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Sexual orientation and Gender identity in Asylum claims under the concept of membership of a particular social group, with a particular interest to the domestic and European case-law: A long road to cross towards a more solidified approach of sexual orientation and gender identity-related persecution?

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Abstract

The research at hand deals with the topic of the Sexual Orientation and Gender Identity (SOGI)-related persecution and specifically, with the Refugee Status Determination (RSD) procedure of asylum seekers raising such experiences when applying for international protection. It is the author's goal to find out whether in the Greek legal order, in view, *inter alia*, of the progressive awareness of the challenges that the LGBTQIA+ (Metzger 2020) community around the globe faces, there is still a long way to cross towards a more solidified approach of the claims of persons belonging to a particular social group due to their SOGI. To this end, the research, after analyzing the current situation and the terminology used, as well as, the respective legal framework, with special emphasis to the vulnerability notion under the Common European Asylum System (CEAS), argues that there are some contentious issues (both legal and practical) during the RSD process, especially in the stage of the credibility assessment, given that, due to the nature of these claims, the respective applicants can only prove their claims via their own statements and at times, even at a later stage of the RSD procedure. Having the aforementioned in mind, the researcher engages herself with the examination of the practical application of the respective instruments in the Greek jurisprudence, by codifying a series of decisions which she considers as landmarks. Upon these, in fact, the research contextualizes some best practices that could be utilized as the necessary next steps towards this much longed for solidified approach vis-à-vis SOGI-related asylum claims.

Keywords: asylum, refugee status determination procedure, SOGI, vulnerability, particular social group, asylum law

Περίληψη

Η παρούσα εργασία ασχολείται με το ζήτημα της σχετιζόμενης με τον σεξουαλικό προσανατολισμό και την ταυτότητα φύλου δίωξης και ειδικότερα, με τη διαδικασία αναγνώρισης ως προσφύγων, ατόμων που αιτούνται άσυλο και που επικαλούνται σχετικές εμπειρίες, στο πλαίσιο της διαδικασίας εξέτασης του αιτήματός τους περί παροχής διεθνούς προστασίας. Σε αυτό το πλαίσιο διερευνάται πόση απόσταση χρειάζεται να διανυθεί ακόμα, ωσότου η ελληνική έννομη τάξη διαμορφώσει μια πιο αποκρυσταλλωμένη εικόνα των ισχυρισμών ατόμων που ανήκουν σε μια ιδιαίτερη κοινωνική ομάδα λόγω του σεξουαλικού προσανατολισμού ή/και της ταυτότητας φύλου τους, αποκρυστάλλωση απαραίτητη τόσο για τον τρόπο προσέγγισης και διαχείρισης των σχετικών αιτημάτων προστασίας όσο και εν όψει, μεταξύ άλλων, της σταδιακής αναγνώρισης των προκλήσεων που αντιμετωπίζει παγκοσμίως η κοινότητα των ΛΟΑΤΚΙΑ+ (Metzger 2020). Με αφετηρία μια περιγραφή της παρούσας κατάστασης επί του εξεταζόμενου ζητήματος και αφού προηγηθεί μια ανάλυση της χρησιμοποιούμενης σχετικά ορολογίας και του σχετικού νομικού πλαισίου, με ιδιαίτερη έμφαση στην έννοια της ευαλωτότητας υπό το Κοινό Ευρωπαϊκό Σύστημα Ασύλου, υποστηρίζεται ότι υπάρχουν κάποια προβληματικά σημεία (τόσο σε νομικό όσο και σε πρακτικό επίπεδο), που εντοπίζονται κατά τη διαδικασία αναγνώρισης του καθεστώτος του πρόσφυγα και ιδίως κατά το στάδιο εκτίμησης της αξιοπιστίας των προβαλλόμενων ισχυρισμών, δεδομένου ότι, εξαιτίας της φύσης αυτών, οι εκάστοτε αιτούντες μπορούν να αποδείξουν όσα ισχυρίζονται μόνο μέσω των δηλώσεων τους και ενίοτε, ακόμη και σε μεταγενέστερο στάδιο της διαδικασίας. Λαμβανομένων υπόψιν των ανωτέρω, η συγγραφέας του παρόντος ασχολείται με την εξέταση της πρακτικής εφαρμογής της σχετικής νομοθεσίας, όπως αυτή αντικατοπτρίζεται στην ελληνική νομολογία, «κωδικοποιώντας» μια σειρά αποφάσεων που η ίδια θεωρεί ως ορόσημα, μέσω δε της εξέτασης αυτής καταλήγει στον εντοπισμό κάποιων καλών πρακτικών που θα μπορούσαν να αποτελέσουν τον καθοδηγητικό μίτο προς τον επιζητούμενο αποκρυσταλλωμένο τρόπο προσέγγισης των αιτημάτων ασύλου που σχετίζονται με τον σεξουαλικό προσανατολισμό και την ταυτότητα φύλου.

Λέξεις-κλειδιά: άσυλο, διαδικασία αναγνώρισης του καθεστώτος πρόσφυγα, σεξουαλικός προσανατολισμός και ταυτότητα φύλου, ευαλωτότητα, ιδιαίτερη κοινωνική ομάδα, δίκαιο ασύλου.

⎸Acknowledgements

To the refugees who "*are mothers, fathers, sisters, brothers, children, with the same hopes and ambitions as us - except that a twist of fate has bound their lives to a global refugee crisis on an unprecedented scale*."[1]

I would like to express my enormous gratitude to the people that helped me get through this effort. Without the moral support of my parents, my sisters and friends, I am uncertain whether I would be able to have completed this work, which reflects the encouragement and enthusiasm of all the persons involved in my life and thus, it is dedicated to them.

Nevertheless, it goes without saying that it is because of the tireless and persistent efforts of all the individuals and organizations across the globe who have struggled to bring the issue of gender identity into the international scene by breaking the chain of -conscious and unconscious- stereotyping, that, I have been able to deepen my research in this field, not only currently, but also, while I was working as part of the UNHCR Protection Team on Samos Island and focal point for vulnerable asylum seekers, as well as, as the UNHCR-appointed member of the semi-judicial 7th Independent Appeals' Committee of the Appeals' Authority of the Greek Ministry of Migration and Asylum. For this reason, this research is devoted not only to all the resilient and inspiring individuals that I have had the chance to meet and know, but also, to all the persons who simply decide to be dissidents in a world that is very unjust.[2]

Upon completing this study, though, I am still worried that the words below, coming from a recognized -by the 7th Independent Appeals' Committee- refugee from Morocco who defines himself as gay, depict the ongoing challenges of many individuals:

> "When my brothers found out about my relation, my problems started. They treated me as if I were not their brother. They started beating and threatening me that they would kill me. I had to stay away from other gay people – I managed to do it for three years; I couldn't do it anymore […] I would rather die than return to Morocco. There, people do not love gays".

[1]UNHCR (United Nations High Commissioner for Refugees). 2016."Stars ask you to stand #WithRefugees."UNHCR. Published January 16, 2016. https://www.unhcr.org/news/latest/2016/6/57625e2e4/stars-ask-you-to-stand-withrefugees.html. (Khaled Hosseini´s words).
[2]Paraphrase of the famous quote of the human rights' activist and feminist, Nawal El Saadawi: "When we live in a world that is very unjust, you have to be a dissident".

Table of Contents

1. **Introduction – A reality check …….. 9**
2. **The Legal Framework ……... 13**
   - 2.1. The Geneva Convention relating to the status of Refugees of 1951 (Refugee Convention) and the United Nations High Commissioner for Refugees (UNHCR)
   - 2.2. Human Rights Law
   - 2.3. The vulnerability context in the Common European Asylum System (CEAS)
3. **The Refugee Status Determination (RSD) procedure through the lens of the domestic and EU jurisprudence – A paradigm shift? …… 14**
   - 3.1. Well-founded fear
     - 3.1.1. To be (discreet) or not to be? The "option" of concealment
   - 3.2.Persecution - The Criminalization of diverse Sexual Orientation and Gender Identity (SOGI) as a decisive factor?
   - 3.3. The nexus requirement
   - 3.4. Membership of a particular social group (MPSG)
     - 3.4.1. Credibility assessment
     - 3.4.2. Disclosure of Sexual Orientation and Gender Identity (SOGI) at a later stage of the procedure in view of two decisions of the 7th Independent Appeals' Committee
   - 3.5. State Protection
   - 3.6. The alternative of Internal Relocation
   - 3.7. Critical outline of the Relevant case-law
4. **Final Remarks: Good practices towards a gendered protective framework … 41**

List of Abbreviations and Conventions

CEAS Common European Asylum System

CEDAW Convention on the Elimination of all Forms of Discrimination Against Women

COI Country of origin information

DSSH Difference, Stigma, Shame and Harm

EASO European Asylum Support Office

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

CJEU Court of Justice of the European Union

EDAL European Database of Asylum Law

EU European Union

FRA European Union Agency for Fundamental Rights

ILGA International Lesbian, Gay, Bisexual, Trans and Intersex Association

IOM International Organization for Migration

LGBTQIA+ Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Intersex, Asexual and other

(M)PSG (Membership of a) particular social group

RSD Refugee Status Determination

SOGI Sexual orientation and gender identity

UDHR Universal Declaration of Human Rights

UK United Kingdom

UN United Nations

UNGA United Nations General Assembly

UNHCR United Nations High Commissioner for Refugees

1. Introduction – A reality check

According to the Universal Declaration of Human Rights, a milestone document that led the way towards the adoption of a series of human rights treaties globally and regionally, "all human beings are born free and equal in dignity and rights"[3] and "everyone has the right to life, liberty and security of person".[4] (UN 1948)

Nevertheless, as practice has shown (ILGAWorld 2020), these provisions do not necessarily reflect the reality of many individuals with diverse Sexual Orientations or Gender Identities (SOGI)[5] in many parts of the world, including the European Union, where, on the one hand, the Charter of Fundamental Rights prohibits any kind of discrimination on grounds of sex (art.21) and there is "an LGBTIQ freedom zone" (European Parliament 2021), but, on the other hand, the European Convention on Human Rights (ECHR, hereinafter) does not include the prohibition of discriminatory treatment due to sexual orientation *per se*, whereas some Member States (MS) of the Council of Europe have not explicitly recognized sexual orientation, gender identity, and/or sex characteristics in their domestic asylum laws. (ILGA Europe n.d.(a); CDDH 2019,73-74)

This harsh reality applies as well, to the Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Intersex, Asexual individuals and others (LGBTQIA+s, henceforth)[6] as asylum seekers who, due to their SOGI, not only have they faced in their countries of origin severe discrimination and violence (ILGAWorld 2020, 331) but also, in the countries of reception, confront intimidating or insensitive border guards (Bruce-Jones 2015, 124) and find themselves in a great difficulty to reveal -let alone discuss about- their experiences throughout the Refugee Status Determination (hencerforth, RSD) procedure vis-à-vis adjudicators "who are incredulous of their claims because they either have children or had

[3]UN (United Nations) General Assembly.1948.Universal Declaration of Human Rights. December 10, 1948. United Nations Official Website. https://www.un.org/en/about-us/universal-declaration-of-human-rights. Article 1.
[4]UN (United Nations) General Assembly.1948. Universal Declaration of Human Rights. December 10, 1948. United Nations Official Website. https://www.un.org/en/about-us/universal-declaration-of-human-rights. Article 3.
[5]i.e. lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. See at the end of this part. Also, see Council of Europe. n.d. "Glossary on Sexual Orientation, Gender Identity or Expression and Sex Characteristics". Council of Europe. https://rm.coe.int/glossary-on-sogiesc-because-words-matter-en/1680a1f110. Basically, LGBTQIA is an acronym that encompasses two identity axes, whereas the term of diverse SOGI refers to the broad groups of individuals discussed under the topic of SOGI. See upon this, further, UNHCR (United Nations High Commissioner for Refugees). 2015. "Protecting persons with diverse sexual orientations and gender identities. A Global Report on UNHCRs Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees". Division of International Protection. UNHCR. December 2015. https://www.refworld.org/pdfid/566140454.pdf. Therein we can also find the definitions that are usually adopted when discussing about LGBTQIAs. More specifically, on the basis of this report (p.5), "a lesbian is a woman whose enduring physical, romantic, and/or emotional attraction is to other women. Gay is often used to describe a man whose enduring physical, romantic, and/or emotional attraction is to other men, although the term can be used to describe both gay men and lesbians. Bisexual describes an individual who is physically, romantically, and/or emotionally attracted to both men and women. Transgender describes people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term intersex covers bodily variations with regard to culturally established standards of maleness and femaleness, including variations at the level of chromosomes, gonads, and genitals".
[6]For the acronym and the history behind it, see, Cherry, Kendra.2020."What Does LGBTQ+ Mean?".Verywell Mind. Medically reviewed by Aron Janssen, MD. Updated on November 30, 2020. https://www.verywellmind.com/what-does-lgbtq-mean-5069804.

been in heterosexual relationships"[7] as well as, interpreters, who, to the author's knowledge, might not be familiarized with the respective terminology or seem to be uncomfortable when the applicants express their experiences, creating, thus, sentiments of insecurity to the latter.

