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Sexuality-based asylum in the European Union

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Anno Accademico 2019/2020

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INTRODUCTION

The European Union (EU) is built on the relevant values of equality and non-discrimination and it has made significant steps toward the fight against discrimination because of sexual orientation.

In this connection, thanks to the Lisbon Treaty, the Charter of Fundamental Rights of the EU (hereinafter, the EU Charter[1]) occupies a remarkable place in influencing the adoption of all the EU policies that may affect the fundamental human rights of the individual. In particular, article 21 of the EU Charter explicitly prohibits discrimination based on sexual orientation in all Member States[2].

For these bright reasons and with the hope to have a better life, many lesbian, gay, bisexual and transgender and intersex (who will be referred as LGBTI individuals in the course of the present dissertation) applicants choose the EU as their lifeline. In fact, in recent years, a great flow of LGBTI asylum seekers have applied for safety in the EU, regarded as the "*land of rights*".

However, although the abovementioned encouraging premises and despite discrimination against LGBTI is increasingly becoming inadmissible at the EU level, public attitudes and behaviors towards LGBTI individuals may vary from one Member State to another[3]. As a result, in some more "conservative" Member States prejudices against LGBTI persons are still alive; furthermore, prejudices against homosexual individuals may be based on senseless beliefs, for instance that *«homosexuality is an illness»* or that *«LGBTI individuals are responsible for the collapse of traditional values*[4].»

As matter of facts, the use of prejudices may affect the positive outcomes of sexuality-based asylum requests as well. Indeed, these kinds of situations and

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[1] *Charter of Fundamental Rights of European Union,* OJ C 364/01, 18.12.2000.

[2] See*, Charter of Fundamental Rights of the European Union*, article 21: "*1. 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. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."*

[3] FRA, *"Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity",* 2010 update, p. 9, available at https://www.refworld.org/pdfid/4d01f6f42.pdf, accessed on 10th March 2020.

[4] *Ibid.,* cfr. p. 11.

environments may be particularly hostile and difficult for the lives of LGBTI asylum applicants and migrants, who ask for international protection in the EU; a Union which is supposed to be totally free from any kind of discrimination, prejudice and injustice, governed by the freedom of expression and the protection of the fundamental human rights.

The issue of sexuality-based asylum within the EU touches upon fundamental aspects of the Union framework: these aspects are first of all related to the Union standards characterizing the asylum system and migration policy. However, when referring to asylum, it is indispensable to highlight the fact that, basically, asylum and refugee law is regulated both by international and EU law provisions, which must be read together in order to have an exhaustive examination of the matter at the core of the present dissertation.

Moreover, through the years asylum based on sexual orientation persecution has been also at the heart of a vibrant dialogue amongst international, European – referring both to ECJ and to ECtHR - and national courts. Tn this way may, a considerable interest for a full protection of LGBTI asylum seekers' rights has been illustrated by Member States' national jurisdiction as well, with a particular reference to the Supreme Court of Italy (*Corte Suprema di Cassazione*).

LGBTI asylum claimants are obliged to flee from countries in which homosexuality or "not straight" sexual orientation is criminalized by national legislations. In fact, according to the data updated for 2019, nowadays there are still about sixty-nine countries worldwide where people may risk to be arrested, imprisoned, or even condemned to death, due to the disclosing their sexual orientation which is not considered as conventional and/or right[5].

Finally recognized as eligible for being granted the refugee status across EU, LGBTI asylum seekers arriving in several Member States continue to face many difficulties in order to get the international protection requested; in fact, they must prove to competent authorities and national adjudicators that they have a well-founded fear to be persecuted because of their sexual orientation, a proof that, even more than in hypothesis of political, religious or ethnic persecution, usually does not exist in

[5] For example, consensual same sex acts are “punished” with the death penalty in Iran, Mauritania, Saudi-Arabia, southern part of Somalia, Sudan and Yemen.

concrete. Moreover, LGBTI applicants are often victims of unreasonable discriminations, humbling stereotypes and humiliations in countries which, instead, are supposed to be "safe" for them. As a consequence, a huge number of sexuality-based claims are dismissed in the EU, actually destroying their hope of being protected; in this way, LGBTI people *de facto* continue to be left at the outset of the society, despite on the paper they should be prevented from being subject to unacceptable discrimination, according to EU law regarding the protection of human rights.

The main aim of the present work, structured in four Chapters, is to analyse the most important legal challenges and jurisprudential developments regarding asylum based on sexual orientation persecution. In addition, it will further be highlighted how the contribution of the civil society, academics, international organizations and non-governmental organizations (NGOs) has been fundamental for the study of sexual orientation and gender identity concepts within refugee law. In particular, the first Chapter will provide a general overview of the basic notions relating to the issue at the core of this dissertation: starting with the definition of the term of “asylum”, the discussion will concentrate on a comprehensive examination of refugee law, in order to understand why sexuality-based asylum seekers should be considered as members of a particular social group, as to be recognized as refugees according to the meaning of the 1951 United Nations Convention Relating to the Status of Refugees (hereafter the 1951 Refugee Convention)[6].

Moreover, on an international point of view, it will be analyzed how the United Nations High Commissioner for Refugees (UNHCR)[7] keeps playing its primary role in protecting asylum seekers and in implementing the provisions established in the 1951 Refugee Convention, cooperating with the EU on the regional level; furthermore, after these overall remarks, it will advance some considerations about

[6] Resolution 2198 (XXI) adopted by the United Nations General Assembly, *1951 Convention Relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees*, Geneva, 28 July 1951, available at https://www.unhcr.org/3b66c2aa10

[7] Created on 14 December 1950, the UNHCR is the United Nations Agency with the mandate to protect refugee all over the world; the Agency aims to grant them adequate international protection, material assistance and help. The UNHCR has the purpose to find concrete solutions for their dramatic situations as well.

sexual orientation and gender identity matters concerning the asylum framework, focusing mainly the attention on criminalizing legislations towards same-sex acts and on the most common practices and "mistakes" undertaken by Member States, while dealing with sexuality-based asylum claims.

The second Chapter will firstly offer a concise, but, at the same time, indispensable overview of the EU common asylum system and policy. In fact, the Union strongly believes that it essential to set and guarantee high standards of protection for vulnerable asylum seekers and refugees, who are obliged to flee from desperate backgrounds.

The discussion will also deal with the analysis of the main features which characterize the Common European Asylum System (CEAS); based on the full application of the 1951 Refugee Convention, the CEAS can be considered as the result of the strong and historical cooperation amongst Member States on asylum matter, which have always pursued to harmonize the standards of international protection, in order to establish common procedures and legal provisions totally effective and equal across the whole EU. Nonetheless, the asylum legal framework shall be read in light of the principles and tools governing international and EU human rights law[8], first of all the principle of *principle of non-refoulement*[9]. Consequently, for the purpose of this work, particular attention must be focused on the compliance of legal provisions and practices regarding LGBTI asylum seekers with the fundamental human rights enshrined in the EU Charter.

Furthermore, the second Chapter will handle the EU legal framework with regard to LGBTI asylum claims; in particular, the Chapter will deeply analyse the most relevant points and criticalities of the Qualification Directive 2011/95/EU[10], which has officially recognized LGBTI claims under the membership of a particular social

[8] For example, the Universal Declaration of Human Rights is an historical act that can be considered as one of the main expressions of the international law regarding human rights protection. The Declaration, not legally binding, includes 30 articles which solemnly affirm the individual's fundamental rights. *Universal Declaration of Human Rights*, Resolution 217 A (III) of 10 December 1948 adopted by United Nations General Assembly

[9] According to international law, the principle of non-refoulement prohibits a country that receives asylum applicants from returning them to a country in which they would face the risk of persecution, on the ground stated in article(1A) of the 1951 Refugee Convention.

[10] *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*), OJ L 337/9, 20.12.2011

group ground. However, despite the important contribution provided by articles 9 and 10 of the recast Qualification Directive, the following discussion will explain the necessity to introduce in the EU legal asylum framework the explicit recognition of sexuality-based persecution as an autonomous reason for granting the refugee legal status, as to finally avoid procedural differences and practices amongst EU countries in assessing LGBTI asylum claims.

Additionally, the last part of the second Chapter will mostly present the challenges and the steps forwards that should be undertaken by the EU, in order to establish an homogenous system aiming to safeguard LGBTI asylum seekers' rights and safety, not only in all Member States, but also in countries, like Turkey, wrongly considered as "safe" for lesbians, gay, bisexuals, transsexuals and intersex individuals.

Therefore, the following discussion will deeply highlight how, during the last seven years, the role of the Court of Justice of the European Union (hereinafter, the CJEU or the Court of Luxembourg), as the main guarantor of EU law, has demonstrated to be essential in building EU common rules relating to sexuality-based asylum applications.

So, the third Chapter will argue about the fundamental position of the CJEU, which has stated important clarifications and legal interpretations on the correct assessment of LGBTI asylum claims in accordance to EU law, influencing in a consistent manner Member States' asylum examination proceedings and stimulating positive, negative and critical reactions form the civil society. Moreover, as it will examine further, the so called "right interpretation" of the Court of Luxembourg's case-law regarding asylum claims based on sexual orientation persecution has also showed a considerable attention for the thorough respect of the provisions laid down by the EU Charter, in particular those linked to the safeguard of human dignity and the individual's private life; thus, it is undoubtful that the CJEU has contributed to strengthen the power of the Charter as a real "living instrument", in relation to the protection of LGBTI individuals as well.

However, as it was already anticipated, the CJEU has not been the only European Court which seems to be sensitive to LGBTI asylum seekers protection: as matter

of fact, the jurisprudence of both the European Court of Human Rights[11] (hereinafter, the ECtHR or the Court of Strasbourg) and the Supreme Court of Italy, analyzed together with the CJEU's case-law, has clearly provided an interesting dialogue amongst the Courts with regards to sexuality-based asylum claims. Consequently, last but not least, in the fourth Chapter a suitable comparative discussion relating to the case-law of the CJEU, of the ECtHR and of the Supreme Court of Italy is required, in order to have a better understanding of the analogies and the discrepancies existing amongst three different European Courts and as to provide a general comprehensive overview of the existing jurisprudence concerning the issue at the heart of the following dissertation.

[11] The European Court of Human Rights (ECtHR) was established in 1959 by the European Convention of Human Right, adopted in the context of the Council of Europe. Article 19 of the Convention states: *"To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis."*

CHAPTER I

GENERAL REMARKS ABOUT SEXUALITY-BASED ASYLUM AND THE ROLE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)

SUMMARY: 1.1 Preliminary observations - 1.2 The interpretation of the concept of asylum and the status of refugee – 1.2.1 The 1951 Refugee Convention – 1.2.2 Well-founded fear of being persecuted – 1.3 Sexual orientation, gender identity and asylum claims – 1.3.1 Sexuality based persecution: membership of a particular social group as a ground for the recognition of refugee status – 1.3.2 Credibility and the issue of "discretion" in the majority of European States – 1.4 UNHCR against sexual orientation persecution - 1.4.1 Guidelines on International Protection no 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity - 1.5 Criminalization of consensual same sex sexual acts - 1.5.1 European Union countries and the necessity of additional requirements for granting refugee status – 1.5.2 Safe countries of origin – 1.6 The UNHCR and the EU: a first appraisal

1.1 Preliminary observations

The present Chapter aims to establish some general considerations about the recognition of the refugee status, regulated both by international and EU law. Basically, the refugee legal framework may be fully understood in conjunction with international human rights law and with international humanitarian law. In particular, according to international humanitarian law, persons who do not take part in a conflict should be respected and protected against the effects of the fighting. Since many asylum seekers flee from international or internal conflicts, humanitarian law principles can also be applied to them[12].

[12] UNHCR, "*A guide to international refugee protection and building state asylum systems*", Handbook for Parliamentarians N° 27, 2017, p. 23 available at https://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html, accessed on 29th of March 2020.

Starting with the definition of the basic concept of “asylum”, it is particularly crucial to set a comprehensive overview of refugee law, in order to understand why sexuality-based asylum seekers should be protected in the same way as people fleeing from destructive wars. For a full understanding of this work, a correct awareness of the terms “sexual orientation” and “gender identity” is also required.
Sexual orientation and gender identity are part of the single’s individuality: persecution and penalization for being “different” from the rest of society may not be allowed within the contemporary international community. So, a precise analysis of the reasons which led to criminalize same-sex consensual acts will be discussed further in the course of the present dissertation; however, in order to grant international protection, the mere existence of criminalizing legislations in a certain country sometimes may not be considered as a sufficient proof.
On the international scenario, it will be analyzed how the UNHCR carries out its primary role in protecting asylum seekers and in implementing the provisions laid down in the 1951 Refugee Convention; in fact, in the recent years the Agency has provided several instruments, non-binding tools in order to recognize the refugee status based on gender identity and on sexual orientation; in its documents, reports, guidelines, the UNHCR has the purpose to solve all the issues which may arise under sexuality-based and gender identity claims[13].
The UNHCR is not the only international actor that hold an important position in this framework. In fact, as it will be discussed in the following paragraphs, academics, international and national courts, international organizations and NGOs have made great advances in studying sexual orientation and gender identity concept within refugee law. For example, Amnesty International, the Organization for Refugee, Asylum and Migration (ORAM) and the International Commission of Jurists are some relevant NGOs which have always been on the front line in order to protect LGBTI rights and in order to legally recognize sexuality-based asylum worldwide, cooperating with the UNHCR.
A great contribution in this field has been provided by the EU, whose action is at the basis of the present dissertation.

[13] See, UNHCR, "*Guidance note on refugee claims relating to sexual orientation and gender identity",* 21 November 2008, available at https://www.refworld.org/pdfid/48abd5660.pdf, p.6, accessed on 8th March 2020.

Asylum seekers and refugees have been central issues of the EU policy during the 1990s. The Treaty of Amsterdam[14], entered into force in 1999, conferred to the EU the competence to adopt minimum standards regarding asylum, bringing new important innovations for asylum policy and for the area of freedom, security and justice across the EU.

For this purpose, article 63 of the Treaty establishing the European Community[15] (on which article 78 of the Treaty of Functioning of the European Union[16] is based) was amended by article 73k of the Amsterdam's Treaty, stating that, within a period of five years after the entry into force of the Treaty of Amsterdam, EU Institutions shall adopt legislative measures on asylum, refugees, displaced persons and on immigration policy.

After the Treaty of Amsterdam, in October 1999 Member States decided to hold a summit in Tampere, where they provided the main political guidelines for an EU development legislation on asylum and immigration, in order to establish a Common European Asylum System (CEAS), based on the full application of the 1951 Refugee Convention[17].

So, since then, Member States have cooperated in order to set up a CEAS, aiming to harmonize the standards of international protection; moreover, the CEAS addresses to coordinate Member States' asylum legislations, including procedures and standards which have to be effective and equal across the whole EU[18].

Nowadays, the CEAS is constituted by different legislative acts: the Dublin II Regulation[19], that determines which Member State should be competent to examine

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[14] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, OJ C 340/ 1, 10.11.97.

[15] *Treaty establishing the European Community ,* OJ C 325/1, 24.12.2002.

[16] *Treaty on the Functioning of the European Union*, OJ C326/49, 26.10. 2012. The legal basis of the EU asylum policy is now constituted by articles 67(2), 78 and 80 TFEU), that will be analyzed further in the next Chapter.

[17] C. KAUNERT, S. LÉONARD, "The European Union asylum policy after the Treaty of Lisbon and the Stockholm Programme: towards supranational governance in a common area of protection?" , *Refugee Survey Quarterly*, Volume 31, No. 4, p.9.

[18] See, European Migration Network, "Common European Asylum System", https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en, accessed on 13rd March, 2020

[19] *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,* OJ L 180, 29.6.2013.

an asylum application; the Procedures Directive 2013/32/EU[20], which establishes common procedures for granting international protection; the Reception Conditions Directive 2013/33/EU[21], which aims to set provisions for the reception of asylum seekers; the Qualification Directive 2011/95/EU[22], the real core of this dissertation; and the Eurodac Regulation[23], that allows the access to the EU database of fingerprints of asylum seekers only under certain conditions, in order to prevent some serious crimes, for example terrorism.

For the purposes of the current work, the Union has been protagonist of important developments in sexuality-based asylum; in fact, first with the "old" Directive 2004/83/EC and then with the recast Qualification Directive 2011/95/EU[24], the EU officially recognized persecution based on sexual orientation as a reason for the recognition of the refugee status; so, the Qualification Directive may be addressed as the most important legal innovation for the protection of LGBTI asylum seeker across EU.

Furthermore, the present Chapter will show that some European actors such as ILGA (International Lesbian, Gay, Bisexual, Trans and Intersex Association) Europe, the European Agency for Fundamental Rights (hereinafter, FRA), or authors like Thomas Spijkerboer[25] have provided many reports and studies that are crucial for the issue at stake[26].

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[20] *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, OJ L 180,* 29.06.2013.

[21] *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*, OJ L 180, 29.06.2013.

[22] The Qualification Directive will be discussed further in the next Chapter.

[23] *Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes,* OJ L 180/1, 29.6.2013.

[24] *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, OJ L 304/12, 30.09.2004.

[25] The project *"Fleeing Homopobia"* may be considered as one of the most interesting report about asylum claims related to sexual orientation in EU. S. JANSEN AND T. SPIJKERBOER, "*Fleeing Homofobia: Asylum Claims related to sexual orientation and gender identity in Europe",* Vrije Universiteit Amsterdam, 2011, p. 14 , available at https://www.coc.nl/wp-content/uploads/2013/11/Fleeing-Homophobia-report-EN_tcm22-232205.pdf, accessed on 7th March 2020.

[26] Indeed, these documents are often mentioned as fundamental sources for the present discussion.

So, in recent years, different Member States, the civil society and above all the CJEU with its fundamental judgements[27] have strongly sensitized the EU Institutions in order to set a single uniform proceeding for sexuality-based asylum claims, which should be enforced in every Member State. Unfortunately, without tangible results: nowadays, EU does not provide yet common legal standards for LGBTI asylum applicants which should be enforced and applied in all Member States equally.

Only in this way, LGBTI applicants may be able to rely on a legal basis to the extent of finding protection and safety elsewhere, far from countries in which they are not welcome anymore.

1.2 The interpretation of the concept of asylum and the status of refugee

As it was already anticipated, in order to understand the particular analysis undertaken in this dissertation, it is important to focus the attention on who are exactly the so called "asylum seekers" and therefore on the concept of "asylum".

An asylum seeker can be indicated as a person who decides to leave his/her home country, in order to enter in another country, where he/she applies for the right to international protection[28]. An asylum seeker is looking for safety outside his/her country, and for this reason he/she is someone different from an economic migrant[29].

The word "asylum" trace its etymology from ancient Greek, and is composed by the privative ἀ and the verb συλάω, which literally means "to devast", "to catch", "to violate": consequently, the word "asylum" can be interpreted as "without violence" or "without devastation". In Ancient Greece, there were many religious

[27] The role of the CJEU in sexuality-based asylum applications will be further discussed in Chapter III of the present dissertation.

[28] For detailed examinations of the key notions on asylum, see European Court of Human Rights, "Asylum", available at https://www.echr.coe.int/Documents/COURTalks_Asyl_Talk_ENG.PDF, accessed on 6th March 2020.

[29] See Amnesty International, "Refugee, Asylum-seekers and migrants", available on https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/, accessed on 6th March 2020.

sanctuaries that were considered as inviolable and sacred; consequently, they were real "asylum" territories, where no kind of persecution was allowed[30].

However, the "right of asylum" has no clear definition in international law and its real nature is still controverted; furthermore, it is applied in different senses in different contexts as well. Several efforts have been made in the doctrine to highlight the main characteristics of the notion[31].

Under a *lege lata* perspective, in 1950 the Institut De Droit International stated that asylum *« désigne la protection qu'un Etat accorde sur son territoire ou dans un autre endroit relevant de certains de ses organs à un individu qui est venu la rechercher*[32]*. »*

This content is based on two important issues: the struggle of the individual in order to obtain protection, and the concession granted by the State of asylum.

As different authors have stated[33], it is impossible and quite inappropriate to identify a classification of the reasons that could be invoked by the asylum seeker; in fact, asylum applications should be evaluated according to the rules and the guiding principles of different legal frameworks.

Moreover, according to public international law, the State of asylum should grant the protection under consideration in a truly effective manner: as a consequence, the State must ignore any kind of return request made by the country from which the seeker had fled[34]. As a matter of fact, it is important to underline that the liberty and the security of the individual is recognized as a fundamental human right, provided through several instruments in global, regional and national dimensions.

At a universal level, the right of asylum is expressed by article 14 of the 1948 Universal Declaration of Human Rights: *«(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked*

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[30] C.HEIN, edited by, *Rifugiati: Vent'anni di storia del diritto d'asilo in Italia*, Donzelli Editore, Rome, 2010, p.4.

[31] On this point, see V. MORENO-LAX, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law,* Oxford University Press, Oxford, 2017.

[32] Cfr. Institut de Droit International, "*L'asile en droit international public"*, article I, available at http://www.idi-iil.org/app/uploads/2017/06/1950_bath_01_fr.pdf, accessed on 6th 2020

[33] See, for example, F. LENZERINI, *Asilo e Diritti Umani: L'evoluzione del diritto d'asilo nel diritto internazionale*, Giuffrè Editore, Milano, 2009, pp. 83-85.

[34] *Ibid.*, p.85.

in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations[35]. »

An authentic interpretation of the norm was provided by the British delegate during the negotiations for the final drafting of the Declaration; the delegate stated that the right of asylum was the right of the country to give refuge and protection and to resist all demands for extradition, as it was mentioned above[36]. This is the perfect meaning of the expression "enjoy asylum from persecution" inserted into the Declaration[37]. So, the verb "to enjoy" must be considered not only as a right offered to an individual, but also as a sort of privilege accorded by the state of asylum, in order to reaffirm the sovereign right to grant protection.

The EU law demonstrates the engagement of its Member States in the implementation of international refugee instruments. In particular, in the Treaties of the European Community, the right of asylum refers to the protection provided by the 1951 Refugee Convention of Geneva. Moreover, within the CEAS, the meaning of asylum appears to be broader, but also quite indeterminate[38].

Article 18 of the EU Charter states that : *«The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union[...]»*

The provision consists of two elements: first of all, it clearly affirms the existence of "the right to asylum". Secondly, it imposes the obligation to guarantee this right. Moreover, it is fundamental to distinguish between the refugee's claim to asylum, which it is recognized by the EU Charter, and the obligation to grant asylum, which is not established by the EU Charter itself[39].

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[35] Cfr. *Universal Declaration of Human Rights*, article 14.
[36] See F. LENZERINI, *op. cit.*, pp. 102-104.
[37] *Ibid.,* p.105.
[38] See H. BATTJES, *European Asylum Law and International Law*, Martinus Nijhopp Publishers, Leiden/Boston, 2006, p. 9.
[39] See H. BATTJES*, European Asylum Law and International Law*, p. 112.

1.2.1 The 1951 Refugee Convention

An asylum seeker may become a refugee and may be given the refugee status if his/her personal situation and circumstance falls into the definition of "refugee", according to the 1951 Refugee Convention. Refugees must be effectively recognized from a legal point of view, because it is very dangerous for them to return home, and they need to seek safety elsewhere[40].

Refugee status at international level is regulated by the 1951 Refugee Convention and its 1967 Protocol.

Ratified by 145 State parties, the 1951 Refugee Convention specifies the term "refugee" and enounces their rights and freedoms, as well as the legal obligations of States in order to protect them[41]. So, this Convention should be considered as the first international treaty providing for a general and universal definition of refugee[42].

The most relevant provision of the Convention is Article 1A(2), that provides that the term "refugee" shall apply to: *«any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country*[43]*.»*

The 1951 Refugee Convention definition is based on a link that exists between the citizen and its State of origin. In the case of refugees, this link has been broken, as persecution and alienage can be considered physical expressions of the break; consequently, these expressions are the necessary and sufficient condition for recognizing refugeehood[44].

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[40] For further information, see United Nation High Commissioner for Refugees (UNHCR), " 'Refugees' and 'Migrants' Frequently Asked Questions (FAQs)", available at https://www.refworld.org/docid/56e81c0d4.html, accessed on 6th March 2020.

[41] For more detailed informations about the history of the 1951 Refugee Convention, see A. KOTZEVA, L. MURRAY, R. TAM QC, *Asylum and Human Rights Appeals Handbook*, Oxford University Press, New York, 2008.

[42] Another definition of "refugee" can be also found in the Statute of the Office of the UNHCR, article 6A(ii), available at https://www.unhcr.org/4d944e589.pdf, accessed on 7th March 2020.

[43] Cfr. *The 1951 Convention Relating to the Status of Refugees*, article 1A(2)

[44] H. LAMBERT, edited by*, International Refugee Law*, Ashgate Publishing Company, United Kingdom, 2010.

However, for our analysis it is very important to consider the definition provided by Article 1A(2) as a single compendious definition, that should be interpreted taking into account the meaning of all the terms that make it up; as a consequence, the definition of the status of refugee is a complex and unitary concept[45].

1.2.2 Well-founded fear of being persecuted

As we mentioned above, article 1A (2) of the 1951 Refugee Convention stated that only who owns a "well-founded fear of being persecuted" in the country of origin may be recognized as a refugee. The central issue in most asylum cases is whether the individual's fear of persecution is well founded.

Therefore, it is necessary that the escape of the asylum seeker should have been caused by a well-founded fear to be persecuted in a "dangerous" country.

In particular, in the case *R v. Secretary of State for the Home Department*, the House of Lords has definitely held that a fear of persecution is well founded if there is shown, objectively, a reasonable proof that the applicant would be persecuted if he/she would return to his/her own country. The judge Lord Keith of Kinkle stated that the "well-founded fear of being persecuted" should be demonstrated by indicating the existence of an actual fear and good reasons for this fear as well, trying to adopt the point of view of the asylum seeker[46].

So, the asylum seeker should prove the existence of the well-founded fear, and the competent authorities should decide on the basis of the elements provided by the applicant[47].

The second important element in order to be recognized as a refugee consists of the persecution, and the five reasons for persecution. In fact, the status of refugee

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[45] See F. LENZERINI *op. cit.,* p. 220.

[46] House of Lords (Judicial Committee), *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals,* 16 December 1987*,* Judgement One, available at https://www.refworld.org/cases,GBR_HL,3ae6b67f40.html, accessed on 6th March 2020.

[47] For example, the New Zealand Refugee Status Appeals Authority has recently refused an asylum request because of "*the paucity of information about the appellant upon which we can rely, [due to which] we are unable to find that she has a well-founded fear of being persecuted in the country of her nationality";* cfr. *Refugee Appeal No.76075*, 17 January 2008, available at https://www.refworld.org/pdfid/479dc0b22.pdf, par.56, accessed on 6th March 2020.

should be granted only for certain kind of reasons, enounced in article 1A(2) of the Convention.

However, a global definition of the term "persecution" does not really exist nowadays. The terms persecution usually refers to threats to life or freedom, that is a very broad concept as well. Over the years, the concept of persecution has increasingly been interpreted and applied according to human rights norms. For example, article 9(1)(a) of the EU Qualification Directive 2011/95/EU (that will be further and deeply discussed in this dissertation) defines acts of persecution as acts which are sufficiently serious as to represent a gross violation of a basic human right. Provision (b) of the same paragraph considers the possibility that an accumulation of various measures may be interpreted as persecution, providing that it is sufficiently severe so as to affect an individual in the same manner[48].

After these necessary observations, it is advisable to deal with the real core of this work: asylum based on sexual orientation persecution.

1.3 Sexual orientation, gender identity and asylum claims

Each year, thousands of lesbians, gay, bisexuals, trans and intersex (LGBTI) people decide to apply for asylum in the EU[49]. Consequently, the attention to LGBTI human rights has strongly increased in recent years, thanks also to some important changes that have occurred in social behaviors and policies "under the rainbow".

Yet, it is also known that there are different ways in which LGBTI asylum applications are examined in several Member States, as it was noted by the Commissioner for Human Rights[50].

Especially in Europe, progress on this issue is spreading : for example, out of the twenty-seven jurisdictions that allow same-sex marriage over the world, eleven are member states of the EU[51]. Furthermore, eight Member States give same-sex

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[48] On this point, see S. JANSEN AND T. SPIJKERBOER, *op. cit.,* p. 140.

[49] *Ibid.,* p. 7.

[50] Commissioner for Human Rights, "*Discrimination on grounds on grounds of sexual orientation and gender identity in Europe"*, Council of Europe Publishing, Strasbourg, 2011, pp. 62-69, available at https://rm.coe.int/discrimination-on-grounds-of-sexual-orientation-and-gender-identity-in/16809079e2, accessed on 8th March 2020.

[51] European Union countries which legally recognize same-sex marriages: Austria, Belgium, Finland, France, Germany, Ireland, Luxembourg, Netherlands, Portugal, Spain and Sweden.

couples the right to engage in a civil union[52], including Catholic countries like Italy[53].

Moreover, as it was already mentioned, article 21 of the EU Charter clearly prohibits discrimination based on sexual orientation in all its Member States.

To summarize, albeit the EU legal system on this matter is not completed yet and while LGBTI rights protection remain strongly different from a Member State to another Member State, discrimination based on sexual orientation is becoming more and more unacceptable across the EU[54].

This paragraph aims to try to answer some questions about sexuality-based asylum: what is the real meaning of the term "sexual orientation"? What is the different between "sexual orientation" and "gender identity"? And, above all, on which ground, indicated in the 1951 Refugee Convention, may LGBTI asylum seekers be recognized as refugees?

First of all, according to the preamble of the 2007 *"Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity"* (hereinafter, the Yogyakarta Principles), "sexual orientation" *«refers to a person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender, or more than one gender*[55]*.»*

"Gender identity" is something different. According to the Yogyakarta Principles, gender identity refers to *«each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at*

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[52] EU countries that legally recognize forms of civil unions: Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy and Slovenia.

[53] The institute of the civil union was introduced in Italy by Law no.76 of 20 May 2016 (the so called "Cirinnà law").

[54] See J.K. GARTNER, "(In)credibly Queer: Sexuality-based Asylum in the European Union", *Humanity in action Press,* 2015, p. 7, available at https://www.humanityinaction.org/knowledge_detail/incredibly-queer-sexuality-based-asylum-in-the-european-union/, accessed on 8th March 2020.

[55] *"The Yogyakarta Principles address a broad range of international human rights standards and their application to sexual orientation and gender identity. On 10 Nov. 2017 a panel of experts published additional principles expanding on the original document reflecting developments in international human rights law and practice since the 2006 Principles, The Yogyakarta Principles plus 10. The new document also contains 111 additional state obligations, related to areas such as torture, asylum, privacy, health and the protection of human rights defenders".* Cfr. "The Yogyakarta Principle", available at www.yogyakartaprinciples.org, accessed on 8th March 2020. The full text of the Yogyakarta Principles and The Yogyakarta Principles plus 10 are available at the abovementioned website.

birth, including the personal sense of the body, and other expressions of gender, including dress, speech and mannerisms[56]*.»* Consequently, it is possible to interpret the term "gender identity" as something that is connected to personal and individual feelings, with his/her sense of self, regardless any kind of relation with other people. Furthermore, several courts all over the world have also stated that sexual orientation may be related not only to the commission of sexual acts, but also to the way in which a person wants to express himself/herself and his/her particular identity. In fact, regarding persecution based on sexual orientation, it can be committed against a person as for the fact of being homosexual, as for acts dealing with the status of homosexuals itself[57].

1.3.1 Sexuality based persecution: membership of a particular social group as a ground for the recognition of refugee status

As it was previously said, the 1951 Refugee Convention indicates five different grounds upon which a person can be recognized as a refugee. However, over the years, different reasons of persecution have risen, and they have been not underlined by its drafters. In the majority of the cases, the recognition of the status has been granted under the membership of a particular social group ground. This is also the case of LGBTI people[58].

It is important to underline the fact that "membership of a particular social group" has always been the most discussed protected ground for asylum.

The UNHCR defines a particular social group as *«a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate,*

[56] *Ibid.,* preamble.

[57] See on this point UNHCR, "*Guidance note on refugee claims relating to sexual orientation and gender identity",* p.6.

