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THE REFUGEE QUALIFICATION PROBLEMS IN LGBT[1] ASYLUM CASES

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Abstract. *In 2011 there are 76 countries of the world still criminalising same-sex sexual acts between consenting adults. In seven of those countries homosexual acts are punishable with death penalty (i.e., Mauritania, Sudan, the northern states of Nigeria, the southern parts of Somalia, Iran, Saudi Arabia, Yemen). Homophobic (transphobic) attitudes are also frequent in many societies. However, the LGBT asylum seekers are frequently left outside the refugee definition due to many refugee qualification problems in LGBT cases. Therefore, in this article the author aims to describe the main refugee qualification problems in LGBT asylum cases (i.e., criminalisation; state protection against non-state persecution; concealment of sexual or gender identity; internal protection) and propose their solutions. Council Directive 2004/83/EC of 29 April 2004 has several important provisions including LGBT asylum seekers into otherwise gender-neutral refugee definition. Today these provisions need to be correctly interpreted and transposed into practice of the Member States.*

1 The term 'LGBT' refers to 'lesbian' (a woman whose enduring physical, romantic and/or emotional attraction is to other women), 'gay' (used to describe people whose enduring physical, romantic and/or emotional attractions are to people of the same sex; often used to describe a man who is sexually attracted to other men, but may be used to describe lesbians as well), 'bisexual' (an individual who is physically, romantically and/or emotionally attracted to both men and women) and 'transgender' (an umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth; transgender people may identify as female-to-male or male-to-female).

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Keywords: *asylum, refugee definition, LGBT asylum seekers, persecution, state protection, internal protection alternative, Qualification Directive.*

Introduction

In 2011, under the European Refugee Fund research project 'Fleeing Homophobia, Seeking Safety in Europe: Best Practices on the Legal Position of LGBT Asylum Seekers in the EU Member States', national experts examined the situation of LGBT asylum seekers in 26 European countries and Israel and prepared their national studies. In September 2011, taking into account the information collected in the national studies and during the consultations with national experts, the Dutch experts Sabine Jansen and Thomas Spijkerboer produced the report 'Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe'[2]. Among the general findings of the report, it is stated that there are considerable differences in the way that European States examine LGBT asylum applications, that on a number of points European state practice is below the standards required by international and European human rights and refugee law, and that LGBT individuals are frequently denied asylum and returned to their country of origin where they have a wellfounded fear of being imprisoned or sentenced to death. The report specifies eight particular issues, raising the most problems regarding the asylum qualification and asylum procedures in LGBT asylum cases (i.e., criminalisation; state protection against non-state persecution; concealment of sexual or gender identity; internal protection; credibility assessment; late disclosure; country of origin information; reception)[3].

The Lithuanian national experts (Lyra Jakulevičienė, Laurynas Biekša and Eglė Samuchovaitė) agree with the findings of this international research and consider it important to inform the Lithuanian lawyers and specialists, studying and/or practicing in the field of asylum, about the main international and European human rights standards, and the main problems of LGBT cases in Lithuania and other European countries. Therefore, in this article the author aims to describe the main refugee qualification problems in LGBT asylum cases (i.e., criminalisation; state protection against non-state persecution; concealment of sexual or gender identity; internal protection) and propose their solutions. Another article will be prepared jointly by Lyra Jakulevičienė, Eglė Samuchovaitė and Laurynas Biekša and it will aim at presenting the procedural problems and their solutions in LGBT asylum cases.

There have been several in-depth scientific researches on the refugee qualification problems in Lithuania[4]. However, this article focuses on a very specific group of asylum

2 Jansen, S.; Spijkerboer, T. *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe.* COC Nederland/Vrije Universiteit Amsterdam, September 2011.

3 *Ibid.*, p. 7−11.