Additionally, due to the lack of knowledge of specific Country of Origin Information (hereinafter, COI) as well as the inadequate understanding of diverse SOGI experiences in various cultural environments on behalf of the asylum organs -who, according to the EU Agency for Fundamental Rights (FRA 2017,7) tend to have stereotypical views on SOGI-, the individual examination and credibility assessment of such claims are affected negatively. (UNHCR 2021)

Moreover, notwithstanding the notion of vulnerability as defined in, and protected by, a series of legal instruments, both at the European[8] and domestic level,[9] and the increasing awareness[10] (History, n.d.; Morris n.d.) of the risks that people who flee their countries, face so as to avoid persecutory acts on the basis of their SOGI,[11] the national jurisprudence as shaped by the RSD organs at first instance and the semi-judicial organs at second instance,[12] has yet to contextualize the SOGI-related issues into recognizing LGBTQIA+ asylum-seekers under a "particular social group", around which there is a significant ambiguity.

Consequently, there is little consistency about how the Refugee Convention definition is applied, albeit quite unsurprisingly, if one considers that "the 1951 Convention does not prescribe any mechanism for determining whether or not someone is a refugee, leaving it up

[7]Bruce-Jones, Eddie. 2015."Death Zones, Comfort Zones: Queering the Refugee Question". *International Journal on Minority and Group Rights* 22, no.1(February): 101-127. DOI:10.1163/15718115-02201004, 24.

[8]i.e. **a)** the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, [2013] OJ L 180/96 (RCD (recast)), **b)** the Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L 180/31 (Dublin III regulation) **and c)** the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60 (APD (recast)) and the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and for the content of protection granted, [2011] OJ L 337/9 (QD (recast)). For a further analysis see IARMJ (International Association of Refugee and Migration Judges) & EASO (European Asylum Support Office). 2021."Judicial analysis: Vulnerability in the context of applications for international protection". EASO Professional Development Series for members of courts and tribunals.EASO.August 2020. https://www.easo.europa.eu/sites/default/files/Vulnerability_JA_EN.pdf. Also, under EU law regarding checks at border-crossing points, the Schengen Borders Code (art.4) requires that border control tasks be carried out with full respect for human dignity and in a way that does not discriminate against a person on grounds of SO, *inter alia*. See further, FRA(European Union Agency for Fundamental Rights).2020."Handbook on European law relating to asylum, borders and immigration". FRA. December 17, 2020. https://fra.europa.eu/en/publication/2020/handbook-european-law-relating-asylum-borders-and-immigration-edition-2020.

[9]Basically, L.4636/2019 on International Protection and other provisions (Gov. Gazette 169/A/01.11.2019) with which the International Protection Act was transposed into the domestic legal order and L.4686/2020 on "Improvement of the migration legislation, amendment of L. 4636/2019 (A΄ 169), 4375/2016 (A΄ 51), 4251/2014 (A΄ 80) and other provisions" (Gov. Gazette 96 /A/12.05.2020).

[10]Mainly, due to the social movements, as well as the raising-awareness activities of various organizations and human rights' activists worldwide.

[11]In fact, in many countries of origin (such as Ghana, Senegal, Tunisia, Morocco, Algeria and Togo) diverse SOGI are criminalized. Regrettably, though, the a/m countries are included in the National List of Safe Countries of Origin on the basis of art.87 par.5 of Law n.4636/2019 (Gov. Gazette 169/A/01.11.2019) (Joint Ministerial Decision No. 1302/20.12.2019 (Gov. Gazette 4907/ B/31.12.2019)).

[12]For this characterization of the Independent Appeals' Committees, see, Council of State.Decision No. 2347/2017.22 September 2017, paras. 20, 34 and 55.

to governments to formulate appropriate processes".[13] In addition, the situation becomes more complex because no official statistics on the number of SOGI-based asylum claims are collected amongst EU MS (except for Slovakia which provides partial data) (FRA 2017, 2-3) and thus, there is not any data collection[14] to which we could turn so as to find out how many LGBTQIA+s apply for asylum, when and where, as well as, the outcomes of such applications so as to compile such information and carry out a thorough relevant analysis on the basis of solid statistics.

Having the aforementioned in mind, the research at hand aims at shedding some light on the challenges faced in the examination of SOGI-related asylum claims, by presenting firstly, the necessary terminology used (*Introduction*) and by focusing on the legal framework and the notion of vulnerability (*Chapter 2*), an analysis of the RSD process through the prism of the relevant jurisprudence as shaped by the EU judicial organs and the Greek adjudicators (*Chapter 3*) is carried out, in an attempt to discover whether jurisprudence in our country has progressively paved the way for a more solidified approach of SOGI-related persecution. Against this backdrop, special attention will be given to the issues of credibility and disclosure of SOGI at a later stage of the procedure, as well as, the imputed SO in view of some noteworthy decisions. Finally, in *Chapter 4*, some suggestions towards a more solidified approach of the SOGI-related asylum claims will be written down, whereas it will be clarified that, despite the steps of progress, we still have a long way to cross to bridge the protection gap amongst asylum seekers with diverse SOGI.

Before "entering" the main part of this research, though, it is important to delineate the **key terminology** used[15] in such asylum cases. To begin with **Sexual Orientation** (SO), according to the Guidelines of the United Nations High Commissioner for Refugees (henceforth, UNHCR) on International Protection No. 9, this is defined as "each person's capacity for emotional, affective and sexual attraction to, and intimate relations with, individuals of the same gender or more than one gender".[16,17]

[13]See Alexander, M. 1999. "Refugee status determination conducted by UNHCR". *International Journal of Refugee Law* 11, no.2 (April): 251–289. https://doi.org/10.1093/ijrl/11.2.251, 254.

[14]It is worth mentioning that in the aforementioned Monthly Report only estimates on behalf of civil society representatives are included. For instance, as far as Greece is concerned, according to the Clients of Transgender Support Association in 2016, thirty-two (32) asylum seekers raised claims linked to SOGI. Also, according to another very recent research paper, only Belgium and Norway collect data about the exact numbers of asylum applications on LGBTI grounds, whereas Sweden, Italy and the Netherlands provide an approximation. (Manganini 2020,14).

[15]Although it needs to be acknowledged that the terminology is evolving.

[16]UNHCR (United Nations High Commissioner for Refugees). 2012."Guidelines on International Protection no. 9:Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugee." UNHCR. October 23,2012. https://www.unhcr.org/509136ca9.pdf, 3.

[17]The same definition is found in the work of various academic scholars, as well. See, among others, Papathanasiou. N. & Christidi, E-O. 2019."Gender Identity Notes".Athens. http://www.kordoutis.gr/panteion/images/pdf/sexualid/Notesgenderid.pdf.

As for **Gender Identity** (GI), this, as aptly pointed out by political scientist Georgia Warnke and Judith Butler as cited by Senthorun Raj (Senthorun 2016, 25:223), cannot be reduced to a biological reality and is frequently used as an umbrella term to refer to transgender, transsexual, and other gender-variant individuals, while also incorporating those who may not identify with any particular gender role or sex. In that sense, "identity becomes a means by which individuals understand themselves and their relationships to others".[18] Further, as it is stated in the UNHCR Guidelines aforementioned, GI refers to "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth"[19] and as mentioned in another source,

> "it refers to the individual's **personal sense of gender**. […] Most people have a gender identity, of the man or woman (or boy or girl), but for some people, their sex does not fit properly into one of these two options. In contrast to gender expression, **gender identity is not visible to others**".[20]

In the light of the foregoing, as well as the Yogyakarta Principles (ICJ 2007), this research uses the "LGBTQIA+" acronym or the term "diverse SOGI" with reference to the persons who do not conform to the conventional notions of female/male gender roles and the researcher, by no means, takes any position regarding which acronyms, definitions and/or terminology are most accurate in representing the groups of individuals discussed herein.

[18] Senthorun, R. 2016. "Evolving Bodies: Mapping (Trans)Gender Identities In Refugee Law". In The Routledge Research Companion to Geographies of Sex and Sexualities, edited by: Brown G., Browne K., Ch.25. Routledge Handbooks Online. May 19, 2016. https://www.routledgehandbooks.com/doi/10.4324/9781315613000, 223.

[19] UNHCR (United Nations High Commissioner for Refugees). 2012. "Guidelines on International Protection no. 9:Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugee." UNHCR. October 23,2012. https://www.unhcr.org/509136ca9.pdf, 3.

[20] Papathanasiou. N. & Christidi, E-O. 2019."Gender Identity Notes".Athens. http://www.kordoutis.gr/panteion/images/pdf/sexualid/Notesgenderid.pdf., 5 , as translated freely from Greek by the author.

2.The Legal Framework

Before the World War II, International Law was "a black canvas as far as the human rights' protection was concerned".[21] Thankfully though, today, in our constantly evolving societies, there is a plethora of international treaties and Conventions which have been adopted for the establishment of an effective protection net for asylum seekers and refugees, *inter alii*.

More specifically, the "traditional" legal regime, *i.e.*, the Geneva Convention relating to the status of Refugees of 1951 (Refugee Convention, henceforth) along with the internationally established norm of "non-refoulement" provide the main legal basis for the protection of persons fleeing persecution, torture and/or inhumane and degrading treatment due to specifically defined reasons. Against this backdrop, in this chapter, an overview of the protective framework, will be presented.

2.1. The Geneva Convention relating to the status of Refugees of 1951 (Refugee Convention) and the United Nations High Commissioner for Refugees (UNHCR)

The **Refugee Convention** is the main pillar of our asylum system, given that, under its art. 1A (2), a person can seek asylum if they are outside their country of origin and face a well-founded fear of persecution on grounds of their ethnicity, nationality, religion, particular social group, or political opinion. It is apparent that SOGI *per se* is not included in this provision, quite expectedly though, if one considers its drafting period and the persons who were then, perceived as its potential beneficiaries.[22]

With the progressive entry of gender-related issues into the international scene,[23] the **UNHCR**, "competent qua its Statute and international treaty law to oversee all instruments relevant to refugee protection",[24] started to shed light to the aspects of gender under the refugee definition, by focusing on women's persecution on the grounds of their female

[21] Bates E.2010. "History". In *International Human Rights Law*, edited by Moeckli D., Shah S., Sivakumaran S., Harris D, Part 1: 3-22. 3rd.ed. Oxford (December 14): Oxford University Press https://doi.org/10.1093/he/9780198767237.003.0001, 27.

[22] For its history see, Jaeger G. 2001. "On the history of the international protection of refugees", *International Review of the Red Cross* 83, no.843:727-737.https://www.icrc.org/ar/doc/assets/files/other/727_738_jaeger.pdf.and https://international-review.icrc.org/fr/articles/history-international-protection-refugees, whereas as, for the travaux préparatoires, see, UNHCR (United Nations High Commissioner for Refugees). 1990. "The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis". https://www.refworld.org/docid/53e1dd114.html.

[23]With the World Conference on Women in Nairobi in 1985 being amongst the first momentous steps towards the contextualization of gender-related issues.