[58] A. GÜLER, "Refugee Status Determination Process for LGBTI Asylum Seekers: (In) Consistencies of States' Implementations with UNHCR's Authoritative Guidance", in A. GÜLER, M. SHEVTSOVA, D. VENTURI, *LGBTI asylum seekers and Refugees from a Legal and Political Perspective*, Springer, Leuven, 2019, p. 165.

unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights[59]*.»*

Sexual orientation can be clearly considered as an innate and unchangeable characteristic and as a fundamental element of a human being; as a consequence, individuals should not hide or forsake it at all. While claims relating to bisexuals and transgender people have been not so common, such groups may also be considered as members of a particular social group[60].

Moreover, principle no. 23 of the Yogyakarta Principles explicitly affirms that the right to seek asylum includes persecution based on sexual orientation and/or gender identity; furthermore, the provision encourages States not to expel a person to any country where that person may be persecuted or tortured, or may risk any kind of inhuman or degrading treatment, because of his/her sexual orientation or gender identity[61].

From an EU point of view, when doing the legal transposing the Qualification Directive 2011/95/EU into their national legal system, some Member States do not explicitly indicate sexual orientation as a ground for asylum. In fact, all the EU Directives indicate only the objectives that Member States have to achieve; they are free to adopt the measures considered as adequate in order to do so. As a consequence, in most cases it is left to the discretion of the Member States to

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[59] UNHCR, *"Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees",* 7 May 2002, available at https://www.unhcr.org/3d58de2da.pdf., p. 3, accessed on 7th March 2020.

[60] UNHCR, "*Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity"*, p.8.

[61] In particular, principle no. 23 declares: *"Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity. States shall:a) Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum; b) Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity; c)Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person's sexual orientation or gender identity."*

whether to decide if LGBTI asylum seekers can be considered as part of a social group or not[62].

Article 10(1) (d) of the Qualification Directive ("Reasons of persecution") reproduces the definition provided by the 1951 Refugee Convention but it adds some other details regarding membership of a particular social group: *«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.»*

From this article it is possible to understand that members of a particular social group usually have some peculiar, shared elements that make them "different" from the rest of the society.

However, as it was already said, even if there are several differences in the way in which EU Member States consider LGBTI asylum applications, some of them have included sexual orientation as grounds of persecution[63].

1.3.2 The issue of "discretion" and credibility in the majority of European Union States

When LGBTI applicants decide to seek asylum in the EU, they often have their applications dismissed. In fact, some Member States believe that LGBTI asylum seekers could not risk their life by hiding their sexual orientation upon return to their country of origin. They have only to be "discreet", to conceal their real desires and their love. They have to stay "in the closet" in order to avoid persecution in their own countries[64].

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[62] M.G.BEGAZO, "The Membership of a Particular Social Group Ground in LGBTI Asylum Cases Under EU Law and European Case-Law: Just Another Example of Social Group or an Independent Ground?", in A. GÜLER, M. SHEVTSOVA, D. VENTURI, *LGBTI asylum seekers and Refugees from a Legal and Political Perspective,* p. 179.

[63] A. GÜLER, "Refugee Status Determination Process for LGBTI Asylum Seekers: (In) Consistencies of States' Implementations with UNHCR's Authoritative Guidance", in A. GÜLER, M. SHEVTSOVA, D. VENTURI, *LGBTI asylum seekers and Refugees from a Legal and Political Perspective*, p. 165

[64] On this point, see ILGA Europe, "*Good Practices related to LGBTI asylum applicant in Europe"*, May 2014, p.13, available at https://www.ilga-

However, if asylum seekers are required to hide something which is related to their fundamental human rights, this means basically negating the role of such rights. Moreover, the persecution does not cease to be perpetuated although the oppressed tries to cover his/her sexuality.

In order to escape persecution and degrading treatments, LGBTI asylum seekers very often may decide to hide some aspects of their private life or most part of it as well. In this way, they cut down their chances of demonstrating their sexual orientation and/or the persecution experienced. Their conduct is not voluntary, but they are forced to act like that in order to save their lives.

Furthermore, LGBTI people may fled their countries for other reasons and may have done the so called "coming out" after arriving in the host country; consequently, they could be recognized as refugees only demonstrating the possibility of persecution in the future[65].

It is important to consider the fact that the so called "discretion requirement" goes against the Qualification Directive, because article 10(1)(d), as it was already highlighted, states that members of a particular social group «*share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.*» In fact, the discretion requirement involves LGBTI asylum seekers renouncing their identity and part of their own conscience.

At the time the "*Fleeing Homophobia*" research was done, the "discretion requirement" still existed in at least fifteen Member States[66].

For example, even if in 1983 the Wiesbaden Administrative Court compared "discretion" in sexuality-based asylum claims to oblige someone to change or hide their skin colour in order to flee persecution,[67] in recent years German case law still continues to argue on this issue. As it is stated in the report "*Fleeing Homophobia"*,

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europe.org/sites/default/files/Attachments/good_practices_related_to_lgbti_asylum_applicants_in_europe_jul14_1.pdf, accessed on 7th March 2020.

[65] See M. BALBONI, *La protezione internazionale in ragione del genere, dell'orientamento sessuale e dell'identità di genere: aspetti di diritto internazionale e dell'Unione Europea,* G. Giappichelli Editore, Torino, 2012, p. 112.

[66] Austria (above all of bisexuals), Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, Malta, the Netherlands, Poland, Romania and Spain. See S. JANSEN AND T. SPIJKERBOER, *op. cit.,* p.34.

[67] Verwaltungsgericht Wiesbaden, Decision No. IV/IE06244/81, 26 April 1983. On this point, see also, J. WEßELS "Discretion in sexuality-based asylum cases", in T. SPIJKERBOER, *Fleeing Homophobia: sexual orientation, gender identity and asylum,* Routledge, London and New York, 2013, p. 55.

the "discretion requirement" is usually applied by German Administrative Courts in particular with regard to African countries, for example Algeria and Morocco[68]. Instead, in France the "discretion requirement" turns in a sort of an "indiscretion requirement": this means that the asylum seekers who have not explicitly shown their sexuality or manifested publicly their identity in the countries of origin, may not be recognized as refugees[69].

In order to solve this specific problem, a great contribute was provided by the CJUE in the *case X, Y and Z v Minister voor Immigratie en Asiel.* With its judgement, the CJEU stated that an asylum applicant may be recognized as a refugee, if his/her sexual orientation may put the person to a risk of persecution in his/her country of origin. The Court hold *«the fact that he could avoid the risk by exercise greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect[70].»*

For the purposes of the CJEU, all Member States should adopt an approach based exclusively on acquiring information about LGBTI protection and rights in the countries of origins, and on verifying the existence of a well-founded fear of being persecuted because of a certain sexual orientation. Any other reasons or element (concealment, discretion) that may avoid mistreatments should not be taken into account by European Union asylum authorities[71].

Thanks to the contribution of the Court, while several Member States (for example, the Netherlands or the Czech Republic) have recently abolished the “discretion requirement", a growing number sexuality-based asylum claims are now being refused on the grounds that the applicants’ requests lack of “credibility”. Although credibility of sexuality is clearly hard to provide, the stereotypes which are daily taken into consideration in most European countries are really dubious.

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[68] J. MILLBAN**,** “Sexual orientation and refugee status determination over the past 20 years: unsteady progress through standard sequences?”, in T. SPIJKERBOER, *Fleeing Homofobia: sexual orientation, gender identity and asylum,* p.35.

[69] *Ibid.,* p. 36.

[70] Cfr. CJEU joined cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie en Asiel*, 7 November 2013, ECLI:EU:C:2013:720, par. 75. The case and the relative C’s judgment will be discussed deeply in chapter III.

[71] On this point, see ILGA Europe, "*Good Practices related to LGBTI Asylum applicants in Europe",* p.14.

For the recognition of the status of refugee, the proof of sexual orientation is a central and discussed issue nowadays.

On this point, the UNHCR Handbook[72] states that it may be difficult that refugees will be able to prove and to clarify every facet of their claim; as a consequence, that they should be granted the "benefit of the doubt" with the condition of general credibility. Obviously, the Handbook indicates that the benefit of the doubt should be given only if the decision makers and/or the competent authorities considered the applicant's answers as coherent and plausible[73]. In other words, when the examiner is satisfied with the applicant's credibility, the competent authorities may decide to believe in the words of the seeker, even if it is not completely sure that the applicant is telling the truth.

In the 2010 UK Supreme Court famous decision, *HJ (Iran) and HT (Cameroon)*,[74] the judge Lord Rodger states that only "*who are practicing homosexuals acts*", or decided to "live openly" his/her sexuality can be considered as a part of a particular according to the 1951 Refugee Convention (and, consequently, a "credible", a "believable" homosexual)[75].

The problem of disbelief is particularly complex because, of course, there is not a sort of "membership card" to show, and a physical demonstration of an LGBTI sexual orientation neither[76].

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[72] UNHCR, *"Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees"* (UNHCR Handbook), 1992, para. 203, available at https://www.unhcr.org/4d93528a9.pdf, accessed on 9th March 2020.

[73] See also J.MILLBANK, "The Ring of Truth ' : A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations", *International Journal of Refugee Law*, Volume 21, Issue 1, March 2009, p. 5.

[74] LORD RODGER' s statement in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, 7 July 2010. Full judgement available at https://www.supremecourt.uk/cases/docs/uksc-2009-0054-judgment.pdf, accessed on 9th March 2020.

[75] For more information about credibility assessment in the UK, see R.A. LEWIS, "Gay? Prove it": The politics of queer anti-deportation activism", *SAGE Journals,* 31 October 2014, available at https://journals.sagepub.com/doi/full/10.1177/1363460714552253?utm_source=summon&utm_medium=discovery-provider, accessed on 9th March 2020.

[76] M. SCHUTZER, "Note: Bringing the asylum process out of the closet. Promoting the acknowledgment of LGB refugees", *Nexis Uni*, Fall, 2012, [*695], available at https://advance.lexis.com/document/?pdmfid=1516831&crid=a560ae18-1bcc-46ef-a820-38241cbc3ba7&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A57BT-KC70-01TH-N04X-00000-00&pddocid=urn%3AcontentItem%3A57BT-KC70-01TH-N04X-00000-00&pdcontentcomponentid=268552&pdteaserkey=sr2&pditab=allpods&ecomp=sp79k&earg=sr2&prid=bb0a93b4-9091-4b20-be42-50782e3574b5, accessed on 8th March 2020.

The FRA in its comprehensive comparative report "*Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity"*[77]*,* stated that Member States' asylum authorities often do not trust asylum seekers who say they are LGBTI. There are several reasons for this. For example, an employee of the Danish Immigration Centre affirmed that there were applicants «*who said that they were homosexuals, but now they were not anymore because they did not think it was fun anymore. We also meet such things, and it can be difficult to take it seriously*[78]*.»*

Moreover, asylum authorities may consider the fact that an applicant is or was married with opposite-sex partner, or he/she has children, as a proof of his/her heterosexuality[79].

However, the FRA in an updated 2010 report[80] has underlined the fact that many lesbians and gay decide to engage into heterosexual marriage only because they want to avoid severe persecution and exclusion from their families and communities, and then later they become ready to publicly show their true sexual orientation. It is relevant to keep in mind the difference between sexual orientation as a personal, individual, pure identity, and material sexual acts or other kind of conduct.

Furthermore, since LGBTI cannot be considered as linked to any kind of medical, psychiatric or psychological classification, the use of medical, psychiatric or psychological expert examination in order to determine a seeker's sexuality is particularly incorrect. Moreover, these practical systems would be clearly in contrast with the right to respect for their private life[81],enounced in article 8 of the European Convention on Human Rights[82].

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[77] European Union Agency for Fundamental Rights (FRA), *"Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity.Part II – The Social Situation",* 2009, vailable on https://fra.europa.eu/sites/default/files/fra_uploads/397-FRA_hdgso_report_part2_en.pdf, accessed on 9th March 2020.

[78] Cfr. *Ibid.,* p.97.

[79] *Ibid.*

[80] FRA, *"Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity",* 2010 update, pp. 55-58

[81] See S. JANSEN AND T. SPIJKERBOER, *op. cit.,* p.9.

[82] Article 8 states: "*1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the*

To summarize, LGBTI applicants should not be required or presumed to hide their sexuality: it would result into an unacceptable situation that should never occurred in the EU framework. As Millbank has highlighted, there is the risk that discretion reasoning could *«led to and compounded errors in a range of areas of analysis in the refugee determination process*[83].»

Relating to the "credibility issue", by this time it is known that LGBTI individuals have the right to express and live their sexual orientation in many different ways, depending on several factors and elements, for example their social class, education, religion or family background. As a consequence, there is no a unique manner in which LGBTI asylum seekers may disclose their sexual orientation.

In some Member States, sexually explicit (and, sometime, inappropriate) questions are asked: but is important to consider the fact that, for the reasons expressed above, answers to decision-makers' questions, aiming to assess an asylum seeker's sexual orientation, will be generally divergent[84].

Asylum seekers on the basis of sexual orientation may have feelings of shame and self-hatred or internalized homophobia, and this situation could affect the genuine process of acquiring needful information as well[85].

Consequently, credibility should be assessed by EU asylum authorities, taking into account the different expressions of individuals' sexual orientation, including the process of "coming out" and the special need of in order to prevent useless references to stereotypes. For example, as it was previously explained, it would be a problem if asylum authorities believe that a woman who is married with a man could not be homosexual in any way[86].

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prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[83] Cfr . J. MILLBANK, "From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom", *International Journal of Human Rights*, Vol. 13, Issue 2-3,2009, p.394, available at https://www.tandfonline.com/doi/full/10.1080/13642980902758218, accessed on 10th March 2020.

[84] See N. LAVIOLETTE, "Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada", *Journal of Research in Gender Studies*, Vol.4(2), 2014, p. 90, available at https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/jogenst4&id=1339&men_tab=srchresults, accessed on 10th March 2020.

[85] J. MILLBANK, "The Ring of Truth'OFFIC: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations", p.8.

[86] For more detailed remarks about the use of stereotypes in the examination of LGBTI asylum seekers' applications, see for example S. VOLGER, "Legally Queer: The Construction of Sexuality

According to these conclusions, competent authorities should be professionally trained, and they should ask more comfortable questions and putting stereotypes aside; so, practical guidance and training for all those embroiled in the asylum proceedings, such as interviewers, decision-makers and interpreters is needed; as a consequence, authorities should fully use reports and resources available, for example those provided by the International Commission of Jurists and ILGA-Europe, that will be mentioned several times in this dissertation.
Only in this way, Member States may be able to treat sexuality-based asylum seekers with the respect, dignity, and safety they are entitled to have.

1.4 UNHCR against sexual orientation persecution

Even if the present work aims to focus the attention on the EU framework about sexuality-based asylum, it is crucial for a correct analysis to concentrate on UNHCR's task on this sensitive issue.
While States continue to have a primary duty to protect refugees and asylum seekers as they flee persecution, UNHCR also plays a critical role in protecting refugees and asylum seekers. As a consequence, UNHCR ensure that its action and operations may be suitable to answer to the needs of LGBTI applicants for asylum.
In recent years, the High Commissioner has been a very important "trainer" for States in order to improve protection for LGBTI refugees, above all issuing guidance notes, guidelines, reports and studies on this specific topic.
As matter of fact, in 2008 UNHCR with its *"Guidance Note on Refugee Claims relating to sexual orientation and Gender Identity"* has officially affirmed that persecution based on sexual orientation and/or gender identity may be considered an asylum claims based on membership of a particular social group[87]; this note clarifies the relevant role of sexual orientation in private life, as a fundamental part of the human dignity[88].

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in LGBQ Asylum Claims*", Law&Society Review*, 7 November 2016, p. 871-878, available at https://onlinelibrary.wiley.com/doi/epdf/10.1111/lasr.12239, accessed on 10th March 2020.
[87] For the full text of the Guidance Notes, cfr. *supra* note no. 13.
[88] Human Rights First, "*Persistent needs and gaps: The protection of lesbian, gay, bisexual, transgender and intersex (LGBTI) refugees: An overview of UNHCR's response to LGBTI refugees and recommendations to enhance protection",* 30 September 2010, available at

However, UNHCR's guidelines and notes are not legally binding in order to apply the provisions expressed to judicial and administrative authorities and decision makers: so, while the UNHCR's notes, reports and guidance do not have a binding power in national or international law, they may be legal interpretative tools, that should be taken into consideration during the application procedures and mechanisms. For example, the UNHCR Handbook may be considered as an "authoritative" guideline for the interpretation of the 1951 Convention on this topic for States, as done, for example, by Finland[89].

Therefore, in doctrine the attention has been focused on how to improve the protection of LGBTI asylum seekers on a regional and international level as well. It is discussed that the UNHCR's supervisory role shall be bolstered through using different tools, such as controlling, state reporting and UNHCR access to asylum seekers and refugees[90].

As it was already underlined, lesbians, gays, bisexuals, transgender and intersex persons may face persecution and discrimination in distinct ways; so, it is a fundamental stage of their protection procedure that authorities and, above all, UNHCR have a clear understanding of their particular vulnerabilities.

Greater attention should also be required to ensure that LGBTI asylum seekers receive non-discriminatory and adequate services from States, international organization and NGOs as well, with a more sensitive protection and respect for to sexual orientation and gender identity.

Consequently, there is a need to take these steps nowadays in order to improve the quality of asylum procedures, principally across the EU. Otherwise, LGBTI asylum seekers may run the risk to be victims of a malfunctioning bureaucracy, with unfortunate consequences for their safety and dignity[91].

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http://briguglio.asgi.it/immigrazione-e-asilo/2010/ottobre/rapp-hrf-prot-lgbti.pdf, accessed on 13th March 2020.

[89] A. GÜLER, "Refugee Status Determination Process for LGBTI Asylum Seekers: (In) Consistencies of States' Implementations with UNHCR's Authoritative Guidance", in A. GÜLER, M. SHEVTSOVA, D. VENTURI, *LGBTI asylum seekers and Refugees from a Legal and Political Perspective*, p. 119.

[90] V.TÜRK, "Ensuring Protection to LGBTI Persons of Concern", *International Journal of Refugee Law*, p.8.

[91] For other important reflections, see UNHCR, *"Discussion Paper on the protection of Lesbian, Gay Bisexual, Transgender and Intersex asylum-seekers and refugees",* 22 September 2010, available at https://www.refworld.org/pdfid/4cff9a8f2.pdf, accessed on 10th March 2020; see also, Amnesty International, *Love, Hate and the Law: Decriminalizing Homosexuality,* Amnesty International Publications, 2008, p.28, available at

Furthermore, not only UNHCR, states and NGOs, but also all the national and international actors should be promoted to keep enhancing their efforts, working together in order to increasingly improve the life conditions of LGBTI asylum-seekers and refugees.

1.4.1 Guidelines on International Protection no 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity

The 1951 Convention had provided actual and concrete protection to many LGBTI individuals since the early 1990s. Due to the huge interest in the discussed topic, in November 2008 the UNHCR released the *"Guidance Note on refugee claims relating to sexual orientation and gender identity",* in which the UN Agency reported its first analysis of refugee claims based on sexual orientation and gender identity. It was a very important step for UNHCR, in order to recognize that LGBTI persons have faced a certain set of problems when applying for refugee status and for protection.

In October 2012, the first Guidance Note was replaced by the "*Guidelines on International Protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees"*[92] (hereinafter, the Guidelines), that aim to offer interpretative, legal instructions and advices for all the authorities involved in the LGBTI application procedure.

According to UNHCR, the Guidelines should be read and interpreted taking into account other important Guidelines on International Protection[93]. So, even if the Guidelines represent a very important tool in order to recognize the status of refugee

https://www.amnesty.org/download/Documents/56000/pol300032008eng.pdf, accessed on 11th March 2020.

[92] UNHCR, "*Guidelines on International Protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*", 23 October 2012, available at https://www.refworld.org/docid/50348afc2.html#_ga=2.31814071.821905958.1584295577-529874936.1584295577, accessed on 15th March 2020.

[93] For example, important Guidelines are UNHCR, "*Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article IA(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees"* (the Gender Guidance Notes), 7 May 2002, available at https://www.unhcr.org/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html, accessed on 15th March 2020.

to LGBTI applicants, they have to be considered in conjunction with other international instruments and other documents provided by UNHCR as well.

It is noteworthy that UNHCR begins the Guidelines stating that all people, including LGBTI people, have the right to enjoy the protection claimed by international human rights law equally and without any kind of discrimination[94]. It is helping to see UNHCR taking precise actions regarding LGBTI human rights protection[95].

Furthermore, the novelty of the Guidelines consists also on the fact that they explain different form of persecution which sexuality-based asylum seekers may confront, not only on a physical, but also on a sexual and psychological level; in fact, *«threats of serious abuse and violence are common in LGBTI claims. Physical, psychological and sexual violence, including rape, would generally meet the threshold level required to establish persecution. Rape in particular has been recognized as a form of torture, leaving "deep psychological scars on the victim". Rape has been identified as being used for such purposes as "intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person. Like torture, rape is a violation of personal dignity*[96]*.»*

So, the Guidelines clarify some other aspects of sexuality-based asylum that have been underlined and discussed in this first Chapter such as the useful terminology, the concept of "well-founded fear of being persecuted", the issue of criminalization, the concealment of sexual orientation and/or gender identity, the problem of membership of a particular social group, and so on.

To summarize, the Guidelines should be a fundamental point of reference for all the national courts, tribunals, refugee lawyers and other competent authorities apply the 1951 Refugee Convention to LGBTI seekers, the number of which has recently risen up.

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[94] Guidelines, para.5.

[95] See N. LAVIOLETTE, "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary", *International Journal of Refugee Law*, vol. 22, no. 2, 2010, p.176, available at https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/intjrl22&men_hide=false&men_tab=toc&kind=&page=173, accessed on 15th March 2020

[96] Cfr. Guidelines, para. 20.

However, as Nicole LaViolette has underlined some years ago (referring to the previous Guidance Note), a more consultative process in drafting the Guidelines probably could have solved many problems; furthermore, it could allow UNHCR to give a full framework of the challenges and issues that exist relating to sexual orientation, gender identity and refugee law[97].

So, even if the Guidelines briefly described in this subparagraph should not be considered as a full and complete "Bible" for refugee claims based on sexual orientation and/or gender identity, they provide surely a primary and useful interpretative instrument for whose are responsible for determining such kind of applications.

The road is still long, but UNHCR with its mandate has demonstrated its great attention and its willing to do more and more in order to protect the fundamental human rights as much as possible.

«UNHCR will continue to develop, revise and apply legal and practical guidance related to sexual orientation and gender and mainstream LGBTI concerns into all its practices. UNHCR will further examine its internal human resource policies and provide guidance to staff members and managers to ensure diversity and fairness for LGBTI staff. This will also allow UNHCR to better comprehend, protect and assist LGBTI asylum-seekers and refugees[98]*.»*

1.5 Criminalization of consensual same sex sexual acts

Why LGBTI asylum seekers still exist nowadays? Why there is the need to protect them? The answer to these questions relates to one basic concept in our dissertation: the issue of criminalization.

All over the world, people may be imprisoned and/or condemned to death because they fall in love with someone else and they want to live their relationship publicly. Such and many more events may occur to lesbian, gay, bisexual, transgender and

[97] N. LAVIOLETTE, "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary", pp.207-208.

[98] Cfr. UNHCR, "*Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity",* November 2010, p. 7, available at https://www.refworld.org/docid/4cff99a42.html, accessed on 16th March 2020.

intersex people worldwide unfortunately as a normal, everyday routine just because of their sexual orientation.

There are still about sixty-nine countries[99] in the world where a person risks being arrested, imprisoned, physically punished and detained, or even sentenced to death, because of expressing a sexual orientation which is not considered as "straight".

Some governments still today not only declare "illegal" same-sex relationships, acts and conducts, but also deny that they are members of the human race. For example, in 1995 President Robert Mugabe of Zimbabwe marked gays as "less than human"[100].

Laws criminalizing same-sex sexual activity are also frequently "gendered", with men often more explicitly persecuted or more penalized in several countries. In some jurisdictions where both female and male same-sex conducts and/or acts are illegal, there is an evident discrepancy related to the harshness of penalties applied to men and to women[101].

Furthermore, criminalizing legislations existing in some countries may also lead to the punishment of homosexual children or teenagers, who carry out same-sex acts and relationships[102]. Regarding this particular issue, in 2016 the United Nations Committee on the Rights of the Children urged its States parties *«to repeal all laws criminalizing or otherwise discriminating against individuals on the basis of their sexual orientation, gender identity or intersex status and adopt laws prohibiting discrimination on those grounds. States should also take effective action to protect all lesbian, gay, bisexual, transgender and intersex adolescents from all forms of violence, discrimination or bullying by raising public awareness and implementing safety and support measures*[103]*.»*

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[99] Data updated to 2019.

[100] Amnesty International, "*Love, Hate and the Law: Decriminalizing Homosexuality".*

[101] UNHCR, "*Protecting person with diverse sexual orientations and gender identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees",* December 2015, p. 13, available at https://www.refworld.org/docid/566140454.html, accessed on 11th March 2020.

[102] See also on this specific point, R. VIRZO, "La Convenzione delle Nazioni Unite sui diritti dl fanciullo e l'orientamento sessuale del minore", in B. ESPERANZA, H. TRUYOL and R. VIRZO (cured by), *Orientamento sessuale, identità di genere e tutela dei minori: profilo di diritto internazionale e diritto comparato*, Edizioni Scientifiche Italiane, Napoli, 2016, p. 115.

[103] Cfr. United Nations Committee on the Children (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20, available at: https://www.refworld.org/docid/589dad3d4.html, accessed on 26th May 2020, para. 35.

Moreover, these types of criminalizing laws can easily cause the insane stigmatization and persecution of LGBTI people, who unfortunately face torture, or other inhuman or degrading treatments.

Furthermore, cruel mistreatments may induce to sever psychological damage, that would be difficult to repair[104]. Indeed, feelings of isolation, shame, self-refuse, and even self-hatred may result into a difficult for a person to express his/her own sexual orientation or gender identity.

The national criminalizing provisions may also reflect the homophobic attitudes of national authorities, which lead LGBTI individuals to risk persecution carried out by the State, that has, instead, the duty to protect them.

The mere subsistence of legislation criminalizing same-sex conduct is not sufficient, in some jurisdictions, for the recognition of refugee status; some countries also require something more from LGBTI asylum applicants[105].

In fact, the lack of explicit criminalization of same-sex sexual activity does not prevent LGBTI people from facing violence and death; indeed, the absence of criminalizing legislation does not mean that there is no risk for homosexuals, and it does not indicate the efficiency of the state protection. As Itaborahy reported in a relevant survey for ILGA, *«the question of legality of gay sex is only one element and cannot alone be taken as an answer to the question of risk of persecution based on sexuality*[106]*.»*

Consequently, as long as societies, different cultures and communities will continue to disdain, persecute and criminalize LGBTI individuals, refugee protection will be one of the most important tools in order to accomplish their fundamental human dignity[107].

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[104] See M. BEJZYK, "Criminalization on the Basis of Sexual Orientation and Gender Identity: Reframing the Dominant Human Rights Discourse to include Freedom from Torture and Inhuman and Degrading Treatment", *Canadian Journal of Women and the Law*, Vol.29, No.2, 2017, available at https://muse.jhu.edu/article/679321, accessed on 11th March 2020.

[105] V.TÜRK, "Ensuring Protection to LGBTI Persons of Concern", *International Journal of Refugee Law*, Volume 25, Issue 1, 2013, p.6, available at https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/sogi/tuerk.pdf, accessed on 11st March 2020.

[106] Cfr. L.P.ITABORAHY, "*State-sponsored Homophobia:A world survey of laws criminalising same-sex sexual acts between consenting adults",* ILGA, May 2012, p. 7, available at https://www.refworld.org/docid/50ae380e2.html, accessed on 12th March 2020.

[107] On this point, see UNHCR, "*Guidelines on International Protection no.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*", cfr. para. 23: "*Social*

Unfortunately, the situation is not so easy because such an unreasonable and widespread sentiment of homophobia is extremely difficult to combat, because it would require nowadays a substantial change in the behavior of all the society[108].
The EU, universally known as the "land" of rights and freedoms, may be the main safety net for LGBTI people coming from threatening countries.
Although some Member States' legislations recognize persecution on the basis of sexual orientation as a ground for asylum, it does not automatically mean that refugee status should be always granted to LGBTI seekers.

1.5.1 European Union countries and the necessity of additional requirements for granting refugee status

In some EU countries, sexuality-based asylum seekers cannot be recognized as refugees, even if the criminalization of same-sex acts in their countries of origin has been demonstrated clearly.
The applicant should prove his/her well-founded fear of being persecuted as a result of criminalization. Furthermore, the persecutory nature is evident if the country adopts hard penalties that are clearly not in compliance with international standards for the protection of fundamental human rights (first of all, the death penalty).
However, sometimes quite "weak" penalties may be considered as out of proportion and persecutory as well[109].
Consequently, in different Member States the existence of criminalization of homosexual behaviors in the country of origin is not sufficient for granting refugee status: in addition, proof of prosecution or "real enforcement" of the criminal provisions is required. Prosecution must obviously be distinguished from persecution; however, prosecution may result into persecution if it is *«pretextural,*

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norms and values, including so-called family "honour", are usually closely intertwined in the refugee claims of LGBTI individuals. While "mere" disapproval from family or community will not amount to persecution, it may be an important factor in the overall context of the claim. Where family or community disapproval, for example, manifests itself in threats of serious physical violence or even murder by family members or the wider community, committed in the name of "honour", it would clearly be classed as persecution."
[108] J. WEßELS, "*Sexual orientation in refugee status determination",* Working Paper Series No. 74, Refugee Studies Centre, 2011, p. 42, available at https://www.rsc.ox.ac.uk/files/files-1/wp74-sexual-orientation-refugee-status-determination-2011.pdf, accessed on 17th March 2020.
[109] M. BALBONI, *op. cit*., p.111.

accompanied by excessive punishment or administered under inadequate or arbitrary procedures[110]*.»*

In some other EU countries (for instance Bulgaria, Finland, Spain), for the recognition of the international protection, applicants are requested to prove that prosecution took place in their specific situations, in their particular cases[111].

According to the *"Fleeing Homophobia"* report, in France it is required the proof of real enforcement as well; if the criminalization is prescribed with remarkable regularity, the status of refugee should be recognized. However, if criminal legal provisions on this issue have never been enforced, applications should be undoubtable rejected. Additionally, the same legal framework can be found in Belgium and in Sweden[112].

So, the presence of enforced criminalization may be sufficient for the recognition of the status of refugee for LGBTI asylum seekers; however, EU asylum authorities are required to examine the country of origin's information on enforcement; in this context, the correct understanding of such information is a crucial point as well.

In fact, the country of origin information is very relevant in order to assess asylum claims. It allows decision makers and authorities to obtain a better knowledge of the human rights situation in countries where homosexuality is still a "social stigma".

It is important to consider the fact that in some countries (above all, in countries governed by Shari'a law[113]) prosecution might take place in courts or tribunals in which it is particularly difficult to find true, real information. Moreover, the lack of information in these frameworks should not be interpreted as an indication that enforcement of provisions against same-sex acts does not take place at all[114]. In these cases, asylum authorities should not conclude that the situation of LGBTI asylum seekers is safe enough to send them back to their countries of origin.

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[110] Cfr. European Legal Network on Asylum (ELENA) *Research Paper on Sexual Orientation as a ground for recognition of refugee status,* June 1997*,* available at http://www.ecre.org/files/orient. Pdf, accessed on 12th March 2020.

[111] S. JANSEN, "Introduction: fleeing homophobia, asylum claims related to sexual orientation and gender identity in Europe", in T. SPIJKERBOER, edited by, *Fleeing Homophobia: sexual orientation, gender identity and asylum,* p. 7.

[112] S. JANSEN AND T. SPIJKERBOER, *op. cit.,* p.22.

[113] Shari'a law is is a rigorous religious law, part of the islamic tradition.

[114] S. JANSENS AND T. SPIJKERBOER, *op. cit.,* p.26.

In fact, a State may conceal the criminalization of LGBTI people, for example, persecuting them for rape, child abuse or many other different crimes. So, a legal and social framework governed by homophobia may be considered as an indicator of possible persecution[115].

Furthermore, according article 6 of the Qualification Directive, actors of persecution or serious harm may be non-state actors too[116]. It is clear that, in countries where national or local authorities are homophobic or transphobic, LGBTI people do not ask police for protection; unfortunately, in these critic situations homophobic police may not offer adequate protection and they may persecute and discriminate LGBTI individuals as well.

