LGBT Persecution in Mexico and Canada’s Refugee Program

Backgrounder

Current Status/Summary

Canada has preserved its humanitarian tradition through ratification of international conventions, human rights laws, and even revising its constitution in 1982. It is obligated under the Convention Relating to the Status of Refugees (the Convention) and the International Covenant on Civil and Political Rights (ICCPR) to provide asylum to those who have a well-founded belief of persecution. The words of Article 9 of the ICCPR, liberty and security of person, form the basis for sec. 7 of the Charter of Rights and Freedoms. A report prepared by Harvard Law School’s Human Rights Program, Global Rights, International Gay and Lesbian Human Rights Commission, and Colectivo Binni Laanu A.C., prepared for the UN Human Rights Committee, has demonstrated how the persecution faced by LGBT people in Mexico violate the ICCPR. Our obligations to protect people facing these types of persecution are enshrined in Canada’s refugee laws, which promise to provide asylum to those who fit the definition of a refugee under the Convention.

Recent developments in Canada’s legal system have limited access to such rights for many LGBT people in Mexico, who face a very real threat of persecution, harassment, and violence. For reasons explained below, the expedited procedures created by Bill C-31 allow for LGBT people with well-founded fear of persecution to be sent back to their country of origin, where they may face persecution, violence, or possibly death. Additionally, Canada’s Immigration and Refugee legislation currently recognized guardianship and spousal bonds based on documentation in claimants’ country of origin. The effect is that Canada does not recognize the family bonds of LGBT claimants from countries that discriminate against LGBT families, such as Mexico.

Human Rights Defenders: Violence and Killings

Human rights defenders who try to advocate for LGBT rights within Mexico are at extreme risk for violence. Javier Gómez Bastida, a transgender lawyer who was the head of a special unit for support of the Lesbian, Gay, Bisexual, Transsexual, Transgender, Transvestite and Intersex (LGBTTTTI) community in the Attorney General’s office of the Federal District (PGJDF), was found dead earlier this year, with his body showing signs of blunt trauma.

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Early attempts have been made to discredit the political importance of this killing by claiming it as a domestic assault. However, reports have shown a trend where potential LGBT hate crimes are labelled as crimes of passion by police and their homophobic motivation is left uninvestigated. In addition, as the Immigration and Refugee Board (IRB) itself notes, “human rights defenders that work on sexual-diversity issues are often the object of threats, aggressions, murder, politically motivated criminal charges and imprisonment for organizing protests or events promoting respect for human rights.” One documented example of police refusing to investigate hate-motivated LGBT violence was the murder of LGBT activist Octavio Acuna Rubio in 2005. Representatives from Mexico’s National Council for the Prevention of Discrimination (CONPARED) have labeled the homicide a homophobic hate crime, but the police investigation failed to investigate this motive, and treated the crime as a common assault.

Killings of activists within Mexico have been common in recent years. Gender rights activist Agnes Torres Hernandez was an outspoken transgender advocate, who was found killed in March 2012. In 2011, two LGBT activists, Quetzacoatl Leija Herrera and Javier Sánchez Juárez, were killed just two months apart.

### Rates of Violence, Homophobia and Transphobia in the General Public

The exact rates of homophobic and transphobic violence and discrimination are difficult to determine, as there is currently no hate crime legislation for LGBT violence. However, the surveys that have been collected reveal disturbing trends. According to one study, 76.4% of LGBT people have experienced physical violence because of their sexual orientation or gender identity and 53.3% have been assaulted in public spaces. Non-violent forms of discrimination, such as employment discrimination, and discrimination while accessing public services are also prevalent. According to Mexico’s national association for HIV/AIDS (CENSIDA), many victims of homophobic violence in Mexico would be unlikely...