[24] See, UNHCR (United Nations High Commissioner for Refugees). n.d. "Executive Summary of the Mandate of the High Commissioner for Refugees and his Office.https://www.unhcr.org/publications/legal/5a1b53607/executive-summary-of-the-mandate-of-the-high-commissioner-for-refugees.html.,2.

gender. In this context, the Conclusion No. 39 on Refugee Women and International Protection (Executive Committee of the High Commissioner's Programme 1985) which highlighted, *inter alia*, the vulnerability of women refugees, was published by the Executive Committee of the UNHCR and the latter, thenceforth, has begun to analyze and perceive the notion of "gender-based persecution" as being entailed into the "membership of a particular social group". (Binder 2001; Chapter 3 below)

To this end, in 2002, the UNHCR, aiming at guiding and developing an interpretative approach in accordance with the evolving findings of social studies, drafted and published its Guideline No. 1 where SOGI in asylum claims was mentioned for the first time (UNHCR 2002)[25], followed by a guidance note (UNHCR 2008) and a discussion paper, (UNHCR 2010) both of which subsequently, in 2012, were included in the Guidelines No. 9, which, as mentioned in their introductory note, complement all the relevant Guidelines issued by UNHCR pursuant to its mandate.

In its **No. 9 Guidelines**, the UNHCR,[26] before conducting a substantive and procedural analysis of the SOGI-related asylum claims in the light of the Refugee Convention, explicitly refers to the serious human rights abuses and other forms of persecution that individuals experience due to their actual or perceived SOGI, considering, *inter alia*, that

> "many countries maintain severe criminal laws for consensual same-sex relations, a number of which stipulate imprisonment, corporal punishment and/or the death penalty. In these and other countries, the authorities may not be willing or able to protect individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution".[27]

As a result,

> "LGBTI individuals are often highly marginalized in society and isolated from their communities and families. It is also not uncommon for some individuals to harbour feelings of shame and/or internalized homophobia. Because of these and other factors, they may be

[25]In paragraph 16 is mentioned that refugee claims based on differing sexual orientation contain a gender element.
[26] Which also, in line with a series of both regional and international Resolutions, has adopted, since 2011, its Age, Gender and Diversity (AGD) Policy, highlighting the importance of targeted actions and mainstreaming of issues pertinent to several populations under the protection of UNHCR, including LGBTI persons of concern. See, UNHCR. 2011b."Age, Gender and Diversity Policy. Working with people and communities for equality and protection". UNHCR. June 1,2011. https://www.refworld.org/docid/58bd552b4.html.
[27] UNHCR (United Nations High Commissioner for Refugees). 2012a. "Guidelines on International Protection no. 9:Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugee." UNHCR. October 23,2012. https://www.unhcr.org/509136ca9.pdf, 3.

inhibited from informing asylum adjudicators that their real fear of persecution relates to their sexual orientation and/or gender identity".[28]

That being said, all these factors need to be considered by the adjudicating authorities in order to guarantee that the rights of all asylum seekers belonging to the LGBTQIA+ community are met without discrimination.

2.2. Human Rights Law

Besides, **Human Rights Law** directs us towards the fulfillment of such purpose. Via the multi-faceted principle of **non-refoulement**, which, over the past decades, has been incorporated into numerous instruments[29] and is applied variously depending on the context and the pertinent law, it is prohibited for an alien to be expelled, returned or extradited to their country of origin or to another country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm.(OHCHR 2018)

Also, as mentioned by Manganini, (2020,18-19; and the references therein, i.e. Costello and Foster 2016; Lauterpacht and Bethlehem 2003) this principle is considered as customary international law and by some as jus cogens, whereas, according to the Office of the United Nations High Commissioner for Human Rights, international human rights bodies, regional human rights courts, and national courts, via their jurisprudence, have showed that this principle is an implicit guarantee flowing from the obligations to respect, protect and fulfil human rights. (OHCHR 2018)

Under Refugee Law, more specifically, non-refoulement is codified in regional instruments, as well as in Article 33 of the Refugee Convention which is applied by each contracting State to all refugees and asylum seekers, under its jurisdiction,[30] aiming at protecting persons who flee due to armed conflicts, as well as, direct and indirect measures. (Rodenhäuser 2018) Moreover, as an integral component of the prohibition of torture and other forms of ill-treatment, the principle is characterized by its absolute nature without any exception and thus,

[28]Ibid.
[29]Such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under article 3, the International Convention for the Protection of All Persons from Enforced Disappearance under Article 16 as well as, the Charter of Fundamental Rights of the European Union.
[30]*i.e.*,within a State's territory,including its borders, in its territorial sea, or when the State exercises effective control over the person or operates extraterritorially, including during interception or rescue operations in the high seas. See, on the matter, Rodenhäuser T. 2014."Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control". *International Journal of Refugee Law* 26, no.2(May): 223–247. https://doi.org/10.1093/ijrl/eeu020, 242-245.

its scope under relevant human rights law treaties is broader than that contained in international refugee law. (OHCHR 2018)

Having the aforementioned in mind and without analyzing this aspect further, the prohibition of refoulement can be a lifesaving tool for the LGBTQIA+s who are not recognized as refugees but could be subject to persecution, torture or inhuman or degrading treatment if returned to their country of origin.

2.3. The vulnerability context in the Common European Asylum System (CEAS)

After having set out the respective protection framework, it is important to highlight that within the Common European Asylum System (CEAS), SOGI is not explicitly referred to in the Reception Conditions Directive (RCD recast).[31]

However, according to Article 18 (3) of the RCD (recast), all MS either in reception arrangements or when depriving persons of their liberty, must take into account gender and age-specific concerns and the situation of vulnerable persons (FRA 2020, 282-283), whereas it can also be argued that, under article 21 of the RCD, which entails a non-exhaustive list of persons who are perceived as vulnerable,[32] LGBTQIA+ asylum seekers, albeit not explicitly mentioned in the Directive, can be regarded as vulnerable (FRA 2017; 2015,98), and as such, pursuant to Article 22 of the RCD, MS must evaluate whether they have special reception needs and if so, to ensure that reception meets their needs.

Likewise, the Asylum Procedures Directive (APD recast)[33] requires from the MS to assess if, for each asylum seeker, due to their individual circumstances, special procedural guarantees need to be met and if so, to provide them with adequate support throughout the asylum process (Article 24), including sufficient time for presenting the necessary elements of their international protection application (Recital 29).[34]

[31]Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.
[32]See also, article 3 (9) of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
[33]Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).
[34] See also Article 15 (3) (a) of the APD (recast), according to which, MS "shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner", while also, ensuring that "the person conducting the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's […] sexual orientation, gender identity or vulnerability".

Against this backdrop, it can be concluded that under EU Asylum Law the notion of **vulnerability** is engrained in both **the principle of equality** before the law,[35] so that vulnerable applicants, equally with individuals who are unhindered by such vulnerabilities, (IARMJ & EASO 2021, 21, 185-186) can benefit from -and comply with- the CEAS obligations as interpreted in the light of the EU Charter,[36] and **the principle of non-discrimination.**[37]

[35] As enshrined in the Treaty on European Union (TEU) (Article 2) and the EU Charter (Article 20), in conjunction with art. 47 (right to an effective remedy and to a fair trial).

[36] More specifically, in view of Arts. 1 (human dignity), 4 (prohibition of torture and inhuman or degrading treatment or punishment), 7 (respect for private and family life) and 18 (right to asylum).

[37] As provided for in the Article 21(1) of the EU Charter, which reads as follows: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or **sexual orientation** shall be prohibited".

3. The Refugee Status Determination procedure through the lens of the domestic and EU jurisprudence – A paradigm shift?

"But to have good laws enacted but not obey them does not constitute well-ordered government".[38] For this reason, it is necessary to examine the extent at which this framework is implemented by the competent authorities within the EU during the RSD procedure - "a multistage process in which identities are experienced, articulated, framed and translated - literally and figuratively- for the purposes of making the Self intelligible within both the terms of the Convention and the decision maker's own understandings of human sexuality and behaviour".[39] But, of what elements is such procedure being consisted?

3.1. Well-founded fear

Based on art.1(2) of the Refugee Convention, the (forward-looking)[40](ICJ 2016) well-founded fear of being persecuted is one of the fundamental requirements of a refugee, whose past (personal) persecution[41] functions as a strong indicator of future prosecution[42] and is directly related to whether such fear is justified,[43] especially when the situation in the respective country of origin/former habitual residence has not markedly changed. Additionally, the notion of fear goes beyond the applicant's emotional state, covering, thus, one objective situation that reinforces their sentiment of fear. Thus, "in determining whether well-founded fear exists, both elements must be taken into consideration".[44]

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[38]Aristotle, and H. Rackham (trans.). 1975. "Aristotle Politics (Book 4, Sec. 1294a) . Aristotle in 23 volumes 21. Cambridge, Mass: Harvard University Press. http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0058%3Abook%3D4%3Asection%3D1294ahttp://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0058%3Abook%3D4%3Asection%3D1294a.

[39] Berg L.and Millbank J.2013."Developing a Jurisprudence of Transgender Particular Social Group". In Fleeing Homophobia, edited by Spijkerboer T.,121-153. London/New York:Routledge 2013 as referred to by Manganini, I. 2020, p.22.

[40] As it covers what the respective individual will face, if and when returning to their country of origin/former habitual residence.

[41] Which, as a way of example, could have started when the claimant started dating with individuals of the same gender or conducting hormone therapy.

[42] Without, however, being a prerequisite for establishing a person's refugee status; given that, as mentioned by the International Commission of Jurists (ICJ 2016) those "who have not been persecuted in the past may apprehend fear about a situation entailing a real risk of being persecuted in the future", while also, the individual's behaviour outside their country of origin/former habitual residence, "may, on return, give rise to a real risk that did not previously exist". Thus, from this perspective as well, these individuals legitimately have a well-found fear of (future) persecution. The persons who gradually understand their SOGI and perhaps also, come out (i.e., openly declare their SOGI) outside their countries of origin or former habitual residence, subsequently understanding the threats and dangers that could face upon their return to these countries, are amongst the most characteristic examples of such cases.

[43]As provided for, for instance, in our domestic order, in article 4 par.4 of the Law 4636/2019 on International Protection and other provisions (Gov. Gazette 169/A/01.11.2019). See, also, Council of State 1904/2003 and 3335/2005 (4th Section). As for the standard of proof which is that of "reasonable probability", see further, UNHCR. (United Nations High Commissioner for Refugees). 1998. "Note on Burden and Standard of Proof in Refugee Claims".December 16, 1998. https://www.refworld.org/docid/3ae6b3338.htm.

[44]UNHCR (United Nations High Commissioner for Refugees). 2019. "Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees". Reissued February 2019. Gevena: UNHCR. www.refworld.org/docid/5cb474b27.html, 19. Nevertheless, it is noteworthy that such approach has provoked some criticism. See, instead of others: (ICJ 2016, 58).

As shown subsequently, at this stage of the RSD procedure, mostly the objective element of fear is being misinterpreted, mainly due to the misunderstanding or misapplication of the law and the Country of Origin Information, which is "decisive in determining who is in need of international protection […]",[45] providing that the information gathered derives from accurate, impartial and up-to-date sources.(UNHCR 2004,1)

3.1.1 To be (discreet) or not to be? The "option" of concealment

More specifically, the absence of the objective element of well-founded fear is often grounded on the option of concealment, despite the opposition in this regard, on behalf of UNHCR, *inter alii.* (UNHCR 2012a) Basically, under this "option" (which, in the author's view, *de facto* is less an option and more a demand on how someone should live their life) it is argued that if an asylum seeker, upon return to their country of nationality/former habitual residence, lives discretely, the well-foundedness of the fear is not objectively justified, given that such concealment would help that individual not to be persecuted. [46]

Undoubtedly though, such perception not only misinterprets the very purpose of the Refugee Convention, but also, militates against it, having in mind that "concealing an aspect of one's identity, including desisting from an activity sufficiently connected to that identity, may give rise to psychological harm"[47], while also, "the real risk in such cases will be the harm implicit in concealment, or that occasioned by the modification of one's behavior or suppression of one's fundamental identity".[48]

As a result, the "camouflage" of one's identity throughout their whole life, would ultimately lead to the same consequences that the persecutory acts of non-state actors would have caused to that individual, who, despite their sacrifices and notwithstanding their behavior modification, can still be outed and exposed to subsequent persecution. (Hathaway and Pobjoy 2012, 346)

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[45]UNHCR (United Nations High Commissioner for Refugees). 2004. "Country of Origin Information: Towards Enhanced International Cooperation". UNHCR. February 2004. https://www.refworld.org/docid/403b2522a.html,1.