What is more, article 4(3) of the Qualification Directive affirms that all important events, facts and information coming from the country of origin and related to the time of the application, including law, decisions and regulations should be taken into account for the assessment of an application for international protection[117].

The Procedures Directive[118] states that decisions shall be taken after an opportune exam of the abovementioned information; furthermore, Member States shall take into consideration all data provided by several sources, such as UNHCR and the European Asylum Support Office (EASO)[119].

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[115] M. BALBONI, *op. cit,* p.112.

[116] Article 6 of the Qualification Directive 2011/95/EU says: "*Actors of persecution or serious harm include:(a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm[…]"*

[117] Article 4(3) of the Qualification Directive 2011/95/EU states: "*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[…]"*

[118] Article 10(3) of the Procedures Directive declares: *"Member States shall ensure that decisions by the deter mining authority on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that [...] precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions."*

[119] The European Asylum Support Office (EASO) aims to ensure that all asylum cases are dealt in a correct manner by all European Union Member States, in order to improve their cooperation on this issue. Article 4 of the Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (EASO Regulation) expresses: *"The Support Office shall organise, promote and coordinate activities relating to*

To conclude, it is fundamental to determine the effects of laws prohibiting same-sex relations; if these provisions may create for the asylum seeker a “well- founded fear of being persecuted”, and the persecution is demonstrated and proved thanks to the information collected by competent authorities, refugee status should be recognized[120].

1.5.2 Safe countries of origin

Specifically connected to the problem of criminalization is the practice of European union countries to draw up the so-called “safe countries of origin”.

Can any country really be considered as “safe” for the purpose of asylum? A country of origin of asylum applicants is considered as “safe” if it does not, or not frequently, have people who ask for international protection. Consequently, most of asylum applicants fleeing those kinds of countries have a lesser chance of seeing their applications accepted, because their human rights are designed as sufficiently or so well protected.

According to the Procedures Directive 2005/85/EC[121], a "safe country of origin" is a country where, on the basis of its legal framework, it is demonstrated that there is generally no persecution, no torture or inhuman or degrading treatment or punishment and any kind of threats and indiscriminate violence. In order to consider a country a “safe country of origin”, it is important to take into account several elements, such as: the laws and regulations of the country and how they are enforced and applied; the effective respect of the rights and freedoms enounced in different

information on countries of origin, in particular: (a) the gathering of relevant, reliable, accurate and up-to-date information on countries of origin of persons applying for international protection in a transparent and impartial manner, making use of all relevant sources of information, including information gathered from governmental, non-governmental and international organisations and the institutions and bodies of the Union; (b) the drafting of reports on countries of origin, on the basis of information gathered in accordance with point (a)”.

[120] For further information on this point, see ILGA Europe, "*Good Practices related to LGBTI asylum applicants in Europe",* p.35.

[121] See article 30 of the *Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status,* OJ L 326/13, 13.12.2005. The Directive is no longer in force because it was replaced by the Directive 2013/32/EU on common procedures for granting and withdrawing international protection.

conventions and international, or regional acts; the fulfillment of the *non-refoulement* principle according to the 1951 Refugee Convention[122].

According to EU law[123], Member States may introduce legislations that allow national authorities to draw up a list of "safe countries of origin", in order to examine the applications for international protection.

As a consequence, Member States shall regularly control the situation in third countries that are considered as "safe countries of origin". Furthermore, it is clear that the determination of whether a country can be evaluated as "safe country of origin" shall be based on several official sources of information, first of all provided by UNHCR, or by EASO or by other Member States[124].

In drafting this kind of lists, EU law does not refer explicitly to the risk that LGBTI may face all over the world. In fact, some lists may include countries where same-sex acts or conducts are criminalized or prohibited in some manner, mostly African countries[125] (for instance, Ghana, Mauritius and Senegal are indicated as "safe countries of origin" both in France and Slovakia; in some lists, homophobic countries like Ukraine and Kosovo appear, even if they do not have an explicitly criminalizing legislation)[126].

However, the Amended Proposal of the EU Procedures Directive[127] states that if the asylum seeker demonstrates that his/her country of origin is not safe, although

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[122] European Commission, *Safe country of origin,* available at https://ec.europa.eu/home-affairs/e-library/glossary/safe-country-origin_en, accessed on 12th March 2020.

[123] Article 37 of the Directive 2013/32/EU states: "*1. Member States may retain or introduce legislation that allows, in accordance with Annex I, for the national designation of safe countries of origin for the purposes of examining appli cations for international protection. 2. Member States shall regularly review the situation in third countries designated as safe countries of origin in accordance with this Article. 3. The assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations […]"*

[124] For a detailed analysis of the concept of safe country of origin and its implications, see M. HUNT, "The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future", *International Journal of Refugee Law*, Volume 26, no.4 , pp. 500-535, 2014, available at https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/intjrl26&id=514&men_tab=srchresults, accessed on 13th March 2020.

[125] The particular situation in Turkey will be deeply described in the next Chapter.

[126] See the data provided by European Commission, *An EU 'safe countries of origin' list*, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_eu_safe_countries_of_origin_en.pdf, accessed on 13th March 2020.

[127] European Commission, *Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast),* 1 June 2011, COM(2011) 319.

that country is included into one of the lists drawn up by Member States, the designation of the country as safe cannot be taking into account for the examination of his/her application[128]. As the matter of fact, the protection of the applicant's right should be a priority for the EU country of asylum.
Criminalization of consensual same-sex acts in the country of origin would be a clear reason not to consider a country a safe place for a LGBTI applicant coming from such country. The country is undoubtedly not safe, so the presumption of safety is disproved rebutted by the fact that an applicant is a lesbian, a gay, a trans, an intersex or a bisexual person[129].
This fundamental concept is also underlined by Recital 42 of the Procedures Directive, that expresses: *«the designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in that country*[130]*.»*

1.6 The UNHCR and the EU: a first appraisal

The analysis handled in the present Chapter demonstrates that, although both the UNHCR and the EU have made particularly innovative steps in order to assess

[128] Article 33 of the Proposal says: "*The designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. For this reason, it is important that, where an applicant shows that there are ð valid ï serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her."*
[129] S. JANSEN, "Introduction: fleeing homophobia, asylum claims related to sexual orientation and gender identity in Europe", in T. SPIJKERBOER, edited by, *Fleeing Homophobia: sexual orientation, gender identity and asylum*, pp. 10-11.
[130] Cfr. Recital 42 of the Directive 2013/32/EU. See also, TSOURDI E.L., *"Laying the ground for LGBTI sensitive asylum decision-making in Europe: Transposition of the recast Asylum Procedures Directive and of the recast Reception Conditions Directive",* ILGA Europe, May 2014.

LGBTI asylum applications, the "rainbow asylum system" should be still implemented.

The essential role of UNHCR in implementing the EU asylum system is demonstrated also by the Declaration 17 to the Treaty of Amsterdam, which states that *«consultations shall be established with the United Nations High Commissioner for Refugees […] on matters relating to asylum policy*[131]*.»* As matter of fact, the UNHCR aims to ensure that Member States and EU Institutions could improve the legislations in relation to refugee law concerns[132]. For this purpose, the UN Agency continues to request Member States to adopt the highest standards in order to grant protection to asylum seekers and refugees, included LGBTI applicants.

In fact, following the UNHCR "*Guidelines on International Protection no.9",* the EU legislation now officially recognises sexual orientation and gender identity as a valid ground for granting the refugee status. Furthermore, thanks to the new Qualification Directive, it is quite undiscussed nowadays that these claims should be considered under the "membership of a particular social group" ground stated in article 1A (2) of the 1951 Refugee Convention.

However, although the innovate instructions provided by UNHCR, Member States continue to deal with LGBTI asylum seekers' requests in many different ways and there is still no common European policy on this sensible issue.

In the absence of common standards, EU authorities and practitioners should blindly follow not only UNHCR guidelines, but also the CJEU's decisions on this sensible matter: if the existence of a criminalizing legislation in the seeker's country of origin is demonstrated, the protection should be granted. For this purpose, it is crucial to properly evaluate all the information gathered in every stage of the application process.

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[131] Cfr. Declaration 17 on Article 73k of the Treaty establishing the European Community, *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities* and certain related acts, OJ C 340/ 1, 10.11.97.

[132] UNHCR, "*Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted"*, p. 3, 2010., available at https://www.unhcr.org/4c5037f99.pdf, accessed on 31st March 2020.

Relying on useless stereotypes or on the “discretion requirement" should not be allowed anymore: no one should be obliged to cover his/her sexual individuality.
These comprehensive remarks are required for a full understanding of the next Chapter.
Indeed, Chapter II will analyze the EU legal framework on sexuality-based asylum, first of all focusing the attention on the 2011 Qualification Directive, especially on articles 9 and 10; moreover, after a general overview of the EU asylum system, the examination will describe how the Union should implement protection of LGBTI asylum individuals, for example, adopting policy guidelines or mainstreaming of sexual orientation and gender identity issues, in order to create a homogenous EU system regarding these claims.
In addition, the dissertation will be related to the risk that LGBTI asylum applicants may face in a specific country, Turkey: as matter of facts, although the existence of cooperation on migration issues between EU and Turkey, and even if Turkey has been qualified as a “safe third country”[133], the context for LGBTI individuals seeking asylum in Turkey is still quite hostile.

[133] *“The safe third country notion[…] is the concept that EU Member States may send applicants to third countries with which the applicant has a connection, such that it would be reasonable for him/her to go there, and in which the possibility exists to request refugee status and if s/he is found to be a refugee, it must be possible for him/her to receive protection in accordance with the 1951 Convention. In that third country, the applicant must not be at risk of persecution, refoulement or treatment in violation of Article 3 ECHR”.* Cfr. J.L. DIAM, *International Migration and Refugee Law: Does Germany’s Migration policy towards Syrian Refuge Comply?,* Anchor Academic Publishing, Hamburg, 2017, p.118. The EU–Turkey Statement, agreed on 18th March 2016, has considered Turkey as a “safe third country”. On this point see also, D. ŞIMSEK, “Turkey as a “Safe Third Country”? The Impacts of the EU-Turkey Statement on Syrian Refugees in Turkey”, *Perceptions* , Volume XXII, Number 4, 2017 pp. 161-162.

CHAPTER II

THE EU LEGISLATIVE DEVELOPMENTS

IN SEXUALITY-BASED ASYLUM AND THE MAIN CHALLENGES

SUMMARY: 2.1 Brief overview of the EU asylum system - 2.2 EU policy regarding the protection of sexual orientation and gender identity in the asylum system - 2.3 The previous Qualification Directive: Directive 2004/83/EC and its relevant principles - 2.4 Directive 2011/95/EU: the new Qualification Directive - 2.4.1 Article 9: acts of persecution against LGBTI asylum seekers – 2.4.2 Article 10(1)(d) - 2.5 The agreement between EU and Turkey: is Turkey really safe for LGBTI asylum seekers? - 2.6 The perspective of an EU homogeneous system

2.1 Brief overview of the EU asylum system

In the first Chapter, the EU was named as *"the land of rights",* a land characterized by open borders and freedom of movement of capitals, services, goods and, above all, persons; for these reasons, the EU believes that it is necessary to set and guarantee high standards of protection for asylum seekers and refugees, who are obliged to flee from adverse backgrounds.

Although all Member States were party of the 1951 Refugee Convention and its 1967 Protocol[134], the legal policy on asylum has been exclusive prerogative of national legislations until the entry into force of the Amsterdam Treaty, which officially enshrined the competence of the EU on immigration and asylum matters.

Regarding the 1951 Refugee Convention, it is undoubtful that such international instrument can be considered as a crucial turning point in order to define the refugee status and to guarantee the right of asylum.

However, actually the 1951 Refugee Convention and its 1967 Protocol do not regulate directly the asylum matter, but only the legal regime applicable to those

[134] However,the EU itself is not party of the 1951 Refugee Convention and its 1967 Protocol.

who are granted the refugee status[135]. Moreover, the Geneva Convention presents a crucial limit: as matter of fact, it does not set up an international mechanism aiming to monitor whether States respect their obligations under the Convention.

So, the EU action in asylum matter has the purpose to fulfill all the protection needs not taken into consideration by the Refugee Convention; consequently, with the provision of the subsidiary protection[136] and the temporary protection[137], the EU asylum system has also regulated other important forms of international protection, in order to safeguard who does not meet the requirements for the recognition of the status of refugee, but is in need of protection as well[138].

As it was previously outlined, the Treaty of Amsterdam represents a very important stage in building an EU common asylum system. In fact, one of the main aims of the Treaty of Amsterdam was to create and to promote an area of freedom, security, and justice, and (starting from the crucial international standards provided by the 1951 Refugee Convention) to adopt a common EU approach on asylum, in order to harmonize the relative legal framework across the Union[139].

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[135] P. PALERMO, "Il diritto di asilo nello spazio europeo: tra rifugio, asilo comunitario e Convenzione Europea dei Diritti Umani", *Quaderni Costituzionali,* 2009, p.2 , available at http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0135_palermo.pdf, accessed on 8th May 2020.

[136] For the first time, the Directive 2004/83/EC officially introduced into the EU system the concept of subsidiary protection. Subsidiary protection can be defined as international protection for asylum seekers who do not qualify as refugees, and who do not fulfill the requirements indicated by Article 1A(2) of the 1951 Refugee Convention. So, according to article 2(e) of the 2004 Directive, a person eligible for subsidiary protection is *"a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, […] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country"*. Article 15 of the 2011 Qualification Directive clarifies that the subsidiary protection should be granted to persons who would face a risk to be subjected to *"(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."*

[137] According to European Commission," *temporary protection is an exceptional measure to provide displaced persons from non-EU countries and unable to return to their country of origin, with immediate and temporary protection. It applies in particular when there is a risk that the standard asylum system is struggling to cope with demand stemming from a mass influx that risks having a negative impact on the processing of claims".* Cfr. Migration and Home Affairs, "Temporary protection", https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en, accessed on 3rd April 2020.

[138] P. PALERMO,*op. cit*., p. 5.

[139] Avviso Pubblico, "Il sistema europeo di asilo: quadro di riferimento riassuntivo", available at https://www.avvisopubblico.it/home/home/cosa-facciamo/informare/documenti-

As matter of fact, in 1999 the European Council held a special summit in Tampere, where Member States required the EU *«to develop common policies on asylum and immigration[…]These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union*[140]*.»*

To this end, article 3(2) TEU clarifies that the Union has the purpose to *«offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.»*

So, in order to achieve these relevant goals, the EU intends to develop a common policy on asylum, subsidiary protection and temporary protection: regarding this issue, the Union aims to offer an adequate legal status to all third-country nationals who seek international protection, and to ensure that the principle of *non-refoulement* is respected. For this purpose, article 19(2) of the EU Charter declares that *«no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. »* Moreover, the EU policy must refer to the provisions laid down in the 1951 Refugee Convention and its 1967 Protocol; as a consequence, the cooperation between EU and the UNHCR in this field is particularly essential, and in recent years it has been notably implemented. In fact*, «the quantity and quality of UNHCR's contacts with the EU institutions have increased considerably not only as a result of the institutional developments in asylum at EU level, but also following the EU's decision to make justice and home affairs matters, including asylum* […][141]*.»*

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tematici/immigrazione/sistema-europeo-asilo-quadro-riferimento-riassuntivo/, accessed on 29th April 2020 .

[140] Cfr. Council of the European Union, *Tampere European Council 15 and 16 October 1999: Presidency Conclusions*, 1999, point 2, available at https://www.europarl.europa.eu/summits/tam_en.htm#c. See also, D. KOSTAKOPOULOU, "An open and secure Europe? Fixity and fissures in the area of freedom, security and justice after Lisbon and Stockholm", *European Security*, 19:2, p. 153, 2010, available at tandfonline.com/doi/full/10.1080/09662839.2010.526938, accessed on 29th April 2020.

[141] Cfr. UNHCR, "*UNHCR and the EU*", https://www.unhcr.org/uk/41b6cbb64.pdf, p. 170, accessed on 6th April 2020.

As it was already outlined in the first Chapter, nowadays it is acknowledged that the CEAS is addressed to provide a uniform refugee legal status, effective across the whole Union, as well as a uniform status of subsidiary protection. Moreover, the EU asylum system aims to set common procedures for granting and withdrawing protection as well, and reception standards. These goals have been achieved by the adoption of two Regulation and three crucial Directives[142].

Nowadays, the legal basis of the EU common asylum system can be found above all in articles 67(2), 78 and 80 TFEU.

Firstly, article 67(2) states that the EU *«shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals[…] stateless persons shall be treated as third-country nationals».* This provision shows that the Union has competences to regulate a fair policy on migration and asylum, with the full respect of the fundamental human rights and in compliance with the principle of solidarity between Member States, reiterated by article 80 TFEU.

Moreover, article 78(1) TFEU[143] affirms that EU asylum legislation must comply with the 1951 Refugee Convention and its 1967 Protocol; so, this means that non-compliance with the present instruments would lead to an infringement of article

[142] The Dublin Regulation, the EURODAC Regulation, the Qualification Directive, the Procedures Directive and the Reception Condition Directive, mentioned in the first paragraph of the previous Chapter.

[143] Full text of article 78 TFEU: "*1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. 3. In the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."*

78(1). Consequently, the present article does not intend to set an EU policy on asylum going beyond the provisions laid down in the 1951 Refugee Convention[144]. According to article 78(2), the EU shall adopt "measures" for the enforcement of the common asylum system, through the use of the ordinary legislative procedure: the term "measures" indicates not only directives, regulations and decisions, but also financial operations, based on EU legal instruments as well[145].

Furthermore, article 78(3) allows EU Institutions to approve "provisional measures" in order to assist Member States in case of a "migratory" emergency across EU.

Finally, article 80 TFEU expresses the fundamental principle of solidarity between Member States regarding border checks, asylum and immigration: as a consequence, *«the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States*[…]*»* The present article does not aim to set obligations for the EU Institutions, but it addresses to ensure Member States' solidarity, and their capacity of sharing responsibilities and duties on asylum and immigration issues. Whenever necessary, EU law should intervene in order to give effect to this crucial principle[146]. Furthermore, Member States share the responsibility to host refugees in their countries in a dignified manner; for this purpose, States should grant them a fair treatment, in compliance with EU common procedures, trying to avoid differences in assessing asylum claims from a Member State to another Member State[147].

In 2015, the EU outlined asylum scenario has been notably put into crisis by the refugee and migrant emergency: in fact, between 2015 and 2016, the EU has registered an unprecedent influx of refugees and migrants, who fled conflicts or poverty in their countries of origin and who were looking for a better future in Member States. Most of that asylum applicants have transited through Turkey or

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[144] K. HAILBRONNER, D. THYM (ed.), *EU Immigration and Asylum Law: A Commentary*, Verlag C. H. Beck oHG, 2nd edition, München, 2016, p. 1030.

[145] *Ibid.,* p. 1038.

[146] Article 80 TFEU adds: *"Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."*

[147] European Commission, Migration and Home Affairs, "Common European Asylum System", available at https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en, accessed on 6th April 2020.

Greece, via the Aegean Sea, to seek protection, for example, in Germany or in Italy[148].

The aforementioned migratory and refugee crisis had the consequence of placing the responsibility to host an huge number of asylum claims on few Member States; as a consequence, several States have decided to restrict the access to most of their borders[149]. In this manner, unfortunately, Member States cannot provide sufficient protection for claimants[150], above all for those who are considered as more vulnerable individuals, for example LGBTI and women asylum seekers.

Consequently, there is the real need of a reform of the Dublin system, which should guarantee that, when an excessive number of asylum applications are claimed in one Member State, the number of asylum seekers outpacing the capacity of that country will be allocated among all others Member States[151].

However, in 2019, according to statistics, about to 900,000 asylum seekers in the EU are still waiting for the processing of their applications, living in the total uncertainty. As a consequence, the efforts to create a common efficient EU asylum system have not completely led to satisfactory results yet[152].

Starting with these general remarks about asylum framework and the 2015 crisis, the present Chapter will further discuss about the reasons which have led the EU to collaborate with the Turkish government in asylum and refugee matters. Due to the several violations of fundamental human rights observed in Turkey, above all

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[148] European Commission, "L'UE e la crisi migratoria", available at https://op.europa.eu/webpub/com/factsheets/migration-crisis/it/, accessed on 29th April 2020

[149] For example, in 2015 Hungary built a fence on its borders with Serbia and Croatia, in order to restrict the number of asylum seekers looking for protection in the country.

[150] ILGA Europe, "*Seeking refuge without harassment, detention or return to a "safe country*" , p.2, 2016, available at https://ilga-europe.org/sites/default/files/Attachments/ilga_europe_briefing_on_lgbti_asylum_issues_-_february_2016_0.pdf, accessed on 3rd April 2020.

[151] European Commission, "The reform of the Dublin system", available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160504/the_reform_of_the_dublin_system_en.pdf, accessed on 29th April 2020. Cfr., p. 3 *"To address the inherent weaknesses of the Dublin system for the longer term, the Commission is presenting a proposal to reform it by streamlining and supplementing it with a corrective allocation mechanism (the fairness mechanism). The main elements of the new system are: a new automated system to monitor the number of asylum applications each Member State receives and the number of persons effectively resettled by each; a reference key to help determine when one Member State is under disproportionate pressure and a fairness mechanism to alleviate that pressure."*

[152] The Guardian, "Nearly 900,000 asylum seekers living in limbo in EU, figures show", available at https://www.theguardian.com/world/2019/aug/25/asylum-seekers-limbo-eu-countries, accessed on 3rd April 2020.

against LGBTI asylum seekers looking for protection, the following dissertation will explain how EU-Turkey cooperation on this concern should be implemented by both the Union and national competent authorities.

Moreover, the Chapter in question will analyze some central notions within the EU legal framework on sexuality-based asylum: in particular, first the Directive 2004/83/EC and then the recast Qualification Directive 2011/95/EU have recognized LGBTI claims under the membership of a particular social group ground, according to article 10(1)(d). However, as it as previously highlighted, some uniform legal practices dealing with asylum based on sexual orientation persecution do not exist nowadays: so, the last paragraphs will discuss about the challenges and the steps that should be undertaken by the EU, in order to establish an homogenous system aiming to safeguard LGBTI asylum seekers' rights and safety in all Member States.

2.2 EU policy regarding the protection of sexual orientation and gender identity in the asylum system

Dealing with the sexual orientation issue in the asylum framework, it is important to stress the fact that, also on this concern, the role of the EU in sexuality-based asylum has been influenced most of all by to the contribution of the UNHCR, whose crucial action was deeply described in the previous Chapter.

In 1987 the European Parliament had already underlined the need for asylum seekers to be recognized as refugees having regard to UNHCR Handbook[153]; moreover, according to the European Parliament, the definition of refugee provided by the 1951 Refugee Convention should include who is persecuted on the basis of his/her sexual orientation as well.

In recent years, the present position has been expressed several times by the Parliament, which continues to develop progresses in this field, above all thanks to

[153] See European Parliament, *Resolution on the right of asylum,* 12 March 1987, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1987:099:FULL&from=IT, pp. 167-171, accessed on 19th March 2020.

its important resolutions[154]. This involved also the recent European Parliament resolution of 2012 about the fight against homophobia across EU[155].

Furthermore, the birth of the CEAS was a very important stage in this process; in fact, the CEAS aims to harmonize EU Member States national legislations and practices.

On a more general point of view, it is undeniable that the last decades have been characterized by great achievements in lesbian, gay, transsexuals and intersex rights protection across the EU, from decriminalization and anti-discrimination legislation to registered partnership in most of EU Member States.

The LGBTI fundamental human rights are legally regulated by the Union's legislation; however, it is important to keep in mind that Member States with their national rulings have also a primary power in regulation and enforcement of the EU provisions about protecting human rights[156].

As a matter of fact, protecting and promoting the fundamental rights of lesbian, gay, bisexual, transgender and intersex people has always been one of the most important aims of the EU action.

For the purposes of the present discussion, as it was previously highlighted in the first Chapter, several examples across Member States demonstrate that the EU has adopted a general positive approach regarding the prohibition of discrimination based on sexual orientation and/or gender identity.

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[154] See for example, European Parliament, *Resolution on the Annual report on human rights and democracy in the world 2017 and the European Union's policy on the matter,* 12 December 2018, available at https://www.europarl.europa.eu/doceo/document/TA-8-2018-0515_EN.html., accessed on 19th March 2020. The European Parliament in para. 57 states that it "*condemns the arbitrary detention, torture, persecution and killings of LGBTI people; acknowledges that sexual orientation and gender identity can increase the risks of discrimination, violence and persecution; notes that in a number of countries around the world, LGBTI people still face persecution and violence on the basis of their sexual orientation; condemns violations against women and minority groups which are in breach of the fundamental right to bodily integrity and identity, such as female genital mutilation and intersex genital mutilations; notes that 72 countries still criminalize same-sex relationships and that in 13 of those countries they are treated as a capital offence; urges these states to immediately change their legislation; welcomes the EU's efforts to improve the rights of and legal protection for LGBTI people; urges EU delegations and Member State embassies to fully implement the EU's LGBTI Guidelines[…]"*

[155] European Parliament, *Resolution of 24 May 2012 on the fight against homophobia in Europe: Fight against Homophobia,* available at https://op.europa.eu/en/publication-detail/-/publication/0d1c0439-1c53-11e3-8d1c-01aa75ed71a1/language-en, accessed on 25th March 2020.

[156] N.J. BEGER, "Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)potency of Rights Politics at the European Court of Justice", *SAGE Journals*, Volume 9, Issue 2, p. 250, available at https://journals.sagepub.com/doi/pdf/10.1177/096466390000900204, accessed on 22nd March 2020.

Therefore, the EU actively invites Member States to supervise that lesbian, gay, transgender, intersex people are safeguarded from any kind of homophobic hate speech and violence; furthermore, the EU continues to ensure that same-sex couples partners have the same respect, dignity and safety as the rest of couples.

Within the EU legal framework, the adoption of three important asylum Directives have led to many important progresses, not only in relation to the general asylum policy, but also regarding sexuality-based claims: the Qualification Directive 2011/95/EU, that will be analyzed further in this chapter, the Asylum Procedures Directive 2013/32/EU, and the Reception Conditions Directive 2013/33/EU.

These three Directives aim to establish common standards with regards to the main different features of Member States' asylum systems, increasing EU cooperation on asylum concerns and improving the relative protection standards within the whole Union[157].

In particular, the recast Qualification Directive expresses important legal standards for the qualification of third-country nationals or stateless persons as refugees or as subsidiary protection beneficiaries. Dealing with sexuality-based asylum, according to the Qualification Directive, Member States now have the explicit obligation to recognize not only sexual orientation, but also gender identity, as specific reasons for persecution in order to grant the refugee status[158].

Furthermore, the Asylum Procedures Directive provides various legal standards regarding asylum procedural matters, for example about the access to the asylum procedures, the guarantees and obligations for seekers, the right to remain in the Member State where the claim has been lodged, personal interviews and judiciary appeals[159].

Moreover, the Procedures Directive states that *«certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or*

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[157] C. KAUNERT, S. LÉONARD, "The development of the EU asylum policy: venue-shopping in perspective", *Journal of European Public Policy*, 19:9, 2012, p. 1401, available at https://www.tandfonline.com/doi/full/10.1080/13501763.2012.677191, accessed on 28h March 2020.

[158] The Qualification Directive will be deeply analyzed in paragraph 2.4 of this Chapter.

[159] C. KAUNERT, S. LÉONARD, *op. cit.*, p. 1401.

sexual violence[160]*.»* So, under the Procedures Directive, all the decision makers, the asylum competent authorities and the interviewers should be sufficiently trained in order to deal with LGBTI asylum applicants in the best possible way.

Although the Reception Directive does not provide norms relating directly to LGBTI asylum seekers, some of its provisions (for example, those about preventing violence in accommodation facilities, ensuring health care, employment and adequate education) may be applied to this kind of applicants as well[161].

Therefore, even if the EU has clearly improved its legislation aiming to protect LGBTI asylum seekers, no precise and definitive directive or regulation has been drawn up yet, addressed to LGBTI applicants or directed to supervise the evaluation of sexuality-based applications. Actually, a full harmonization of LGBTI asylum application is quite difficult to realize nowadays: indeed, there are no common EU guidelines on this issue, that should be an important tool in order to grant international protection to LGBTI seekers[162].

Furthermore, as the Advocate General Sharpston stated *«[…]neither the Procedures Directive itself nor the Geneva Convention or the Charter lays down specific rules as to how to assess the credibility of an applicant who requests refugee status on any of the grounds listed in Article 10(1) of the Qualification Directive, including that he belongs to a particular social group because of his homosexual orientation*[163]*.»*

The relevance of this legal lack is particularly underestimated by European institutions and authorities, considering the fact that the number of LGBTI seekers is increasing year after year across EU.

As it was already underlined in the previous Chapter of this dissertation, most of Member States' national legislations on the assessment of asylum applications often do not fully comply with the legal European and international standards for the

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[160] Cfr. Whereas (29) of the Procedures Directive.

[161] On this point, see ILGA Europe, "*Good practices relating to LGBTI asylum applicants in Europe*", p. 4.

[162] L.L. LIBONI, "Richiedenti asilo Lgbti nella Ue: esiste una linea comune?", *Open Migration*, 2018, available at https://openmigration.org/analisi/richiedenti-asilo-lgbti-nella-ue-esiste-una-linea-comune/, accessed on 19th March 2020.

[163] Cfr., opinion of Advocate General Sharpston delivered on 17 July 2014. CJEU, case *A (C-148/13), B (C-149/13) and C (C-150/13) v Staatssecretaris van Veiligheid en Justitie*, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62013CC0148, accessed on 20th March 2020.

protection of basic human rights[164]. And this situation may constitute a big problem for LGBTI applicants, who should be considered as vulnerable and under pressure individuals, because of the persecution experienced.

The solution to this problem may be easy: Member States, EU Institutions and agencies should realize in practice all the standards provided by the by CJEU in its judgments, in order to grant the best protection to LGBTI people applying for international protection, following scrupulously the provisions set down in EU Directives as well[165].

Moreover, the interesting data collected across the EU show that the majority of LGBTI asylum seekers cases concerns applicants from Africa, Iran and the Middle East; however, unfortunately, some applicants come also from Asia and Eastern Europe, and some of them decided to flee from Council of Europe's Member States as well (above all, from the historical homophobic Russian Federation)[166]. As relevant parties of the Council of Europe, Member States should also try to push states' governments to protect LGBTI rights and to avoid any kind of discrimination on the basis of sexual orientation and/or gender identity.

To conclude, the efforts made on this issue by the European Commission, the European Parliament, the Council of the European Union, by all the other EU Institutions and by Member States have been particularly important; they absolutely should continue to play a key role in the implementation of control measures within the protection of LGBTI individuals.

Moreover, cooperation amongst regional and local authorities, as well as the active participation of civil society, are also crucial in order to make discrimination against LGBTI people something "of the past", which must not be tolerated anymore across EU.

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[164] V. DE BRUYCKERE, "Somewhere over the Rainbow: On the Use of Psychological Tests to Determine Asylum Seekers' Sexual Orientation and the Impact on the Right to Private Life (Case C-473/16, 25 January 2018)," *Croatian Yearbook of European Law and Policy*, Volume 14, p. 260, 2018, available at https://heinonline.org/HOL/Page?collection=intyb&handle=hein.intyb/cybelp0014&id=282&men_tab=srchresults, accessed on 19th March 2020.

[165] See FRA, "*Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU: Comparative legal analysis"*, 2015, p.12, available at https://fra.europa.eu/sites/default/files/fra_uploads/protection_against_discrimination_legal_update_2015.pdf, accessed on 19th March 2020.

[166] Commissioner for Human Rights, "*Discrimination on grounds on grounds of sexual orientation and gender identity in Europe"*, p. 135.

2.3 The previous Qualification Directive: Directive 2004/83/EC and its relevant principles

Before starting the analysis of the "new" Qualification Directive, it is necessary to take a step back in time, focusing the attention on the Directive 2004/83/EC (hereinafter, the 2004 Directive), which is no longer in force, because in 2011 it was replaced by the latest Qualification Directive.

As it was already underlined, the aim of the CEAS was to progressively harmonize Member States' legislations and practices on asylum; this process was characterized by two important phases.

The purpose of the first phase was to harmonize the "minimum common standards" to be respected by Member States when dealing with applications for international protection. The mentioned phase included the adoption of four important innovative Directive, such as the 2001 Directive on temporary protection[167], the 2003 Reception Conditions Directive[168], the 2005 Asylum Procedures Directive[169], the and the 2004 Qualification Directive.