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4 Shadow Report, *Supra* Note 1


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to report it.\textsuperscript{10} According to CONAPRED (Mexico’s National Council for the Prevention of Discrimination), LGBT people lack confidence in law enforcement agencies because of perceived homophobia.\textsuperscript{11}

Although police rarely label homophobia or transphobia as a motive in homicides, statistics have been compiled which show that there was an average of 60 killings motivated by sexual orientation per year between 2001 and 2009.\textsuperscript{12}

**Police Impunity and Acts of Violence**

Despite legislation aiming to protect people, including LGBT people, from violence, LGBT people have little recourse against violence because of the prevalence of homophobia and transphobia in police and security forces. According to a study by the Metropolitan Autonomous University, Mexico’s security forces have harassed 20% of LGB people and 30% have faced discrimination by police.\textsuperscript{13} Another study also found that 30% had been discriminated against, but also found that 20% of LGB people had been assaulted by police.\textsuperscript{14} Reports by Amnesty International document an incident in Yucatán state, where an LGBT activist was handcuffed and blindfolded by police, who "repeatedly beat him in the face, chest, and back," and "questioned him using homophobic language."\textsuperscript{15} The victim was also threatened and told to keep silent about the incident. Many municipal governments still have laws against “immoral acts” and “public indecency” which law enforcement use to harass same sex couples.\textsuperscript{16} Even if incidents are reported to police, sources indicate that impunity of crimes against sexual minorities is prevalent.\textsuperscript{17}

**Federal District: Recognition and Denial**

The Federal District (Mexico City) has significantly more progressive legislation than many other areas of the country. To date, it has already passed equal marriage and adoption legislation, which has withstood constitutional challenge.\textsuperscript{18} This is sometimes used as evidence that Mexican LGBT people need not seek asylum in another country, because they can seek safe refuge in the Federal District. However, this is not the experience of many LGBT people in Mexico City. Many who identify as LGBT and live within the

\textsuperscript{10} Issue Paper, \textit{Supra} Note 6.
\textsuperscript{11} \textit{Ibid}.
\textsuperscript{13} MEX103804.E, \textit{Supra} Note 5
\textsuperscript{14} Shadow Report, \textit{Supra} Note 1.
\textsuperscript{16} Issue Paper, \textit{Supra} Note 6.
\textsuperscript{17} MEX103804.E, \textit{Supra} Note 5
\textsuperscript{18} MEX103798.E, \textit{Supra} Note 12
Federal District report homophobia, transphobia, and violence, sometimes at the hands of police.\textsuperscript{19} 11% of LGBT people living in Mexico City report that they have been victims of threats, extortion, or detention by police due to their sexual orientation.\textsuperscript{20} The prevalence of societal and police homophobia and transphobia mean that LGBT people may face persecution within the Federal District.

**Mexico and Bill C-31**

With the introduction of Bill C-31, *Protecting Canada’s Immigration System Act*, Canada has formed a “safe countries list.”\textsuperscript{21} Applicants from these countries receive expeditious hearings, and do not share many of the rights that Canada has traditionally guaranteed asylum seekers. One problem with this approach is that, although the decision to label a country as a “designated country of origin” is ultimately left to the Minister of Citizenship and Immigration, counties are designated “safe” based on aggregated data of failed refugee applications.

The challenge with the “safe countries list” is that it does not appropriately recognize that many refugees, and potential claimants, are persecuted because of membership in a particular social group. A persecuted group from a country where most citizens are safe may not receive protection if the general population of that country has filed a large number of unsuccessful claims. Mexico was designated a “safe country of origin” on February 15, 2013 due to the conditions faced by most citizens, and the number of rejected refugee claims. Canada’s use of aggregated data on Mexico has caused an erasure of the heightened risk of persecution and violence faced by LGBT asylum seekers.