[46]See in this regard, UK Supreme Court, *HJ (Iran) v Secretary of State for the Home Department* (Rev 1) [2010] UKSC 31 (07 July 2010), in which the Court held that there may be cases where an applicant would hide his sexuality not only because of his fear of persecution but also for other reasons, such as adverse reaction of family, friends or colleagues. In such cases if the fear of persecution is a "material reason" for the concealment, then he would be entitled to protection.More specifically, in para.35 (d) reads as below: "The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. **If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded".**

[47]Hathaway, James. C. and Pobjoy Jason M. 2012. "Queer Cases Make Bad Law". *New York University Journal of International Law and Politics* 44, no 2:315-389. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1888&context=articles, 360. As also, pointed out by Lord Roger in HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department case. (ICJ 2011, 304-305)

[48]Hathaway, James. C. and Pobjoy Jason M. 2012. "Queer Cases Make Bad Law". *New York University Journal of International Law and Politics* 44, no 2:315-389. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1888&context=articles, 347. As also, pointed out by Lord Roger in HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department case. (ICJ 2011, 304-305)

In this context, in fact, Manganini (2020, 25-26) aptly underlines that "no competent adjudicator would apply such reasoning to a claimant asking for asylum on the basis of political opinion or religion" which are perceived as inherent in their identity[49] and thus, not only is hiding them not an option, but also, previous experiences of relevant discretion provide an additional reason for granting asylum to the person concerned. The author, then, concludes that such approach should, beyond any doubt, be adopted in GI cases, given that "there is hardly any identity that is deeper than gender identity and yet people are asked to hide it", (Manganini 2020, 25).

3.2. Persecution - The Criminalization of diverse Sexual orientation and Gender Identity (SOGI) as a decisive factor?

Having the aforesaid in mind, the second requirement for an individual to be considered as a refugee, is consisted of their **fear of persecution**, *i.e.*, the harmful acts[50] amounting to persecution that prompted them to flee.

Even though there is not an explicit term of such notion (perhaps deliberately), (Manganini 2020, 30) Article 33 of the Refugee Convention can serve as the adjudicators' starting point and thus, "a **threat to life or freedom** on account of race, religion, nationality, political opinion or membership of a particular social group **is always persecution**",[51] something that applies, as well, for "**other serious violations of human rights** on account of a Convention reason".[52]

From thereon, each assessor, **in view of the individual characteristics of each case, must establish the acts to which the applicant has been (or is likely to be) exposed and based on their intensity, to conclude whether these violations amount to persecution.**[53]In that

[49]For sure, in the author's view, the same applies to gender identity, as well. See, for instance, the a/m decision HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department, in which Lord Roger has written down, *inter alia*, that "sexual identity is inherent to one's very identity as a person", emphasizing that an applicant does not need to "show that his homosexuality plays a particularly prominent part in his life. All that matters is that he has a well-founded fear that he will be persecuted because of that particular characteristic which he either cannot change or cannot be required to change".(ICJ 2011, 288)

[50]Of crucial importance are questions regarding the applicability of the law, the equal or unequal character of its enforcement, the attitude and practice of the persecutors vis-à-vis those violating the law, the unduly harsh (or not) character of the punishment, as well as, the consequences of the applicant's compliance with the law in their private life.

[51]UNHCR (United Nations High Commissioner for Refugees). 2011a."Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees". UNHCR. December 2011, HCR/1P/4/ENG/REV. 3. https://www.refworld.org/docid/4f33c8d92.html.

[52]UNHCR's discussion paper of 2010 on LGBTI asylum-seekers and refugees protection includes"other gender-variant people" in the definition of transgender. (UNHCR 2010, paras.51-52).

[53] See, in this regard, Article 4, para. 3 (a) of the Greek Law 4636/2019 (Gov. Gazette 169/A/01.11.2019) (art. 4 of the Directive 2011/95/EU the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [recast]), according to which "The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied […]".

sense, the **RSD decision-makers**, with the human rights standards as their interpretative toolkit, are **provided with a flexibility that enables them to focus on the core human right affected and delineate new forms of persecution**, in which surely SOGI-related violations[54] or measures which disregard human dignity (Weis 1954, 970) -from which the authorities are not willing or able to protect the persons affected-[55] are included.

In fact, according to the UNHCR guidelines,

> "where persons are at risk of persecution or punishment such as by the death penalty, prison terms, or severe corporal punishment, including flogging, their persecutory character is particularly evident. Even if irregularly, rarely, or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution". [56]

Moreover, as stated by the UNHCR in its intervention before the Court of Justice of the European Union (CJEU) in the three joined cases X,Y,Z,

> "assessing the 'well-founded fear of being persecuted' on the basis of a person's sexual orientation in such cases needs to be fact-based […] The word 'fear' refers not only to persons to whom such laws have already been applied, but also to individuals who wish to avoid the risk of the application of such laws to them. Where there is no conclusive country of origin information upon which it is possible to determine if and how the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted or are at risk thereof".[57]

In this context, it is important to highlight that according to the Updated Edition of the ILGA World's report on state-sponsored homophobia, currently there are

> "**67 UN Member States** with provisions **criminalizing consensual same-sex conduct**, with two additional UN Member States having *de facto* criminalization. Additionally, there is one

[54]See for an analysis of the concept of persecution, Maiani F. 2010. "The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach".*Les Dossiers du Grihl*.Février 28, 2010. http://journals.openedition.org/dossiersgrihl/3896.

[55]See the case of Nabulwala v. Gonzales (United States Court of Appeals for the Eighth Circuit, Nabulwala v. Alberto R. Gonzales, Attorney General, No. 05-4128 (2007)), in which an Ugandan lesbian woman, whose past history of persecution on SO grounds was found credible, but she was not provided with refugee status because these acts amounted "only" to "private family mistreatment". The Court of Appeals reversed the decision due to the respective judge's failure to assess whether the harm inflicted by non-state actors, whom the government was unable or unwilling to control.

[56]UNHCR (United Nations High Commissioner for Refugees). 2012a. "Guidelines on International Protection no. 9:Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugee.UNHCR. October 23,2012. https://www.unhcr.org/509136ca9.pdf, paras.26-27.

[57]UNHCR (United Nations High Commissioner for Refugees). 2012b. "UNHCR intervention before the Court of Justice of the European Union in the cases of Minister voor Immigratie en Asiel v. X, Y and Z, 28 September 2012, C-199/12, C-200/12, C-201/12".UNHCR. https://www.refworld.org/docid/5065c0bd2.html, para. 4.3.

non-independent jurisdiction that criminalizes same-sex sexual activity (Cook Islands). Among those countries which criminalize, we have full legal certainty that the death penalty is the legally prescribed punishment for consensual same-sex sexual acts in six UN Member States, namely: Brunei, Iran, Mauritania, Nigeria (12 Northern states only), Saudi Arabia and Yemen. There are also five additional UN Member States where certain sources indicate that the death penalty may be imposed for consensual same-sex conduct, but where there is less legal certainty on the matter. These countries are Afghanistan, Pakistan, Qatar, Somalia (including Somaliland) and the United Arab Emirates".[58]

Besides, even from a quick glance at the map provided therein regarding the countries' criminalizing laws, it can be concluded that, in most cases, the respective provisions mention 'unnatural'/'indecent' behaviour or 'acts against the order of nature', targeting, this way, directly, all individuals with diverse SOGI.

Thus, in view of the above, there is an ongoing discussion on whether RSD organs should take into consideration (and if so, to what extent) the existence of such provisions when assessing if an applicant has been (or will be) persecuted in their country of origin. Nevertheless, as will be shown below, adjudicators -both at European and domestic level- although they do not assess *in abstracto* each claimant's assessments (UNHCR 2012a), instead of focusing more on the narrative and the individual characteristics of the applicant, they tend to rely quite heavily on the facts of criminalization and enforcement (or not) *per se* of diverse SOGI. This occurs especially when either there is a lack of COI[59] or the relevant COI shows that, despite criminalizing laws, these are not enforced[60] or the claimants did not

[58]ILGAWorld: Lucas Ramon Mendos, Kellyn Botha, Rafael Carrano Lelis, Enrique López de la Peña, Ilia Savelev and Daron Tan.2020."State-Sponsored Homophobia 2020:Global Legislation Overview Update".Updated December 15, 2020. Geneva: ILGA World. https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview, 25.

[59]In which cases, though, it is advised to rely on the individual´s statements and grant them the benefit of the doubt. See, in this regard, UNHCR (United Nations High Commissioner for Refugees). 2010. "The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees- Discussion Paper - Prepared for a UNHCR Roundtable on Asylum-Seekers and Refugees Seeking Protection on Account of Their Sexual Orientation and Gender Identity, 30 September – 1 October 2010, Geneva Division of International Protection". UNHCR. September 22, 2010. https://www.refworld.org/pdfid/4cff9a8f2.pdf, para.64.

[60]Or there is not any evidence regarding the enforcement of these provisions. See, in this context, the application brought before the European Court of Human Rights (ECtHR) by an Iranian gay individual who complained about the breach of Article 3 of the ECHR on behalf of the Dutch authorities. According to his claims, he had been arrested in his country of origin because he was seen kissing his boyfriend on the street. The Court rejected the application as manifestly ill-founded, reaching the following conclusion: "Although it is not disputed in the abstract therefore that very draconian punishment can be imposed for homosexual acts, the Court is not persuaded that the applicant has shown that he is at a real risk of falling foul of the authorities on that ground. While he claimed that he had been arrested after having been caught kissing a male friend in an alley in January/February 2001, there is no indication that this has in fact resulted in any criminal proceedings being brought against him. Although it must be acknowledged that the general situation in Iran does not foster the protection of human rights and that homosexuals may be vulnerable to abuse, the applicant has not established in his case that there are substantial grounds for believing that he will be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention on grounds of his homosexuality". See, European Court of Human Rights (ECtHR*), I.I.N. v. the Netherlands* (Application no. 2035/04), 9 December 2004.

manage to show that persecution will happen in their case.[61] In such contexts, it is usually concluded that their fear of persecution is not objectively justified.[62]

Such reasonings bring us to the three joined cases against Minister voor Immigratie en Asiel mentioned above, in which the CJEU, after having found that homosexuals originated from countries with criminalizing laws belong to a Particular Social Group (PSG), reached the conclusion that "not all violations of fundamental rights suffered by a homosexual asylum-seeker will necessarily reach the level of seriousness required to constitute a persecution within the meaning of Article 1(A) of the Refugee Convention",[63] while also, ruling that the criminalization of homosexual acts *per s*e does not constitute a persecutory act; nevertheless, a "term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution".[64]

At the same vein, according to the European Court of Human Rights (henceforth, ECtHR)(F. v. The United Kingdom 2013,12) a threat of violation of the claimant's right to respect of private life under Article 8 of the European Convention of Human Rights (ECHR), due to criminalization, does not imply that he cannot be expelled to this country, given 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 the rights and freedoms set out in the Convention". [65]

Likewise, in the case of I.K. v. Switzerland (2017)[66] brought before the ECtHR, the applicant, a national from Sierra Leone -where homosexuality is criminalized- whose asylum claim was rejected by the Swiss authorities which assessed that his claims were not credible and the criminalizing provisions are not enforced, was found not to be at risk of treatment prohibited under Article 3 of the ECHR in case of return to his country of origin.

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[61]See also, Decision 667/2019 of the Athens' Administrative Court of Appeals, in which the Court, although it accepted in part the application for annulment due to the inadequate reasoning of the Decision 17521/2017 of the 10th Independent Appeals' Committee regarding the issue of subsidiary protection due to the applicant's state of health, upheld the Committee's position that the existence of a criminal provision -even accompanied by the individual's stigmatization within his country of origin and his exclusion from the access to social and economic rights- is not considered as persecution. Thus, the risk of persecution based only on the general conditions of the LGBTIs is not sufficient and the claimant has to refer to the specific facts that occurred to his detriment or to the detriment of other persons of the same SO.