The 2004 Directive defined two different forms of international protection: the legal status of refugee and the subsidiary protection.

The "old" Directive was adopted in order to set the criteria for identifying people seeking for international protection and to provide them minimum guaranties and securities in all Member States[170].

What is more, the objective of the 2004 Directive was to create a uniform asylum proceeding and a common refugee legal status, that should be effective across EU as a whole.

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[167] *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof,* OJ L 212/12, 7.8.2001.

[168] *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers,* OJ L 31/18, 6.2.2003.

[169] *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, OJ L 326/13, 13.12.2005.

[170] See, Whereas (6) of the Directive: *"The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States."*

Moreover, before the enter into force of the Qualification Directive 2011/95/EU, the 2004 Directive application has been taken into account by the CJEU for several years; consequently, for a long period the Court has considered it as the main legal parameter for granting refugee status (on the ground of sexual orientation as well)[171].

Actually, the 2004 Directive represented one of the first EU attempts in order to create a common European asylum system based on a comprehensive and literal application of the 1951 Refugee Convention; in fact, the 2004 Directive also includes basic principles of refugee law (for example, the principle of *non-refoulement*) and a set of provisions giving refugee the possibilities to be fully integrated in the host country.

Furthermore, the 2004 Directive did not aim to modify the existing international refugee law at all, but it wanted to provide some binding norms, in order to grant a correct interpretation of the 1951 Refugee Convention across EU[172]. In fact, as it was highlighted by the UNHCR, the 1951 Refugee Convention is an instrument which should be applied universally, all over the world; as a consequence, in order to maintain the Convention's international features, Member States should to take into account not only all the reports, documents and understandings provided by UNHCR itself, but also the state practices outside the Union regarding the implementation of the provisions expressed by the 1951 Refugee Convention[173].

However, although the good results achieved by the 2004 Directive, this tool probably did not be able to maximize its function, and in October 2009 the

[171] See for example, the judgment held by the CJEU in *X, Y and Z v. Minister Voor Immigratie en Asiel* or in *A, B and C v. Staatssecretaris van Veiligheid en Justitie.*

[172] For example, article 2(d) of the Directive defines the term "refugee", relying on article 1A(2) of the 1951 Refugee Convention: *"'refugee' means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it […]"*

[173] See UNHCR, "*Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted",* January 2005, available at https://www.unhcr.org/43661eee2.pdf, accessed on 22nd March 2020.

Commission decided to present a proposal for the recast of the "old" Qualification Directive[174].

As matter of facts, in a 2010 report, the Commission itself declared that *«the evaluation of the implementation of the Directive shows that in practice few Member States make use of the possibility to differentiate between refugees and beneficiaries of subsidiary protection in terms of the content of the protection granted. On the other hand, the level of protection granted in different Member States differs, which affects asylum flows and is a cause of secondary movements*[175]*.»*

For the purposes of this dissertation, the 2004 Directive has made some considerable steps in order to include LGBTI asylum seekers into the refugee definition. Indeed, the 2004 Directive has solved the big issue of non-recognition of LGBTI applicants as members to a particular social group.

As matter of fact, article 10, paragraph 1, letter d) of the 2004 Directive was the first EU provision which referred to sexual orientation persecution as a reason for recognizing refugee status, on the ground of membership of a particular social group: *«[…]a particular social group might include a group based on a common characteristic of sexual orientation.»*

Secondly, Article 9 of the 2004 Directive has claimed that state discriminatory measures may be also considered as forms of persecution as well, above all in the case of LGBTI persons.

Obviously, as the European Commission affirmed at the time[176], the reference to sexual orientation does not mean that this ground of persecution must absolutely

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[174] European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection,* 21 October 2009, available at https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2009)0554_/com_com(2009)0554_en.pdf, accessed on 22nd March 2020.

[175] Cfr. European Commission, *Report to the European Parliament and the Council on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugee or as persons who otherwise need international protection and the content of protection,* 16 June 2010, p. 15, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0314&from=IT, accessed on 22nd March 2020.

[176] See, European Commission, *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection,* 12 September 2001, available at

include all homosexuals/transgender/intersex people, without any kind of "selection". The legal status of refugee should be granted depending on the specific circumstances and information collected about the country of origin and the singular features of the individual persecuted.
Furthermore, it is crucial to underline that articles 9 and 10 of the new Qualification Directive 2011/95/EU remain unchanged compared to the provisions included in the 2004 Directive; so, the new Directive has confirmed the fundamental innovation consisting of the recognition of sexuality-based persecution in every Member State[177].

2.4 Directive 2011/95/EU: the new Qualification Directive

The second phase of the CEAS had the purpose of establishing an "uniform legal status" for those who are granted asylum in the EU. So, the asylum recasting process started in 2009, but it was only in 2013 that all the new asylum tools were adopted after long debates.
Nowadays, the EU legislative framework on asylum includes the Dublin II Regulation, the Eurodac Regulation, the recast Asylum Procedures Directive, the recast Reception Conditions Directive and the recast Qualification Directive 2011/95/EU (hereinafter, the Qualification Directive)[178].
From the purposes of EU law, the Qualification Directive is undoubtedly the most important tool within the new European asylum system existing nowadays, because it is linked to the real core of the 1951 Refugee Convention.
Although the 2004 Directive has undoubtedly had a great impact on the EU order and has improved most Member States' asylum systems, actually the Commission underlined the fact that the "old" Qualification Directive has reached minimal goals only: in fact, on a general point of view, the legal frameworks about the recognition

http://www.statewatch.org/semdoc/assets/files/commission/COM-2001-510.pdf, accessed on 24st March 2020.
[177] Article 9 and 10 of the Directive 2011/95/ EU will be analyzed further in next paragraphs of this dissertation.
[178] S. PEERS, "Legislative Update 2011, EU Immigration and Asylum Law: The Recast Qualification Directive", *European Journal of Migration and Law*, vol. 14, 2012, pp. 201, available at https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/ejml14&id=209&men_tab=srchresults, accessed on 29th April 2020.

of international protection continued to be different from a Member State to another[179].

So, the recast Qualification Directive is addressed *«to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and […] to ensure that a minimum level of benefits is available for those persons in all Member States*[180]*.»*

Furthermore, in order to achieve the goal enounced in the abovementioned article 78 TFEU, the Qualification Directive aims to coordinate the European asylum system with the legal framework relating to the status of refugee and to international protection, a framework regulated by international law at universal level.

Moreover, the Qualification Directive was introduced in order to increase the access to protection and justice and to strengthen the principle of non-discrimination, thanks to the amendments done to the membership of particular social group ground[181].

The present Directive applies to third-countries nationals or stateless individuals seeking for international protection.

Such protection includes not only the refugee legal status, but also the subsidiary protection; eligible for the subsidiary protection are third-countries nationals or stateless persons who (although they do not have the requirements for being recognized as refugees) if returned to their countries of origin, or their country of habitual residence, would face a real risk to be persecuted and they are unable or unwilling to be granted the protection of such countries.

Furthermore, the Directive's application meets a limit *ratione loci:* the Qualification Directive (or, it is better to say, the provisions included into the

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[179] European Commission, "*Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on asylum. An integrated approach to protection across the EU",* 2008, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0360&from=EN, accessed on 26th March 2020. In this communication, the Commission affirmed that *"the 2004 Qualification Directive has secured a minimum alignment on both the criteria for granting international protection and the content of protection statuses across the EU. The positive impact of the Directive has been evident in many Member States. However, data show that the recognition of protection needs of applicants from the same countries of origin still varies significantly from one Member State to another. To some extent, this phenomenon is rooted in the wording of certain provisions of the Qualification Directive*".

[180] Cfr. Whereas (12) of the Qualification Directive.

[181] European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection,* 2009.

Qualification Directive which modify the previous 2004 Directive) is not binding for the UK (which was still a Member State at the time) and for Ireland, that chose not be obligated by the 2011 Qualification Directive. The Qualification Directive is not binding for Denmark as well[182].

Moreover, the Qualification Directive not only establishes eligibility for international protection and for the refugee legal status, but also clarifies the subsequent rights; for example, the Qualification Directive handles issues regarding the residence permits, the travel documents, rules about employment and education for the applicants, healthcare, and access to accommodation facilities.

Moreover, it is crucial to keep in mind that the Qualification Directive is a "recast" and for this reason it does not modify at all the basic principles and the general structure of the 2004 Directive[183].

However, it is also important to stress the fact that the new Qualification Directive made some changes and progresses compared to the previous Directive, thanks not only to the CJEU jurisprudence, but also thanks to the contribution of the European Courts of Human Rights[184].

Nevertheless, the Qualification Directive added some important legal innovations, above all in some cases[185].

First of all, article 1 of the Qualification Directive provides no longer "minimum standards" (like the same article 1 of the 2004 Directive), but "standards" *«for the qualification of third-country nationals or stateless persons as beneficiaries of*

[182] See, Asilo in Europa, "Direttiva Qualifiche". Ireland has chosen an opt-out from the area of freedom, security and justice. Moreover, Denmark has chosen a stricter opt-out from the area of freedom, security and justice as well; the exception is represented by the Schengen visa rules.

[183] According to the *"Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts",* point 2, *"recasting shall consist in the adoption of a new legal act which incorporates in a single text both the substantive amendments which it makes to an earlier act and the unchanged provisions of that act. The new legal act replaces and repeals the earlier act.".* Full text available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002Q0328&from=EN, accessed on 24th March 2020.

[184] The most important judgements of the CJEU and of the ECHR about sexuality-based asylum will be discussed in the following Chapters.

[185] See, Melting Pot Europa, "La nuova Direttiva Qualifiche - Pubblicazione nella Gazzetta Ufficiale UE della Direttiva 2011/95/UE", available at https://www.meltingpot.org/La-nuova-Direttiva-Qualifiche-Pubblicazione-nella-Gazzetta.html#.Xnnrz6eZNQJ, accessed on 24th March 2020.

international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection-granted[186]*.»*

However, according to a correct interpretation of the article, Member States may maintain and/or introduce more favorable provisions compared to "standards" provided by EU law; of course, these provisions should be in compliance with the Qualification Directive itself[187].

Secondly, on a general point of view, the Qualification Directive brings the institute of the subsidiary protection closer to the recognition of the legal status of refugee; consequently, in this way the EU law has taken away the possibility for Member States to grant some rights to refugees only[188]. In fact, the Qualification Directive affirms that the beneficiaries of subsidiary protection should be given the same rights and benefits as refugees, and they should be granted the same conditions for eligibility[189]. The enjoyment of some rights is common to both legal statuses, for example rights relating to occupation (article 26), education (article 27), access to procedures for recognition of qualifications (article 28), healthcare (article 30), and so on[190].

Therefore, within the EU legal framework there is no question that thus the innovative understanding of the concept of subsidiary protection may strengthen not only international protection granted, but also the principle of *non-refoulement*,

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[186] Cfr. article 1 of the Qualification Directive. Full article: "*The purpose of this Directive is to lay down 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."*

[187] G. MORGESE, "La Direttiva 2011/95/UE sull'attribuzione e il contenuto della protezione internazionale", *La Comunità Internazionale*, 2012, p 259, available at https://www.uniba.it/ricerca/dipartimenti/scienze-politiche/docenti/dott.-giuseppe-morgese/morgese-a.a.-2012-2013/226-articolo-nuova-direttiva-qualifiche.pdf. accessed on 24th March 2020. See also UNHCR, "*Observations in the cases of Minister voor Immigratie en Asiel v. X, Y and Z (C-199/12, C-200/12, C-201/12) regarding claims for refugee status based on sexual orientation and the interpretation of Articles 9 and 10 of the EU Qualification Directive"*, September 2012, p. 8, cfr: "*UNHCR also notes that the Qualification Directive provides that Member States may introduce or retain more favourable standards than those set out in the Directive".* Full text available at https://www.refworld.org/pdfid/5065c0bd2.pdf, accessed on 31st March 2020.

[188] See, Asilo in Europa, "Direttiva Qualifiche," http://www.asiloineuropa.it/wp-content/uploads/2016/10/DIRETTIVA-QUALIFICHE.pdf, accessed on 25th March 2020.

[189] See Whereas (39) of the Qualification Directive.

[190] F. PERRINI, "Dalla direttiva 2011/95/UE alla proposta di regolamento qualifiche: quale futuro per la protezione internazionale nell'ordinamento UE?", *Freedom, Security & Justice: European Legal Studies,* Volume 3, p.65, 2017.

as it is claimed by article 3 of the European Convention on Human Rights[191] and by other international instruments[192].

During the negotiations for the 2004 Directive and its recast in 2011, several LGBTI organizations and institutions, above all ILGA-Europe, required within the Qualification Directive an express reference to sexual orientation and gender identity as reasons of persecution. As it was already said, for the first time the European Parliament with the 2004 Directive succeeded in including this important innovation in the EU framework[193].

The previous Chapter has remarkably underlined that sexual orientation can be considered as a characteristic which is sufficient for proving an asylum seeker's membership of a particular social group, according to the meaning of article 2(d) of Directive 2011/95/EU[194].

For the purposes of this dissertation, two important provisions of the "new" Qualification Directive play an important role in assessing LGBTI asylum applications: article 9 ("Acts of persecution") and article 10 ("Reasons of persecution").

2.4.1 Article 9: acts of persecution against LGBTI asylum seekers

It is quite undoubtable that the evidence of sexual orientation and/or gender identity discrimination in the country of origin is not always considered as resulting into persecution[195].

As it was already outlined in the previous Chapter, article 9, paragraph 1, clarifies that, within the meaning of article 1A(2) of the 1951 Refugee Convention, acts of

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[191] Article 3 of the European Convention on Human Right states the prohibition of torture: " *No one shall be subjected to torture or to inhuman or degrading treatment or punishment. "*

[192] B. NASCIMBENE, "Il futuro della politica europea di asilo", *ISPI Working Paper*, 2008, available at https://www.ispionline.it/sites/default/files/pubblicazioni/wp_25_2008.pdf, accessed on 25th March 2020. On this point, see also M.BALBONI, *La protezione internazionale in ragione del genere, dell'orientamento sessuale e dell'identità di genere: Aspetti di diritto internazionale e dell'Unione Europea*, p.220.

[193] TSOURDI E.L., *"Guidelines on the transposition of the Asylum Qualification Directive: protecting LGBTI asylum seekers",* ILGA Europe, p. 5, available at https://www.ilga-europe.org/sites/default/files/directive_transposition_web.pdf, accessed on 25th March 2020

[194] *Supra* note no. 172.

[195] TSOURDI E.L., *"Guidelines on the transposition of the Asylum Qualification Directive: protecting LGBTI asylum seekers"*, p. 8.

persecution must: *«(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights[…](b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)».* So, the 2011 recast did not change the same provision laid down in the previous Qualification Directive.

The present article shows that several acts or omissions, taken individually, cannot actually form persecution; however, these acts or omissions, considered together, may constitute violations of one or different applicant's basic human rights. So, not only single acts of evident persecution, but also different conducts considered "cumulatively" may conduct to the recognition of the refugee status.

Moreover, according to article 9(2), acts of persecution may take different forms; for the purposes of this dissertation, they may result into several discriminatory measures[196]. In fact, unfortunately, discrimination is a common element in the experiences of LGBTI people. Discrimination may lead to persecution where such discriminatory measures, individually or cumulatively, may constitute a dangerous risk for the LGBTI individual looking for protection: this should be the correct interpretation of the first part of article 9.

Moreover, according to article 9(3) in order to grant the status of refugee status it is necessary the existence of a connection, a causal nexus between the reasons of persecution (indicated in article 10 of the Qualification Directive) and the acts of persecution or the absence of protection against these acts[197]. On this point, the Commission has observed that there have been many cases *«where persecution emanates from non-state actors, such as militia, clans, criminal networks, local*

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[196] In particular, article 9(2) states that *"acts of persecution as qualified in paragraph 1 can, inter alia, take the form of: (a) acts of physical or mental violence, including acts of sexual violence; (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment which is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2); (f) acts of a gender-specific or child-specific nature."*

[197] The concept is expressed by Recital 29 as well: *"one of the conditions for qualification for refugee status within the meaning of Article 1(A) of the Geneva Convention is the existence of a causal link between the reasons for persecution, namely race, religion, nationality, political opinion or membership of a particular social group, and the acts of persecution or the absence of protection against such acts."*

communities or families, the act of persecution may not have been committed for reasons related to a Refugee Convention ground but, for instance, for criminal motivations or for private revenge[198]*.»* So, the abovementioned provision of the Qualification Directive was considered as appropriate and needful.

As matter of facts, the legal protection may be granted not only where there is an act of persecution (or several acts which may amount to persecution), but also where there is an absence of or failure to provide protection. This point is clearly crucial for sexual orientation and gender identity-based claims, because these kind of asylum seekers may be persecuted, abused or mistreated not only by state legal provisions, but also by the surrounding society or by other different actors; moreover, state authorities may tacitly accept these mistreatments; as a consequence, national authorities may even refuse, or be unable to provide sufficient protection.

So, article 9(3) should be referred not only to the direct actors of persecution, but also to the State or any relative authority which fail to protect vulnerable people from discriminatory scenarios[199].

In order to grant a better protection for LGBTI who continue to face adverse situations, probably more specific references to sexual orientation claims in the Qualification Directive should be proposed. In fact, the norm refers to some acts which may constitute gross violation of basic human rights; however, the list is intended to be illustrative only and it is too broad as well.

For instance, according to *"Fleeing Homophobia"* report, because criminalization is intrinsically discriminatory, punishment on the basis of laws which directly or indirectly criminalize LGBTI individual should be by themselves amount to persecution, in order to recognize the refugee legal status[200]; on this sense, an accurate provision should be included in the Directive.

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[198] Cfr. European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection,* 2009, p. 7.

[199] UNHCR, *"Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted"*, 2010, p.7.

[200] S. JANSENS AND T. SPIJKERBOER, *op. cit.,* p. 22. On this point, see also M. BALBONI, *op.cit.,* p. 204.

2.4.2 Article 10(1)(d)

Article 10(1)(d) of the Qualification Directive considers sexual orientation persecution as a reason for recognizing refugee status, on the ground of membership of a particular social group. In fact, the norm affirms that *«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. […] a particular social group might include a group based on a common characteristic of sexual orientation*[201]*.»*

So, also in this case, the Qualification Directive did not notably modify the language used by 2004 Directive for the same provision.

In particular, it is important to underline that every kind of persecution may be perpetuated against individuals that cannot be technically referred as members of the social groups mentioned by the Qualification Directive. Similarly, they may be identified by the surrounding society as such for various reasons and they may face persecution as well because of useless stereotypes and prejudices[202].

However, according to paragraph 2 of the same article, it is not relevant for granting international protection *«whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution*[203]*.»* In this manner, the Qualification Directive shows its purpose of

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[201] See also, point 46 of the CJEU's judgement in the case *"X e Y and Z. v. Minister voor Immigratie en Asiel" :"it is common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it. That interpretation is supported by the second subparagraph of Article 10(1)(d) of the Directive, from which it appears that, according to the conditions prevailing in the country of origin, a specific social group may be a group whose members have sexual orientation as the shared characteristic."*

[202] M.BALBONI, *op. cit.,* p. 205.

[203] On this point, the UNHCR has clarified that *"Refugee law theory have emerged as to what constitutes a particular social group within the meaning of the 1951 Convention and are reflected in the Directive. The "protected characteristics approach" is based on an immutable characteristic or a characteristic so fundamental to human dignity that a person should not be compelled to forsake it. The "social perception approach" is based on a common characteristic which creates a cognizable group that sets it apart from society at large. This means that people may require protection because they are perceived to belong to a group irrespective of whether they actually possess the group's characteristics. While the results under the two approaches may frequently*

extending the meaning of the present protection, in order to embrace as many vulnerable people as possible[204].

Furthermore, recalling the provision stated by the 2004 Directive, article 10(1)(d) of the Qualification Directive clarifies that sexual orientation cannot be interpreted in order *«to include acts considered to be criminal in accordance with national law of the Member States. »* A very interesting analysis of this particular statement has been done by Balboni[205], who has questioned the real meaning of the present expression.

If the present provision aims to refer only to sexual orientation (so, including homosexuals, bisexuals, heterosexual conducts), it will not be effective, because as matter of fact no Member State criminalize same-sex acts nowadays. In fact, such legislations would be clearly not in compliance with the EU Charter[206].

Actually, the ruling should be addressed to punish harmful behaviors, perpetuated against vulnerable people: for example, pedophile acts are normally criminalized by Member States' criminal legislations.

However, it is crucial to stress the fact that the abovementioned behaviors should not be considered as expressions of sexual orientation at all, because in this way "criminalized" pedophiles may be granted sort of protection as well: it would be an unacceptable situation within EU law[207].

Therefore, according to Balboni, the actual problem of article 10(1)(d) consists in the fact that there is still an evident disorientation in understanding the differences

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converge, this is not always the case. To avoid any protection gaps, UNHCR therefore recommends that the Qualification Directive permit the alternative, rather than cumulative, application of the two concepts". UNHCR, "*Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*", 2010, p. 8.

[204] See also, recital 30 of the Qualification Directive: *"It is equally necessary to introduce a common concept of the persecution ground 'membership of a particular social group'. For the purposes of defining a particular social group, issues arising from an applicant's gender, including 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."*

[205] BALBONI in his work *La protezione internazionale in ragione del genere, dell'orientamento sessuale e dell'identità di genere: Aspetti di diritto internazionale e dell'Unione Europea,* undertakes a systematic examination of the Qualification Directive relating to sexual orientation and gender identity. In particular, see pp. 203 *et seq.*

[206] See article 21 of the Charter, mentioned previously, which explicitly prohibits discrimination based on sexual orientation.

[207] M.BALBONI, *op. cit.,* p.207.

between sexual orientation and sexual conducts that should not be tolerable within the modern society, for instance pedophile acts and conducts[208].
As a consequence, some international associations, first of all ILGA Europe, claimed for the total removal of the abovementioned sentence[209].

2.5 The agreement between EU and Turkey: is Turkey really safe for LGBTI asylum seekers?

As it was underlined in this work, the process of recognition of the refugee status is particularly complicated for LGBTI asylum seekers due to several reasons: in fact, there is no an EU common procedure in order to deal with sexuality-based asylum claims; moreover, some Member States still continue to use the "discretion requirement" in the application assessment procedure; finally, the mere existence of legal criminalization of same-sex acts in the country of origin sometimes is not considered as a sufficient ground for granting international protection.
Furthermore, some Member States' lists of countries defined as "safe" for asylum seekers, actually include countries where LGBTI applicants may risk persecution, as the case of Turkey shows.
The problem of LGBTI asylum applicants in Turkey is particularly crucial for the purposes of the current dissertation and for a comprehensive implementation of the EU-Turkey cooperation in refugee claims' assessment.

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[208] *Ibid.*
[209] ILGA Europe, *"Policy paper: the recast of the EU legislation on asylum",* 2011, p.4 cfr: *"ILGA-Europe considers that the following sentence should be deleted: «Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States.»* This language is unnecessary, since the concept of sexual orientation is clearly defined in European treaties and EU law, and thus also recognized in national law". Paper available at https://www.ilga-europe.org/sites/default/files/Attachments/ie_policy_paper_asylum_recast_2011jan.pdf, accessed on 31st March 2020. See also on this point, ILGA Europe, "*Protection the rights of LGBTI asylum seekers and refugees in the reform of the European Common Asylum System"*, ILGA Policy Papers, 2017, p. 4: *"[…]the phrase linking sexual orientation to acts considered criminal is out of place as it recalls the offensive assimilations made between persons attracted to persons of the same sex on the one hand and pedophiles on the other hand, and should therefore be removed. Sexual orientation in legislation can never mean acts considered to be criminal. Moreover, the phrase has no legal added value since the concept of sexual orientation is clearly defined in European treaties and EU law, and thus also recognized in national law".* Paper available at https://ilga-europe.org/sites/default/files/Attachments/ilga-europe_-_protecting_the_rights_of_lgbti_asylum_seekers_and_refugees_in_the_ceas_-_december_2016.pdf, accessed on 5th April 2020.

The present paragraph addresses to underline the necessity of an EU intervention in order to deal with the difficult situation that LGBTI claimants may face in countries like Turkey: although the EU with the 2016 agreement has formally consider Turkey as a "safe place" for finding international protection, the country is still governed by a clear homophobic climate, which may lead sexuality-based seekers to be victims of harassments and unacceptable discrimination.

Firstly, it is important to stress the fact that Turkey can be considered one of the main countries in which refugees and asylum seekers from Middle Eastern countries have established; moreover, in the 1990s the number of refugees in the country has been remarkably increased because of the Balkan Wars and the Civil War in Syria. Furthermore, due to its strategic geographical position in proximity with the coasts of some Member States (above all, Greece and Italy), Turkey is referred also as a "transit" country, a crossroad between Europe, Asia, Africa and Middle East.

As a consequence, Turkey has always been characterized by great flows of refugee and migrants[210].

Regarding refugees protection, the Republic of Turkey is party to both the 1951 Refugee Convention and its 1967 Protocol, but the country processes only asylum seekers originating in Europe[211]; consequently, non-European asylum seekers must request the temporary protection to the Turkish authorities and they must apply for the recognition of the refugee legal status to UNHCR. However, even if these two different procedures for granting international protection are required, most of asylum seekers usually refer to the UN Agency first[212].

In 2015 more than 150 000 of irregular migrants and asylum seekers arrived from Turkey to the Greek coasts[213]. Consequently, the EU and its Member States had to fight with the so called "refugee crisis," characterized by a massive surge of asylum

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[210] G. CRAGNOLINI, "Lesbian, gay, bisexual and transgender refugees: challenges in refugee status determination and living conditions in Turkey", in T. SPIJKERBOER, edited by, *Fleeing Homophobia: sexual orientation, gender identity and asylum,* p. 101.

[211] UNHCR, "*Global Appeal 2008-2009: Turkey"*, cfr. p.1: *"Turkey, while party to the 1951 Refugee Convention, maintains the geographical limitation only to people originating from Europe.",* available at https://www.unhcr.org/474ac8e60.pdf, accessed on 4th April 2020.

[212] G. CRAGNOLINI, *op. cit,* p. 102.

[213] Frontex, "540 000 Migrants Arrive on Greek Islands in the First 10 Months of 2015," available at http://frontex.europa.eu/news/540-000-migrants-arrived-on-greek-islands-in-the-first- 10-months-of-2015-4uH4FJ, accessed on 4th April 2020.

seekers, above all fleeing from Syria, Iraq and Afghanistan, who had decided to undertake dangerous journeys via Turkey, in order to reach the *"land of rights"*[214]. Obviously, the abovementioned migration flows did not determine only a severe humanitarian crisis, but they also seriously damaged the geopolitical balance across EU. For these reasons, Member States deemed right to cooperate with the Turkish government, trying to find a solution for the complex humanitarian and political situation[215].

So, in response the 2015 "refugee crisis", Member States agreed to adopt on 29 November a joint action plan with Turkey, in which the Turkish government was committed to cooperate with Member States, in order to return those asylum claimants not eligible for international protection to their countries of origin[216].

Moreover, on 18 March 2016, the EU-Turkey agreement[217]was reached; in particular, this important deal, requested by twenty-eight Member States, aims to supervise and coordinate the flow of irregular migrants arriving in the EU via Turkey.

According to the present statement, irregular migrants and asylum seekers arriving from Turkey to Greece and whose claims for asylum have been dismissed, should be returned to Turkey[218]. In this manner, the EU-Turkey agreement seems to rely on the tacit assumption that Turkey should be considered a "safe third country"[219] for who is looking for safety.

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[214] M.L. BORGES, "The EU-Turkey agreement: Refugees, rights and Public Policy", *Rutgers Race & the Law Review*, vol. 18, no. 2, 2017, p. 123, available at https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/rrace18&id=146&men_tab=srchresults, accessed on 27th April 2020.

[215] *Ibid.*

[216] Press corner of the European Commission, "EU-Turkey joint action plan", https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860, accessed on 4th April 2020.

[217] See all the action point of EU-Turkey agreement on Council of the European Union, Press release, "EU-Turkey statement, 18 March 2016", available at https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/, accessed on 4th April 2020.

[218] Corriere PL, "Accordo Ue-Turchia: l'impatto sui rifugiati Lgbt", available at https://www.corrierepl.it/2019/12/12/accordo-ue-turchia-limpatto-sui-rifugiati-lgbti/, 2019, accessed on 5th April 2020.

[219] Article 38(1) of the Procedures Directive states: *" Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned: (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of non-refoulement in accordance with the*

This situation not only suggests that the forced return to Turkey of asylum applicants arriving in EU is allowed, but also that asylum seekers can stay and find international protection in the country.

According to Amnesty International, the agreement is based *«on the untrue, but willfully ignored, premise that Turkey is a safe country for refugees and asylum-seekers*[220]*».* Indeed, in recent years, several NGOs and associations for the protection of human and LGBTI rights have strongly criticized the choice of the EU (which has considered Turkey as a "safe country" for seeking asylum), because of the lack of protection of the basic human rights.

So, although Turkey is well known for having the world's largest number of refugees claims[221], the human rights conditions in the country continues to lead asylum seekers to face several difficulties: as matter of fact, the situation is even more adverse for LGBTI applicants, who are often victims of discrimination and mistreatments.

On this sensitive issue, a Turkish journalist affirmed: *«LGBTI individuals are the biggest outsiders among the refugees in Turkey. These are the people whose relatives and friends died in the conflict, who fought for their lives, escaped Syria, and sought shelter in Turkey. But here their struggle only continues*[222]*.»*

For instance, in 2019, ILGA Europe specifically denounced gross violations of the LGBTI individuals' rights[223]. In particular, the Turkish government has totally set

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Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention."

[220] Cfr. Amnesty International*, " 'Not an illness nor a crime' Lesbian, gay, bisexual and transgender people in Turkey demand equality*", 2011, available at https://www.amnesty.org/download/Documents/28000/eur440012011en.pdf, accessed on 4th April 2020.

[221] On Young World, "Turkey: World's biggest refugee country", https://www.oneyoungworld.com/blog/turkey-biggest-refugee-country, accessed on 5th April 2020

[222] Cfr. E. ALTAY, "On the margins", *Transition Online,* p. 1, 2018, available at https://global.factiva.com/ha/default.aspx#./!?&_suid=158798105567405083741310179 24, accessed on 27th April 2020.

[223] ILGA Europe, *"Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People covering events that occurred in Europe and Central Asia",* 2019, available at https://www.ilga-europe.org/sites/default/files/Attachments/Annual%20Review%202020.pdf, accessed on 5th April 2020.

bans on Pride manifestations and on events regarding LGBTI individuals across Turkey[224], actually suppressing their freedom of expression.

Furthermore, as it was underline by KAOS, an important Turkish organization for LGBTI rights, in Turkey there are no explicitly discriminatory or prohibiting legal provisions against LGBTI people. However, the Republic of Turkey continues to use *«ambiguous terms in the legislation such as "public morality", "obscenity" and "the Turkish Family Structure" are used to limit or prevent LGBTIs from exercising their basic rights[225].»* So, although no criminalizing legislation exists nowadays, it is also true that there is no policy or provision aiming to fight discrimination, hate and violence based on sexual orientation and/or gender identity[226].

Moreover, Turkey continues to tolerate hate speech against homosexuals and transgender individuals, both in the media and on social media. Sometimes, these unacceptable talks come from political actors; these hate episodes became especially frequent under the government of Erdogan. Indeed, the Turkish hate speech legislation is still not being applied in an effective manner[227].

For these reasons, LGBTI asylum seekers in Turkey not only should suffer the pain of fleeing their countries in order to avoid persecution, but also they should go through a clear atmosphere of intolerance towards LGBTI people in the "host" country: as a consequence, they may be easily discriminated by state and non-state actors in the workplace or they may be subject to cruel attacks or persecution as well[228]. Moreover, in this context, LGBTI asylum seekers may be also led to hide their sexual orientation and/or gender identity, in order to save their lives.

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[224] On this point, in a 2019 Resolution the European Parliament expressed *"its concern at the violations of the human rights of LGBTI people, in particular the repeated bans on Pride marches and LGBTI-related events across the country which are still being imposed, despite the lifting of the state of emergency, and calls for these discriminatory bans to be immediately lifted."* European Parliament, *Resolution of 13 March 2019 on the 2018 Commission Report on Turkey,* cfr. recital 12, available at https://www.europarl.europa.eu/delegations/en/d-tr/product/20190315DPU21361, accessed on 5th April 2020.