LGBT refugees from Mexico will face an expeditious process, with 45 days processing time (rather than the prior 171) for those who make a refugee claim at a port of entry, and 30 days for those who make a claim at an inland office for Citizenship and Immigration. This is especially problematic for LGBT claimants. As noted by researchers at Simon Fraser University, because of the documentary evidence requirements for claims based on sexual orientation and gender identity, LGBT claimants often require a greater time to compile documents.\textsuperscript{22} Even LGBT asylum seekers with a very valid claim of persecution may not be able to compile documentary evidence of their sexual orientation or gender identity, or the persecution they face, in time for these procedures. After having their application expeditiously declined, LGBT refugees from countries labelled “safe” will no longer have a right to appeal their

\textsuperscript{20} MEX103804.E, Supra Note 5
decision, or a right to make a claim under humanitarian and compassionate grounds. These requirements violate UN High Commissioner for Refugees’ guidelines on the treatment of SOGI refugees, which recognize that many LGBT people will not have lived openly as LGBT in their countries of origin.\(^{23}\) It notes that many claimants facing real persecution will struggle to produce documents and encourages procedures that are sensitive to their circumstances.

Additionally, LGBT claimants may have difficulty disclosing aspects of their sexual orientation or gender identity, or may express them in ways inconsistent with Canadian terminology on SOGI. For instance, in a 2007 Federal Court ruling, the court noted that the claimant was hesitant to acknowledge her gender identity to immigration officials for fear of persecution.\(^{24}\) Expedited procedures are inappropriate for providing a fair hearing where a person must disclose information to immigration officials, due to discrimination and potential violence they have experienced from public officials in their country of origin. Accommodations are currently available for vulnerable people seeking asylum,\(^ {25}\) but the reduced trial period may also limit a person’s ability to seek and obtain accommodations in time.

**LGBT families and recognition for non-accompanying family members**

Canada’s refugee and immigration programs allow refugee claimants and immigrants to list family members who are not able to accompany them at the time they enter Canada, but will be joining them after the fact.\(^ {26}\) However, Canada’s refugee and immigration system creates very specific barriers for LGBT families as it relies on recognition of family bonds by the country that families are coming from. Canada allows refugees and immigrants to list their spouses\(^ {27}\) as non-accompanying family members, but does not allow common-law partners to do so. The effect of this is that Canada will not recognize partnerships where couples have not been able to access same-sex marriage.\(^ {28}\) A couple fleeing a country due to persecution based on sexual orientation usually does not have access to marriage equality in their country of origin, and is unlikely to have been able to travel to another country to

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obtain a marriage license. The result is that same-sex partners who must travel to Canada separately will most often be unable to take advantage of the one-year window that Canada offers to opposite-sex spouses.

Canada’s refugee and immigration programs also allow claimants to list dependent children who will not be able to travel with them. This can occur when families are separated due to the persecution that led to their refugee claim. However, Canada’s system creates specific barriers for LGBT families who are forced to travel separately. Most governments worldwide do not allow individuals to adopt their same-sex partner’s biological child, or allow same sex partners to jointly adopt. As a result, Canada will not recognize that many parents in same-sex relationships are parents to their children, and as a result, they will not be able to access the resources available to parents who are in opposite-sex relationships.

This issue is particularly concerning when considering the persecution of LGBT families in Mexico. In some Mexican states, same-sex couples are prohibited from adopting by law. However, even in areas that do allow for adoption by same-sex couples, LGBT individuals risk facing discrimination by adoption and child protection agencies, which may see them as unfit parents due to their sexual orientation or gender identity. LGBT people risk discrimination both during the adoption process, and to potentially losing custody of their children after the fact. In one instance, an 8-year-old child was taken from the transgender woman, Alondra Avila Velez, who had raised the child since birth. The state office of the agency on family issues removed the child, whom was then sent to the State Family Council. When a court ordered that the child be returned to her adoptive mother’s custody in 2008, the State Family Council moved the child to an unknown location, citing the transgender woman’s “moral character.” This violates the rights of both LGBT parents and their children, under Articles 17 and 24 of the ICCPR.

**Conclusion:**

LGBT people face a high risk of persecution, violence, and even death within Mexico. Canada’s designated country of origin list has the effect of requiring refugee boards to use expedited procedures on this vulnerable group. LGBT claimants are forced to prove intimate aspects of their personal lives, which have been denied by their government and community, and face the threat of having no right to appeal decisions. Additionally, Canada’s IRB is not currently prepared to recognize family bonds which are denied through state persecution.

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30 Shadow Report, *Supra* Note 1