[62]For instance, one of the Independent Appeals' Committees examined the asylum claim of an Algerian appellant who identified himself as homosexual and based on the available information indicating that *de facto* a prosecution procedure is not being initiated unless a minor is involved in acts of homosexuality, concluded in favor of the lack of an objectively justified fear of persecution.

[63]CJEU, judgment of 7 November 2013, *X, Y and Z*, joined cases C199/12 and C201/12, EU:C:2013:720, available at: https://curia.europa.eu/juris/document/document.jsf?docid=144215&doclang=EN, para.53.

[64] *Ibid*, para.61.

[65] ECtHR, *F. v. The United Kingdom* (No. 17341/03), 22 June 2004, p.12.

[66] ECtHR, *I.K. v. Switzerland* (No. 21417/17), 18 January 2018.

In our domestic order as well, the Greek Asylum Service, in the case of a gay seropositive man from Morocco rejected at first instance his asylum claim because the available COI revealed that the law against homosexuals is rarely being enforced and according to the case worker, such non-enforcement justified why the applicant (who, remarkably, was hiding his SO for years) has not been prosecuted in Morocco. As a result, his fear to be persecuted upon his return, due to his SO, was not perceived as objectively justified.

The above practices illustrate the quite **problematic** -in the author's view- **misunderstanding** of the consequences that the SOGI criminalizing provisions bring upon the persons concerned.

Thankfully, gradually, a more SOGI-centered approach is developed. As a way of example, very recently, the ECtHR proved its "living instrument doctrine"[67] in the case B and C v. Switzerland,[68] in which it concluded that, although SOGI-related persecutory acts were not reported in the recent reports on Gambia, this may be due to under-reporting and the discrimination that LGBTI persons openly expressing their SOGI were likely to face from State actors.

Also, from the author's work experience since 2016 in the Greek Independent Appeals' Committees, there are numerous decisions at second instance[69] in which the Committees assessed that the existence *per se* of criminalizing laws, regardless of their enforcement or not, combined with the inability or unwillingness of the state authorities to protect individuals with diverse SOGI, suffice for the establishment of persecution. In this way, LGBTQIA+ appellants from Iran, Afghanistan, Pakistan, the Democratic Republic of Congo and Morocco,[70] in which diverse SOGI is criminalized, have been recognized as refugees.

[67] Having regard to the constantly changing conditions. See, instead of others, Council of Europe. n.d.(b)"Interpretative mechanisms of ECHR case-law: the concept of European consensus". www.coe.int/en/web/help/article-echr-case-law.
[68] ECtHR, B and C v. Switzerland (Applications nos. 889/19 and 43987/16), 17 November 2020 (final on 17/02/2021).
[69] Which, for confidentiality and data protection purposes, are not mentioned with reference to their protocol numbers, but by the author, who has personally handled these cases.
[70] It should be noted that, Morocco, along with many other countries that criminalize diverse SOGI, such as Tunisia, Algeria, Senegal, Togo, Ghana, Bangladesh and Pakistan, are included in the National List of Safe Countries of Origin, on the basis of the joint Ministerial Decision 778/2021 (Government's Gazette 317/B/29.01.2021), in combination with Article 87 para. 5 of the L.4636/2019 (Gov. Gazette 169/A/01.11.2019) (which incorporated Arts. 36 and 37 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [recast]). Under the safe country concept, there is a presumption of safety, and the burden of proof is being reversed; it is up to each applicant to submit serious grounds for considering the country not to be a safe country of origin in their particular circumstances and in terms of their qualification as a beneficiary of international protection. If the applicant does not manage to reverse such presumption, then their claim is being rejected as manifestly ill-founded (in accordance to Art. 87 para. 3 in conjunction with Article 88 para. 2 of the Law 4636/2019). It is a dangerous concept with potential detrimental effects (especially if the asylum claim is examined under fast-track procedures and/or the claimant/appellant does not have any legal representation), as well as, an interesting and contentious issue, which cannot be analyzed for the purposes of this study.

For example, in the case of the Moroccan seropositive gay individual aforementioned, the 7th Independent Appeals' Committee unanimously approached the issue differently from the first instance organ and granted the appellant with refugee status.

More specifically, the Committee, after taking into account both the jurisprudence regarding persecution on SOGI grounds and the fact that it is difficult to recall traumatic experiences in the exact chronological order in which they took place,[71] along with the UNHCR guidelines,[72] emphasized that SO allegations relate to events of a private nature which cannot be cross-examined completely objectively, and thus, by providing the appellant with the benefit of the doubt, accepted his statements as credible in their entirety.

Then, instead of focusing on the frequency of persecution against the LGBTQIA+ community, it analyzed the situation on the ground (including their social stigmatization and marginalization, the fact alone of the criminalization of their SOGI *etc*.) and scrutinized the notion of persecution, reaching the following conclusion in regards to the applicant's fear that, due to his SO, his personal freedom, physical integrity and life will be endangered by either non-state actors (family members, as in the past, but also third parties and members of the wider society) or the state authorities:

> "[…] such fear, under the prism of a) the profile and individual characteristics of the appellant, who, on the one hand, despite having concealed for many years his SO, has become a survivor of chronic verbal and psychological violence, with which the police/state authorities, based on relevant COI are not capable/willing to deal and on the other hand, still explicitly expresses his strong reluctance and fear of returning to the region and country of origin, in which, as he explained, he will not be able to express freely his SO and b) of the information confirming that homosexuality in Morocco is a criminal offense and that LGBTQIA+ individuals (especially the HIV positive individuals) experience multiple discrimination from members of the Moroccan community who commit acts of violence against them, under the tolerance of state authorities, is well-founded and justified, having in

[71] In this context, the UNHCR points out that: "For asylum seekers, dates, locations, distances and even personal experiences may have been erased from memory due to spiritual shock and there may be a time gap. The omissions or inaccuracies on the part of the asylum seeker are not a sign of dishonesty. [...] The chronological order of events is difficult to repeat. Asylum seekers usually remember the events that particularly affect them with an emotional rather than a temporal flow". (UNHCR 1995, 25-26).

[72] According to which, *inter alia*, (i) not all LGBTIQIA + asylum seekers must have been persecuted in the past, (ii) past persecution is not a prerequisite for recognition of refugee status; and (iii) it is not necessary for the person concerned to prove that the authorities of his country were aware of his/her sexual orientation and/or of his/her gender identity before deciding to flee seeking protection. (UNHCR 2012a,10-11,para.18).

mind that it is reasonably believed that the applicant, upon his return to Morocco, will face the consequences of which he fears […]".[73]

3.3. The nexus requirement

The next requirement for the refugee status' acquisition is the causal link, *i.e.*, the connection of the "well-founded fear of being persecuted" with one of the reasons provided for in the Refugee Convention, in the sense that the alleged persecutors cause (or are likely to cause) harm on the person concerned, for reasons of one of the Convention grounds[74] or that the respective State is unable or unwilling to protect that person for one of these grounds or at cases, the ground *per se* explains the reason of the applicant's risk. (Hathaway and Foster 2003, 461‑476)

It needs to be mentioned, though, that, in view of the (real or imputed) characteristics of each individual, more than one Convention ground can be relevant, but it is not required from the individual to show their persecution on all relevant grounds. (See, for instance, in this regard EASO 2018, 25).

3.4. Membership of a particular social group (MPSG)

As for the Convention ground which is related to diverse SOGI, this is the "membership of a particular social group" (MPSG) - an often-debated notion that "is difficult to understand intuitively" and "is not commonly used outside the context of the Refugee Convention".[75] Its concept has mainly been defined via interpretation on an *ad hoc* basis and has acquired a series of well-established characteristics which are drawn from the other Convention grounds, creating three groups which, according to some scholars, (see, instead of others, Manganini 2020,40;UNHCR 2002b) exist in absence of their persecution[76]:

"(a) groups defined by an innate or unchangeable characteristic; (b) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be

[73]Extract taken from the a/m decision, translated freely in English by the author, who also was charged with the drafting of the respective case as Member of the Committee.
[74]The Committee of Ministers of the Council of Europe, noted that MS "should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law." See Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity ((Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a.
[75]EASO (European Asylum Support Office). 2020. "Guidance on membership of a particular social group". EASO. March 2020. https://easo.europa.eu/sites/default/files/EASO-Guidance-on%20MPSG-EN.pdf.,7.
[76]Although persecutory actions towards the group is a relevant factor in determining the groups'visibility and could serve to identify or even cause the creation of a particular social group in society. (UNHCR 2002a)

> forced to forsake the association; and (c) groups associated by a former voluntary status, unalterable due to its historical permanence".[77]

In any case, as referred in the UNHCR guidelines aforementioned, having in mind that

> "the Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground, the term […] should be read in an **evolutionary manner**, **open to the diverse and changing nature of groups in various societies and evolving international human rights norms**",[78]

whereas the size of the group or the fact of non-persecution of all its members is not relevant. (UNHCR 2002b, 5 para. 18) These remarks are of utmost importance for individuals raising SOGI-related claims, given that their core human rights are violated due to characteristics which were not relevant at the drafting process of the Convention.

Moreover, Article 10 of the Qualification Directive (QD)[79] reads as follows:

> "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. […] Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group". [80]

[77]UNHCR (United Nations High Commissioner for Refugees). 2002b. "Guidelines on International Protection No. 2: "Membership of a Particular Social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees". UNHCR. May 7, 2002. https://www.unhcr.org/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html

[78]*Ibid*, p.2, para. 3.

[79]Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). See also, recital 30 of the QD (recast) which provides that 'For the purposes of defining a particular social group, issues arising from an applicant's […] gender identity and sexual orientation […] should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution".

[80] On the matter of MPSG and its relation with other Convention grounds, it is interesting to see CJEU, judgment of 4 October 2018, Nigyar Rauf Kaza Ahmedbekova and Rauf Emin Ogla Ahmedbekov v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite, Case C-652/16, EU:C:2018:801, where the CJEU had been requested for a preliminary ruling by a Bulgarian Administrative Court regarding the interpretation of several provisions of the QD and the APD. The seventh question was relevant to whether the fact that an applicant has brought a complaint against their own State of origin before the European Court of Human Rights establishes that applicant's membership of a particular social group, or constitutes a political opinion, within the meaning of Article 10(1)(e) QD. The summary is available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=209626&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=531212

As can be seen, the QD defines the PSG by two elements (*i.e.*, common characteristic and distinct identity in the relevant country) that need to be met **cumulatively**. Thus, sharing certain characteristics or beliefs is not enough, if this is not visible to others and therefore, identifiable as different.

This approach, which is not adopted by the UNHCR,[81] was reaffirmed in the X,Y and Z case brought before the CJEU,[82] which ruled that a particular social group cannot exist solely on account of its risk of being persecuted; its existence must be analyzed in accordance with the conditions of the respective country of origin and in view of the surrounding society which perceives such group as different. However, as the CJEU confirmed in that case, a person's SO is a characteristic so fundamental to their identity that they should not be forced to renounce it, whereas the existence of criminal laws in the country of origin which target specifically homosexuals, supports the finding that those persons must be regarded as forming a PSG.

3.4.1. Credibility assessment

All the above help us to move on the credibility assessment of the material facts via interviews[83] which is the most important phase of the RSD procedure, given that, on the one hand, applicants with diverse SOGI must prove that they belong to a PSG (or are perceived as such by state/non-state actors) and on the other hand, the assessors examining asylum applications under all administrative procedures,[84] have to collect, in conformity with the guarantees enshrined in the Charter, evidence so as to establish the claimants' credibility (or not) which is crucial for the determination of their eligibility for international protection status.

But for the adjudicators to carry out an objective and transparent assessment via which they can decide upon the claimants' credibility -even without absolute certainty-, there are some indicators,[85] which may include verifying whether each claimant's statements are consistent

[81] In short, the UNHCR argues that the alternative test is the correct one, i.e. that it is sufficient for a group to establish **either** a common characteristic **or** distinct identity. For this reason, it had recommended amending Article 10 (1) (d) by replacing 'and' with 'to', so as to avoid protection gaps. (UNHCR 2009).

[82] CJEU, judgment of 7 November 2013, *X, Y and Z*, joined cases C199/12 and C201/12, EU:C:2013:720, available at: https://curia.europa.eu/juris/document/document.jsf?docid=144215&doclang=EN, para. 45.

[83] See Articles 14-17 APD (recast) regarding the standards on interviews.

