugee status. Such information exists only on the formularies of each applicant. Any compilation effort would mean the individual analysis of thousands of processes, which means unreasonable work. Thus, it is not possible to comply with the request in question, pursuant to article 13, item II, of the Decree 7,724, of May 16th, 2012.²¹

In addition, for the responses of the questions "4", "5" and "6", the Committee claims that it does not have compiled data on requests based on persecution of LGBT+ people, as well as there is no compilation on possible requests that have been rejected on this basis, nor the reason for such rejection. Also, there is no compilation of additional data on these applicants and refugees, such as sex or gender.

For question "3", CONARE again informs that it does not have compiled data on LGBT+ people, as well as it highlights that through the Interactive Platform for Decisions on Asylum, in the "Reasons for Inclusion" field, it is possible to verify the broad category on which the decision of the Committee was made.

However, although the platform guarantees access to important information such as nationality, status of asylum request and age group, when searching for the reason for inclusion, specific data on LGBT+ people are not found.

It can be concluded that there is a possibility that these data enter the list of "Social Group" according to the possibility of research on the platform, however, it is not possible to make a more accurate investigation on the situation.

The Platform shares the recognition of 59 asylum requests for 15 different nationalities in relation to the social group for the year 2019; 104 asylum application recognitions for 33 different nationalities in 2020; and, finally, 71 recognitions of asylum requests for 25 different nationalities in 2021, however, as the term "Social Group" encompasses other groups than LGBTQIA+ people, it cannot be understood that all these requests are from this groups in special.

Finally, for question "7", the answer is that data on the total number of requests for recognition of refugee status in Brazil can be found in the table Applications for

²⁰ According to the original: "1- Quantos pedidos de refúgio foram realizados por razões LGBT no Brasil de 2018 em diante?; 2- Qual o número total de pedidos que já foi realizado com base LGBT?; 3- Qual o número total de pedidos que já foi aceito com base LGBT?; 4- Qual a principal causa de recusa desses pedidos? Quais as nacionalidades?; 5- Qual a proporção entre homens e mulheres?; 6- A partir de 2018 houve pedidos de pessoas cis, hétero pedindo refúgio por razões LGBT? Se sim, quantos?; 7- Quais as 10 principais nacionalidades dos solicitantes?"

²¹ "O Comitê Nacional para os Refugiados (CONARE) não possui informação compilada sobre as razões de pedir das solicitações de reconhecimento da condição de refugiado. Tal informação existe apenas nos formulários de cada solicitante. Eventual esforço de compilação significaria a análise individualizada de milhares de processos, o que significa trabalho desarrazoado. Assim, não é possível atender ao pedido em questão, nos termos do artigo 13, inciso II, do Decreto 7.724, de 16 de maio de 2012."

recognition of refugee status on November 23, 2020.^{22,23} In addition, CONARE remarks that if the request concerns nationalities related to requests on the basis of persecution of LGBT people, such data is not compiled, therefore, it is not possible to comply with the request.²⁴

In face of the responses, it is surprising that the Committee responsible for compiling information related to such requests and asylum granting does not have it or does not want to provide it, which is alarming as Brazil, during Bolsonaro's term, is in a political context of a very conservative agenda.

4.3. Brazil's special condition

Although Brazil has received several requests and granted asylum to LGBTQIA+ people, the country is experiencing a certain contradiction. It manages to be a receiving country and at the same time a country of origin for refugees due to persecution of the LGBTQIA+ community.

Such phenomenon happens even with the understanding of the Brazilian Supreme Court (Supremo Tribunal Federal – STF) of the framing of crimes of homophobia and transphobia in Law 7716/89 on crimes of racism.²⁵

The persecution of LGBTQIA+ people is not recent in Brazil. In 1989, Marcelo Tenorio, a Brazilian citizen, suffered aggressions due to his sexual orientation, fled to the United States of America, crossing the border as an illegal migrant and in 1993, obtained recognition of his refugee status, which would be the first recognized case (Gorisch and Mendes 2016, 6).

Even though there have been many other cases over the last few decades of Brazilians seeking asylum abroad due to homophobia, with increasing data such as three in 2011 and 25 only in the first quarter of 2012 (Garcia 2012), the perception of insecurity started to increase since the election of the current president of the country, Jair M. Bolsonaro (ANSA 2019).