[225] Cfr. KAOS Gay and Lesbian Cultural Research and Solidarity Association (KAOS GL), *"Waiting to be safe and sound: Turkey as LGBTI refugee's way station",* 2016, p. 7 https://www.asylumineurope.org/sites/default/files/resources/lgbti_refugees-_english-_multeci_raporu2016.pdf, accessed on 5th April 2020.

[226] *Ibid.*

[227] ILGA Europe, *LGBTI Enlargement Review,* 2019, p.3, available at https://ilga-europe.org/sites/default/files/LGBTIEnlargementReview2019.pdf, accessed on 5th April 2020

[228] G. CRAGNOLINI, *op. cit.* p. 106.

Having regard of these serious violations of fundamental human rights, it is undoubted that a huge number of LGBTI asylum applicants may be obliged to stay in Turkey without any kind of protection, consequently becoming victims of persecution again.

In order to avoid hostile situations like the ones described above, the EU should seriously take into account that the control of borders cannot justify a lowering of the standards laid down for the protection of human rights; considering Turkey as a "safe country" for LGBTI asylum seekers means ignoring and denying a proven reality nowadays. The Union must not be party of harassments and discriminations such those carried out in Turkey[229].

In this context, ILGA Europe affirmed that EU Institutions and authorities should take into account the concept of "safe country of origin" and "safe third country" in a more precise manner, above all for claims based on sexual orientation and/or gender identity[230].

As matter of fact, all the EU Institutions and Member States must ensure that asylum authorities and decision makers may not rely on the assumption that a country is "safe" for asylum seekers because it has been formally considered as such; the example of the EU-Turkey agreement shows that definitions does not necessarily correspond to the truth.

As a consequence, competent authorities (in this case, above all Greek authorities), before deciding to dismiss LGBTI asylum seekers' applications and to return them to countries listed as "safe", like Turkey , should ensure that LGBTI refugees may be truly protected, according to human rights provisions and to EU asylum law[231].

2.6 The perspective of an EU homogeneous system

Following the abovementioned considerations, it is crucial to stress the fact that, although the Qualification Directive 2011/95/EU has explicitly recognized sexual orientation persecution as a reason for granting refugee status on the ground of

[229] Corriere PL, "Accordo Ue-Turchia: l'impatto sui rifugiati Lgbt".
[230] ILGA Europe, *"Seeking refuge without harassment, detention or return to a "safe country",* p.5
[231] See also, ILGA Europe, *"Protection the rights of LGBTI asylum seekers and refugees in the reform of the European Common Asylum System"*, cfr. p. 6: *"In order to fully protect the asylum rights of people belonging to persecuted minorities, including LGBTI people, accelerated procedures, like lists of safe countries of origin, safe third countries, etc. need to be rejected."*

membership of a particular social group, from an EU law perspective Member States are totally free to choose the tools and measures, in order to implement an adopted Directive.

As a consequence, the issue is notably complicated, actually because it is left to the discretion of national authorities to state if an LGBTI asylum seeker request may be received, according to the definition of particular social group provided both by international instruments and EU provisions.

Moreover, although great political and social progresses have been made across EU in protection LGBTI individuals from every sort of discrimination, an officially extent of the EU definition of refugee in the Qualification Directive, in order to include sexual orientation as an independent ground for granting international protection, is not being under consideration nowadays within the Union[232].

As it was underlined in the first Chapter as well, Member States has made some important steps forwards in interpreting correctly the meaning of article 10(1)(d) of the Qualification Directive; however, only the explicit recognition of sexuality-based persecution as an autonomous, specific motive for granting the refugee legal status may led to an homogenous system for the protection of LGBTI asylum seekers.

So, even if the EU has created common standards for the asylum thanks to the CEAS, if an LGBTI asylum seeker would apply for international protection in two different Member State nowadays, probably he/she would get two distinct and contrasting outcomes[233].

Apparently, a possible admittance of sexual orientation as an independent ground for the refugee status may require necessarily an open-mindedness of Member States on this specific topic (in fact, some Member States are considered as more culturally conservative than others, referring to sexual orientation issues)[234].

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[232] M.G. BEGAZO, "The Membership of a Particular Social Group Ground in LGBTI Asylum Cases Under EU Law and European Case-Law: Just Another Example of Social Group or an Independent Ground?", in A. GÜLER, M. SHEVTSOVA, D. VENTURI, *LGBTI asylum seekers and Refugees from a Legal and Political Perspective* p. 181.

[233] L. L. LIBONI, "Richiedenti asilo Lgbti nella Ue: esiste una linea comune?"

[234] M.G. BEGAZO, *op. cit.,* p. 182.

Because of the absence of an actual "LGBTI asylum seekers mainstreaming policy"[235] within the EU legal framework, it is fundamental that all Member States should blindly interpret the concept of membership of a particular social group ground in order to obtain refugee status in accordance to the provisions laid down in the Qualification Directive[236].

So, waiting for the current purposes to be achieved, the role of the CJEU, as the main guarantor of EU law correct interpretation, remains fundamental.

The most important judgements of the Court regarding sexuality-based asylum will be analyzed in detail in the following Chapter.

[235] M. BALBONI, *op. cit.,* p. 237.

[236] Moreover, ILGA Europe recommendes that *"the new Qualification Regulation, the Reception Conditions Directive and the Procedure Regulation should enhance protection, reception and procedural standards offered to people persecuted on the ground of their sexual orientation, gender identity, gender expression and sex characteristics."* ILGA Europe, *"Protection the rights of LGBTI asylum seekers and refugees in the reform of the European Common Asylum System"*, p.1.

CHAPTER III

THE EVOLUTION OF THE CJEU'S APPROACH IN SEXUALITY-BASED ASYLUM

SUMMARY: 3.1 The fundamental contribution of the CJEU in asylum based on sexual orientation persecution - 3.2 *X, Y and Z v. Minister Voor Immigratie en Asiel* (2013): the first opportunity for the CJEU to deal with sexuality-based asylum claims – 3.2.1 Examination of the questions concerned - 3.2.2 The critical reaction of the civil society - 3.3 *A, B and C v. Staatssecretaris van Veiligheid en Justitie* (2014) - 3.4 *F. v. Bevándorlási és Állampolgársági Hivatal* (2018): "testing the untestable" - 3.4.1 Assessing sexual orientation through experts' reports - 3.4.2 The ban of psychologist's expert reports based on homosexuality tests - 3.5 The right-oriented interpretation of the Court and the urgent need of clear guidance

3.1 The fundamental contribution of the CJEU's in asylum based on sexual orientation persecution

As it was observed by Kaunert and Leonard, the changes made to the EU asylum system described in the previous Chapter had two relevant effects: in particular, they enforced the role of the EU Institutions, such as the European Commission, the European Parliament and CJEU on asylum matters (the so called "communitarization" of asylum). Moreover, they have strengthened the position held by the CJEU in the EU asylum policy framework ("judicialization" of asylum)[237]. As a consequence, the more and more evident communitarization of asylum has contributed to increase the role of the Court, which has brought to the affirmation of the "judicialization" of the EU asylum policy as well[238].

In particular, the Amsterdam Treaty conferred to the Court the competence to decide, when asked by a national court or tribunal, on two different kind of claims: questions on the interpretation of the Treaty provisions with regard to asylum and

[237] Cfr. C. KAUNERT, S. LÉONARD, "The development of the EU asylum policy: venue-shopping in perspective", p. 15.
[238] *Ibid.*

questions on the legitimacy or interpretation of acts of the Community institutions based on the Treaty provisions on asylum, but only regarding to cases *«pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law*[239]*.»*

For the purposes of the present dissertation, it was remarkably highlighted that no EU uniform practices regarding sexuality-based asylum have been developed yet, because the determination process for the recognition of the refugee status varies quite a lot from a Member State to another.

Within this heterogenous groundwork, in recent years the legal position of the CJEU has been specifically significant; in fact, the Court has provided useful explanations in order to deal with LGBTI asylum applications; however, the case-law on the present issue is particularly modest, and some problems continue to be unsolved[240].

Nonetheless, it is undoubtful that the Court maintains its fundamental role in future assessments of this kind of refugee applications and its decisions have influenced in a consistent manner all Member States and their asylum examination proceedings. Moreover, the Court has taken especially into account the developments and the proposes that ILGA-Europe and other similar human rights NGOs have been reporting for so long[241]; in fact, within the case law that will be examined in the present Chapter, the position of international organizations and non-state actors was remarkably crucial in order to raise the CJEU's awareness on some particular issues concerning LGBTI asylum applicants, their fundamental freedoms and their right to be who they are, without worthless restrictions.

In particular, this Chapter will deeply analyze all the challenges and criticalities of three crucial cases regarding asylum claims based on sexual orientation: *"X, Y and*

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[239] Cfr. article 73p (2) of the Amsterdam Treaty. See also, C. KAUNERT, S. LÉONARD, "The development of the EU asylum policy: venue-shopping in perspective", p. 16.

[240] F. FERRI, "Assessing Credibility of Asylum Seekers' Statements on Sexual Orientation: Lights and Shadows of the F Judgment", *European Papers*, 2018, p. 875, available at http://www.europeanpapers.eu/it/europeanforum/assessing-credibility-of-asylum-seekers-statements-on-sexual-orientation, accessed on 10th April 2020.

[241] V. DE BRUYCKERE,"Somewhere over the Rainbow: On the Use of Psychological Tests to Determine Asylum Seekers' Sexual Orientation and the Impact on the Right to Private Life (Case C-473/16, 25 January 2018)," p. 267.

Z v. Minister Voor Immigratie en Asiel"[242], "*A, B and C v. Staatssecretaris van Veiligheid en Justitie"*[243] and *"F. v. Bevándorlási és Állampolgársági Hivatal"*[244].

To sum up, for the first time, in the *X, Y and Z* decision the Court definitively stated the possibility of recognizing LGBTI applicants as refugees, according to the meaning of the 1951 Refugee Convention; in the second case *A, B and C*, the Court underlined that, although Member States' authorities have the competence to examine sexuality-based asylum claims, the procedure for the recognition of the refugee status must not violate both the individual seeker's fundamental human rights (safeguarded by the EU Charter) and his/her dignity[245]; finally, in the innovative judgment relating to the case *F*, the CJEU restricted the preparation and use of the expert's report in assessing LGBTI asylum seekers' applications, banning discriminatory homosexuality tests aiming to verify a claimants' sexual orientation[246].

Although the important contribute and impact of its judgements, it seems that even now the Court still cannot provide a more specific and precise guidance on how in concrete Member States should be deal with applications based on sexual orientation. On this issue, there is a real need to create legal detailed guidelines on LGBTI asylum seekers' requests[247].

So, in absence of an EU uniform system on the present subject, the abovementioned cases should be considered as very good opportunities for the CJEU in order to establish more mandatory principles, not only for Member States' legislations, but also for their own decision makers and asylum competent authorities[248].

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[242] CJEU, joined cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie en Asiel*, 7 November 2013, ECLI:EU:C:2013:720. Full text available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0199&from=EN.

[243] CJEU, joined cases C-148/13, C-149/13 and C-150/13 *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, 2 December 2014, ECLI:EU:C:2014:2406. Full text available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=160244&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6297739.

[244] CJEU, case C-473/2016, *F. v. Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, ECLI:EU:C:2018:36. Full text available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0473&from=EN.

[245] ILGA Europe, "CJEU steps in to protect the rights of asylum seekers", available at https://www.ilga-europe.org/resources/news/latest-news/sexual-orientation-and-refugee-status-cjeu-steps-protect-rights-asylum, accessed on 9th April 2020.

[246] F. FERRI., *op. cit.,* p. 883.

[247] V. DE BRUYCKERE, *op. cit.,* p. 271.

[248] *Ibid.*

Moreover, it is also necessary to monitor Member States in implementing both the Court's decisions and the rights and freedoms expressed by the EU Charter, *«as well as how the international community in general will ensure the respect for human rights while addressing future asylum claims on the basis of sexuality related grounds*[249]*.»*

3.2 *X, Y and Z v. Minister Voor Immigratie en Asiel* (2013): the first opportunity for the CJEU to deal with sexuality-based asylum claims

The real first chance for the Court of Luxembourg to rule on the LGBTI asylum claims matter was in the joined cases of *X, Y and Z v. Minister Voor Immigratie en Asiel* (hereinafter *X, Y, Z),* where the Court pointed out the key concept of article 9 and 10 of the Directive 2004/83/EC.

The joined cases concern the Dutch *Raad van State* (Council of State), which referred some questions for a preliminary ruling to the CJEU; the request for the preliminary ruling came from the asylum applications lodged in the Netherlands by three asylum seekers, who were citizens of Sierra Leone, Uganda and Senegal, and were respectively and anonymously named as X, Y and Z in the proceedings before the Court.

The three men jointly claimed that each one of them had a well-founded fear of being persecuted in his country of origin because of his sexual orientation, basing on the fact that in Sierra Leone, in Uganda and Senegal same-sex acts are legally criminalized[250].

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[249] Cfr. J. ZHENG, "European Court of Justice Bans Homosexuality Tests for Asylum Seekers*", EJIL Talk!, Blog of the European Journal of International Law,* 2018, available at https://www.ejiltalk.org/european-court-of-justice-bans-homosexuality-tests-for-asylum-seekers/, accessed on 10th April 2020.

[250] Nowadays, in Uganda LGBTI individuals are legally discriminated. Moreover, in December 2013, the National Parliament approved an anti-homosexuality law: according to this legislation, who is part of the LGBTI community and/or carries out same-sex conduct may be sentenced to the life imprisonment. The freedom of expression is also restricted and punished: for example, movies or any kind of show may be subject to censure, because they are not in compliance with the "public morality". In Sierra Leone and in Senegal, homosexual individuals may risk life imprisonment as well. See on this point, Amnesty International, "Essere gay in Africa può costare la vita: la situazione Paese per Paese", 2019, available at https://www.amnesty.it/diritti-gay-africa/, accessed on 11th April 2020.

In particular, the Court's judgment aimed to answer three main questions. First of all, whether sexuality-based asylum seekers may be considered as members of a particular social group, according to the meaning of the 1951 Refugee Convention for the recognition of the refugee legal status; second, whether homosexual asylum seekers should hide or repress their sexual orientation, in order to avoid persecution and mistreatments[251]; finally, to what extent criminalization of same-sex acts may result into to persecution[252].

3.2.1 Examination of the questions concerned

Regarding the first question at stake, in its judgement the Court stresses out that, according to article 10(1)(d) of the "old" Qualification Directive, a group can be considered as a particular social group for the purposes of the 1951 Refugee Convention if: *«members share a characteristic or belief that is fundamental to their identity or conscience»* and *«members have a distinct identity»* because they are *«perceived as being different by the surrounding society».*

According to a cumulative approach[253], the two present conditions must be met in order to grant the refugee status. In this specific context, the Court finds that same-sex individuals should be considered as part of a particular social group, because both requirements are clearly fulfilled.

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[251] *"[..]Which homosexual activities fall within the scope of the Directive and, in the case of acts of persecution in respect of those activities and if the other requirements are met, can that lead to the granting of refugee status? That question encompasses the following subquestions: (a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their [respective] country of origin in order to avoid persecution? (b) If the previous question is to be answered in the negative, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals? (c) If, in that regard, a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of the orientation and in what way can it be determined?"* Cfr. *"Reference for a preliminary ruling from the Raad van State (Netherlands) lodged on 27 April 2012 - Minister voor Immigratie en Asiel v X (Case C-199/12)",* OJ C 217/7, 21.07.2012.

[252] European Council on Refugee and Exiles (ECRE), *"Preliminary Deference? The impact of judgments of the Court of Justice of the EU in cases X.Y.Z., A.B.C. and Cimade and Gisti on national law and the use of the EU Charter of Fundamental Rights"*, p. 18, March 2017, available at https://www.ecre.org/wp-content/uploads/2017/03/CJEU-study-Feb-2017-NEW.pdf, accessed on 1st April 2020.

[253] CJEU, joined cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie en Asiel*, point 45.

In fact, relating to the first prerequisite, as it was outlined previously in the present dissertation, nowadays it is quite undiscussed that an individual's sexual orientation is *«a characteristic so fundamental to his identity that he should not be forced to renounce it*[254]*.»*

In relation to the second condition, for the recognition of the refugee legal status the second subparagraph of article 10(1)(d) requires that members of a particular social group, sharing an innate characteristic (for instance, sexual orientation), should be considered as "different" by the rest of society in the asylum seekers countries of origin[255]: On this particular point, the Court affirms that the existence of legislations that directly criminalize same-sex acts or conducts, and that punish expressly homosexual individuals, should be interpreted as a proof that this kind of people were perceived as totally diverse by the surrounding society[256].

Moreover, it is also relevant to consider the possible consequences that the abovementioned perception may have for the physical and psychological integrity of the LGBTI asylum seekers, which can cause a well-founded fear of being persecuted as well[257].

On this issue, the Advocate General Sharpston, in her opinion delivered on July 2013, clarified that the formulation of the Directive clearly demonstrated that the EU legislator aimed to indicate that individuals with a shared characteristic of sexual orientation may be contemplated as members of a particular social group[258]. However, it is also important to underline that the Court's ruling does not go beyond the questions specifically referred and the particular context in which its intervention has been requested. As a consequence, the Court's interpretation does

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[254] *Ibid.,* cfr. point 46. The Court adds: *"that interpretation is supported by the second subparagraph of Article 10(1)(d) of the Directive, from which it appears that, according to the conditions prevailing in the country of origin, a specific social group may be a group whose members have sexual orientation as the shared characteristic."*

[255] *Ibid.,* point 47.

[256] *Ibid.,* point 48.

[257] F. FERRI, *op. cit,* p. 272.

[258] *Opinion of Advocate General Sharpston, delivered on 11 July 2013, X, Y and Z v. Minister voor Immigratie, Integratie en Asiel, C-199/12, C-200/12 and C-201/12*, 11 July 2013, point 35. Available at: https://www.refworld.org/cases,ECJ,51e01a3a4.html. Accessed April 15, 2020. The Advocate General's Opinion is not binding for the CJEU. See also, CJEU, Press release no 87/13, *"According to Advocate General Sharpston, applicants for refugee status claiming to be persecuted for their homosexual orientation may form a 'particular social group' under EU refugee law,* 11 July 2013, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2013-07/cp130087en.pdf, accessed on 15th April 2020.

not aim to unconditionally exclude a group from being recognized as a particular social group in the absence of criminal laws specifically destinating to homosexual individuals[259].

Consequently, each LGBTI asylum application should be examined in detail, taking into account all the relevant information relating to the legal framework of the country of origin at stake.

So, the present judgement has precisely showed that the 2004 Directive was proposed to include sexual orientation for granting international protection on the ground of the membership of particular social group.

Furthermore, the Court reversed the order in which it answered the second and the third question.

Concerning the third question[260], the CJEU queried whether criminalize laws must be enough severe in order to result into a violation of fundamental rights and to constitute persecution according to the meaning of the 1951 Refugee Convention; indeed, for the Court not all the violations of a LGBTI individual's right may automatically amount to persecutory acts[261].

As it was also discussed in the first Chapter of this work, actually the Court points out that the mere existence of legislation criminalizing same-sex actions, acts or relationship cannot always constitute *per se* persecution within the concrete meaning of article 9(1) of the 2004 Directive[262].

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[259] M. FRASER, "The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel", EDAL: European Database of Asylum Law, available at https://www.asylumlawdatabase.eu/en/content/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y, accessed on 12th April 2020.

[260] "*Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in the Offences against the Person Act 1861 of Sierra Leone, constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive? If not, under what circumstances would that be the case?"* Cfr. *"Reference for a preliminary ruling from the Raad van State (Netherlands) lodged on 27 April 2012 - Minister voor Immigratie en Asiel v X (Case C-199/12)."*

[261] CJEU judgment, point 53: *"It is clear from those provisions that, for a violation of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva Convention, it must be sufficiently serious. Therefore, not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness."*

[262] *Ibid.,* point 55. A it was highlighted in Chapter II, article 9(1) of the old Qualification Directive indicates acts which should be considered as acts of persecution according to article 1A(2) of the 1951 Refugee Convention.

However, the Court considers that a criminal legislation, which it is applied and enforced in the seeker's country of origin as a rule and which has the purpose to punish same-sex acts or conducts with a relevant term of imprisonment, may be considered as a severe form of persecution for homosexual individuals[263].

According to the opinion of the Advocate General Sharpston, national competent authorities should assess LGBTI asylum applications taking into account various elements: the risk and frequency of prosecution of the criminalizing legislations; in case of prosecution, the severity of the sanction normally imposed; any other tools or practices which may arouse a well-founded fear to be victim of a gross violation of the basic human rights[264].

Therefore, in those specific cases, the decision makers and national asylum authorities should evaluate the LGBTI seekers' applications taking into consideration all the main and significant facts relating to the country of origin under examination, inclusive of its legislation and regulations and how they are applied in concrete[265].

To sum up, the CJEU expresses that *«article 9(1) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, 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*

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[263] *Ibid.*, point 56.

[264] Opinion of the Advocate General Sharpston, point 50, *"or to an accumulation of various measures, including violations of human rights, which is sufficiently severe similarly to affect the applicant."*

[265] CJEU, Press release no. 145/13, *"Homosexual applicants for asylum can constitute a particular social group who may be persecuted on account of their sexual orientation"*, 7 November 2013, p. 2, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2013-11/cp130145en.pdf, accessed on 13th April 2020. Moreover, the Court states in point 59 of the judgment: *"in undertaking that assessment it is, in particular, for those authorities to determine whether, in the applicant's country of origin, the term of imprisonment provided for by such legislation is applied in practice."* The Advocate General expressed in her opinion, point 49: "*In general terms, it is thus for the national authorities, having ascertained whether a particular applicant is, by reason of his homosexual orientation, to be considered as a member of a particular social group within the meaning of Article 10(1)(d), to go on to examine whether the circumstances in his country of origin are such as to give rise to acts of persecution within the meaning of Article 9(1). To do so, they should assess whether repressive measures are applicable to those who are, or who are thought to be, members of that social group;whether those measures are enforced and the severity of the sanctions imposed; and whether – in consequence – the applicant has a well-founded fear of persecution. The national authorities' determination of these matters must, of course, be subject to review by the national courts in order to guarantee the correct application of the criteria laid down by the Directive."*

punishment which is disproportionate or discriminatory and thus constitutes an act of persecution[266]*.»*

Finally, regarding the issue of concealment[267], the Court refers to the situation of Y and Z in joined cases C-71/11 and C-99/11[268], where the CJEU stated that the possibility of refrain from religious practices in order to avoid persecution should not be adequate, in order to determine the risk to face persecutory behaviors. As a consequence, the same principle should be applied by analogy to sexuality-based persecution[269].

Furthermore, in her opinion the Advocate General Sharpston preliminarily remarks that the 2004 Qualification Directive does not indicate any kind of distinction of an individual's sexual orientation expression in public or in private; in fact, such a differentiation is not important for the determination of whether there is an act of persecution within the purpose of Article 9(1) of the Directive[270].

On this point at stake, the Court states that *«requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it*[271]*.»*

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[266] Cfr. CJEU's judgement, point 61.

[267] *"Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their country of origin in order to avoid persecution? If the previous question is to be answered in the negative, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?" Cfr. "Reference for a preliminary ruling from the Raad van State (Netherlands) lodged on 27 April 2012 - Minister voor Immigratie en Asiel v X (Case C-199/12)".*

[268] CJEU, joined cases C-71/11 and C-99/11, *Germany vs Y and Z*, 5 September 2012, ECLI:EU:C:2012:518.

[269] CJEU's judgement in *X, Y and Z v Minister voor Immigratie en Asiel,* points 74 and 75.

[270] Opinion of the Advocate General Sharpston, points 60 and 61. The Advocate General concluded: *"in assessing whether criminalisation of the expression of homosexuality as an expression of sexual orientation is an act of persecution within the meaning of Article 9(1) of the Directive, the competent authorities of a Member State must consider whether the applicant is likely to be subject to acts, or an accumulation of various measures, that are sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights."*

[271] CJEU's judgement in *X, Y and Z v Minister voor Immigratie en Asiel* The Court concluded its judgement ruling that: *"Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation."*

3.2.2 The critical reaction of the civil society

As matter of fact, it is quite undiscussed that the *X, Y, Z* judgement was the first important decision which had a relevant impact on both practices and policies in Member States regarding sexuality-based asylum applications.

Thereupon, many exponents of the doctrine and authors have appreciated the *X, Y, Z* outcome for: firstly, recognizing as members of a particular social group sexuality-based asylum seekers, who come from country where there are legislations criminalizing homosexuals individuals; secondly, because it stated that imprisonment for committing same-sex conducts must be actually considered as an act of persecution; lastly, for endorsing that an asylum seeker cannot be requested to hide or restrain his/her homosexuality in order to avoid persecutory acts in the country of origin.

However, the present ruling of the Court has been characterized by various "feelings" both of optimism and criticism amongst significant actors of the contemporary civil society[272].

For instance, at the time of the decision, Evelyne Paradis, Executive Director of ILGA-Europe, affirmed that the CJEU decision finally has stated that nowadays LGBTI individuals around the globe are part of a particular social group and, fighting together against mistreatments and persecution, they have the full right to seek for asylum and protection[273].

On the other hand, most part of criticism has concerned mainly the issue of criminalizing legislations.

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[272] Asylum in Europe, "Hope and criticism following CJEU ruling on claims from LGBTI asylum seekers", available at http://www.asylumineurope.org/news/21-05-2016/hope-and-criticism-following-cjeu-ruling-claims-lgbti-asylum-seekers, accessed on 17th April 2020.

[273] *"We welcome today's judgment which clarifies that LGBTI asylum seekers from many countries around the world clearly belong to a particular social group which is united by violence, degrading treatment and fear of persecution because of their sexual orientation and are entitled to claim asylum in the EU. We particular welcome the Court's rejection of completely unreasonable and degrading requirements noticed in some countries when LGBTI asylum seekers were suggested to 'tone down' their homosexuality, be 'discreet' and therefore be 'safe' back in their home countries. We hope this will put an end to the use by national authorities of the so-called "discretion argument" to return LGBTI asylum seekers to their countries of origin."* See, ILGA Europe, "LGBTI people are eligible group for claiming asylum in EU and they cannot be requested to conceal their sexual orientation", available at https://www.ilga-europe.org/resources/news/latest-news/lgbti-people-are-eligible-group-claiming-asylum-eu-and-they-cannot-be, accessed on 17th April 2020.

On this point, Amnesty International claimed that the CJEU lost the opportunity to recognize the mere criminalisation of same-sex relationships and conducts as ground for persecution *per se*; according to the present organization, the Court in its judgement did not consider the true reality of a criminalizing legislation, which led to *«deny LGBTI individuals – or those perceived to be LGBTI – effective state protection to which they are entitled under international human rights law deny LGBTI individuals – or those perceived to be LGBTI – effective state protection to which they are entitled under international human rights law*[274]*.»*

This sort of criticism was supported by the International Commission of Juristsas well, which stated that the existence of this kind of legislations can lead to a lack of sufficient protection for LGBTI individuals, above all from discrimination and misconducts carried out by the state police[275].

Therefore, as it was underline in the previous Chapter, in these particular situations the state authorities cannot offer adequate protection against its own action; as a result, LGBTI people cannot be safeguarded by the same actors of their persecution, who rather have the duty to do it[276].

So, both Amnesty International and the International Commission of Jurists conclude that every State in which homosexuality and same-sex acts are legally criminalized should be considered as unwilling or unable to provide protection to

[274] Cfr. Amnesty International, "EU Court ruling a setback for refugees", available at https://www.amnesty.org/en/latest/news/2013/11/eu-court-ruling-setback-refugees/, accessed on 17th April 2020.

[275] See, Amnesty International and International Commission of Jurists, "*Observations by Amnesty International and the International Commission of Jurists on the case X, Y and Z v Minister voor Immigratie en Asiel (C-199/12, C-200/12 and C-201/12) following the Opinion of Advocate General Sharpston of 11 July 2013",* 2 October 2013, p. 5, available at https://www.icj.org/wp-content/uploads/2013/10/Observations-by-AI-and-ICJ-on-X-Y-and-Z-CJEU-ref-2-OCT-2013-FINAL-with-index-number-and-logos.pdf, accessed on 18th April 2020.

[276] In the present judgement, the CJEU seemed to ignore that *"even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGBTI person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection."* Cfr. UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,* point 27.

LGBTI people, regardless the criminalizing legislations are enforced or not: the existence of such law should be viewed as a form of persecution *per se*[277].

In fact, article 9(2)(c) of the "old" Qualification Directive considered as act of persecution *«prosecution or punishment, which is disproportionated or discriminatory.»*. In analyzing the present provision, the Court did not take into serious consideration that the 2004 Directive did not require at all application or enforcement of these measures, but it only was addressed to the simple existence of such measures[278].

To conclude, it is undeniably that the *X, Y, Z* judgement must be praised for granting a more protective approaches to LGBTI individuals who decided to flee persecution in their country of origin.

Although the inarguable criticalities described in this subparagraph, the Court's decision has visibly left an important mark for new developments regarding the interpretation of the refugee status based on sexual orientation persecution and harassment.

Therefore, the CJEU has solved one of the most relevant uncertainty regarding the present issue: LGBTI asylum seekers must not be obliged to hide their sexual identity, in order to escape from discriminatory oppression.

So, starting with the *X, Y, Z* judgement's points, the Court of Luxembourg has further provided some other important clarifications in order to guarantee the most satisfactory protection to these kind of vulnerable asylum seekers.

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[277] *Ibid.,* p. 7.

[278] S. CHELVAN, "Case Comment: C-199/12, C-200/12, C-201/12 - X, Y, Z v Minister voor Immigratie en Asiel Court of Justice of the European Union, Judgment 7th November 2013 A MISSED OPPORTUNITY OR A NEW DAWN?", 2013, p. 3, available at https://www.no5.com/cms/documents/SCH%20-XYZ%20v%20Minister%20voor%20Immigratie%20en%20Asiel%20-%20Case%20Comment.pdf, accessed on 17th April 2020. See also, M.MOUZOURAKIS, *"Case Comment: Joined cases C-199/12, C-200/12 and C-201/12, X,Y and Z v. Minister voor Immigratie"*, Rights in Exile, 2013, available at https://rightsinexile.tumblr.com/post/68661003172/case-comment-joined-cases-c-19912-c-20012-and, accessed on 17th April 2020.

3.3 *A, B and C v. Staatssecretaris van Veiligheid en Justitie* (2014)

The second lucky chance for the CJEU to evaluate some specific concerns about sexuality-based asylum was in the joined case *A, B and C v. Staatssecretaris van Veiligheid en Justitie*.

The ruling that will be analyzed in this paragraph is particularly meaningful, because it relates to methods of assessing credibility that might be used whether the asylum applicant is an LGBTI individual.

The present case regards three claimants, A, B and C, respectively from Gambia, Afghanistan and Uganda and the *Staatssecretaris van Veiligheid en Justitie* (the Dutch State Secretary for Security and Justice). All the applicants lodged their claims in the Netherlands, seeking for international protection because of their fear of persecution on the basis of their sexual orientation in their countries of origin.

However, first the *Staatssecretaris* and then the *Rechtbank-Gravenhage*[279] dismissed their applications, stating that their sexual orientation had not been positively demonstrated: so, the reason at the basis of their request was considered as implausible. Consequently, A, B and C decided to appeal against this decision.

Thus, in 2013 the *Raad van State* requested for a preliminary ruling before the CJEU, in order to figure out whether any limits are imposed by EU law regarding the determination of the asylum applicants' sexual orientation.

The Dutch Council of State asked one specific question: *«what limits do Article 4 of Council Directive 2004/83/EC […], and the Charter of Fundamental Rights of the European Union, in particular Articles 3 and 7 thereof*[280]*, impose on the method of assessing the credibility of a declared sexual orientation, and are those limits*

[279] The District Court of The Hague.