4 Jakulevičienė, L. *Pabėgėlių teisė* [Refugee Law]. Vilnius: Mykolas Romeris University, 2005; Biekša, L.

cases, the qualification of which has not been deeply researched before, and it is very problematic, rapidly developing and pushing the boundaries of today's refugee law. This article presents a comparative research with the dominating methods of systematic and comparative approach, examining legal provisions and practice at international, European and national levels in Lithuania and other European countries.

1. The Qualification of LGBT Asylum Seekers from Countries where their Sexual Orientation or Gender Identity is Criminalised

In 2011 there are 76 countries of the world still criminalising same-sex sexual acts between consenting adults. In seven of those countries homosexual acts are punishable with death penalty (i.e., Mauritania, Sudan, the northern states of Nigeria, the southern parts of Somalia, Iran, Saudi Arabia, Yemen)[5]. In the practice of the UN Human Rights Committee and the European Court of Human Rights it has been stated that the penal provisions criminalising homosexuality are contrary to the right to privacy and that the mere criminalisation (which is not necessary enforced) is sufficient for the conclusion that the right to private life of a person to whom these laws might be applicable is violated[6].

However, international human rights bodies do not protect LGBT persons against their expulsion to a country that criminalises same-sex sexual acts and violates their right to privacy, unless the danger of torture, inhuman or degrading treatment exists. The European Court of Human Rights (hereinafter – ECtHR) explained that on a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all rights and freedoms set out in the Convention[7]. Not being protected from such expulsions under the general international human rights documents, LGBT persons also try to find international protection by invoking refugee law and asking for asylum[8].

Pabėgėlio sąvokos problemos 1951 m. konvencijoje dėl pabėgėlių statuso ir ES direktyvoje 2004/83/EB [Problems of Refugee Definition under 1951 Convention Relating to the Status of Refugees and European Community Directive 2004/83/EC]. Doctoral Thesis. Social Sciences (Law). Vilnius: Mykolas Romeris University, 2008; Jakulevičienė, L.; Biekša, L. Insights into Transposition and Implementation Problems of the EU Asylum Directives in Lithuania. *AWR Bulletin*. 2007, 45/54(3): 221−246; Jakulevičienė, L.; Biekša, L. Pabėgėlio statuso ir papildomos apsaugos (kvalifikavimo) direktyvos perkėlimo į Lietuvos teisę ir įgyvendinimo problemos Lietuvoje [Transposition and Implementation Problems of the Refugee Status and Subsidiary Protection (Qualification) Directive in Lithuania]. *Jurisprudencija*. 2008, 3(105): 36−46.

5 Bruce-Jones, E.; Itaborahy, L.P. *State-sponsored Homophobia: a World Survey of Laws Prohibiting Same-sex Sexual Acts between Consenting Adults*. ILGA, May 2011, p. 9−10 [interactive]. [accessed 01-11-2011]. <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf>.

6 *Dudgeon v. UK,* appl. no. 7525/76, ECtHR; *Norris v. Ireland,* appl. no. 10581/83, ECtHR; *Modinos v. Cyprus,* appl. no. 15070/89, ECtHR; *Toonen v. Australia*, comm. no. 488/1992, HRC.

7 *F. v. UK,* appl. no. 17341/03, ECtHR; *I.I.N. v. the Netherlands,* appl. no. 2035/04, ECtHR; *K.S.Y. v. the Netherlands,* comp. no. 190/2001, CAT.

8 *International Commission of Jurists Sexual Orientation, Gender Identity and International Human Rights*

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereinafter – Qualification directive)[9] has made some big steps towards the inclusion of LGBT asylum seekers into otherwise gender-neutral refugee definition. Firstly, the Qualification Directive has solved the big problem of non-recognition of LGBT persons as belonging to a 'particular social group'. Article 10(1)(d) of the Qualification Directive includes sexual orientation and gender identity as possible characteristics identifying 'particular social group'[10]. Secondly, Article 9(2)(b to d) of the Qualification Directive has clarified the 'persecution' element of refugee definition, inter alia referring to discriminatory state measures as a possible form of 'persecution'[11].