[84] Including border and accelerated (fast-track) procedures. See, in this regard, Articles 31(8) and 43(1) APD (recast).

[85] For a further analysis, see IARLJ (International Association of Refugee Law Judges) & EASO (European Asylum Support Office). 2018. "Judicial analysis: Evidence and credibility assessment in the context of the Common European Asylum System". EASO Professional Development Series for members of courts and tribunals. EASO. https://www.easo.europa.eu/sites/default/files/EASO%20Evidence%20and%20Credibility%20Assesment_JA_EN_0.pdf, 81-103.

(internally and externally), sufficiently detailed, plausible,[86] and compatible with relevant documents, COI, or any other available evidence.[87] (IARLJ & EASO 2018,19-20)

As for the way in which such indicators can be used, this depends on the approach of each interviewer and more specifically, on the types of questions posed. Practice has shown that in cases when interviewers do not create a safe space and sentiments of trust and confidence or their questions end up being insulting or too intrusive, the applicants (especially those who have not found out how they identify themselves) are more reluctant to disclose sensitive information and/or traumatic experiences related to their SOGI or struggle to unfold their stories, which, ultimately, might seem suspicious to their interviewers (with all the negative consequences that such perception could bring).

From this perspective, the author, having in mind that not many EU MS have national guidelines for interviewing LGBTQIA+s, (FRA 2017,2) holds the view that the credibility assessment becomes one of the most stressful moments for individuals with diverse SOGI, while being, at the same time, the most challenging and complicated part of the process for all RSD organs, given that "there is no uniform way in which LGBTIs recognize and act on their sexual orientation or gender identity". Therefore, the focus on questions regarding the applicant's SOGI is based on assumptions about the ways a 'true' LGBTI person behaves. (Spijkerboer & Jansen 2011, 47)

In other words, the duty of evaluating if someone is an LGBTQIA+ individual might result in the assessors' stereotyping (about the look, for instance, or the behaviour of members belonging to the LGBTQIA+ community), as well as, in embarrassing and invasive (at best) questions which, despite of being able to lead the adjudicators towards researching accurate COI,[88] "demand" from the applicant, specific answers, "tailored" to the assessors' views (misconceptions) and expectations, which most often misunderstand the situation at hand and result in incorrect conclusions.

[86]For the issue of plausibility, HK v Secretary of State is noteworthy. Therein (para.28), the Court of Appeals, stated *inter alia* that: "in many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the appellant has said before, and with other factual evidence (where there is any)". See, HK v Secretary of State for the Home Department, [2006] EWCA Civ 1037, United Kingdom: Court of Appeal (England and Wales), 20 July 2006, available at: https://www.refworld.org/cases,GBR_CA_CIV,5379c2214.html

[87] According to UNHCR, "Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed".(UNHCR 1998, para.11).

[88]*i.e.*,questions that shed a light upon the criminalization of diverse SOGI, the general perception of both authorities and non-state actors towards the LGBTQIA+ community, the status of the latter in society and in law, the existence or not of state and legal protection throughout the country *etc.*

Such misuse can be illustrated in a case brought before the 7th Independent Appeals' Committee, in which an appellant from Cameroun, who has identified himself as gay[89] and has explained that, due to the mistreatment that he had received in different instances of his life by persons who had understood his SO, he had decided to be as discreet and hidden as possible (even in Greece), had been asked by the case worker at first instance, persistently, *inter alia*, about intimate details of his relationships whereas excessive emphasis was placed at the applicant's demeanour (*e.g.* his gestures and nervousness) which was used as a negative factor of credibility.

Likewise, in the case of the Moroccan seropositive gay man which was analyzed in Chapter 3.1.1.,[90] the case worker, while assessing the credibility of the claimant's statements, did not manage to pose open and general questions so as to assist him in telling his story. Instead, he posed only closed and sexually direct questions, such as what triggered him to feel gay, what was his exact role during his first sexual intercourse with a same-sex partner (active/passive) and what are his preferences in general, how he felt after this, how he feels vis-à-vis women (especially, the "provocative" ones) and if he had any sexual interaction with them or if he wishes to stop his habit of relationships with men.[91] As a result, some of the indirect answers given by the applicant were perceived as damaging his credibility, whereas the interviewer did not take into consideration the sentiment of shock that such questions could provoke.

[89]Who, notably, submitted before the Committee a psychosocial report. See, nevertheless, on this matter, the judgement of the CJEU, in the case of F., in which the Court was asked by a Hungarian Court for a preliminary ruling regarding the use of psychologists' expert opinions as a means of verification of the credibility of SO-related claims. To this end, the CJEU stated that "[…]Therefore, even if the performance of the psychological tests on which an expert's report, such as that at issue in the main proceedings, is based is formally conditional upon the consent of the person concerned, it must be considered that that consent is not necessarily given freely, being de facto imposed under the pressure of the circumstances in which applicants for international protection find themselves (see, to that effect, judgment of 2 December 2014, *A and Others*, C-148/13 to C-150/13, EU:C:2014:2406, paragraph 66). In those circumstances, as the Advocate General noted in point 43 of his Opinion, the preparation and use of a psychologist's expert report such as that at issue in the main proceedings constitutes an interference with that person's right to respect for his private life. […] In any event, the impact of an expert's report such as that at issue in the main proceedings on the applicant's private life seems disproportionate to the aim pursued, since the seriousness of the interference with the right to privacy it constitutes cannot be regarded as proportionate to the benefit that it may possibly represent for the assessment of the facts and circumstances set out in Article 4 of Directive 2011/95. […]Such an expert's report is based in particular on the fact that the person concerned undergoes a series of psychological tests intended to establish an essential element of his identity that concerns his personal sphere in that it relates to intimate aspects of his life (see, to that effect, judgments of 7 November 2013, X and Others, C-199/12 to C-201/12, EU:C:2013:720, paragraph 46, and of 2 December 2014, A and Others, C-148/13 to C-150/13, EU:C:2014:2406, paragraphs 52 and 69). […] Furthermore, even assuming that an expert's report based on projective personality tests, such as that at issue in the main proceedings, may contribute to identifying with a degree of reliability the sexual orientation of the person concerned, it follows from the statements of the referring court that the conclusions of such an expert's report are only capable of giving an indication of that sexual orientation. Accordingly, those conclusions are, in any event, approximate in nature and are therefore of only limited interest for the purpose of assessing the statements of an applicant for international protection, in particular where, as in the case at issue in the main proceedings, those statements are not contradictory. […]Article 4 of Directive 2011/95, read in the light of Article 7 of the Charter, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant […]", paras.53,54,59,61,69,71 of the CJEU, judgment of 25 January 2018, F v Bevándorlási és Állampolgársági Hivatal, Case C-473/16, EU:C:2018:36.

[90] See above, pp.22-24.

[91]From the author's first-hand experience, other examples of pervasive or stereotypical questions are: "how is it possible to be gay but married?", "why haven't you participated in Prides?", "why did you have sexual intercourse with a person of the opposite sex if you are actually lesbian?", "have you visited any web pages for LGBTQIA+s", "what about gay bars?Can you tell me some of them?", "Do you like men or women more?", "How many sexual partners did you have?", "Can you describe the gay community in your country?", *etc.*

These examples highlight the inevitable subjective assessments involved in the procedure of the evaluation of a person's SO by third parties, notwithstanding the fact that some noteworthy directives can be drawn from the CJEU and the UNHCR.

As the former pointed out in the cases of A, B and C,[92] whose SOGI-related claims were perceived as vague and non-credible by the Dutch authorities, EU MS are bound by the EU Charter (especially Article 1 regarding human dignity and Article 7 concerning the right to respect for private and family life) and while it recognized that "stereotyped notions" can be useful when assessing an asylum application, such assessment should be contextualized into the applicant's personal circumstances. Therefore, competent authorities should not pose sensitive questions regarding sexual practices since such questioning would be contrary to human dignity. Similarly, asking from applicants to provide evidence (such as films of intimate acts) or submitting them to "tests" with the aim of demonstrating their homosexuality are prohibited.

Additionally, deliberating upon the provisions of Article 4 of the QD (recast) and the UNHCR Handbook, (UNHCR 2019, paras. 195-205), the competent authorities collaborate with the claimants (who, due to the fear of the authorities in their own country, may feel apprehensive vis-à-vis any authority) to assess the relevant elements of their applications.

Moreover, in the UNHCR's Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, it is stated that

> "self-identification as LGBT should be taken as an indication of the individual's sexual orientation. […] If the applicant's account appears credible, he or she should, unless there are good reasons to the contrary, be given the benefit of the doubt. In the assessment of LGBT claims, stereotypical images of LGBT persons must be avoided, such as expecting a particular "flamboyant" or feminine demeanour in gay men, or "butch" or masculine appearance in lesbian women. Similarly, a person should not automatically be considered heterosexual merely because he or she is, or has been, married, has children, or dresses in conformity with prevailing social codes […]". [93]

[92]CJEU (GC), judgment of 2 December 2014, A, B and C v Staatssecretaris van Veiligheid en Justitie, joined cases C-148/13 to C-150/13, EU:C:2014:2406. Also, as referred to therein, the methods used to assess an application by LGBTI persons may place them in a situation of vulnerability.

[93]UNHCR (United Nations High Commissioner for Refugees). 2008. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity". UNHCR. November 21, 2008. https:// www.refworld.org/docid/48abd5660.html., 35-36.

Correspondingly, according to UNHCR's Guidelines No. 1, (UNHCR 2002a, para.36,vii.) open-ended and specific questions may help to reveal gender issues relevant to a refugee claim.

In addition, reference should be made to the DSSH (Difference, Stigma, Shame and Harm) model, which was developed in 2011 as a tool that helps assessors to avoid using sexually explicit or inappropriate questions and focus on identity grounds, when evaluating the claimants' credibility. (Dawson and Gerber 2017) Or, to put it differently, this model has been developed to "enable the asylum applicant an ability to address their individual narrative by asking specific 'trigger questions', to enable further investigation".[94]

Without elaborating on this matter extensively, that model, due to its potential to improve the way SOGI-related asylum claims are carried out, has been endorsed globally by many countries and organizations. Amongst them, the UNHCR, in cooperation with other entities, has published a series of training manuals[95] for credibility assessment, directed to both its personnel and other humanitarian agencies, in which the DSSH model, *inter alia*, is analyzed with the aim of identifying delicate ways to interview applicants.

Nevertheless, it needs to be mentioned that, according to Dawson and Prof. Gerber, the model, despite offering an important improvement, still perpetuates ontological constructions of non-heterosexuality as linear and ultimately fixed; thus, its utility is negatively affected in the cases of SO claims made by women, (Dawson and Gerber 2017,293) who, often, are not exposed to exogenous harm -as defined by the model- since they have never acted against the traditional norms of their societies, by expressing their SO, the realization of which, perhaps took place years after their adulthood and even, their marriage and their children's birth. As a result, these women, during their interviews, can only speak about the private harm they suffered and their heterosexual story in which they must emphasize their emotional journey towards their SO realization so as to be perceived as credible.

[94]Chelvan S.2014. "C-148/13, C-149/13 and C-150/13, A, B and C v Staatssecretaris van Veiligheid en Justitie: Stop Filming and Start Listening – a judicial black list for gay asylum claims". European Law Blog. https://europeanlawblog.eu/2014/12/12/c-14813-c-14913-and-c-15013-a-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-stop-filming-and-start-listening-a-judicial-black-list-for-gay-asylum-claims/
See also, Consonant (formerly Asylum Aid). 2011. "Women's Asylum News: Issue No. 105". October 2011. https://www.refworld.org/docid/4ea6ab132.html where it is stated by Barrister Chelvan , "[i]t is the self-identification of difference with the consequent recognition of stigma, which attaches shame and fears harm which are the core four triggers in the majority (but not all) LGBTI asylum claims".

[95]Amongst them, see, for an analysis of the four basic notions of Difference, Stigma, Shame and Harm, the manual developed by the Hungarian Helsinki Committee (Gyulai, Singer et al, 4-89).