[280] Article 3 (right to the integrity of the person) of the Charter of Fundamental Rights of the EU states: *"1. Everyone has the right to respect for his or her physical and mental integrity. 2. In the fields of medicine and biology, the following must be respected in particular: the free and informed consent of the person concerned, according to the procedures laid down by law; the prohibition of eugenic practices, in particular those aiming at the selection of persons;the prohibition on making the human body and its parts as such a source of financial gain; the prohibition of the reproductive cloning of human beings."* Therefore, article 7 (respect for private and family life) expresses: *"Everyone has the right to respect for his or her private and family life, home and communications."*

different from the limits which apply to assessment of the credibility of the other grounds of persecution and, if so, in what respect?[281]*»*

First of all, as the Advocate General Sharpston underlined in her opinion relating to the case at stake[282], article 4 of the Qualification Directive requires Member States to consider all applications for international protection and to analyze their main features[283].

Furthermore, article 4 of the 2004 Directive must be applied to all asylum requests and applications. Therefore, the present provision does not state any particular distinction depending on the different grounds of persecution claimed by article 1A(2) of the 1951 Refugee Convention; as a consequence, LGBTI applicants should be subject to the same assessment process as asylum seekers who flee in order to avoid any other kind of persecutory acts[284].

In fact, in its ruling the Court affirms that the declarations made by an asylum seeker regarding his/her sexual orientation are only the "starting point" in processing the asylum applications to grant international protection[285].

It is important to underline that the evaluation of material elements concerning a claim (for example, the fact that the seeker declares his/her own sexual orientation) is a normal stage in assessing the request. Nonetheless, sexuality-based applications may origin difficult challenges both for competent authorities and claimants[286].

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[281] Cfr. *Request for a preliminary ruling from the Raad van State (Netherlands) lodged on 25 March 2013 — A v Staatssecretaris van Veiligheid en Justitie*, OJ C 171/16, 15.6.2013.

[282] *Opinion of the Advocate General Sharpston delivered on 17 July 2014 in Joined Cases C-148/13, C-149/13 and C-150/13 A, B and C,* ECLI:EU:C:2014:2111, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CC0148&from=EN, accessed on 19th April 2020.

[283] In particular, article 4(1) of the Directive 2004/83/EC affirms: *"Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application."*

[284] Opinion of the Advocate General Sharpston, point 41. As matter of fact, the Court underlined that *"even though Article 4 of Directive 2004/83 is applicable to all applications for international protection, whatever the ground for persecution relied on in support of those applications, it remains the case that it is for the competent authorities to modify their methods of assessing statements and documentary or other evidence having regard to the specific features of each category of application for asylum, in observance of the rights guaranteed by the Charter."* CJEU's judgement in the joined case *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, cfr. point 54.

[285] CJEU's judgement, point 49.

[286] UNHCR, "*Written Observations of the United Nations High Commissioner for Refugees in the cases of A and Others (C-148/13, 149/13 and 150/13)***",** 21 August 2013, , available at https://www.refworld.org/docid/5215e58b4.html, accessed on 21st April 2020.

However, the tools used by the asylum competent authorities to prove the truth of the declarations and the answers provided by asylum seekers must necessarily be in compliance with the EU law; above all, these methods must be conform to the fundamental human rights safeguarded by the EU Charter, first of all the right to respect the human dignity[287] and the respect for private and family life, respectively enounced in article 1 and article 7[288].

On this particular point, the Advocate General Sharpston considered as not in compliance with articles 3 and 7 of the EU Charter some kind of examinations and evaluations carried out by asylum authorities, for example: medical tests with the purpose to indicate the applicant's sexual orientation; the strongly criticized phallometric testing[289]; too explicit questions and investigations concerning an asylum seeker's sexual acts and conducts; and requiring LGBTI asylum claimants to *«produce evidence such as films or photographs or to request them to perform sexual acts in order to demonstrate their sexual orientation*[290]*.»*

Additionally, the Advocate General highlighted that, since homosexuality is not a medical condition, medical tests utilized in order to assess an asylum seeker's sexual orientation could not be view as in compliance with with Article 3 of the EU Charter. As matter of facts, such practices should be considered as inadequate and not compatible with human right provisions at all[291].

Furthermore, according to the purposes of article 4(3)(c)[292], the Court clarified that asylum competent authorities should evaluate every single request, taking into

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[287] According to article 1 of the Charter, *"Human dignity is inviolable. It must be respected and protected."*

[288] CJEU's judgement, point 53.

[289] "*Phallometric testing focused on the applicants' physical reaction to pornographic material. This pornographic material included heterosexual, gay, lesbian, adolescent and child pornography. According to reactions of the applicant to these types of pornographic materials, the sexologist arrived at a conclusion. In medical terminology, phallometric testing of men is called penile plethysmography (also known as "PPG") and its counterpart for women is called vaginal photoplethysmography (also known as "VPG")".* Cfr. JENSES S. AND SPIJKERBOER T., *op. cit.,* p. 52.

[290] Cfr. Opinion of the Advocate General Sharpston, point 66. The Advocate General affirmed: *"In my view it is clearly contrary to Article 7 of the Charter to require applicants to produce evidence such as films or photographs or to request them to perform sexual acts in order to demonstrate their sexual orientation. I add that, again, the probative value of such evidence is doubtful because it can be fabricated if needed and cannot distinguish the genuine applicant from the bogus".*

[291] *Ibid.*, point 61.

[292] *"The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: [...](c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to*

consideration the individual situation and the personal conditions of the claimant (for example, taking into account elements such as gender and age), with the purpose of individuating the real risk for the applicant to be subject to persecution[293]. Following this statement, the Court added that the claimants' evaluations based only on *«stereotyped notions»* relating to homosexuals individuals do not accomplish the meaning of article 4(3)(c) of the Directive 2004/83 and article 13(3)(a) of the Procedures Directive, with regard to the manner in which asylum assessments should be carried out[294]. In fact, as was also outlined in the first Chapter of the present dissertation, relying on stereotypes in assessing LGBTI asylum claims may be very dangerous, because stereotypes may be based on unacceptable prejudices against homosexuals.

However, the CJEU did not exclude at all the use of stereotypes in assessing these kind of asylum claims[295]; as a consequence, according to the point of view of Chelvan, the CJEU should have explicitly clarified what kind of stereotypes could be legitimately used, and which clearly could not[296].

Unfortunately, this lacuna has continued to lead to inappropriate utilizations of dangerous stereotypes regarding to LGBTI people across EU.

The Court continues its analysis firmly stating that asylum competent authorities must not ask questions regarding the intimate sexual activities of the seekers, because these kind of investigations are not fully in compliance with the respect for private and family life expressed by the EU Charter; moreover, the Court affirms

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assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm."

[293] CJEU's judgement, point 57. On this point, article 13(3)(a) of the Procedure Directive 2005/85/EC (replaced by the Procedure Directive 2013/32/EU) stated: *"Member States 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. To that end, Member States shall: (a) ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, insofar as it is possible to do so.[...]"* Cfr. *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, OJ L 326/13, 13.12 2005.

[294] CJEU judgment, point 62.

[295] *Ibid.*, point 62: *"[...] questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment".*

[296] S. CHELVAN, "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 blacklist for gay asylum claims", *European Law Blog*, 2014, available at 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/, accessed on 18thApril 2020.

that tests or any kind production of films which aim to demonstrate the applicant's sexual orientation have no automatically probative value and would be in contrast with the protection of human dignity[297].

Finally, the CJEU states that the fact that an LGBTI applicant decides not to disclose his/her homosexuality at the beginning of the asylum assessment, does not mean that the seeker's answers and declarations are not credible[298].

On this specific point, the Court holds that the 2004 Directive requires the asylum claimant to declare all the relevant elements for assessing his/her application as soon as possible: moreover, the CJEU demands asylum competent authorities *«to conduct the interview taking account of the personal or general circumstances surrounding the application, in particular, the vulnerability of the applicant, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant*[299]*.»*

In the present case, the applicant's unwillingness to provide details about his/her personal sexual life should not be considered as a lack of credibility[300].

However, the CJEU remains silent in providing a clear and precise guidance for competent authorities in order to correctly deal with sexuality-based applications and in order to avoid violation of the human right safeguarded by the EU Charter; unfortunately, nowadays this lacuna has not been plugged yet by the Court[301].

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[297] CJEU judgment, points 64 and 65.

[298] *Ibid.*, point 69. On this issue, as underlined in UNHCR's Guidelines no.9 on Sexual Orientation and/or Gender Identity*, "where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared. Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview",* cfr. point 59. Furthermore, UNHCR in its written observation on the case at stake, clarifies that: "*Romantic or sexual relationships with, and/or hopes for future relationships, will usually be part of the narrative of gay applicants. Not every applicant, however, will have had such relationships; there may be good reasons, including a fear of persecution, why the applicant has not had any past relationships with a member of the same sex. Likewise, there may be good reasons why the applicant is reluctant or finds it difficult to disclose such information*." Cfr. UNHCR, "*Written Observations of the United Nations High Commissioner for Refugees in the cases of A and Others (C-148/13, 149/13 and 150/13",* point 3.8.

[299] *Ibid.*, cfr. point 70.

[300] See, "CJEU - Joined cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie, 2 December 2014", EDAL- European Database of Asylum Law, available at https://www.asylumlawdatabase.eu/en/content/cjeu-joined-cases-c%E2%80%9114813-c%E2%80%9115013-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-2, accessed on 19th April 2020.

[301] On this point, see the last paragraph of the present Chapter.

To conclude, the Court rules that article 4(3)(c) of Directive 2004/83/EC and article 13(3)(a) of the 2005 Procedure Directive must be interpreted as preventing the asylum competent authorities to assess LGBTI asylum applications basing only on stereotyped concepts regarding homosexual individuals and their own lives.

In fact, in order to accomplish the specific limits laid down by these provisions, the methods for assessing credibility should depend on the particular circumstances, situations and conditions of each asylum seeker.

Furthermore, the abovementioned authorities should avoid: asking detailed questions regarding the asylum seeker's sexual activity and the performances of homosexual acts carried out by the applicant; his/her subjection to tests in order to establish his/her sexual orientation; the production by him/her of films of homosexuals acts regarded as evidence.

The mentioned practices may seriously danger the protection of human dignity and the respect of the private and family life of the individual, enshrined by the EU Charter[302].

Moreover, the Court affirms that assessment authorities must not consider an asylum applicant as not credible solely because he/she did not declare his/her sexual orientation *«on the first occasion he/she was given to set out the ground for persecution*[303]*.»*

[302] Moreover, the UNHCR in its written observations underline: *[…] intrusive questions can have the effect of making the applicant feel embarrassed, ashamed, intimidated, and harassed, and may result in them refusing or finding it difficult to respond to such questions. Reluctance to share intimate details or discomfort in speaking about sexual conduct is common to almost all people. In addition, lesbians, gays and bisexual persons who have had to hide their sexual orientation may be unable to recount intimate details of sexual experiences. Respect for human dignity and privacy preclude the use of questions which seek intrusive detail around the applicant's sexual practices. Such questioning goes beyond what is needed for the purposes of establishing the material elements of the claim and subsequently determining an applicant's eligibility for refugee status or other forms of international protection."* Cfr. point 3.13.

[303] Cfr. CJEU's outcome.

3.4 *F. v. Bevándorlási és Állampolgársági Hivatal* (2018): "testing the untestable"

Few years ago, the case *F. v. Bevándorlási és Állampolgársági*[304] (hereinafter, the *F.* case) offered the CJEU a new and interesting opportunity to deal with sexuality-based asylum and to develop some issues discussed in the previous rulings.

The case that will be analyzed in this paragraph gave the Court the possibility to clarify how competent asylum authorities should handle asylum claims based on a well-founded fear to be persecuted on the ground of sexual orientation.

In particular, the Court focused the attention on the use of psychological tests, in order to verify the sexual orientation of asylum seekers; moreover, the present ruling had the purpose to underline that the use of this homosexuality test and other similar methods may seriously danger the correct outcomes of asylum application procedures[305].

As it was previously outlined, in the context of asylum assessment proceeding relating to LGBTI individuals, in recent years various practices have been criticized: for example, the use of stereotyped questions, the recourse to methods of questionable scientific value, such as the phallometric testing, whereby gay male asylum applicants are requested to watch pornography in order to verify their real sexual preferences.

Even if such practices having been strongly disapproved by the UNHCR, several NGOs and many exponents of the civil society as well, the *F.* case demonstrates that they continue to exist in several contexts across EU[306].

For instance, in the Netherlands national legislation allows competent authorities to ask questions based on stereotypes. In particular, in this Member State, some evaluating questions may be frequently related to the claimant's familiarity with

[304] Hungarian Immigration and Citizenship Office.

[305] V. DE BRUYCKERE, "Somewhere over the Rainbow: On the Use of Psychological Tests to Determine Asylum Seekers' Sexual Orientation and the Impact on the Right to Private Life (Case C-473/16, 25 January 2018)," p. 257.

[306] See, N. FERREIRA, D.VENTURA,"Tell me what you see and I'll tell you if you're gay: Analysing the Advocate General's Opinion in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal", *EU Migration and Asylum Law and Policy*, available at https://eumigrationlawblog.eu/tell-me-what-you-see-and-ill-tell-you-if-youre-gay-analysing-the-advocate-generals-opinion-in-case-c-47316-f-v-bevandorlasi-es-allampolgarsagi-hivatal/, accessed on 22nd April 2020.

gay bars or with activism in social movements aiming to protect LGBTI rights, both in the country of origin and in the Netherlands: such kind of interviews plays an important role in the proceeding for assessing the LGBTI seeker's credibility, and usually the applicant is expected to be involved or to have knowledge of these particular experiences[307].

The *F*. case came from a dispute arisen in Hungary in April 2015, where a Nigerian citizen named as F applied in order to seek international protection on the basis of persecution because of his homosexuality.

So, the Hungarian competent authority for asylum decided to determine the credibility of the applicant's declaration regarding his sexual orientation.

For that purpose, F gave his consent to be submitted to some specific tests (most of all, several personality test and other similar examinations[308]), conducted by a psychologist[309].

However, the psychologist's report concluded that the asylum seeker's declarations about his/her sexual orientation should not be considered as credible.

It is important to keep in mind that the report required did not totally disbelieve that the seeker was gay, but it simply claimed that it was not possible to confirm it.

So, based on the affirmations of the expert, the Hungarian asylum authority dismissed the claim lodged by F, who decided to appeal against the decision before the *Szegedi Közigazgatási és Munkaügyi Bíróság* (the Administrative and Labour Court of Szeged, a city in Hungary).

In particular, the asylum applicant claimed that the reports and the homosexuality tests in question could seriously danger his fundamental rights and, additionally, they were not useful enough in order to verify his homosexuality[310].

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[307] ECRE, *"Preliminary Deference? The impact of judgments of the Court of Justice of the EU in cases X.Y.Z., A.B.C. and Cimade and Gisti on national law and the use of the EU Charter of Fundamental Rights"*, p. 47.

[308] In particular, the Rorschach, Szondi and 'Draw-A-Person-In-The-Rain' projective personality tests.

[309] N. FERREIRA, D. VENTURI, "Testing the untestable: the CJEU's decision in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal", *EDAL,* 28 June 2018, available at https://www.asylumlawdatabase.eu/en/journal/testing-untestable-cjeu%E2%80%99s-decision-case-c-47316-f-v-bev%C3%A1ndorl%C3%A1si-%C3%A9s-%C3%A1llampolg%C3%A1rs%C3%A1gi-hivatal, accessed on 22nd April 2020.

[310] N. FERREIRA, D.VENTURA,"Tell me what you see and I'll tell you if you're gay: Analysing the Advocate General's Opinion in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal".

During the main dispute, some questions and problems were arisen with regard to the compliance of the activities carried out by the competent adjudicators with the obligations expressed by the EU law on the assessment of asylum seekers' claims, in particular article 4 of the recast Qualification Directive[311].

As a consequence, the *Szegedi Közigazgatási és Munkaügyi Bíróság* addressed a preliminary ruling before the CJEU to ask whether article 4 of recast Qualification Directive may allow national asylum authorities, during the assessment proceeding in order to grant international protection, 1) to rely on an expert's report in order to determine the asylum seeker's real necessity to be granted international protection because of persecution; and 2) to allow the use of psychological and personality test in order to verify the applicant's sexual orientation and his/her real fear to be persecuted because of it[312].

3.4.1 Assessing sexual orientation through experts' reports

The Court decides to begin its ruling by answering the second question, giving some important outcomes about the general use of experts' reports in sexuality-based asylum applications.

First of all, the CJEU calls up the *A, B and C* judgement, reaffirming that the applicants' statements about their sexuality are only the starting point within the

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[311] Unlike the previous two rulings dealing with sexuality-based asylum, the facts and events at the basis of the question referred to the CJEU concerning the *F.* case, occurred in 2015. So, in this case, the law that needs to be interpreted and enforced is the recast Qualification Directive 2011/95/EU, because it is in force since 22 December 2013.

[312] "*In the light of Article 1 of the Charter of Fundamental Rights of the European Union, must Article 4 of Directive 2004/83/EC be interpreted as not precluding a forensic psychologist's expert opinion based on projective personality tests from being sought and evaluated, in relation to LGBTI applicants for asylum, when in order to formulate that opinion no questions are asked about the applicant for asylum sexual habits and that applicant is not subject to a physical examination? If the expert opinion referred to in question 1 may not be used as proof, must Article 4 of Directive 2004/83 be interpreted, […]as meaning that when the asylum application is based on persecution on grounds of sexual orientation, neither the national administrative authorities nor the courts have any possibility of examining, by expert methods, the truthfulness of the applicant for asylum claims, irrespective of the particular characteristics of those methods*?" Cfr. *"Request for a preliminary ruling from the Szegedi Közigazgatási és Munkaügyi Bíróság (Hungary) lodged on 29 August 2016 — F v Bevándorlási és Állampolgársági Hivatal (Case C-473/16)", OJ* C 419/3, 14.11.2016. See also, J. CAMPBELL, "European Court of Justice finds asylum seeker may not be subjected to a psychological test to determine sexual orientation", *Human Rights Law Centre*, 2018, available at https://www.hrlc.org.au/human-rights-case-summaries/2018/5/7/european-court-of-justice-finds-asylum-seeker-may-not-be-subjected-to-a-psychological-test-to-determine-his-sexual-orientation, accessed on 22nd April 2020.

assessment proceeding of the facts and circumstances laid down in article 4 of the Qualification Directive[313].

Moreover, the Court states that article 4 of the Directive does not aim to restrict the tools which can be handled by competent authorities to verify the plausibility and the truthfulness of the declarations made by the LGBTI asylum seeker, relating to his/her own sexual orientation; in fact, the present evaluation is considered as a fundamental stage in the assessment proceeding, in order to grant the international protection.

Consequently, the Court allows to recourse to all the experts' reports considered as most adequate to test the statements of the asylum applicants[314].

As a matter of fact, the Advocate General Wahl in his opinion underlined that there may be countries of origin where, despite the existence of legislation criminalizing homosexual individuals, certain LGBTI persons do not face a real risk to be persecuted (for example, because such legislation is not applied at all); on the other hand, there may be particular situations in which *«the simple act of behaving in a way that, from a traditional point of view, is perceived to be non-gender-conform, may create an actual risk for the person concerned of being subject to physical or psychological harm*[315]*.»*

So, in these situations of uncertainty, the Advocate General Wahl suggested, according to article 10(3)(d) of the Procedures Directive 2013/32/EU[316], to allow national authorities competent for asylum applications to ask for the advice from experts on specific and problematic issues, including sexual orientation issues[317].

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[313] F. FERRI, *op. cit.,* p. 879.

[314] CJEU's judgment in the case *F v Bevándorlási és Állampolgársági Hivatal,* point 34.

[315] Cfr. *Opinion of the Advocate General Wahl delivered on 5 October 2017, case C-473/16 F v Bevándorlási és Menekültügyi Hivatal (formerly Bevándorlási és Állampolgársági Hivatal*), 5 October 2017, ECLI:EU:C:2017:739, point 30, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CC0473&from=EN, accessed on 24th April 2020. On this issue see also, *Opinion of the Advocate General Sharpston delivered on 17 July 2014 in Joined Cases C-148/13, C-149/13 and C-150/13 A, B and C*, point 34.

[316] Article 10(3)(d) of the Procedures Directive states*: "Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that: (d) the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues."*

[317] Opinion of the Advocate General Wahl, point 35.

Therefore, the Court considers some experts' reports as having a fundamental role in the assessment of asylum claims based on sexual orientation, above all those reports and every kind of useful information regarding the situation of LGBTI individuals in the country of origin of the claimant. However, obviously the use of such methods and tools must be necessarily in compliance with EU law and with the fundamental rights safeguarded by the EU Charter[318].

Thus, in line with the decision undertaken in the *A, B and C* case, the Court states that during the assessment of the facts and circumstances for granting international protection, it is critical to underline the necessity to respect article 1 (human dignity) and article 7 (right to respect for private and family life) of the EU Charter.

Moreover, according to article 4 of the Directive, asylum determining authorities have the duty to carry out a personnel and individual assessment of all the facts, declarations and relevant information relating to an asylum seeker's application[319].

By virtue of these considerations, the competent authority may consider as adequate seeking the advice of one or more experts; however, asylum authorities cannot abdicate their responsibility by basing their assessment evaluations only on the outcomes of those experts' reports and they cannot believe to be totally "bound" by those decisions[320].

In the light of this conclusions, the Court answers to the second question stating that article 4 of the Qualification Directive must be interpreted as not preventing the competent authorities to request an expert's report in order to verify the declared sexual orientation at the basis of an asylum claim.

However, the CJEU concludes that the procedures for such kind of reports must necessarily comply with the fundamental human rights enshrined by the EU Charter; furthermore, the competent authorities must not undertake their assessment decisions exclusively on the basis of these experts' statements and they are not bound by the related conclusions[321].

[318] CJEU's judgement, point 34.
[319] *Ibid.*, point 41.
[320] *Ibid.*, point 42.
[321] *Ibid.*, point 45.

3.4.2 The ban of psychologist's expert reports based on homosexuality tests

The first question referred before the Court of Luxembourg is related to the more specific subject of analyzing the admissibility of the projective personality tests; these tests can be considered as particular methods used sometimes by psychologists in order to assess asylum claims on the ground of sexual orientation. The ruling of the Court on the present issue is crucial for sexuality-based applications, but it raises some singular problems as well[322].

First of all, it is important to clarify that a projective personality test is a type of psychological test in which the "patient" is requested to react to different ambiguous scenes, words, or images. The aims of these tests are to uncover the hidden issues and features of the patient and to deal with such issues via psychotherapy or any other adequate mental treatments[323].

In the *F.* case, the determining asylum authority based its assessment decision on the conclusions provided by some specific personality tests, such as the "*Draw-A Person-In-The-Rain*" and the "*Rorschach and Szondi*"[324].

As it was underlined by the Advocate General Wahl, the presence of a psychologist during the asylum assessment proceeding may facilitate the applicant to freely discuss about his/her sexual orientation, about the persecution or harassment experienced and/or about his/her fear to face in his/her country of origin; consequently, the authorities may have a more comprehensive and truthful overview of this kind of delicate situations[325].

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[322] N. FERREIRA, D. VENTURI, "Testing the untestable: the CJEU's decision in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal".

[323] Very well mind, "How Projective Tests Are Used to Measure Personality", available at https://www.verywellmind.com/what-is-a-projective-test-2795586, accessed on 26th April 2020.

[324] See, N. FERREIRA, D. VENTURA, "Tell me what you see, and I'll tell you if you're gay: Analysing the Advocate General's Opinion in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal". Furthermore, according to the report *Fleeing Homophobia*, especially the Rorschach and Szondi test is often admitted in Hungary when the credibility of sexual orientation has to be proven: *"in order to examine the credibility of sexual orientation, the Hungarian Office of Immigration and Nationality (OIN) sometimes requests an "expert opinion" of a forensic expert (without any specific professional interest in or training on sexual orientation or gender identity). The 'examination' is usually limited to a simple discussion between the 'expert' and the applicant. In some cases the medical expert used Rorschach and Szondi psychological tests. These examinations are applied even in clear-cut cases, when no doubts arise regarding the applicant's credibility (e.g. when the applicant has been living together with his same-sex partner for several months in Hungary and this fact could have easily been checked and considered sufficient factual evidence)."* Cfr. S. JANSEN, T. SPIJKERBOEAR, *op. cit.,* cfr. p. 50.

[325] Opinion of the Advocate General Wahl, point 34.

In its preliminary considerations on the case at stake, the Court deals with the issue of the consent: according to the CJEU, the fact that an asylum seeker, claiming for protection on the basis of his/her sexuality, gives his/her consent to go through those personality tests may not be regarded as a sufficient element to deduce that the tests are lawful[326]. In fact, the claimant may be easily influenced by the fact that his/her own safety depends on the outcomes of the projective tests, requested by the asylum authorities: this situation may lead the applicant to release untruthful declarations as well, making more difficult or distorted the assessment evaluation.

Moreover, even if the psychological tests are undertaken formally with the consent of the asylum seeker as a "patient", it should be considered that such consent may be not totally free: the applicant might feel compelled to undergo certain examinations in order to save his/her life and finally to be granted international protection[327].

As matter of fact, psychological evaluations may be, for the LGBTI asylum seeker's mental health, as intrusive as medical tests may be for his/her physical integrity[328], because they may interfere with his/her private life and sphere.

Considering this background, first of all the seeker's refusal to be subject to psychological examinations may be fully respected; then, these type of psychological tests may be in compliance with the proportionality principle and they may be carried out in accordance with the safeguard of the individual's human dignity and the right to respect his/her private and family life, according to the EU Charter[329].

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[326] CJEU's judgement, point 52.

[327] CJEU's judgement point 53. See also by analogy, points 65 and 66 of the Court's judgement in the case A, B and C: *"In relation, […], to the option for the national authorities of allowing, as certain applicants in the main proceedings proposed, homosexual acts to be performed, the submission of the applicants to possible 'tests' in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, it must be pointed out that, besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity[…]Furthermore, the effect of authorising or accepting such types of evidence would be to incite other applicants to offer the same and would lead, de facto, to requiring applicants to provide such evidence."*

[328] Opinion of the Advocate General Wahl, point 43.

[329] *Ibid.* Moreover, regarding to the principle of proportionality, the Court in its ruling held that: *"Under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. In observance of the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms*

Following this assertion, the Court notes that an expert's report such that at stake in the *F.* case may be considerable as acceptable only if it is found on *«sufficiently reliable methods and principles in the light of the standards recognised by the international scientific community*[330]*.»*

However, the CJEU does not indicate precisely some adequate sources recognized by the mentioned international scientific community that can be used in the assessment of sexuality-based application[331].

Indeed, the Court only addresses to principle 18 of the Yogyakarta Principles[332], according to which *«no person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed*[333]*.»*

Homosexuality is not a disease and consequently it does not require any kind of particular health treatment.

Nonetheless, the Court makes no references to all the studies, documents, reports and interpretative guidelines released on this sensible issue (for example, those provided by the UNHCR and discussed in Chapter one of the present dissertation[334]).

To summarize, the Court bans the preparation and use of psychological experts' reports based on the projective personality tests used by the Hungarian authorities in the *F.* case, that may be called as "homosexuality tests"[335].

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of others. As regards, in particular, the proportionality of the interference that has been found to exist, it should be recalled that the principle of proportionality requires,[…] that the measures adopted do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, since the disadvantages caused by the legislation must not be disproportionate to the aims pursued" cfr. points 55 and 56 of judgement.

[330] Cfr. CJEU's judgement, point 58.

[331] F. FERRI, *op. cit.,* p.881.

[332] CJEU's judgement, point 62.

[333] It is important to keep in mind that the Yogyakarta Principles constitutes a declaratory document only. So, it has no legal binding effect, but it may be an important interpretative instrument regarding the application of international human rights standards in relation to sexual orientation, gender Identity, gender expression and sex characteristics. See, *supra* note no. 56.

[334] F. FERRI, *op. cit.,* p. 882.

[335] The Court ruled: "*article 4 of Directive 2011/95, read in the light of Article 7 of the Charter of Fundamental Rights, 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*

In the point of view of the CJEU, they should be considered as not proportionate, because they are too intrusive compared to the real purpose of the assessing authorities: verifying the credibility of the LGBTI applicants who claim to face persecution in their countries of origin because of their sexuality, according to article 4 of the Qualification Directive.

Thus, the interference of these "homosexuality tests" with the seeker's private life is definitely out of balance and not indispensable for the asylum determination[336].

Nonetheless, the Court did not clarify and discuss what categories may or may not considered as elements of life which are too personal or intimate to lead these tests to interfere with the individual's private life[337].

Furthermore, these kind of psychological reports and examinations would just be regarded as simple indications of the claimant's sexual orientation, not real tools for determining it[338].

Regarding to the particular case at stake, the CJEU affirms that such reports based on psychological perspective tests are not in compliance with EU law; on the contrary, experts' reports aiming to assess the applicant's general credibility (consequently, reports that have not the purpose to verify the credibility of the applicant's declarations on his/her sexual orientation) may be considered as legitimate.

However, it is remarkably complicated to distinguish these two different hypotheses and, consequently, the Court leaves a wide margin of discretion for competent authorities. As matter of fact, the present ruling only provides a general indication: national authorities may ask for psychological reports, on the condition that they must comply with the fundamental rights enshrined in the EU Charter[339].

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purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant."

[336] CJEU's judgement, points 59 and 63.

[337] J. ZHENG, "European Court of Justice Bans Homosexuality Tests for Asylum Seekers*".*

[338] *"[…] 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."* Cfr. point 69 of the Court's ruling.

[339] M. FERRARA, "La Corte di giustizia dell'Unione europea e lo 'strano caso' dei Principi di Yogyakarta", in *Diritti umani e diritto internazionale,* Booklet 1, 2019, p. 181, available at https://www.rivisteweb.it/doi/10.12829/93318, accessed on 30th April 2020.

3.5 The right-oriented interpretation of the Court and the urgent need of a clear guidance

Overall, for the third time the CJEU has underlined several relevant aspects on the evaluation of sexuality-based applications, providing national authorities competent for asylum a clearer vision on how they should carry out these kind of assessments.

With the *F.* judgement, the Court finally greeted the disappointing that in recent years different international organizations, NGOs and, above all, ILGA Europe have shown about several discriminatory and undignified methods in order to verify the applicant's sexual orientation.

At the outset, the Court states that, even if the claimant's mere declarations about his/her sexuality are not sufficient for granting the refugee status and the credibility of the relevant request, asylum competent authorities meet some limits in when evaluating LGBTI asylum claims[340]. The settlement of these limits reflects the so called "right-oriented interpretation" of the Court regarding sexuality-based asylum, which aims to protect the human fundamental rights expressed by EU law.

So, on a more general point of view, with the three crucial rulings analyzed in the present Chapter, the CJEU not only has officially acknowledged that LGBTI asylum seekers fleeing from persecution are eligible for international protection, but also it has provided some significant clarifications on the correct application of the EU Charter on this matter across the whole EU: as matter of fact, thanks to the contribution of the case law of CJEU, the «*EU Charter could become more of a living instrument which can play a real role in ensuring a fairer asylum procedure in all Member States*[341].»

To sum up, the *F.* ruling, read together with the other two judgements provided by the Court of Luxembourg, is notably relevant, because it settles some main concepts

[340] N. FERREIRA, D.VENTURA,"Tell me what you see and I'll tell you if you're gay: Analysing the Advocate General's Opinion in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal".

[341] Cfr. European Council on Refugee and Exiles (ECRE), *"Preliminary Deference? The impact of judgments of the Court of Justice of the EU in cases X.Y.Z., A.B.C. and Cimade and Gisti on national law and the use of the EU Charter of Fundamental Rights"*, p. 71.

on credibility and evidence assessment[342]; however, also in this very recent case, the Court remains silent and refrains from providing clear, positive and precise guidelines in order to establish further explanations on how the national asylum authorities should deal with sexuality-based asylum; moreover, the Court continues to not officially recognize the relevance of declarations about the sexual orientation offered by the asylum claimants.

In particular, it should be noted that the CJEU simply provides a kind of "blacklist" of what tools must not be used by competent authorities, but it did explain how these authorities, asylum adjudicators and decision maker should assess sexuality-based applications in concrete[343].

As a consequence, the Court should set some key principles and guidelines, in order to clarify some different aspects characterizing these kind of claims, for example how interviews to LGBTI asylum seekers should be carried out by the competent actors, or what kind of evidence and proof concerning an individual's sexual orientation should be used by decision makers as well[344].

Furthermore, these kind of principles and comprehensive guidance should be respected by all domestic authorities dealing with sexual orientation asylum requests; additionality is also crucial to create an impartial and EU control system, to allow the immediate identification of inappropriate and inadequate practices in sexuality-based assessment proceedings across all Member States[345].