Bolsonaro's, an ultra-conservative president, election made Brazil a hostile country for the LGBTQIA+ community, as anti-gay, anti-gender movement support his campaigns with the help of other right-wing politicians, church leaders and media moguls (Cowper-Smith *et al.* 2021, 2).

The perception of insecurity has increased to the point that the National Network of LGBTI Public Security Operators (Rede Nacional de Operadores de Segurança Pública LGBTI – RENOSP) launched a booklet, in October 2018 (Benevides 2018), with safety tips for the LGBTQIA+ population, following the increase in cases and reports of human

²² The Committee informs that the table is available at the link <https://www.justica.gov.br/seus-direitos/refugio/refugio-em-numeros>

²³ According to the original: "Solicitações de reconhecimento da condição de refugiado em 23 de novembro de 2020".

²⁴ According to the original: "Caso o pedido diga respeito às nacionalidades relacionadas a pedidos com base em perseguição a pessoas LGBT, tais dados não estão compilados e, pelos motivos já acima apresentados, não é possível atender ao pedido".

²⁵ On June 13th 2019, the Federal Supreme Court (STF) decided to criminalize homophobia and transphobia in Brazil, through the assimilation and application of Law no. 7716 of 1989, which addresses the crime of racism in the Brazilian context (STF ADO n. 26 of 13 June 2019).

rights violations, which raised fears for LGBTQIA+ Brazilians to return to Brazil (Graminha 2018).

Whilst, there are also cases of LGBTQIA+ people seeking asylum in other countries (ANSA 2019), even when they have important positions in the Parliament of the country, such as federal deputy Jean Wyllys, the first openly gay parliamentarian to take up the LGBTQIA+ agenda in the Brazilian Congress,²⁶ who due to fear for his physical integrity and for his life, has left the country (Barros 2019).

This news that Brazil finds itself in the position of country of origin of LGBTQIA+ people seeking asylum due to homophobic and transphobic violence are true contrasts with the reality of the same country which is a hub for LGBTQIA+ people fleeing situations even worse than those faced in Brazil with regard to the protection of their lives and mental and physical integrity in their countries of origin.

There remains the concern about the eventuality of Brazil failing to recognize the possibility of obtaining asylum due to the persecution of LGBTQIA+ people.

In international law, there is the recognition of the prohibition of setback in human rights, called the *cliquet* effect, which obliges States not to reduce the protection already given in human rights, as it is recognized in the courts, such as Brazil's Supreme Federal Court (STF)²⁷ This negative change is not possible even through new international treaties that impose restrictions or reductions on grounds of the protection of human rights already achieved (Ramos 2016, 90).

The prohibition against setback is found, for example, in the Additional Protocol to the American Convention on Human Rights in the field of Economic, Social and Cultural Rights, the "Protocol of São Salvador", of 1988, to which Brazil is a party.

This Protocol, in its Article 1, establishes that States undertake to adopt the necessary measures in order to progressively achieve – whether gradual or by preventing setback – and in accordance with their domestic legislation, the effectiveness of the rights recognized by that document, thus, it is understood that human rights can only be expanded, and there can be no reversal on the levels already reached (Ramos 2016, 290–291).

In conclusion, once it is understood that the request for asylum for people who are part of the LGBTQIA+ group fits within the identification of a "social group", it is laid down that any shift in interpretation that restricts rights in practice, even without changing the legal framework – a more restrictive interpretation and consequent change in the application of the law (or treaty) – is also contrary to the law and, therefore, is prohibited, being contrary to the *cliquet* effect.

²⁶ Nevertheless, it is important to remark that on the 2022 elections, Brazil sent, for the first time in its history, two transgender women to the Congress, Erika Hilton and Duda Salabert (Martins 2022), which can bring some hope to the reinforcement of LGBT+ rights.

²⁷ There is a plethora of cases where the STF had the opportunity to manifest itself against social setback, such as ADI 6965/RS – Rio Grande do Sul, ADI 2096/DF – Distrito Federal, ADI 4467/DF – Distrito Federal, among others.