Therefore, for a more gendered approach in the credibility assessment, more guidelines focused on "the way in which applicants suffer harm and persecution for non-adherence to expected gender-based cultural roles and behaviours" should be developed. (Dawson and Gerber 2017, 293)

3.4.2. Disclosure of Sexual Orientation and Gender Identity (SOGI) at a later stage of the procedure in view of two decisions of the 7th Independent Appeals' Committee

It is relevant to mention that in LGBTQIA+ cases, it is not uncommon for first-instance adjudicators in Greece to perceive[96] the disclosure of SOGI-related claims at a later stage of the RSD procedure (or via subsequent applications)[97] as undermining their credibility, rejecting, thus, the objective element of well-founded fear, especially when the claimants do not explain why they have not raised this claim earlier or the reasons for such late disclosure.

This practice, which is observed also in cases in which the claimant is originated from a "safe country of origin"[98]and/or a country in which SOGI criminalizing laws exist (and perhaps, are enforced), fails to assess the reasons behind such late disclosure, which can be summarized (Spijkerboer 2011, 9-10) in the feelings of shame and fear, as well as, in the facts that their SOGI has been crystallized in the reception country (in which they do not know if the community accepts them or not) or they simply do not know that such a personal element is important for their application.[99]

[96]In view also to article 4 (1) of the L.4636/2019 (Gov. Gazette 169/A/01.11.2019), according to which there is an obligation on behalf of the applicant to submit as soon as possible all the information required to substantiate the application for international protection.

[97]Namely, an application for international protection, made after a final decision has been taken on a previous application for international protection, including cases where the applicant has expressly withdrawn their application and cases where the determining authority has rejected the application after its tacit withdrawal (See Articles 63 element viii and 89 of the L. 4636/2019 - Gov. Gazette 169/A/01.11.2019). A "final decision" is a decision granting or refusing international protection: (a) taken [by the Appeals Committees] following an administrative appeal, or (b) which is no longer amenable to an administrative appeal due to the expiry of the time limit to appeal. An application for annulment can be lodged against the final decision before the Administrative Court. According to Article 89 of the same Law (translated freely from Greek by the author), when a subsequent application is lodged, the relevant authorities examine the application in conjunction with the information provided in previous applications. Subsequent applications are subject to a preliminary examination, during which the authorities examine whether new substantial elements have arisen or are submitted by the applicant. The preliminary examination of subsequent applications is conducted within 5 days to assess whether new substantial elements have arisen or been submitted by the applicant. During that preliminary stage, all information is provided in writing by the applicant.If the preliminary examination concludes on the existence of new elements "which affect the assessment of the application for international protection", the subsequent application is considered admissible and examined on the merits. If no such elements are identified, the subsequent application is deemed inadmissible. Until a final decision is taken on the preliminary examination, all pending measures of deportation or removal if applicants who have lodged a subsequent asylum application are suspended. Exceptionally though, "the right to remain on the territory" is not guaranteed to applicants who (a) make a first subsequent application which is deemed inadmissible, solely to delay or frustrate removal, or (b) make a second subsequent application after a final decision dismissing or rejecting the first subsequent application.

[98]On the basis of the joint Ministerial Decision 778/2021 (Government's Gazette 317/B/29.01.2021), in combination with Article 87 para. 5 of the L.4636/2019 (Gov. Gazette 169/A/01.11.2019) (which incorporated Arts. 36 and 37 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [recast]). See footnote 70.

[99]Especially in cases in which the claimants do not have any legal assistance before and throughout the RSD procedure.

Nonetheless, as the CJEU has held, the non-declaration of one's homosexuality at the outset before the authorities cannot lead to a conclusion regarding the lack of credibility of such declaration.[100] This approach in fact, has been adopted by some of the Greek Independent Appeals' Committees, when dealing with claims concerning the appellants' vulnerability and/or SOGI, as disclosed before them via memoranda submitted by their attorneys. The exact reasoning of such claims though, depends mostly on each Committee' view, in combination with the individual characteristics of the appellant, as well as the reasons presented for the late disclosure of such substantive claim.

For instance, in a case brought before the 7th Independent Appeals' Committee, the appellant (of Iranian origin), whose subsequent asylum application (concerning his desertion from the army and his religious beliefs) was rejected by the Greek Asylum Service, invoked, for the first time, via a memorandum, his SO which he did not mention to the Greek authorities earlier because he had been told -in order to get asylum more easily- not to state the exact reason for requesting international protection, but to state that he was a minor. As he also explained, he had not understood the RSD procedure and from what he had experienced, the process was formalistic and thus, in his subsequent application,[101] he did not state that he was homosexual because he did not feel comfortable in front of the interpreter. As a result, he invoked religious reasons and asked for his interview to be conducted in Greek so that he could freely express his SO.

In another case, an Afghan appellant disclosed his SO in written, via a memorandum submitted before the aforesaid Committee, where he explained that he identifies himself as homosexual - something that he did not reveal earlier because, in view of his conservative background, not only does he feel shame for his self-identity, but also, he feared that if his SO was revealed in Greece, he would be attacked by extremist Muslims.

[100]CJEU (GC), judgment of 2 December 2014, A, B and C v Staatssecretaris van Veiligheid en Justitie, joined cases C-148/13 to C-150/13, EU:C:2014:2406, para.69.

[101]See for a further analysis, IARMJ (International Association of Refugee and Migration Judges) & EASO (European Asylum Support Office). 2021. "Judicial analysis: Vulnerability in the context of applications for international protection".EASO Professional Development Series for members of courts and tribunals.EASO. August 2020. https://www.easo.europa.eu/sites/default/files/Vulnerability_JA_EN.pdf., 194-195, where it is stated, *inter alia*, that "vulnerable applicants may, on account of their vulnerability, present new elements or findings, or new elements or findings may have arisen, after a final decision has been taken on their previous application […] Similar concerns arise for vulnerable persons such as victims of rape or sexual violence, or victims of torture, who, particularly if they were without the necessary support during the processing of their initial application, may seek to substantiate their true claim for the first time in a subsequent application. Someone who has not mentioned their sexual orientation and/or gender identity at the outset, for example because of fear or shame, could be in a similar position […]".

In both cases, the Committee, despite the absence of relevant past persecution,[102] ruled in favour of the appellants' credibility, by focusing on the relevant EU jurisprudence and the UNHCR guidelines, the criminalizing SOGI provisions, as well as the COI confirming the practices/policies followed (especially in smaller cities and communities) by both state and non-state actors against individuals who deviate from religious or social norms. Subsequently, it concluded that the appellants are part of a PSG within the meaning of the provisions of the Refugee Convention and it cannot reasonably be expected that, in order to avoid persecution, they will conceal their homosexuality in their countries of origin or show restraint during the externalization of their SO. In view of the above, a possible future persecution is mainly related to their gender, SO and vulnerability as homosexual young men without supportive environment, due to the patriarchal standards within the society of their region and country of origin.

As can be seen, the exact moment of disclosure together with the reasons for a possible "late" disclosure, should be only two of the many elements that RSD organs should take into account when assessing an asylum seeker's credibility and certainly and surely, not the only ones.

3.5. State Protection

After assessing one's credibility and objective fear, the last requirement of the Refugee Convention is the insufficiency of state protection, *i.e.*, the unwillingness and/or the inability of the authorities of the respective country of origin/habitual residence to provide a reasonable level of protection from the harm feared through an effective legal system (FRA 2020, 120-123) which the claimants can access *de facto* (meaning that they will not face homophobic or corrupted authorities).[103]

Notwithstanding the ongoing debate on certain aspects of this prerequisite, in Article 7 of the QD it is stated that '[p]rotection against persecution or serious harm can only be provided by […] the State; or […] parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State; provided they are willing and able to offer protection […]' that is 'effective and of a non-temporary nature'.

[102] Which in fact, in the Committee's view, was related to the longstanding concealment on behalf of the appelants, of their SO.
[103]Which, to the author's knowledge, is the scenario with which individuals raising SOGI-related asylum claims are confronted most often in their countries of origin/habitual residence.

As pointed by the European Asylum Support Office (EASO),

> "The availability or non-availability of protection does not need to be linked to the reasons for persecution. Plain failure and inability to sufficiently protect demonstrate lack of protection. Motives or discriminatory reasons on the part of the actors of protection are not a prerequisite. However, it should be noted that in cases where the lack of protection is intentional, this could amount to persecution or serious harm".[104]

It is obvious that in cases in which the persecution derives from either the state itself (in SOGI cases, via its discriminatory and/or criminalizing laws/policies) or its actors, under the state's tolerance, protection is not available (due to the state's unwillingness to do so). Likewise, the authorities are unable to protect a person when they do not "possess the necessary power or resources to provide it", *e.g.*, in situations where a transition to power has occurred in the country of origin or the country is under a state of emergency. (EASO 2018, 37)

3.6. The alternative of Internal Relocation

In this assessment, the RSD organs should examine whether there is a safe, accessible, and reasonable place within the respective country, in which the applicant would not have a well-founded fear of being persecuted or could be protected against persecution.(EASO 2018,39-41) In practice, if the applicant does not manage to demonstrate that the alternative of internal relocation is not possible in their case and/or such place is found, then the applicant can be denied refugee status, although international law, does not consider asylum as last resort. (UNHCR 2003, para. 4)

Consequently, this concept should not be invoked "in a manner that would undermine important human rights tenets underlying the international protection regime, namely the right to leave one's country, the right to seek asylum and protection against refoulement".(UNHCR 2003, para. 4)

In SOGI-related asylum claims, according to the respective UNHCR Guidelines, (UNHCR 2012a, para. 54) intolerance towards LGBTI individuals would exist throughout the whole country and thus, the alternative of Internal Relocation will often be unavailable, as it would expose the applicants to the original or any new forms of persecution (*e.g.,* concealment).

[104]EASO (European Asylum Support Office).2018. "Practical Guide: Qualification for International Protection". EASO. April 2018. https://www.easo.europa.eu/sites/default/files/easo-practical-guide-qualification-for-international-protection-2018.pdf.

Nevertheless, in Greece, there are cases in which the second-instance adjudicators, concluded that the option of concealment during relocation in a big city of a country with SOGI criminalizing laws (such as Tehran in Iran) was the proper solution for the avoidance of persecution. Unfortunately, such approach ignores that "an internal protection alternative can only be taken into consideration, after it has been established that the State authorities in that part of the country are not homophobic or transphobic,but are instead willing and able to offer protection to LGBTIs, when needed",[105] something *de facto* impossible in countries where either diverse SOGI are criminalized or the protection mechanisms in place are not implemented.

3.7. Critical outline of recent case-law

In view of the previous Chapters, it is important to illustrate how the requirements and provisions aforementioned, are implemented into practice. The best, perhaps, way to achieve this, is by elaborating on the reasonings of some noteworthy decisions.

Let us begin with the case of a Pakistani unaccompanied minor who claimed that he fled from his country of origin when the imam and his social surroundings learnt about the appellant's relationship with a male partner (after the dissemination via local media, of photos of him together with his partner, along with the message that "gays do not have place in our school and village"), given that local protests against him took place due to the public insult of morals and he was subjected to mocks and threats to life, which the officer in the local police department denied to register, unless he was given a large amount of money which the appellant did not have. Some of his relatives as well, severed ties with his family, the honour of which the boy had insulted.

The case worker at first instance, albeit taking into account the UNHCR Guidelines on International Protection No. 8 in view of the claimant's young age (who, at the drafting period had turned 18), focused on the fact that the claimant, in his narrative, did not invoke his SO, nor did he identify himself as a homosexual, having also in mind that he had had sexual intercourses with women (notwithstanding the fact that he had explained that he feels as a man and a woman altogether who is more attracted to men). Subsequently, the administrative

[105]Spijkerboer T. & Jansen S.2011. "Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe". Vrije Universiteit Amsterdam (VU University Amsterdam). September 2011. https://www.refworld.org/docid/4ebba7852.html, 42.

organ rejected the applicant's internal credibility and the objective element of the "well-founded fear".