So, it remains to be seen how the CJEU's judgements will be implemented in practice and whether they will exactly benefit the improvement of human rights protection of LGBTI asylum seekers in the EU.

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[342] *Ibid.*

[343] Cfr. V. DE BRUYCKERE,"Somewhere over the Rainbow: On the Use of Psychological Tests to Determine Asylum Seekers' Sexual Orientation and the Impact on the Right to Private Life (Case C-473/16, 25 January 2018)," p. 267.

[344] N. FERREIRA, D. VENTURI, "Testing the untestable: the CJEU's decision in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal".

[345] *Ibid.* See also, A. DEL GUERCIO, "Criminalizzazione delle relazioni tra persone dello stesso sesso e riconoscimento della protezione internazionale: la direttiva "qualifiche" e la giurisprudenza della Corte di giustizia", *Diritto, Immigrazione e Cittadinanza*, XVII,2, 2015, p. 82, available at https://www.francoangeli.it/riviste/Scheda_rivista.aspx?IDArticolo=55836, accessed on 30th April 2020.

CHAPTER IV

CJEU, ECtHR AND THE SUPREME COURT OF ITALY:

BETWEEN ANALOGIES AND DISCREPANCIES

SUMMARY: 4.1 Not only CJEU: comparing sexuality-based asylum in the ECtHR and Italian jurisprudence - 4.1.1 Introductive clarifications for a better understanding - 4.2 Evident conflicts between ECtHR and CJEU: the case *M.E. v. Sweden* (2014) - 4.2.1 Concealing the true identity of LGBTI asylum seekers - 4.2.2 Does criminalization itself amount to persecution? - 4.3 The Italian correct practice in assessing sexuality-based asylum claims and the role of the Supreme Court - 4.3.1 Supreme Court, ordinance no. 15981/2012: the criminalization of same-sex conducts may amount to persecution *per se* - 4.3.2 Supreme Court, judgement no. 4522/2015: the admissibility of belated asylum claims based on sexual orientation persecution - 4.3.3 Supreme Court, judgement no. 11176/2019: even if homosexuality is not formally a crime, the international protection should be granted - 4.4 The outcomes of the two European Courts and of the Supreme Court for the protection LGBTI asylum seekers

4.1 Not only CJEU: comparing sexuality-based asylum in the ECtHR and Italian jurisprudence

As it was examined in the previous Chapters, despite the innovations and the "right-oriented" interpretations of the EU provisions regarding asylum claims based on sexual orientation provided by the CJEU, EU legislation still remains silent concerning which methods, tools and guidelines should be precisely used by competent authorities in dealing with LGBTI asylum applications.

From an overall perspective, there is a need for additional research on how the refugee legal status can be determined, respecting the fundamental human rights of LGBTI applicants; but, at the same time, it should be provided the opportunity for

asylum authorities to reject unfounded claims as well[346]. So, a correct balance of different interests and necessities is required in assessing these kinds of particular applications.

However, as matter of facts, it is undoubtable that the CJEU jurisprudence has played a key role in achieving higher levels of protection for the rights of LGBTI asylum claimants[347].

The EU case-law developments concerning sexuality-based asylum clearly demonstrate that LGBTI asylum seekers may be recognized as refugees on the ground of membership of a particular social group and, for this reason, they have the right to enjoy the protection laid down by the recast Qualification Directive and, on the international level, by the 1951 Refugee Convention. However, these developments may be considered also as results of a continuous contestation and adjudication of claims before different Courts[348].

In fact, in recent years, the issue at the core of the present dissertation has been also handled by the ECtHR and by several Italian Courts, above all the Supreme Court of Italy (*Corte Suprema di Cassazione,* hereinafter the Supreme Court). Indeed, together with the jurisprudence of the CJEU, the abovementioned Courts have given their own primary contributions in clarifying which practices may be admissible in LGBTI asylum proceedings and which methods should be prohibited, as they may violate asylum seekers' fundamental human rights.

The present Chapter further aims to compare the previously analyzed case-law of the CJEU with the most central case-law of the ECtHR and of a specific Member State, Italy: so, this Chapter has the purpose to identify and discuss the most common discording and contacting points amongst the three Courts in dealing with sexuality-based asylum cases.

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[346] A. MRAZOVA, "Legal Requirements to Prove Asylum Claims Based on Sexual Orientation: A Comparison Between the CJEU and ECtHR Case Law", in A. GÜLER, M. SHEVTSOVA, D. VENTURI, *LGBTI asylum seekers and Refugees from a Legal and Political Perspective*, p. 185.

[347] *Ibid.*

[348] I. RICCI, "European asylum policy and sexual orientation", in D. ARCHIBUGI and A.E. BENLI (edited by), *Claiming Citizenship Rights in Europe: Emerging Challenges and Political Agents*, Routledge/UACES Contemporary European Studies, New York, 2018, p. 75.

4.1.1 Introductive clarifications for a better understanding

Before starting the jurisprudential comparative analysis between the three Courts, it is necessary to highlight some general remarks in order to have an overall comprehension of the case-law study that will be further undertaken during this Chapter.

First of all, in all of the three judgements that have been under examination in the second Chapter of this dissertation, the CJEU replied to preliminary references requested by national courts, in particular Dutch and Hungarian courts, in order to clarify some points concerning the interpretation of EU law[349].

According to EU law, the interpretation provided by the CJEU in a preliminary ruling is binding for the national court which had required it; moreover, such Court's ruling binds other Member States' national courts before which the same issue is arisen as well[350].

Consequently, because of the fact that Italy is a Member State, Italian Courts are required to observe the CJEU's judgements and decisions regarding the assessment of sexuality-based asylum claims.

Furthermore, in 2012 the Supreme Court with its ordinance no. 1598[351] (that will be further analyzed in the Chapter) has even anticipated the EU case-law discussion about sexuality-based asylum matter, declaring that asylum seekers have the right

[349] Article 267 TFEU states: *"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties;(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."*

[350] B.E. CARTER, A. S. WEINER, D. B. HOLLIS, *International Law*, Seventh Edition, Wolters Kluwer, New York, 2018, p. 375.

[351] Supreme Court of Italy, Judgement no. 15981/2012, Civil Division VI, 20 September 2012. Unofficial English version available at, Articolo 29: famiglia, orientamento sessuale e identità di genere, "Supreme Court (Corte Suprema di Cassazione) Ord. n. 15981/2012 – September the 20th 2012", http://www.articolo29.it/decisioni/supreme-court-corte-suprema-cassazione-ord-n-159812012-september-the-20th-2012/, accessed on 20th May.

to be granted international protection because of sexual-orientation based persecution[352].

In fact, as it will be deeply discussed in the present Chapter, Italy is often referred as a country which has adopted "the correct practice" in dealing with LGBTI asylum applications, due to the fact that in this country the criminalization of same-sex acts in itself is considered as a persecutory action, in order to grant the refugee legal status[353].

So, the following dissertation will examine the most relevant case-law provided by the Supreme Court which, following and implementing the CJEU's rulings, had contributed to make Italy one of the most cautious Member States in protecting LGBTI asylum seekers.

Regarding to the ECtHR, actually its jurisprudence seems not to be so close to the interpretations given by the CJEU and it may risk to remarkably disorient decision-makers and competent authorities regarding to what may be and what may be not admitted in assessing LGBTI asylum applications[354].

In fact, according to the point of view of the ECtHR, LGBTI asylum seekers, coming from countries criminalizing same-sex conducts, have been supposed to avoid the risk of persecution in their countries of origin by "playing the game",[355] and by what in the present dissertation was previously called as the "discretion requirement".

The meaning of the expression "playing the game" is linked to the fact that an individual's particular behavior (for example, expressing freely his/her sexual orientation) may cause some overwhelming responses in the country of origin.

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[352] In fact, the first CJEU ruling regarding asylum claims based on sexual orientation was provided by the Court in 2013 in the case *X, Y and Z v. Minister Voor Immigratie en Asiel.*

[353] See for example, S. JANSENS AND T. SPIJKERBOER, *op.cit.,* p.23 *et seq.*

[354] FIDH (Fédération Internationale des Ligues des Droits de l'Homme) and ILGA Europe, *Written Comments on European Court of Human Rights, M.E. v. Sweden, Application no. 71398/12*, 22 January 2015, p. 3, available at https://www.ilga-europe.org/sites/default/files/Written%20Comments%20%28Grand%20Chamber%29%20FINAL%202015-01-22.pdf , accessed on 11th May 2020.

[355] The abovementioned terminology was used by the ECtHR in the case *Sufi and Elmi v United Kingdom*, application nos. 8319/07 and 11449/07, 28 June 2011, cfr. para. 92: *"A number of sources considered the areas controlled by al-Shabaab to be stable and generally safe for those Somalis who were able to "play the game" and avoid the unnecessary attention of al-Shabaab."* Full case available at https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20SUFI%20AND%20ELMI%20v.%20THE%20UNITED%20KINGDOM.pdf.

According to this view, asylum seekers may avoid persecution and mistreatments adapting their attitudes in order to prevent these oppressive reactions in their home countries[356].

After these crucial clarifications, this Chapter will consider and explain the relevant contradictions between the jurisprudence of the CJEU and the case-law of the ECtHR; these differences are particularly noticeable in the judgement *M.E. v. Sweden*[357], that provided several months after the *X, Y and Z v. Minister voor Immigratie en Asiel* decision (hereinafter, *X,Y,Z),* which represented the first opportunity for CJEU to deal with sexuality-based asylum.

However, it is important to underline that, before the *M.E. v. Sweden* ruling, the ECtHR had already pronounced itself on the same issue in June and December 2004 respectively in the *F. v. United Kingdom*[358] and *I.I.N. v. the Netherlands*[359] cases. Both decisions concerned two gay asylum seekers from Iran, who saw their complaints declared as inadmissible by the ECtHR.

In particular, in the admissibility decision relating to the *F. v. United Kingdom* case*,* after an analysis of the information about the LGBTI right situation in the country, the Court of Strasbourg concluded that the data collected did not *«disclose a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships*[360]*»* and that *«the majority of sources refer to a certain toleration in practice, with known meeting places for homosexuals in Tehran*[361]*.»*

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[356] Cfr. T.SPIJKERBOER, "Gender, Sexuality, Asylum and European Human Rights", Law and Critique, Volume 29, 2018, p. 224, available at https://link.springer.com/article/10.1007/s10978-017-9219-2, accessed on 12th May 2020.

[357] ECtHR, Application no. 71398/12*, M.E. v. Sweden*, 26 June 2014, available at https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20M.E.%20v.%20SWEDEN.pdf.

[358] ECtHR*,* Application no. 17341/03, *F. v. United Kingdom,* 22 June 2004, available at https://www.refworld.org/cases,ECHR,4ee21ffd2.html.

[359] ECtHR, Application no. 2035/04, *I.N. v. Netherlands,* 9 December 2004, available at https://hudoc.echr.coe.int/eng#{"itemid":["001-67880"]}.

[360] Cfr. ECtHR's decision as to the admissibility of application no. 17341/03, *F. v. United Kingdom*

[361] *Ibid.*

With these words, the Court implicitly affirmed that the applicant would be "discreet" about showing publicly his sexual orientation, significantly reducing his chances of be persecuted in Iran[362].

Furthermore, the Court's analysis in *I.I.N. v. the Netherlands* is almost exactly like its decision in *F. v. United Kingdom,* with the same reference to the "discretion requirement"[363].

So, as matter of facts, the ECtHR's decision in both *F. v. United Kingdom* and *I.I.N. v. the Netherlands* cases focuses the attention on the fact that homosexual asylum seekers may avoid criminal prosecution, imprisonment and mistreatments in their countries of origin by "playing the game"; this means that LGBTI applicants may successfully save themselves by simply refraining from expressing their sexual orientation in public, outside the sphere of their private life[364].

To sum up, in light of the "right-oriented" considerations given by the CJEU analyzed in the previous Chapter, the interpretation of "playing the game" provided by the ECtHR seems to be quite unacceptable and not particularly sensible to the protection of the right of LGBTI asylum seekers.

As it was previously outlined, these criticalities are notably evident in the case *M.E. v. Sweden,* which is fundamental for the purpose of the present Chapter. As matter of fact, this ruling is perfectly aligned with the abovementioned ECtHR cases, where the Court of Strasbourg forecasted gay men to avoid any risks of persecution and/or degrading and inhuman treatment by "living discreetly"[365].

The case *M.E. v. Sweden* presents some visible divergences between the opinions of the CJEU and of the ECtHR regarding the correct assessment of asylum claims based on sexual orientation persecution. These kind of jurisprudential conflicts between the two Courts have been also pointed up and deeply analyzed by the Judge

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[362] M. FRASER, "LGBTI asylum seekers: discord between the European Courts?", *EDAL: European Database of Asylum Law*, 2014, available at https://www.asylumlawdatabase.eu/en/journal/lgbti-asylum-seekers-discord-between-european-courts, accessed on 11th May 2020.

[363] Moreover, the Court observed that in Iran "*The few sources which refer to trials or execution for homosexual offences occurring in recent times appear vague and unspecific[...]"*

[364] FIDH and ILGA Europe, *op.cit.,* p. 3.

[365] T. SPIJKERBOER, "Gender, Sexuality, Asylum and European Human Rights", p. 7.

Power-Forde[366] in her dissenting opinion and by the Judge De Gaetano in his separate opinion[367].

4.2 Evident conflicts between ECtHR and CJEU: the case *M.E. v. Sweden* (2014)

The case at stake concerns a Libyan citizen who applied for asylum in Sweden, initially because he claimed that he risked persecution after being involved in an illegal transport of weapons; additionally, few months later, the applicant stated that he might face persecution in Libya because of his homosexuality and because of the fact that he had married a man resident in Sweden.

In 2012, the Migration Board (the Swedish competent authority for migration) refused his claims by virtue of the lack of credibility and as a result of his untruthful declarations; furthermore, the Swedish authorities decided that the asylum seeker had to come back in Libya temporarily (for four months only), in order to apply for family reunion with his husband.

However, the applicant claimed that his return to Libya would lead to a severe infringement of article 3 of the European Convention on Human Rights (which affirms the prohibition of torture and degrading treatments), because of his sexual orientation[368].

In its judgement, the ECtHR confirms that the claimant's declarations lack of credibility and that he has not provided clear and truthful statements in telling his own story, changing it several times before different authorities as well[369].

Consequently, considering the continuous changing submissions to the Swedish competent authorities for asylum about his own sexual orientation, the Court

[366] Dissenting opinion of Judge Power-Forde in the case *M.E. v. Sweden*, available at https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20M.E.%20v.%20SWEDEN.pdf , p. 30.

[367] Separate opinion of Judge De Gaetano in the case *M.E. v. Sweden,* available at https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20M.E.%20v.%20SWEDEN.pdf , p. 28.

[368] EDAL: European Database of Asylum Law, "ECtHR – M.E. v. Sweden, Application No. 71398/12: Case Summary", available at https://www.asylumlawdatabase.eu/en/content/ecthr-–-me-v-sweden-application-no-7139812#content, accessed on 13th May 2020.

[369] ECtHR's judgement in the case *M.E. v. Sweden*, point 84.

affirms that the asylum seeker has not given a coherent report for a correct evaluation of his international protection request[370].

Furthermore, regarding to the situation of homosexuals in Libya, the Court of Strasbourg holds that, since the fall of the Gaddafi's regime in 2011, the social and political context in this country has been particularly unclear and uncertain; consequently, for the Court is remarkably difficult to make assessments on the LGBTI position in Libya[371].

Furthermore, despite to the fact that *«homosexuality is a taboo subject and seen as an immoral activity against Islam in Libya*[372]*»*, the Court does not have sufficient basis and information *«to conclude that the Libyan authorities actively persecute homosexuals*[373]*.»*

However, the Judge Power-Forde in her dissenting opinion does not approve the Court's statements. In fact, she underlines that the recent documentation on Libya[374] clearly demonstrates that homosexuality is a crime in such country, where gay and lesbian people may be arrested, hit and killed simply for their sexual orientation[375]. Moreover, the Court observed that the applicant has introduced his husband to his family online, with the use of a camera; nonetheless, the asylum seeker has introduced him as a woman, hiding his real sexual orientation and deciding to be "discreet".

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[370] The Court affirmed that: "*it seems strange that in his first submission to the Court, in December 2012, the applicant claimed that he had already lived as a homosexual in Libya before going to Sweden and had suffered beatings and two arrests by the morality police. He has never brought these claims before the Swedish authorities even though he requested the Migration Board to reconsider his case in October 2012, only a few months before raising them before the Court. On the contrary, during the in-depth interview with the Migration Board on 20 August 2010, the applicant had stated that he had lived well in Libya until his arrest and that he had planned to marry a woman in Libya in May 2010."* Cfr. ECtHR's judgement point 84.

[371] M. FRASER, *op. cit.*

[372] Cfr. ECtHR's judgement, point 87.

[373] *Ibid.*

[374] For example, the ECtHR at point 45 of its judgement cited the *"Country of Origin Information Report on Libya",* provided by the United Kingdom Border and Immigration Agency in 2012.

[375] *"Homosexuality is illegal in Libya— the applicant's country of origin—and is punishable by imprisonment. Whilst, apparently, there have been no 'active prosecutions' since the fall of the former regime, recent evidence indicates that arrests and serious assaults are inflicted upon homosexuals simply for being homosexual"*. Cfr. dissenting opinion of Judge Power-Forde in the case *M.E. vs. Sweden*, available athttps://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20M.E.%20v.%20SWEDEN.pdf , p. 30.

So, according to the Court's opinion, the claimants made the free choice to conceal his homosexuality *«not because of fear of persecution but rather due to private considerations*[376]*.»*

The Court adds that the case under consideration does not involve a permanent return of the claimants in his country of origin, but only a temporary return, for the time necessary to allow the national competent authorities for migration to evaluate his application for family reunion[377].

Thus, the ECtHR concludes its evaluation stating that even if the applicant would be obliged to hide his sexual orientation during the short period of time of four months only in Libya, it would not lead him to conceal his sexual identity permanently or for a longer period of time. As a result, the Court does not find any kind of violation of article 3 of the European Convention on Human Rights[378].

As it was already outlined, the present judgement presents a clear jurisprudential contrast with the CJEU's view relating to sexuality-based asylum, in particular with the decision provided by the Court of Luxembourg in the *X, Y, Z* case*,* a judgement held few months before the ruling *M.E. v. Sweden.* Indeed, it is possible to underline two different points of contrast between the CJEU's rulings and the ECtHR's position about sexuality based asylum: the first issue is related to the "discretion requirement" for LGBTI asylum seekers in order to avoid persecution in their countries of origin; the second point concerns whether national legislations criminalizing same sex conducts may constitute acts of persecution *per se*, in order to recognize the refugee legal status.

4.2.1 Concealing the true identity of LGBTI asylum seekers

Regarding the first point at stake, as it was discussed in detail in the previous Chapter, in 2013 for the first time the CJEU in its ruling in the *X, Y, Z* case expressly affirmed that an LGBTI asylum seeker cannot be requested to hide or restrain his/her sexual orientation in order to avoid persecutory acts in his/her own country of origin.

[376] Cfr. ECtHR's judgement, point 86.
[377] *Ibid.,* point 88.
[378] *Ibid.*

So, citing the *X, Y, Z* judgment and the UNHCR's *"Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees"*[379], the Judge Power-Forde in her dissenting opinion states that the conclusions of the ECtHR in the case *M.E. v. Sweden* seem clearly to ignore the progresses and developments made during the last decades within the international and European law context in protecting the individual's fundamental human rights.

Thus, although the Court of Strasbourg has referred to the *X, Y, Z* judgement[380] too, actually the ECtHR has not taken into account the CJEU's ruling; as matter of fact, the Judge accuses the majority of the ECtHR to have adopted some conclusions which *«revert to the old "reasonably tolerable" test laid down by this Court over a decade ago*[381]*.»*

Moreover, the Judge Power-Forde underlines the fact that the ECtHR has introduced a weird concept of "duration", that is totally new in the European framework; as matter of fact, it has not been mentioned at all by the CJEU's jurisprudence dealing with sexuality-based asylum claims.

However, actually this kind of "time requirement" is not relevant for assessing LGBTI asylum applications; indeed, according to the Judge Power-Forde's point of view, for the CJEU what it does not comply with the EU law is the fact that an homosexual individual must suffocate his/her sexual orientation, and not the duration of time for which the discriminatory repression would have to be respected[382].

Moreover, despite in some hypothetical circumstances the time of permanence in the dangerous country of origin might be so short to prevent an LGBTI asylum seeker to face a real risk to be persecuted (for example, the transit time of few hours

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[379] The Guidelines have been deeply analyzed in the first Chapter of the present dissertation.

[380] ECtHR's judgement, point 50.

[381] Cfr. dissenting opinion of Judge Power-Forde in the case *M.E. vs. Sweden*, p. 32. Moreover, the Judge sets up the so called "Anne Frank" hypothesis. She says that if the tolerable test " *had it been applied to Anne Frank, it would have meant, hypothetically, that she could have been returned to Nazi-occupied Holland as long as denying her religion and hiding in an attic were a 'reasonably tolerable' means of avoiding detection. The absurdity of that argument is not diminished by the fact that the requirement to hide in an attic to avoid detection might involve only months rather than years."* Cfr. p. 33. See also on this point, FRASER M., *op. cit.*

[382] *Ibid.*

in an airport), rather a period of four months can be considered as a long period of time; so, this term may be particularly dangerous for the seeker, who may easily be "uncovered" and consequently he/she may be victims of violence, physical and/or psychological damages, carried out by the state's authorities or private actors in his/her home country[383].

Furthermore, the Judge Power-Forde highlights an interesting issue against the ECtHR's decision. Indeed, it seems that the Court of Strasbourg implicitly considers sexual orientation and identity as something that deals mainly with sexual material acts. However, as it was already discussed previously in the present dissertation, sexual orientation may be expressed also in many different ways, and it cannot be hidden in order to avoid persecution in countries which criminalize homosexuality[384].

Thus, it is undoubtful that the dissenting opinion of Judge Power-Forde has stressed an evident contrast in relation to one of the most important concepts relating to the issue at the core of this dissertation: so, in order to avoid discord between the two European Courts, the ECtHR is recommended to coordinate its own jurisprudence with the "right oriented" interpretation of the Court of Luxembourg, aiming to eliminate once at all the unacceptable "discretion requirement", that may unreasonable lead LGBTI asylum seeker to renounce an essential part of their identity (just as they cannot be required to hide their political opinion or religion as well).

Additionally, as it was already discussed in the first Chapter of the present dissertation and also underlined by both the FIDH (*Fédération Internationale des Ligues des Droits de l'Homme*) and ILGA Europe in their written observations, not only the CJEU, but also the UNHCR in its guidelines firmly agree that LGBTI claimants for asylum must enjoy the right to freely and publicly express their sexual orientation in their countries of origin (including revealing explicitly their own matrimonial status and the sex of their spouse)[385].

Sexuality-based asylum seekers cannot be required to remain "voiceless" about these central aspects of their personal and private lives.

[383] FIDH and ILGA Europe, *op. cit.,* p. 9.
[384] *Ibid.*, p. 33.
[385] FIDH and ILGA Europe, *op. cit.,* p. 10.

4.2.2 Does criminalization itself amount to persecution?

Regarding the critical question whether the existence of criminalizing legislations may represents persecution in order to grant the refugee legal status, before the *M.E. v. Sweden's* ruling, the ECtHR has already affirmed the fact that for an LGBTI asylum seeker the mere existences of norms criminalizing same-sex acts and conducts constitutes a direct interference with the enjoyment of his/her own right to respect personal and private life (which obviously includes sexual orientation as well)[386].

Indeed, the Judge De Gaetano in his separate opinion in the case *M.E. v. Sweden,* citing the 1988 the Court of Strasbourg's ruling in the *Norris v. Ireland*[387]*,* affirms that the mere existence of these kind of provisions may lead to persecution and to a clear violation of article 8 of the European Convention on Human Right[388] (right to respect for private and family life), regardless the fact that such norms are enforced or not in the country threatening for LGBTI asylum seekers. So, the Judge confirms *«the consequent irrelevance, for the purpose of a violation of fundamental human rights, of whether or not such laws are in fact applied or applied sporadically*[389]*.»*

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[386] For example, the ECtHR in its judgement *Laskey, Jaggard and Brown v. United Kingdom* stated that "*there can be no doubt that sexual orientation and activity concern an intimate aspect of private life"* Cfr. ECtHR, Application no. 21627/93; 21628/93; 21974/93*, Laskey, Jaggard and Brown v. United Kingdom,* 19 February 1997, point 36, available at https://hudoc.echr.coe.int/eng#{"itemid":["001-58021"]}.

[387] ECtHR, Application no. 10581/83, *Norris v. Ireland,* 26 October 1988, available at *https://hudoc.echr.coe.int/fre#{"itemid":["001-57547"]}.* In particular, in this case, the ECtHR adds that *"a law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question."* Cfr. point 33 of the judgement.

[388] Article 8 of the European Convention on Human Rights states: "*1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

[389] Cfr. separate opinion of Judge De Gaetano in the case *M.E. vs. Sweden*, p. 29. See also on this point, E.G. CABRERO, "La orientación sexual ante el Tribunal Europeo de Derechos Humanos", *Revista de Derecho Politico*, no. 91, 2014**,** p. 308, available at http://revistas.uned.es/index.php/derechopolitico/article/view/13673, accessed on 18th May 2020

In short, unlike the CJEU' s statement in *X, Y, Z*, the ECtHR seems to imply that the criminalization of same-sex relations itself may lead to persecution, according to the meaning of article 1A(2) of the 1951 Refugee Convention[390].

As matter of fact, regarding the problem if criminalization *per se* may constitute persecution, there is a clear contrast between the ECtHR and the CJEU: but, concerning this issue, this time the Court of Strasbourg seems to have adopted a more protective view regarding sexuality-based asylum seekers that the one embraced by the CJEU in its ruling *X,Y,Z,* where the Court of Luxembourg in a generic way stated that *«article 9(1) of Directive 2004/83, read together with Article 9(2)(c) [...] must be interpreted as meaning that the criminalization of homosexual acts per se does not constitute an act of persecution*[391]*.»*

This interpretation could be seen as somehow overturning the standards earlier provided and set up by the Court of Strasbourg[392].

4.3 The Italian correct practice in assessing sexuality-based asylum claims and the role of the Supreme Court

In order to have a general and comprehensive comparative overview of the case-law regarding asylum claims based on sexual orientation persecution across Europe, an analysis of the Italian jurisprudence and, in particular, of the Supreme Court, seems to be peculiarly adequate.

In fact, within the EU context and for the purposes of the present dissertation, Italy is quite often referred as a Member State which has adopted a "good" or "correct practice" in dealing with sexuality-based asylum claims and, additionally, as a country which should be taken as a "role model" for others Member States.

More specifically, across the EU the term "good practice" is usually used in order to indicate some Member States' legislations, policies or practices which have provided a great contribution in protecting and safeguarding of LGBTI rights[393], in particular with regard to the evaluation of LGBTI asylum applications. These "good

[390] See also, M. FRASER, *op. cit.*
[391] Cfr. ruling of the CJEU in the case *X, Y and Z v. Minister voor Immigratie en Asiel.*
[392] *Ibid.*
[393] S. JANSENS AND T. SPIJKERBOER, *op.cit.,* p. 10.

practices" may be identified relying on the most significant principles of international human rights law, including refugee law as well[394].

Furthermore, the adoption of such "good practices" by other Member States would be helpful in order to harmonize all the proceedings and practices relating to the matter at the core of the present work.

What is more, it is important to highlight that in 2011 the "*Fleeing Homophobia"* research reported that, within the Italian procedural system for asylum, it is not a problem whether or not the criminal provisions against LGBTI individuals are enforced: as matter of fact, in Italy the mere existence of criminalizing legislations in some "dangerous countries" allows lesbians, gays, bisexual, transsexuals and intersex asylum applicants, coming from these risky states, to be recognized as refugees, regardless whether such laws are actually applied or not[395]. Moreover, it is also reported that in the country under examination the "discretion requirement" concerning LGBTI asylum seekers' applications is not taken into consideration by Italian authorities and courts at all[396].

As it will be discussed further in the following dissertation, the abovementioned Italian "correct practice" was also confirmed by the jurisprudence of Italian courts and, above all, of the Supreme Court.

Before starting the comparative analysis between the case-law of the Supreme Court and the CJEU's jurisprudence, it is adequate to introduce a brief overview of the Italian legal background regarding the asylum matter, and specifically relating to LGBTI's refugee claims.

First of all, it is needed to stress the fact that the Constitution of the Italian Republic (which is located at the top of the hierarchy of legal fonts in Italy) does not impede discrimination based on sexual orientation or gender identity in an explicit manner. In fact, articles 2 and 3 of the Italian Constitution[397], that establish the relevance of

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[394] *Ibid.,* p. 19.

[395] S. JANSENS AND T. SPIJKERBOER, *op. cit.,* p. 7 *et seq.*

[396] Cfr. ILGA Europe, "*Good Practices related to LGBTI asylum applicant in Europe"*, p. 18.

[397] In particular, article 2 declares: *" The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled."* Moreover, article 3 affirms: "*All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the*

the protection of human rights and the prohibition of discrimination, do not mention explicitly LGBTI individuals. However, actually a correct interpretation of the Italian Constitution should include the protection of sexuality and gender identity, and consequently it should comprehend discrimination based on sexual orientation and/or gender identity as well.

Regarding the asylum legal framework, even if Italy has not adopted yet its own systematic legislation concerning asylum[398], the country is party of the 1951 Refugee Convention.

Furthermore, article 10(3) of the Italian Constitution firmly enounces the relevance of guaranteeing the right to asylum, claiming that *«a foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian Constitution shall be entitled to the right of asylum under the conditions established by law. A foreigner may not be extradited for a political offence*[399]*.»*

However, despite these encouraging premises, nowadays Italy is often considered as an "host country" for refugee with an inadequate coordination policy for asylum seekers and refugee, and usually unable to fully integrate them into the society[400].

As matter of fact, Italy has always been reported as a country of emigration and it started to be referred as a land of immigration only in the 1970s. Moreover, the Italian 1990s have been characterized by a great flow of migrant and asylum applicants, most of them coming from Albania and the Yugoslav Republic, in order to seek safety in Italy, fleeing from dramatic conflicts[401].

Furthermore, for the main purposes of the present dissertation, it is fundamental to underline that the country implemented the old Qualification Directive 2004/83/EC

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human person and the effective participation of all workers in the political, economic and social organisation of the country." The text of the unofficial English version of the Constitution of the Italian Republic is available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, accessed on 20th May 2020. The Italian Constitution entered into force on the 1st of January 1948.

[398] Camera dei Deputati, Servizio Studi, "Diritto di asilo e accoglienza dei migranti sul territorio", 2020, available at https://www.camera.it/temiap/documentazione/temi/pdf/1105104.pdf, accessed on 23rd May 2020.

[399] Cfr. the unofficial English version of the Constitution of the Italian Republic.

[400] Cfr. E. BASSETTI, "Integration Challenges Faced by Transgender Refugees in Italy", in A. GÜLER, M. SHEVTSOVA, D. VENTURI, *LGBTI asylum seekers and Refugees from a Legal and Political Perspective,* p. 340.

[401] *Ibid.*

with the legislative decree no. 251/2007[402]; then, the recast Qualification Directive 2011/95/EU was implemented by the Italian legislative decree no. 18/2014, which officially recognizes LGBTI individuals as members of a particular social group[403]. One of the most interesting provision of the legislative decree no. 18/2014 can be found in article 7(2)(d), which states that acts of persecution for the purpose of recognizing the legal status of refugee may be take the form of administrative, legislative or judiciary measures that have discriminatory features: as matter of fact, nowadays it is undoubtful that, in the majority of the countries worldwide, it is through these kind of discriminatory behaviors that persecution against LGBTI individuals takes place[404].

Finally, in September 2019, the Italian Government approved the decree-law no. 113/2018[405] (converted into Law no. 132/2018[406]) on security and migration, the so called "Salvini Decree"[407]. In brief, the decree-law provides some measures which actually restrict the level of protection for the most defenseless migrants and asylum seekers, creating a legal mechanism which may make refugees' expulsions from shelters easier[408].