In addition, the Qualification Directive states that consultations with the UN High Commissioner for Refugees (hereinafter – UNHCR) may provide valuable guidance for the Member States when determining refugee status according to Article 1 of the Geneva Convention. The UNHCR provides a very detailed and useful guidance on the issues of criminalisation and 'persecution':

'17. Criminal laws prohibiting same-sex consensual relations between adults have been found to be both discriminatory and to constitute a violation of the right to privacy. The very existence of such laws, irrespective of whether they are enforced and the severity of the penalties they impose, may have far-reaching effects on LGBT persons' enjoyment of their fundamental human rights. Even where homosexual practices are not criminalized by specific provisions, others directed at homosexual sex such as those proscribing "carnal acts against the order of nature' and other crimes, such as

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Law: a Practitioners Guide. Practitioners Guide No. 4, 2009 [interactive]. [accessed 01-11-2011]. <http://www.unhcr.org/refworld/docid/4a783aed2.html>.

9 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. [2004] OJ, L 304/12.

10 'Article 10
Reasons for persecution
1. Member States shall take the following elements into account when assessing the reasons for persecution:
<...> (d) a group shall be considered to form a particular social group where in particular:
members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article; <...>'

11 'Article 9
Acts of persecution
<...> 2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:
<...> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
(c) prosecution or punishment, which is disproportionate or discriminatory;
(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; <...>'.

'undermining public morality' or 'immoral gratification of sexual desires', may be relevant for the assessment of the claim.

18. A law can be considered as persecutory *per se*, for instance, where it reflects social or cultural norms which are not in conformity with international human rights standards. The applicant, however, still has to show that he or she has a well-founded fear of being persecuted as a result of that law. Penal prosecution, under a law which *per se* is not inherently persecutory or discriminatory, may in itself amount to persecution, for instance, if applied to particular groups only or, if it is arbitrary or unlawfully executed.'[12]

In spite of above-mentioned detailed international and EU refugee law requirements, a number of EU countries do not consider that criminalisation of same-sex sexual acts between consenting adults amounts to persecution (even in cases of enforced criminalisation). According to the report 'Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe', Denmark, Norway, Bulgaria, Spain and Finland reject LGBT asylum seekers even from the countries where the criminalisation is enforced; Austria, Belgium, France, Germany, Italy, Ireland, Lithuania, the Netherlands, Poland, Sweden and the UK recognise only enforced criminalisation as 'persecution'. In the report Italy and Austria are also presented as the examples of good practice because their courts decide that the mere criminalisation (even not enforced) amounts to 'persecution' [13].

It is noteworthy that the UK national expert S.Chelvan suggests the further reaching interpretation of the refugee definition and considers that the non-enforced criminalisation always must (not should) amount to 'persecution'. He pays attention, that in case of the non-enforced criminalisation the expression of identity is still governed by the threat of harm flowing directly out of a fear of arrest, detention, torture and in some cases, execution; that the criminalisation reinforces a general climate of homophobia (presumably accompanied by transphobia), which enables State agents as well as non-State agents to persecute or harm LGBT with impunity; and that the criminalisation makes LGBTs into outlaws, at risk of persecution or serious harm at any time[14].

The author of the present article agrees with the position of S.Chelvan and considers this as a correct interpretation of refugee definition. In its decision *Toonen v. Australia* the UN Human Rights Committee held that the non-enforced criminalisation made the applicant the victim whose communication was admissible, and the violation of the right to privacy was established[15]. And broadly accepted J.C.Hathaway's definition of 'persecution' includes a discriminatory or non-emergency violation of the right to

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12 *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*. Geneva, 21 November 2008, p. 10 [interactive]. [accessed 01-11-2011]. <http://www.unhcr.org/refworld/pdfid/48abd5660.pdf>.