There can be no setback due to the suppression of diplomas (laws) guaranteeing rights to a certain group, nor new interpretation of these laws which alter or reduce the guarantees to those who seek asylum.

A more restrictive interpretation is impossible. One can always expand the rights granted to individuals, and a more beneficial interpretation is welcome, but there can be no diminishing.

5. Final considerations

The asylum institute underwent important developments from the beginning of the 20th century to the 1951 Convention and its current practice, with the installation of a permanent mission of the Office of the United Nations High Commissioner for Refugees in Brazil in 1977.

Although no international document specifically recognizes the possibility of asylum for the LGBTQIA+ population, within their condition of vulnerability, Brazil over the years has extended the granting of asylum to people who suffer persecution because of their sexual orientation or gender identity.

In 2018, UNHCR and CONARE released an important survey with data on granting asylum to LGBTQIA+ people in Brazil. This research informs the applicants' countries of origin, the number of requests and concessions, among other important factors that shed light on the situation of this group of people and the persecution they suffer.

The granting of LGBTQIA+ asylum in Brazil, despite having as a landmark the asylum of a Colombian couple in 2002, is marked by the number of requests from people from African countries, constituting in the document presented in 2018 Nigerians as the group with the largest amount, 121 requests.

Fleeing persecution from countries where there is legislation that restricts their rights or even criminalizes sexual acts between people of the same sex who have reached the legal age or from political regimes and armed conflicts that threaten their physical and psychological integrity, these people sought refuge in Brazil.

This search for asylum in the country occurs, even though Brazil also has a history of episodes of homophobia and transphobia, having equated these actions with the crime of racism only in 2019, via its Constitutional Court.

It is important to remark that these crimes have produced Brazilian own refugees seeking safety outside the country, and, although the first known case occurred in the 1990s, it has had significant concern and increase in the last five years.

Information regarding the issue of granting asylum in Brazil was requested from the Brazilian Government, through the Law on Access to Information, for the National Committee for Refugees and for the Brazilian Federal Police Department.

The request sent to the Federal Police Department was denied, and therefore, an appeal was made for the information to be provided. In response to the appeal, the Federal Police Department claimed not to have the information requested, which is curious, given that it is the agency responsible for most of the registration of asylum requests in the country.

As for the National Committee for Refugees, the body sent the answers without the need to file an appeal. However, it claimed that, for most of the responses, it did not have compiled data, so it was not possible to respond to the request, a fact that also causes surprise, since this would be the committee responsible for compiling this specific information on requests and granting of refuge in Brazil.

In this way, the latest reliable data on granting asylum specifically for LGBTQIA+ people is referred to the year 2016 – the study published by CONARE and UNHCR in 2018.

Although it is possible to have access to the number of requests and asylum grants in Brazil until 2021, there is, however, no way to identify which cases would be related to LGBTQIA+ people, moreover, it is impossible to consider that all asylum cases based on “social group” are related to LGBTQIA+ people, therefore, there is a lack of specific data for the necessary follow-up, which raises concern.

As it is not possible to distinguish which refugee requests are based on sexual orientation and gender identity, it is not possible to conclude whether the Brazilian State maintained the same level of recognition of refugee status for this reason or whether it expanded, decreased or ceased granting refuge to LGBTQIA+ people.

However, International Human Rights Law guarantees, including documents at the regional level to which Brazil is a party, that Human Rights, once acquired in the domestic order of a country, cannot undergo setback, recognized as a *cliquet* effect, they can only be enlarged never reduced.

Thus, even though the possibility of granting asylum specifically to LGBTQIA+ people is not expressed in any official document to which Brazil is a part, the interpretation that Brazil has made of international diplomas about the possibility of offering asylum to those people guarantees a new level in the protection of Human Rights. Therefore, it is not possible to go back due to a possible change in the interpretation, in a negative way, of the application of the diploma.

The protection of vulnerable populations and the granting of asylum to those who seek shelter from the violence they suffer in their countries of origin are necessary, however, transparency and publicity of the data are also needed so that they can be followed up by civil society and thus, with greater control over advances or setbacks, there can be able to improve and make effective public policies aimed at these groups, with the monitoring of the evolution of treatment and the granting of asylum by the competent authorities.

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