Precisely, one of the most evident changes of the abovementioned legal mechanism is that this decree-law provides first of all the abolition of humanitarian protection; this form of protection was additional to the recognition of refugee status and

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[402] Legislative decree 19 November 2007, no.251*"Implementation of Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted",* Official Journal of the Italian Republic no. 3, 4 January 2008. Later, this legislative decree was amended by legislative decree 21 February 2014, no. 18, Official Journal of the Italian Republic, no. 55, 7 March 2014. Furthermore, the legislative decree no. 145/2015 implemented both the Procedures Directive 2013/32/EU and the Reception Conditions Directive 2013/33/EU, analysed in the second Chapter of this dissertation.

[403] Article 8(d) of the legislative decree no. 18/2014.

[404] Arcigay (Italian lesbian and gay association), *Immigrazione e omosessualità: tracce per operatrici e operatori*, 2008, available at http://www.arcigay.it/wp-content/uploads/2008-Immigrazione-IO-Tracce-per-operatori1.pdf, accessed on 24th May 2020.

[405] Decree Law 4 October 2018, no. 113, Official Journal of the Italian Republic no. 281, 3 December 2018. The Decree Law no. 113/2018, amended the Legislative Decree no. 286/1998 *"Consolidated Act on provisions concerning the Immigration regulations and foreign national conditions norms".*

[406] In Italy the decree-law is a regulatory act which requires the adoption of a legislative act (precisely, a law) in order to have definitive force.

[407] Named as such after the former Minister of the Interior Matteo Salvini.

[408] Infomigrants, "By abolishing humanitarian protection permits, Salvini forces refugees to become illegal again", available at https://www.infomigrants.net/en/post/14017/by-abolishing-humanitarian-protection-permits-salvini-forces-refugees-to-become-illegal-again, accessed on 25th May 2020.

subsidiary protection and it used to allow foreign citizens to be granted a residence permit, because of humanitarian reasons. However, with the Salvini decree, these kind of permits can no longer be accorded; in fact, in order to remain in Italy legally, migrants should convert their humanitarian permits to other form of residence permits (for example, residence permits linked to working reasons), with the involvement of a very intricate procedure[409].

To sum up, the decree-law no. 113/2018 seems to go against all the achievements and the efforts made by national authorities in order to integrate migrants and asylum seekers in the country and in order to protect the lives of many people who decided to flee from desperate situations, seeking for safety in Italy.

So, although Italy is often indicated as one of the most guarantor Member States for the protection of LGBTI asylum seekers, actually a greater attention should be paid on migrants and refugees' problematics, leaving outside some unacceptable xenophobic prejudices.

In dealing with the issue at the heart of this dissertation, as it was already outlined previously in the present Chapter, since 2012 the Supreme Court of Italy, together with others national courts, has adopted one of the most protective approach towards LGBTI asylum applicants across the whole EU, actively contributing to the development of Member States' jurisprudence regarding sexuality-based asylum.

Indeed, the Supreme Court affirmed that the mere fact that homosexual acts are criminalized in the LGBTI asylum seeker's country of origin is particularly critical, because it constitutes a gross interference in the claimants' private lives: such interference may easily danger the individual's freedom, constructing an objective condition of persecution which leads to grant the international protection required by the applicant[410].

[409] CILD (Italian Coalition for Civil Liberties and Rights),"The Salvini decree has been approved: Legislative changes on immigration", available at https://cild.eu/en/2018/09/25/the-salvini-decree-has-been-approved-legislative-changes-on-immigration/, accessed on 25th May 2020.

[410] Supreme Court's ordinance no. 15981/2012, cfr. Refugee Legal Aid Information for Lawyers Representing Refugees Globally, "Italy LGBTI Resources", available at http://www.refugeelegalaidinformation.org/italy-lgbti-resources, accessed on 20th May 2020. The ordinance and the relative case will be discussed further in the next subparagraph.

Moreover, according to the "*Fleeing Homophobia"* report, Italian national authorities, tribunals and courts generally does not carry out investigations on the possible application of criminal code of a country criminalizing same-sex acts[411]; additionally, the abovementioned research reports that in Italy, the sexual orientation and/or gender identity that is taken into account during a specific asylum claims' evaluation is the seeker's ongoing sexual orientation and/or gender identity at the time of the examination. The applicant's sexual orientation and/or gender identity is eventually established thanks to the analysis of the LGBTI asylum applicants' declarations and the relevant proof[412].

As matter of fact, the following subparagraphs will aim to analyze how the Supreme Court, dealing with sexuality-based asylum, not only has implemented EU asylum provisions and the CJEU's rulings provided during the last years, but also, with the ordinance no. 15981/2012, it has anticipated the Court of Luxembourg discussion on the present topic.

In particular, the current dissertation will focus the attention on three important decisions provided by the Supreme Court on the matter at the core of this work: the abovementioned ordinance no. 15981/2012, the judgement no. 4522/2015[413] and the recent judgement 11176/2019[414].

4.3.1 Supreme Court, ordinance no. 15981/2012: the criminalization of same-sex conduct may amount to persecution *per se*

The first chance for the Italian Supreme Court to rule on asylum claims based on sexual orientation persecution, was in 2010, when a citizen from Senegal demanded to the Tribunal of Trieste, in northern Italy, the recognition of the refugee legal status or the granting of the subsidiary protection or a residence permit as well.

The applicant claimed that he was homosexual and for this reason he was victim of persecution in his country of origin, where homosexuality was a crime; moreover, the claimant affirmed that his request was justified also by the evident environment

[411] S. JANSENS AND T. SPIJKERBOER, *op. cit.,* p. 26.
[412] *Ibid.,* p. 52.
[413] Supreme Court of Italy, Judgment no. 4522, Civil Division VI, 5 March 2015.
[414] Supreme Court of Italy, Judgement no. 11176/2019, Civil Division I, 27 February 2019.

of intolerance and hatred which characterized his familiar and social life. However, in 2011 the Tribunal of Trieste rejected such claim and the relative Court of Appeal dismissed the appeal as well[415].

In its ruling, the *Corte d'Appello di Trieste* (Court of Appeal of Trieste), reaffirming a principle previously hold by the Supreme Court in 2007[416], stated that the fact that same-sex acts and relationships were criminalized in Senegal is not particularly relevant for granting the international protection, because it was not possible to individuate from the general situation and background that the applicant was actually and individually persecuted or not in the country under examination.

Moreover, the Court of Appeal of Trieste clarified that, although the seeker's sexual orientation would be proven, he could not demonstrate in a precise manner that he had suffered mistreatments, punishments or other forms of violence by the Senegal's state authorities, that have led him to flee his country of origin.

Furthermore, the only assumption that the Court could held on the basis of the applicant's words is that he was not accepted by his own family, which considered homosexuality as something socially unacceptable; but, according to the Court of Appeal, such issue was clearly not sufficient in order to recognize the refugee status or any other kind of international protection as well[417].

As a consequence, the applicant decided to appeal before the Supreme Court, claiming that the Court of Appeal of Trieste had violated or not correctly interpreted article 3 of Legislative Decree no. 251/2007[418](which implemented the

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[415] *Corte d'Appello di Trieste* (Court of Appeal of Trieste), Judgment issued on 14th June 2011 and filed on 25th August 2011, R.G. no. 69/2011.

[416] On this point, the Supreme Court of Italy in its judgment no. 26822 affirmed *"la valutazione demandata quindi al Giudice del merito [...]si deve fondare sulla verifica della ricorrenza di entrambi i dati oggettivi (attinta anche in via di ragionamenti inferenziali), quello afferente la condizione socio politica normativa del Paese di provenienza e quella relativa alla singola posizione del richiedente (esposto a rischio concreto di sanzioni), senza poter ricavare sillogisticamente ed automaticamente dalla prima la seconda (non ogni appartenente ad una minoranza discriminata essendo automaticamente un perseguitato)".* Cfr. Supreme Court of Italy in judgment no. 26822, Civil Division I, 20 December 2007.

[417] Supreme Court 's ordinance no. 15981/2012, point 3.

[418] Cfr. note no. 57. Article 3 of the Legislative Decree no. 251/2007 indicated how the correct evaluation of the circumstances and facts relating to the asylum request should have been carried out by competent authorities.

Qualification Directive 2004/83/EC) and article 8 of Legislative Decree no. 25/2008[419] (which implemented the Procedures Directives 2005/85/EC).

In particular, regarding the first argument, the applicant claimed that the Court of second instance did not evaluate in a correct manner the evidence which could have led to confirm his declarations; moreover, the claimant also criticized the Court of Appeal because it has not further investigated on his demand, in order to have adequate knowledge of the legal and social situation of his country of origin, consequently breaching Italian and EU law regarding the correct assessment of international protection requests[420].

Furthermore, concerning the second objection, according to the seeker, the existence of legislations criminalizing same-sex acts itself represents a violation of the individual's fundamental right to live freely their sexual, private and affective right; for these reasons, the Court of Appeal illogically affirms that the general situation in Senegal could not affect individually and personally the condition of the homosexual applicant[421].

The Supreme Court finds both the applicant's reasons of appeal as well-founded. Specifically, with regard to the first legal objection, the Court recognizes that the Senegalese criminal code, providing penalties and even imprisonment for carrying out same-sex acts[422], should be considered as a general situation of violation of the individual's freedom to live his life in all facets, without unacceptable and unreasonable restrictions[423].

Additionally, the Court notes that this situation not only leads to a gross interference in the private life of the Senegalese citizen, but also represents a clear violation of

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[419] Legislative Decree 28 January 2008, no. 25 *"Implementation of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status"*, Official Journal of the Italian Republic no. 40, 16 February 2008. Article 8 of the Legislative Decree no. 25/2008 provided the criteria which should have been applied by the competent authorities in dealing with the examination of asylum applications.

[420] Supreme Court 's ordinance no. 15981/2012, point 4.

[421] *Ibid.* See also, Articolo 29: famiglia, orientamento sessuale e identità di genere, "Supreme Court (Corte Suprema di Cassazione) Ord. n. 15981/2012 – September the 20th 2012".

[422] Section 139 of the Senegalese criminal code provides that: *"Sans préjudice des peines plus graves prévues par les alinéas qui précèdent ou par les articles 320 et 321 du présent Code, sera punì d'un emprisonnement d'un à cinq ans et d'une amende de 100.000 à 1.500.000 francs, quiconque aura commis un acte impudique ou contre nature avec un individu de son sexe. Si l'acte a été commis avec un mineur de 21 ans, le maximum de la peine sera toujours prononcé"* Cfr. Supreme Court 's ordinance no. 15981/2012, point 5.

[423] Supreme Court 's ordinance no. 15981/2012, point 5.

the personal freedom of an individual. In fact, this fundamental human right is enshrined by the Italian Constitution, by the European Convention on Human Rights and by the EU Charter. As a consequence, according to the Supreme Court, the homosexual applicant is placed in a situation of objective persecution as to legitimized the grant of the international protection[424].

Regarding the second legal objection, the Supreme Court considers that the Court of Appeal of Trieste expressed a convincement about the homosexuality of the claimant which was not based on a full investigation of the case concerned; in fact, the claimant had requested the Court of Appeal to consider the witness of his partner as a proof of his homosexuality, but the abovementioned Court deemed this kind of evidence as not relevant at all for the evaluation of the application under consideration[425].

Furthermore, the Supreme Court observes that the Court of Appeal has completely ignored the social situation of Senegal, because the general environment of homophobia, discrimination and persecutory behaviors against LGBTI people in the country have been reported by media, by institutional and NGO websites as well[426].

At the outcome, the Supreme Court considers the recourse as well founded and addresses the claim under examination before the same Court of Appeal, in order to analyze the evidence provided by the applicant regarding his sexual orientation and in order to establish the real situation of same-sex individual in Senegal, with regard to the opinion of the civil society as well. Moreover, the Supreme Court recommends the Court of second instance to respect the principles set up by Italian and EU law about the evaluation of international protection claims[427].

So, with the present ordinance, for the first time the Supreme Court stated a fundamental assertion for the purposes of the present work; in fact, according to the Court's view, the mere criminalization of same-sex acts is a clear signal that homosexual individuals are victim of persecution, regardless of whether these criminal provisions are applied in concrete or not; in these cases, after an adequate

[424] *Ibid.*
[425] *Ibid.*, point 6.
[426] *Ibid.*
[427] *Ibid.*, point 7.

evaluation and examination regarding the single asylum seeker's situation carried out by the competent authorities and courts, the refugee status should be granted.

Thus, with the ordinance no. 15981/2012, the Supreme Court not only anticipated the discussion about sexuality-based asylum within the EU context, but also it has gone beyond the CJEU's decision in the *X, Y, Z* case one year later, stating that criminalization of same-sex conduct may amount to persecution *per se*; however, the Court of Luxembourg has stated that *«the mere fact that homosexuality or homosexual acts are criminalized in a country does not automatically lead to the conclusion that a homosexual from that country is a refugee. The asylum applicant must make a plausible case [...] that he personally has a well-founded reason to fear persecution*[428]*.»*

Moreover, in the present circumstances the Italian case-law approach seems to be more similar to the conclusions reached by the ECtHR in the abovementioned case *Norris v. Ireland* and also supported by the Judge De Gaetano in his separate opinion regarding the previously discussed case *M.E. Sweden*.

Moreover, the Italian Court of Cassation has showed a great attention on the EU legal level as well, in order to guarantee the full respect of the EU law regarding the assessment procedure for asylum applications and of the human rights provisions laid down in the EU Charter.

Consequently, this ordinance of the Supreme Court reflects the choice of the Italian legal order to adopt or maintain more favorable regime than the standards laid down in the Qualification Directive according to the Whereas(14) of the Directive 2011/95/EU[429]; a regime that, on the point of view of the author of the present dissertation, appears even more respectful of the rights at stake, compared to the CJEU's outcome in the *X,Y,Z* case.

Thus, this choice seems to continue to have been undertaken by the Court of Cassation in its following rulings about sexuality-based asylum matter, as it will be highlighted in the next subparagraphs.

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[428] Cfr. CJEU's judgement in case *X, Y and Z v. Minister voor Immigratie,* point 22.

[429] "*Member States should have the power to introduce or maintain more favourable provisions than the standards laid down in this Directive for third-country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person eligible for subsidiary protection."*

4.3.2 Supreme Court, judgement no. 4522/2015: the admissibility of belated asylum claims based on sexual orientation persecution

The second case that will be analyzed in the present dissertation, regarding sexuality-based asylum claims assessment in Italy, concerns a Liberian citizen, who applied for international protection before the Territorial Commission of Caserta in 2011.

At the beginning, the asylum seeker's application was not based on the ground of his own homosexuality, because of his feeling of shame and embarrassment; consequently, his first claim was rejected by the Territorial Commission.

As a consequence, the applicant decided to appeal before the Court of first instance of Naples, where the seeker asserted that, because of his sexual orientation, he could be victim of criminal penalties in Liberia, due to the existence in such country of criminalizing legislation against LGBTI individuals.

However, both the Court of first instance and the *Corte d'Appello di Napoli* (Court of Appeal of Naples) dismissed the second application as well, because they found that the sexual orientation ground for asylum claimed before the judge after the first request should not be admitted, if it already existed before the starting of the entire proceeding for granting international protection[430].

Firstly, regarding the case at stake, the Supreme Court starts its judgment recalling article 29, letter b) of the Legislative decree 25/2008[431], which regulates the admissibility of a new request concerning the asylum assessment procedure. In particular, such article affirms that the Territorial Commission competent for asylum should declare an asylum seeker request as inadmissible if the applicant has reiterated an identical request before the same Commission, without providing new elements regarding his/her personal condition or concerning the situation in his/her country of origin.

The Court notes that the abovementioned provision should be interpreted in order to recognize the admissibility of the asylum request when the applicant decides to

[430] *Corte d'Appello di Napoli* (Court of Appeal of Naples), ordinance no. 220/2014, issued on 10th January 2014 and filed on 3rd February 2014, R.G. no. 1571/2013.
[431] *Supra*, note no. 419.

provide new elements which, although already existing at the time of the previous claim, could not be submitted before the Territorial Commission or before the judge, for reasons not attributable to the seeker; consequently, the following application should be considered as admissible as far as the reasons for the later submission are credible and logical[432].

Moreover, in the present case, the Supreme Court underlines that the psychological and moral aspects, which in the first place probably have led the claimant to conceal his sexual orientation, should be taken into account as objective obstacles to the declaration of homosexuality as a ground for his asylum request[433].

For the comparative purpose of the present Chapter, it is important to underline that, with regard to the point under consideration, the Supreme Court follows the interpretative line undertaken by the CJEU's ruling in the *A, B and C v Staatssecretaris van Veiligheid en Justitie* case, implicitly stating that, in order to correctly evaluate an asylum request, competent authorities should take into consideration the homosexuality of the seeker, even if it was disclosed belatedly*;* in fact, about one year before, the Court of Luxembourg claimed that the fact that an LGBTI applicant decides not to reveal his/her sexual orientation at the beginning of the asylum request's examination, does not mean that the seeker's answers and declarations are not sufficient and credible in order to grant the international protection[434].

Moreover, in the present case, the Supreme Court underlines that the psychological and moral aspects, which have led the claimant to firstly conceal his sexual orientation, should be taken into account as sufficient reasons in order to consider the application as admissible[435].

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[432] Supreme Court's judgement no. 4522/2015, point 10. See also, EDAL: European Database of Asylum Law, "Italy – Court of Cassation, Civil Division VI, 5 March 2015, n. 4522", available at https://www.asylumlawdatabase.eu/en/case-law/italy-%E2%80%93-court-cassation-civil-division-vi-5-march-2015-n-4522, accessed on 26th May 2020.

[433] *Ibid.*, point 11.

[434] *Supra,* note 298. See also on this point, Asilo in Europa, "Le richieste di asilo fondate sull'orientamento sessuale e l'identità di genere: quadro normativo e giursprudenziale", available at https://www.adl-zavidovici.eu/wp-content/uploads/2017/05/02-Intervento-Asilo-in-Europa-S.Zarrella-1.pdf, accessed on 28th May 2020.

[435] *Ibid.*, point 11.

Secondly, the Italian Court continues its discussion dealing with the issue of assessing the well-founded fear of being persecuted because of the sexual orientation of asylum seeker.

Regarding the abovementioned concern, the Supreme Court upholds its jurisprudential line undertaken in the previously analyzed ordinance no. 15981/2012, confirming for the second time the "correct" or "good practice" of Italy: criminalizing legislations against homosexuality may preclude homosexual citizens from enjoying their individual freedoms, and may lead them to be victims of persecution, which should justify the recognition of the legal status of refugee[436].

This Supreme Court's decision is essential for the purpose of the present Chapter, because it was the first judgement to be ruled after the CJEU's pronounce in *X, Y, Z.*

However, as it was outlined, also in this case, the Supreme Court firmly maintains its "contrasting" position with the CJEU's opinion, affirming that criminalizing legislations may constitute persecution, while previously the Court of Luxembourg has stated that it is a duty of national competent authorities and courts *«to determine whether, in the applicant's country of origin, the term of imprisonment provided for by such legislation is applied in practice*[437]*.»*

So, the Court seems to affirm that, for the realization in concrete of the persecution, the penalty should be actually applied in the criminalizing country. Consequently, the national competent authorities should have the responsibility to verify this condition; however, it does not appear that the Italian Territorial Commissions qualified for the evaluation of asylum application have carried out this kind of inspections, as it results from the action of the Territorial Commission under examination.

Thus, the Italian jurisprudence has not changed its viewpoint on this particular concern, adopting once again more favorable standards that those enounced in the Qualification Directive[438].

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[436] *Ibid.*, point 12.

[437] Cfr. CJEU's judgement in case *X, Y and Z v. Minister voor Immigratie,* point 59.

[438] See also, S. PIZZORNO, "Il punto sulla tutela dell'omosessuale richiedente protezione internazionale tra Corte di Giustizia dell'Unione e Corte di Cassazione", *Quaderni Costituzionali,* 2018, p. 4, available at http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2018/05/pizzorno.pdf, accessed on 26th May 2020.

Lastly, after welcoming the applicant's recourse for the reasons mentioned above, in the present case the Supreme Court specifies that the situation of persecution against homosexual citizens in the country of origin cannot be verified taking into examination solely the credibility of the seeker's declarations; indeed, according to article 8, para. 3 of the Legislative Decree 25/2008[439], in dealing with asylum applications, the judge has the duty to fully exercise his power of instruction, in order to collect all the useful information and documents on the situation in the applicant's country of origin[440].
Thus, the Supreme Court concludes stating that the analysis of the case must to return back to Court of Appeal of Naples for a review and a final decision, taking into account all the considerations laid down by the Court of Cassation in its judgment.

4.3.3 Supreme Court, judgement no. 11176/2019: even if homosexuality is not formally a crime, the international protection should be granted

The last interesting Supreme Court's case-law that will be examined with regard to sexuality-based asylum, concerns a somewhat different issue; in fact, in the case under consideration, the LGBTI applicant comes from a country in which homosexuality is not officially criminalized but it is disdained and abhorred by the surrounding society as well. In this recent judgment, once again the Supreme Court of Italy confirms its consolidated willingness to protect LGBTI asylum seekers in the best possible way, taking into account all the potential elements which may identify a situation of persecution because of a "not straight" sexual orientation.
The case involved an Ivorian citizen, a Muslim in religion, who, although married with two children, had a homosexual relationship; for this reason, he claimed before the Territorial Commission of Catanzaro, to have been scorned by his family, in particular by his wife and his father. Furthermore, the asylum seeker decided to flee from his country of origin, following the murder of his partner who, according to his view, was killed by his father because of their romantic relationship.

[439] See, *supra* note no. 419.
[440] Supreme Court's judgement no. 4522/2015, point 13.

However, first the Territorial Commission, and then both the Court of first instance and the Court of Appeal of Catanzaro rejected his claim, stating that there were no sufficient conditions in order to grant any forms of international protection. Consequently, the applicant appealed before the Supreme Court, which considered his recourse as well-founded.

First of all, the Supreme Court regards as unlawful the principle which led the Territorial Commission to adopt its decision; as matter of fact, on one hand the abovementioned Commission dismissed the application because, after an accurate analysis of the historical, political and social situation in Ivory Coast, it affirmed that the Ivorian seeker has based his request exclusively on personal and subjective reasons, without any reference to the existence of a dangerous situation caused by general circumstances of conflict in his country of origin; on the other hand, in order to exclude the risk of persecution for LGBTI individuals in Ivory Coast, the Commission considered as sufficient the fact that homosexuality was not formally a crime in the country under examination[441].

Thus, referring to its previous rulings on sexuality-based asylum claims and on the issue of criminalization of same-sex acts, in the present judgement the Supreme Court affirms that the absence of legal provisions which directly or indirectly prevent individuals from carrying out same-sex conducts is not *per se* an adequate reason in order to exclude the granting of international protection.

As matter of facts, according to the Italian Court, in order to recognize the protection requested national authorities competent for asylum should verify whether the state of origin is unwilling or unable to offer a fair protection to homosexual individuals and, consequently, whether the applicant may be subject to persecution or a serious threat to his life in concrete because of his sexual orientation[442].

So, the Supreme Court underlines that the Territorial Commission, not only did not evaluate at all the level of protection provided by the authorities and by the private actors in the country under consideration, but also it actually omitted to examine

[441] Supreme Court, judgement no. 11176/2019, p. 5.

[442] *"[...] e dunque l'impossibilità di vivere nel proprio paese d'origine senza rischi effettivi per la propria incolumità psicofisica la propria condizione personale."* Cfr. Supreme Court, judgement no. 11176/2019, p. 6.

the real vulnerability of the LGBTI asylum seeker and the risk to be subject to degrading treatment and deprivation of the enjoyment of his fundamental human rights in Ivory Coast, which may lead to harm the full respect of human dignity in case of return to his country of origin[443].

Along these lines, the Supreme Court appears to have perfectly followed the reasoning of the CJEU's ruling in *A, B and C v Staatssecretaris van Veiligheid en Justitie*, which stated that, according to EU law, all the authorities competent for the asylum assessment procedure should be required to handle the asylum interviews taking under consideration all the general circumstances surrounding the claims and, specifically, the vulnerability of the applicant; moreover, they should realize individual evaluations of all the applications, examining in deep the individual and personal situations of the asylum seekers[444].

Furthermore, it is important to highlight that once more the Italian Supreme Court based its decision bearing in mind the psychological damages[445] which may affect LGBTI asylum seekers as well: so, even if they are not criminally prosecuted for carrying out same-sex behaviors, the surrounding discriminatory and hateful surrounding background may put them at the outcome of the society, making their life clearly unbearable and forcing them to flee from their "home" countries.

4.4 The outcomes of the two European Courts and of the Supreme Court for the protection LGBTI asylum seekers

As it was analyzed in this Chapter and in the previous one as well, the three European Courts present both some discordances and some points of contact in approaching with sexuality-based asylum applications. However, despite their different interpretations on certain particular issues, their contribution to the safeguard of lesbians, gay, bisexuals, transsexuals and intersex asylum claimants

[443] Supreme Court, judgement no. 11176/2019, p. 7. See also, Altalex, "Protezione internazionale va riconosciuta al migrante omosessuale che rischia nel paese d'origine", available at https://www.altalex.com/documents/news/2019/05/03/protezione-internazionale-va-riconosciuta-al-migrante-omosessuale-che-rischia-nel-paese-d-origine, accessed on 27th May 2020.
[444] Cfr. *supra* note no. 292.
[445] See also, *supra* note no. 433.

has been fundamental in order to achieve a complete awareness of the topic at the heart of the present dissertation.

In particular, the third Chapter has showed that the CJEU has officially recognized LGBTI applicants as eligible for the refugee legal status because members of a particular social group; moreover, the Court set up relevant key principles regarding the assessment of sexuality-based asylum claims, rejecting the "discretion requirement" and the use of some psychological tests, which are addressed to prove the seeker's sexual orientation and which do not comply at all with EU law.

However, the Court of Luxembourg did not consider the fact that the mere existence of legislations criminalizing of same-sex conduct may result into persecution, requiring the application of such laws: in this perspective, the CJEU risks to deny a great number of LGBTI asylum applications, basing on useless formalities.

Instead, regarding this issue, the ECtHR in its case-law seems to implicitly affirm that the criminalization of same-sex relations *per se* may lead to persecution, adopting an interpretation in line with the Italian Supreme Court's jurisprudence.

Nonetheless, the Court of Strasbourg has also adopted an "old" approach regarding sexuality-based asylum claims, relying on the "discretion requirement" in relation to the evaluation of these kinds of particular applications: in this way, relating to sexuality-based asylum, the Court of Strasbourg has demonstrated to completely ignore the progresses made at the international and European level, above all those undertaken by the CJEU.

Regarding the Italian jurisprudence previously highlighted, although Italy is usually considered as a culturally conservative country in relation to the protection of LGBTI rights[446], the Italian Supreme Court's case-law has surprisingly demonstrated to have a great sensibility regarding the needs of sexuality-based asylum seekers, who look for protection in the "*Bel Paese*".

Claiming that the mere existence of criminalizing legislation may result into persecution, the Italian Court has even gone beyond the CJEU's interpretation in *X, Y, Z* case; moreover, in its recent ruling the Supreme Court adds that the fact that homosexuality or "not straight" sexual orientation is not formally a crime does not exclude the risk of persecution for LGBTI asylum applicants.

[446] *Supra*, paragraph 1.3.

In brief, the above examined Italian case-law may represent an important starting point and a "role model" to be taken into consideration by the Court as well, in order to deal in the future with this particular kind of claims. In this way, the "right-oriented interpretation" of the Court of Luxembourg would be considered as fully realized.

CONCLUSIONS

As illustrated in the present dissertation, nowadays the issue of sexuality-based asylum in the EU still shows some criticalities that should necessarily be solved in order to guarantee LGBTI seekers to be completely safe, according to EU standards for the protection of the fundamental human rights.

Moreover, as analysed in the previous Chapter, asylum claims based on sexual orientation persecution continue to be notably under-researched and ambiguous within the whole Union[447].

In particular, the current work has demonstrated that the civil society's representatives, above all the UNHCR and others European and international organizations and NGOs aiming to safeguard human rights, have always been the main actors (and, often, the only ones) to keep promoting the enhancement of EU Institutions and State efforts in order to make effective the recognition of LGBTI refugees and to improve their life conditions.

In fact, the abovementioned role-players keep urging States all over the world, not only to eliminate from their legal orders all the provisions which directly criminalize same-sex acts, but also to prevent any kind of behaviours carried out by both private and state actors that may lead LGBTI people to face violence, mistreatments and even death.

However, in the 21st century, LGBTI asylum seekers, forced to flee from their countries of origin, are also obliged to deal with unreasonable homophobic and transsexual discriminatory backgrounds in several "host" Member States across the Union, which is supposed to be the *"land of rights"*.

Therefore, these kind of vulnerable applicants, unwelcomed within both the host community and the community of origin, often live a double disgrace. As matter of fact, they are persecuted in their home countries by criminalizing legislations and discriminatory conducts, and, at the same time, they may easily experience climates of intolerance in countries considered as "safe", because parties of the EU.

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[447] J.K. GARTNER, "(In)credibly Queer: Sexuality-based Asylum in the European Union", p. 12.

Furthermore, on this specific issue, as the example of the "homophobic" Turkey has showed, both EU Institutions and national authorities should take into account and eventually reshape the concept of countries considering as "safe", above all for sexuality-based asylum claimants; as matter of facts, all the competent authorities should ensure that LGBTI refugees may be truly protected, in compliance with human rights standards and with EU asylum law.

Additionally, it was also highlighted that one of the most relevant problems concerning LGBTI applicants regards the lack of precise guidelines and unequivocal legislations across EU: as it was deeply analyzed previously, first the Qualification Directive 2004/83/EC and then the recast Qualification Directive 2011/95/EU have officially recognized sexuality-based asylum seekers as members of a particular social group and, consequently, as eligible for international protection.

However, it seems clear that only an explicit recognition of sexuality-based persecution as an autonomous reason for the recognition of the refugee status may lead to a homogenous system for the protection of LGBTI asylum seekers across EU; in this way, different practices concerning sexuality-based asylum claims between Member States may be avoided as well.

Indeed, as the "*Fleeing Homophobia"* research has reported, several Member States continue to rely on some unacceptable and meaningless stereotypes and requirements (such as the "discretion requirement", referred to by the ECtHR in the majority of its case-law), which may seriously obstacle the recognition of international protection for LGBTI seekers; for these reasons, unfortunately even today, the assessment of sexuality-based asylum claims may be strongly different from a Member State to another Member State.

As a consequence, accurate EU common procedures and standards are required and indispensable in order to prevent manifest divergences in assessing these kind of asylum applications across the Union.

Regarding the CJEU jurisprudence, it is certain that the Court of Luxembourg has played an essential role in build an EU point of view relating to the evaluation of LGBTI asylum applications, pointing out revolutionary principles for the protection of such claimants as well. More specifically, besides ruling down the ECtHR's

opinion on the issue of concealment of sexual orientation in order to avoid persecution, the Court not only has stated relevant basic principles regarding sexuality-based asylum, but it has also provided some important limits that competent authorities for asylum are required to respect in assessing LGBTI applications; for example, they should ask appropriate questions in order to evaluate the credibility of the claimant's sexual orientation and they should use all the trustworthy reports and resources available, putting stereotypes aside.

As it was discussed deeply above, the CJEU officially has offered some significant clarifications on the correct application of the EU Charter on this particular concern, stating that relying on psychological "homosexuality tests", which interfere with the seeker's private life, is definitely a breach of the fundamental rights safeguarded by the EU Charter.

However, despite its remarkable contribution, the CJEU's "right interpretation" of sexuality-based asylum claims is still expected to take some steps forward: for instance, the EU Court should take into account the "correct practice" adopted by the Supreme Court of Italy, which considers the mere existence of criminalizing legislations as a sufficient reason to grant LGBTI asylum seekers the protection requested.

To conclude, it is unquestionable that during recent years the EU legal and jurisprudential debate has made important progresses and advances in protecting LGBTI asylum seekers; however, EU Institutions are recommended to adopt more concrete and definite legislative provisions and/or soft law acts, in order to fully harmonize the Union asylum system regarding the safeguard of *«those who had to forcibly leave their countries to seek safety and undertake perilous journeys to live freely their love and their identity. [...] Their resilience is there to show us that human rights are not fancy words, but something to pursue and protect always*[448]*.»*

[448] Cfr. A. GÜLER, M. SHEVTSOVA, D. VENTURI, *LGBTI asylum seekers and Refugees from a Legal and Political Perspective.*

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