13 Jansen, S.; Spijkerboer, T., *supra* note 2, p. 22–24.

14 Chelvan, S. From Sodomy to Safety?: the Case for Defining Persecution to Include Unenforced Criminalisation of Same-sex Conduct. *VU University Amsterdam, Fleeing Homophobia Conference, 5-6 September, 2011*, p. 1.

15 *Toonen v. Australia*, comm. no. 488/1992, HRC.

privacy[16]. Therefore, it should be concluded that the non-enforced criminalisation of same-sex sexual acts between consenting adults amounts to persecution as well as enforced criminalisation.

2. Other Qualification Problems of LGBT Asylum Seekers (State Protection against Non-State Persecution; Concealment of Sexual or Gender Identity; Internal Protection)

Another extensive debate in many jurisdictions is whether the decision makers could require from LGBT asylum seekers to conceal their sexual or gender identity in order to avoid their human rights violations in a country of origin (i.e., 'reasonably tolerable discretion' requirement). The UNHCR has already provided a clear answer and its guidance on the correct interpretation of refugee definition:

'25. A person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution. As affirmed by numerous jurisdictions, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action. Just as a claim based on political opinion or nationality would not be dismissed on grounds that the applicant could avoid the anticipated harm by changing or concealing his or her beliefs or identity, applications based on sexual orientation and gender identity should not be rejected merely on such grounds. <…>'[17]

However, in the majority of EU Member States discretion reasoning still occurs (e.g., Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, Malta, the Netherlands, Poland, Romania, Spain; Norway and Switzerland also use the discretion argument)[18].

In the report the UK is presented as the example of good practice because the UK courts abandoned the restrictive approach of 'reasonably tolerable discretion'[19]. However, J.Wessels identifies another problem in the UK case law. The courts abandoned the requirement of concealment caused by fear of persecution, but introduced the distinction between 'fear of persecution' and 'fear of some sort of social pressure', which is difficult to understand. The courts motivate that it is possible that the only real reason for an applicant behaving discreetly would be his perfectly natural wish to avoid harming his relationships with his family, friends and colleagues, and that the Convention does not afford protection against these social pressures, however, and so an applicant cannot claim asylum in order to avoid them. J.Wessels does not agree with such a distinction and claims that a 'choice' of concealment is always caused by the fear of persecution[20].

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16 Hathaway, J. C. *The Law of Refugee Status*. Canada: Butterworths, 1991, p. 109−112.

17 UNHCR, *supra* note 12, p. 12.

18 Jansen, S.; Spijkerboer, T., *supra* note 2, p. 34.

19 *Ibid.*, p. 36−38.

20 Wessels, J. HJ (Iran) and Another – Reflections on a New Test for Sexuality-based Asylum Claims in Britain. *VU University Amsterdam, Fleeing Homophobia Conference, 5-6 September, 2011*, p. 21−29.

The author of the present article agrees with the position of J.Wessels and thinks this would be a correct interpretation of refugee definition. J.Wessels raises objections with regard to the examination of the state of mind of the asylum seeker similar to the objections having been raised by the authorities of refugee law. A.Grahl-Madsen thinks that it is not important what type of person an applicant is, and that 'well-founded fear' exists, irrespective of whether the applicant in question is a babe-in-arms, a lunatic, ignorant or well-informed, naïve or cunning. He explains that a 'reasonable man' approach is sufficient, and that 'well-founded fear' should be linked only to external facts and the likelihood of persecution[21]. J.C.Hathaway argues that the two-part approach to 'well-founded fear' is neither historically nor practically reasonable. 'Well-founded fear' was intended to stress the forward-looking nature of the test, and it has nothing to do with the state of mind of an applicant. He thinks that an applicant of stoic disposition should not be viewed as less worthy of international protection than the one who is easily scared, because the international human rights instruments are basically concerned with objective indicators of human dignity[22]. G.S.Goodwin-Gill recognises that fear may be exaggerated or understated, but still reasonable. However, he also concludes that it seems to be intended to require not so much evidence of subjective fear, as evidence of the subjective aspects of an individual's life, including beliefs and commitments[23]. Therefore, it should be concluded that concealment must not have any role. Instead, it must be important whether the applicant would have a wellfounded fear of being persecuted if it were no concealment.