On the other hand, the 7th Independent Appeals' Committee, by majority, after attributing special attention to the appellant's age and maturity at the critical time-point, proceeded with the credibility assessment of his substantive allegations. In this assessment, the Committee, having in mind the relevant case-law and the difficulty in recalling traumatic experiences in the exact chronological order in which they took place,[106] emphasized that these allegations relate to events of a private nature which cannot be cross-examined completely objectively, and are accepted as credible in their entirety, especially because that the appellant described in sufficient detail the circumstances under which his SO (as bisexual, insofar as his relations with same-sex persons are concerned) was revealed as well as the problems he faced because of this. From thereon, the deciding organ, based on the past persecution, the respective COI and the authorities' unwillingness to protect the appellant who is a survivor of verbal and psychological violence, ruled in favour of the well-foundedness of his fear and after including him in the PSG of bisexual persons who are persecuted due to the prohibited by law, homosexual acts, recognized him as a refugee.

Similarly, in a case brought before the 9th Independent Appeals' Committee, the Committee dealt with the issue of an intersex asylum seeker from Pakistan, who urinates from the perineum and suffers from cryptorchidism and micropenis. Due to these characteristics, upon the appelant's birth, his parents thought the appellant was a girl, an estimation that was rejected by the paediatrician who defined his as a boy. As the years went by, though, the appellant was stigmatized and subjected constantly to mockery, deciding, thus, to flee in Europe so as to find a cure.

The Committee, after analyzing the necessary terminology regarding transgender and intersex individuals, as well as the hypospadias from which the appellant suffered by birth and contextualizing the factual basis of the case under the umbrella-term "hijras" (used in Pakistan and Bagladesh, as well) and their discriminatory treatment in Pakistan, assessed his claims as credible in their entirety and concluded that the appellant should be recognized as a

[106]The UNHCR points out that: "For asylum seekers, dates, locations, distances and even personal experiences may have been erased from memory due to spiritual shock and there may be a time gap. The omissions or inaccuracies on the part of the asylum seeker are not a sign of dishonesty. [...] The chronological order of events is difficult to repeat. "Asylum seekers usually remember the events that particularly affect them with an emotional rather than a temporal flow." (UNHCR. 1995,25-26)

refugee due to his MPSG of intersex individuals, whose, in addition, the innate medical specificity has become widely known to the local community, resulting, thus, in his social stigmatization and isolation.

Moreover, interestingly, in 2019, the Piraeus' Administrative Court of Appeal dealt with the issue of imputed SO, annulling the decision of the 6th Independent Appeals' Committee to refuse international protection to a Ghanaian applicant who claimed that he cannot be returned to his country of origin as he was accused of promoting homosexuality by members of a local group, which in fact, disseminated a video with his photograph and called publicly for him to be killed. In this landmark decision (n.401/2019),[107] the Court ordered the re-assessment of the international protection application, after finding that the Committee did not examine the possibility that imputed SO may be sufficient on its own to establish a well-founded fear of persecution and thus, to provide the basis for refugee status recognition, by pointing out that the Committee should have assessed that claim even if the applicant did not identify as LGBTQ.

In another remarkable decision (n. 411/2020),[108] the Athens' Administrative Court of First Instance suspended the decision of deportation of a transgender Moroccan person who had submitted a subsequent asylum application that was rejected at second instance by the 2nd Independent Appeals' Committee on the grounds that neither the medical follow-up due to gender discomfort nor the additional hormone therapy received for gender reassignment are considered new elements, because, albeit having taken place after the applicant's first asylum application, they are a natural consequence of gender discomfort and transgenderism which had been raised by the applicant in the first application and were rejected via a final decision.

The Administrative Court though, accepted the applicant's right to self-termination and ruled that, as a trans woman in a transition process, if returned to her country of origin, she would be at risk of being arrested, imprisoned and subjected to inhuman and degrading treatment.

[107] Available at: https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/0_%CE%94%CE%95%CF%86%CE%A0%CE%B5%CE%B9%CF%81%2040 1-2019%2C%CE%B5%CE%B9%CE%BA%CE%B1%CE%B6%CF%8C%CE%BC%CE%B5%CE%BD%CE%BF%CF%82%20%CF%83%CE%B5%CE%BE%CE%BF%CF%85%CE%B1%CE%BB%CE%B9%CE%BA%CF%8C%CF%82%20%CF%80%CF%81%CE%BF%CF%83%CE%B1%CE%BD%CE%B1%CF%84%CE%BF%CE%BB%CE%B9%CF%83%CE%BC%CF%8C%CF%82.pdf.

[108] See for further analysis (in Greek translated freely by the author), Immigartion.Gr. 2020. "Administrative Court of First Instance of Athens 411/2020: Suspension of asylum rejected by a transgender woman from Morocco. http://www.immigration.gr/2020/11/dioikhtiko-prvtodikeio-anastolh-asporripsis-asyloy-diemfylikhs-gynaikas-maroko.htmlas well as, CRWI Diotima. 2020. "Suspension of deportation of a transgender woman from Morocco".Published November 05,2020. https://diotima.org.gr/anastoli-apelasis-diemfylikis-gynaikas-apo-to-maroko/.

Hence, on the basis of art. 52 par. 8 of the Presidential Decree 18/1989, the Greek Court, ordered the administrative organs to abstain from any action resulting in her forced departure from the Greek territory under the exclusive power of the contested act, pending a final decision on the application for annulment.

Consequently, we observe a more informed and human-centric approach of SOGI-related asylum claims by Greek adjudicators which indicates an important change of paradigm. Be that as it may, how can all parties involved in the RSD process move towards a more gendered protective framework?

4. Final Remarks : Good practices towards a gendered protective framework

To elaborate upon this question, one should always have in mind that asylum seekers raising SOGI-related claims may have suffered traumatic experiences in their countries of origin, as well as, during their journey to the reception countries. Moreover, due to sentiments of fear and lack of trust towards the authorities, *inter alia*, they might not have access to basic services and thus, they become even more vulnerable. For this reason, "authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place".[109]

To this end, timely screening and vulnerabilities' identification is of utmost importance[110] and surely, specialized SOGI-related training of all involved in the asylum procedure (reception authorities, interviewers, decision makers, interpreters *etc*.) as part of their regular agenda, would help create a safe place for all LGBTQIA+s throughout the asylum process. Having, also, in mind that the asylum claims of persons with diverse SOGI, in their majority, are rejected due to the lack of credibility or reasonable fear as assessed via biased techniques, such trainings would contribute to the gradual awareness of the shame and fear that LGBTQIA+s might feel when talking about their SOGI and the elimination of stereotypical and/or inappropriate perceptions and questiong during the interviews.

In addition, nowadays, there have been developed many SOGI-related tools (including the DSSH model, previously analyzed) and resources by many organizations and civil society groups,[111] to which authorities can resort with the aim of adopting a more gendered and open-minded approach of asylum claims,[112] as provided for by, *inter alii*, the UNHCR guidelines analyzed in previous Chapters.

[109] ECtHR, *O.M. v. Hungary* (Application no. 9912/15), 5 July 2016 (finalized on 05.10.2016), para.53.
[110]See, in this context the tool developed by EASO for assessing special reception and procedural needs, available at: https://ipsn.easo.europa.eu/ .
[111]See instead of others manuals and tools, ICJ (International Commission of Jurists). 2016. "Refugee Status Claims Based on Sexual Orientation and Gender Identity - A Practitioners' Guide No. 11". ICJ. February 2016. https://www.refworld.org/docid/56cabb7d4.html and Jansen Sabine. 2014. "Good Practices related to LGBTI Asylum Applicants in Europe". Edited by Joël Le Déroff. ILGA Europe. May 2014. https://www.ilga-europe.org/sites/default/files/good_practices_related_to_lgbti_asylum_applicants_in_europe_jul14.pdf .
[112]See, CDDH (Steering Committee for Human Rights). 2019. "Combating discrimination on grounds of sexual orientation and gender identity in Council of Europe Member States. CDDH Report on the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity[adopted by the CDDH at its 92nd meeting (26–29 November 2019)]". Council of Europe. https://rm.coe.int/combating-discrimination-on-grounds-of-sexual-orientation-and-gender-i/16809fb2b8., 75.

Notably, in Greece, to the author's knowledge, a series of trainings[113]and workshops on SOGI issues are held regularly on the ground, by UNHCR and EASO to case workers and front-line services. Nevertheless, trainings with regards to LGBTQIA+s should extent to the interpreters as well, who, from the very first phase of the asylum procedure, are called to transfer the claimants' exact words to the authorities and thus, inevitably, affect the frame of mind of the claimants.[114]

Undoubtedly, such trainings will end up being void if quality control mechanisms are not established. In such mechanisms, one should include both regular reviews of all (or a significant amount of) interviews and decisions -at first instance, at least- and the collection of SOGI-related asylum claims (regarding the total number of LGBTQIA+ asylum seekers, their countries of origin, their recognition rate, the enjoyment of legal assistance and/or procedural guarantees, the recognition or not of their vulnerability *etc*.) with the aim of compiling such information and addressing the issues arisen in a more targeted way than via a case-by-case approach.

Furthermore, from the author's perspective, the reform of Article 71 of L. 4636/2019 (in which Articles 19-23 of the Directive 2013/32/EU are incorporated) is important so that applicants can enjoy free legal assistance and representation during their interviews at first instance and be able to substantiate more freely their claims, having in mind that the procedure before the Appeals' Committees, as a rule, is written and based on the elements of each case file[115] and in practice, the applicants, are called quite rarely on a supplementary hearing.

Last but not least, in the author's view, SOGI-related asylum claims should be exempted from the national lists of safe countries of origin, especially if one takes into account that Ghana, Senegal, Tunisia, Morocco, Algeria and Togo which are considered as safe under that concept

[113]In this context, see the manual "designed for police trainers, investigators, managers, hate crime officers and frontline police officers working in countries across the Council of Europe region to develop essential skills to identify and investigate hate crimes against LGBTI persons", Perry Joanna & Franey Paul. 2017."Policing Hate Crime against LGBTI persons:Training for a Professional Police Response". Edited and co-ordinated by Yuri de Boer and Evgenia Giakoumopoulou. Council of Europe. May 2017. https://edoc.coe.int/en/lgbt/7405-policing-hate-crime-against-lgbti-persons-training-for-a-professional-police-response.html.

[114]See also, for some good practices on SOGI-related claims, IARMJ (International Association of Refugee and Migration Judges) & EASO (European Asylum Support Office). 2021. "Judicial analysis: Vulnerability in the context of applications for international protection".EASO Professional Development Series for members of courts and tribunals.EASO. August 2020. https://www.easo.europa.eu/sites/default/files/Vulnerability_JA_EN.pdf, 251.

[115]See, instead of other sources, Ministry of Migration and Asylum.n.d. "Second Instance Procedure". Hellenic Republic. https://migration.gov.gr/en/appeals/b-vathmos/.

by virtue of the joint Ministerial Decision No. 1302/20.12.2019 (Gov. Gazette 4907/B/31.12.2019), criminalize and enforce diverse SOGI.[116]

By adopting such practices, we could enhance and redefine the asylum system through a more SOGI-friendly lens so as to bridge the gap arisen in the cases of LGBTQIA+ asylum seekers, at a time when European countries persistently face hate crimes against this community[117] and anti-LGBTQIA+ legislation.[118]

[116] Remarkably, at the time of writing and more specifically, on 2nd July 2021, the French Council of State, aiming at protecting LGBTQIA+s and providing them with a more lenient asylum procedure, exempted Benin, Senegal and Ghana from their national list of safe countries of origin. See, instead of others, Le Monde 2021. " Immigration : le Conseil d'Etat retire trois pays africains de la controversée liste des pays «sûrs». July 2, 2021. https://www.lemonde.fr/societe/article/2021/07/02/immigration-le-conseil-d-etat-retire-trois-pays-africains-de-la-controversee-liste-des-pays-surs_6086777_3224.html

[117] See on the issue, ILGA-Europe. n.d.(b). "Hate Crime". ILGA-Europe. https://www.ilga-europe.org/tags/hate-crime.

[118] See, for instance, the very recent law in Hungary banning LTGBT content in schools and on kid's TV or Poland's "LGBT-free zones". See, instead of others, The Guardian 2021. "Hungary passes law banning LGBT content in schools or kids' TV". Guardian News & Media. June 15,2021. https://www.theguardian.com/world/2021/jun/15/hungary-passes-law-banning-lbgt-content-in-schools and Ash Lucy. 2020. Inside Polands 'LGBT-free zones'. BBC News. September 21,2020. https://www.bbc.com/news/stories-54191344 respectively.

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