Two more refugee qualification problems in LGBT cases are related to the correct interpretation of Articles 7 and 8 of the Qualification Directive. Many Member States reject LGBT asylum seekers motivating that they could have applied to police asking for protection against their neighbours (e.g., Finland, Denmark, Lithuania, Czech Republic, the Netherlands, Portugal, Sweden, Germany, Spain, Poland) and/or they could have moved to another region of their country of origin (e.g., Austria, Denmark, Ireland, Finland, Italy, the Netherlands, Lithuania)[24]. The solution to this problem could be found in careful reading of Articles 7 and 8 of the Qualification Directive, which refer to reasonable, accessible and effective legal system.

The UNHCR elaborates further and provides useful guidance on the issues of state protection against non-state persecution and internal protection:

'33. As homophobia, whether expressed through laws or people's attitudes and behaviour, often tends to exist nationwide rather than merely being localized, internal flight alternatives cannot normally be considered as applicable in claims related to sexual orientation and gender identity. Any suggested place of relocation would have to be carefully assessed and must be both 'relevant' and 'reasonable'. <…>

21 Grahl-Madsen, A. *The Status of Refugees in International Law, Vol. I*. Netherlands: A.W.Sijhoff, 1966, p. 174.

22 Hathaway, J. C., *supra* note 16, p. 65−75.

23 Goodwin-Gill, G. S. *The Refugee in International Law*. 2nd ed. Oxford: Clarendon Press, 1996, p. 40−41.

24 Jansen, S.; Spijkerboer, T., *supra* note 2, p. 29−31, 42−43.

34. Where a non-State actor is the persecutor, it can often be assumed that if the State is not willing or able to protect in one part of the country, it will not be willing or able to do so in any other part. Applicants cannot be expected to suppress their sexual orientation or gender identity in the internal flight area, or required to depend on anonymity to avoid the reach of the agent of persecution. While a major or capital city in some cases may offer a more tolerant and anonymous environment, the place of relocation must be more than a "safe haven". The applicant must also be able to access a minimum level of political, civil and socio-economic rights. Thus, he or she must be able to access State protection in a genuine and meaningful way. The existence of LGBT related Non Governmental Organizations does not in itself provide protection from persecution.' [25]

Taking into account the issues discussed above, it is necessary to conclude that Articles 7 and 8 of the Qualification Directive have to be applied in such a way that, when sexual orientation or gender identity is criminalised in the country of origin and/or the society in the country of origin is highly homophobic (transphobic), LGBT asylum seekers are not required to invoke the protection of the authorities and/or are not reasonably expected to seek alternative internal protection. LGBT asylum seekers are also not required to hide their sexual orientation or gender in the internal protection area in order to be protected against persecution[26].

Conclusions

The non-enforced criminalisation of same-sex sexual acts between consenting adults amounts to persecution as well as the enforced criminalisation.

Instead of examining the state of mind causing the concealment, it must be important whether the LGBT asylum seeker would have a wellfounded fear of being persecuted if it were no concealment.

When sexual orientation or gender identity is criminalised in the country of origin and/or the society in the country of origin is highly homophobic (transphobic), LGBT asylum seekers are not required to invoke the protection of the authorities and/or are not reasonably expected to seek alternative internal protection. LGBT asylum seekers are also not required to conceal their sexual orientation or gender in the internal protection area in order to be protected against persecution.

25 UNHCR, *supra* note 12, p. 15−16.

26 Jansen, S.; Spijkerboer, T., *supra* note 2, p. 29, 31, 45.

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KVALIFIKAVIMO PABĖGĖLIAIS PROBLEMOS LGBT[27] PRIEGLOBSČIO BYLOSE

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Santrauka. *2011 m. vis dar yra 76 valstybės, kurios kriminalizuoja tos pačios lyties asmenų seksualinius santykius, esant pačių suaugusių asmenų sutikimui santykiauti. Septyniose iš minėtų 76 valstybių (t. y. Mauritanijoje, Sudane, šiaurinėse Nigerijos valstijose, pietinėse Somalio dalyse, Irane, Saudo Arabijoje, Jemene) homoseksualiniai santykiai yra baudžiami mirties bausme. Homofobija (ir / ar transfobija) taip pat yra paplitusi daugelyje visuomenių. Nepaisant to, LGBT prieglobsčio prašytojams yra labai sunku būti pripažintiemss pabėgėliais, nes LGBT bylose yra daug problemų, valstybėms netinkamai kvalifikuojant LGBT prieglobsčio prašytojus.*

Todėl šio straipsnio autoriaus tikslas yra nagrinėti pagrindines kvalifikavimo pabėgėliais problemas LGBT prieglobsčio bylose (t. y. kriminalizavimo vertinimas; valstybės apsauga nuo nevalstybinio persekiojimo; reikalavimas slėpti savo seksualinę orientaciją ar lytinę tapatybę; vidinės apsaugos alternatyva) ir pasiūlyti problemų sprendimus. ES direktyvoje 2004/83/EB yra įtrauktos kelios svarbios nuostatos, kurios padeda LGBT prieglobsčio prašytojams atitikti bendrą pabėgėlio sąvoką. Šiandien yra svarbu tas nuostatas tinkamai aiškinti ir užtikrinti jų perkėlimą į nacionalinę valstybių narių praktiką.

Straipsnyje, aiškinant LGBT bylose problemų keliančius pabėgėlio sąvokos elementus, daromos pagrindinės išvados, kad:

- *kriminalizavimas tos pačios lyties asmenų seksualinių santykių, esant pačių suaugusių asmenų sutikimui santykiauti, yra persekiojimui prilygstantis asmens privataus gyvenimo pažeidimas, nepriklausomai nuo to, ar tokie baudžiamieji įstatymai yra įgyvendinami, ar ne;*
- *jei LGBT prieglobsčio prašytojas kilmės šalyje buvo priverstas slėpti savo seksualinę orientaciją ar tapatybę, yra svarbu, ar neslepiant jos jam grėstų persekiojimas;*
- *taikant valstybės apsaugos ir vidinės apsaugos alternatyvos pabėgėlio sąvokos elementus LGBT bylose, yra svarbu atsižvelgti, kad homofobiškose (ir / ar transfobiškose) visuomenėse apsauga dažniausiai yra neefektyvi ir / arba racionaliai netinkama LGBT asmenims pasinaudoti.*

Reikšminiai žodžiai: *prieglobstis, pabėgėlio sąvoka, LGBT prieglobsčio prašytojai, persekiojimas, valstybės apsauga, vidinės apsaugos alternatyva, Kvalifikavimo direktyva.*

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27 Terminas „LGBT“ reiškia „lesbietes“ (moterys, kurias traukia kitos moterys), „gėjus“ (vartojama žmonėms, kuriuos traukia tos pačios lyties žmonės, pavadinti; dažnai vartojama vyrams, kuriuos traukia kiti vyrai, taip pat gali būti vartojama ir lesbietėms pavadinti); „biseksualus“ (asmenys, kuriuos traukia ir vyrai, ir moterys) ir „transeksualus“ (vartojama žmonėms, kurių lyties tapatybė arba / ir lyties išraiška skiriasi nuo jų įgimtos lyties, kai moteris gali save identifikuoti kaip vyrą arba vyras save identifikuoti kaip moterį, pavadinti).

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