

“You Look so Gay”: Social Perception and Hindrances in SOGI Asylum Seekers’ Process of Evaluation.

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Abstract

The thesis will take in analysis the case of LGBTQI+ asylum seekers procedure. Because of the several problematics which have been arisen for this specific category during the last decades, this paper aims to answer to what extent is possible to reorient the LGBTQI+ refugees evaluation procedure on the basis of the perception of these subjects within the countries they are fleeing. Indeed, the perception perspective is important because, as stated by Kobelinsky, “Claiming homosexuality became the key element in granting asylum. The applicant must have been publicly seen and acknowledged as homosexual in their own country. [...] This was mirrored by the fact that refugee status was granted to applicants who had manifested and claimed their sexual orientation”¹. Nevertheless, in the search of proofs for guaranteeing the authenticity of asylum seeking based on the sexuality, the process of evaluation presents several problems on the international level. Besides the difficulty on assessing the authenticity of someone’s sexuality, the process of assessing is also dominated by a western/heteronormative perspective which often does not keep in consideration the anthropological variants which might prevent asylum seekers in identifying in the western conception of homosexual. Hence, this thesis aims to investigate to what extent and how it would be possible that the mere perception of certain individuals as belonging to the LGBTQI+ community might be sufficient in the process of asylum seeking. How this might apply concretely? How this interrelate with the other categories of refugees? The approach used in the dissertation will be interdisciplinary, with both anthropological and legal focus.

¹ Kobelinsky Carolina, “Judging Homosexuality, Granting Asylum”, October 3rd, 2016, <https://booksandideas.net/Judging-Homosexuality-Granting-Asylum.html>

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Introduction

As an Italian citizen, it has been worrying to witness to two different events in the last month. On one hand, the decision of the Italian House of Representatives to refinance the Libyan Coast Guard, which has been internationally held responsible for rape and murder towards the people in the detention camps², in order to handle the migrants flows aiming to reach Europe³. On the other hand, the struggling in approving the “Zan Bill”, the first well structured anti-homophobia law in Italy, due to the opposition of both the Vatican and the far right⁴. These political episodes perfectly summarize two topics that go far beyond the national borders of Italy and seem to shake the whole Europe. Suffice to think about the political debate that the migrant crisis disclosed between Western and the former Soviet Europe⁵; nevertheless, this has also been the case for the Hungarian Law - concerning the limitations of LGBTQ+ material between people under 18 years old – which has caused vibrant exchanges between two bloc exponents like Viktor Orban and Ursula Von Der Leyen⁶. In this scenario, it seems reasonable to question how efficiently LGBTQ+ asylum seekers’ human rights are defended in the process to obtain the asylum status. More specifically, it is important to question how to guarantee an evaluation process which might entail a fair and just assessment of an asylum application based on sexual orientation or gender identity (SOGI) grounds. Indeed, due to the difficulties in proving the reasons for applying for asylum status, often SOGI asylum seekers had to face number of hindrances. In addition to that, it has only been in recent times that the UNHCR has produced a *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*⁷ which has been defined by academic LaViolette as “entirely appropriate and long overdue”⁸. However, LaViolette also defined it as a constant “work in progress as it overlooks a number of important issues. These include difficulties connected to evidentiary practices and procedures, such as the credibility of claims and independent country of origin information”⁹. Hence, this is exactly the topic which this thesis aims to analyze. In particular, this study will try to investigate to what are the main anthropological, political and legal problems

² Mannocchi Francesca, “Torture, rape and murder: inside Tripoli’s refugee detention camps”, *The Guardian*, November 3rd, 2019, <https://www.theguardian.com/world/2019/nov/03/libya-migrants-tripoli-refugees-detention-camps>

³ Sofia Alberto, “Libia, alla Camera passa rifinanziamento delle missioni con voti contrari allamaggioranza. Orfini (Pd) : Soldi a chi stupra e uccide, ipocrisia”, *Il Fatto Quotidiano*, July 16th, 2020, <https://www.ilfattoquotidiano.it/2020/07/16/libia-alla-camera-passa-rifinanziamento-delle-missioni-con-voti-contrari-tra-la-maggioranza-orfini-pd-soldi-a-chi-stupra-e-uccide-ipocrisia/5870288/>

⁴ “Vatican accused of meddling in Italy’s LGBT bill”, *Euronews*, June 22nd, 2021, <https://www.euronews.com/2021/06/22/vatican-accused-of-meddling-in-italy-s-lgbt-bill>

⁵ QuinnEugene, “The Refugeeand Migrant Crisis: Europe’sChallenge”, *Studies: AnIrish Quarterly Review*, Vol. 105, No. 419, Autumn 2016, pp.275 - 285

⁶ Rankin Jennifer, “EU Parliament condemns Hungary’s anti-LGBT law”, July 8th, 2021, <https://www.theguardian.com/world/2021/jul/08/eu-parliament-condemns-hungary-anti-lgbt-law>

⁷ UN High Commissioner for Refugees UNHCR, “UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity”, November 21st, 2008, <https://www.refworld.org/docid/48abd5660.html>

⁸ Weßels Janna, “Sexual Orientation in Refugee Status Determination”, *Refugee Studies Centre*, April 2011, <https://www.sogica.org/wp-content/uploads/2017/06/4ebb93182.pdf>

⁹ Weßels Janna, *Ibid*.

which impact the evaluation process of SOGI asylum seekers and how the perception of LGBTQ+ asylum applicants can acquire an objectively relevant value on the international legal framework without being based on gendered or racial stereotypes.

The study is divided in three chapters. The first one wants to provide a general overview on the historical reasons that have shaped the international asylum system to have an extremely selective approach in providing refugee status to applicants. In order to better explain these motivations, it will be used Fassin and Kobelinsky principle of moral economy of the asylum system and the necessity to find the bogus applicant. Due to the employment of sexual orientation and gender identity as motivations for actually asylum applicants that would not be entitled to international protection, the first chapter will also compare the “Cultural test” applied for religious asylum seekers to the “Discretion test” applied to SOGI asylum seekers and which often involve the reading of the individual’s body as codification of the personal sexuality. This will allow to further put in evidence the obstacles and the problematics stemming from the evaluation process which has been applied for many years in regards to SOGI asylum applicants: this also includes the employ of medical test such as plethysmography and vaginal photoplethysmography. Moreover, the last part of the first chapter will provide an analysis of the cultural and anthropological elements which have shaped the evaluation of SOGI asylum seekers until few years ago. In order to have a better insight of such dynamics, it will be taken into consideration how the concept of “Gay International” and the cultural perception of homosexuality might influence the objective assessment of SOGI asylum seekers.

The second chapter will consider the legal obstacles that LGBTQ+ asylum seekers face in relation to the UN Convention of the refugee of 1951. In the first place, the chapter will examine the definition of refugee as conceived by the Convention. Specifically, it will be analyzed the main difficulties in assessing SOGI applicants into the definition of “particular social group”, as well as both approaches of immutable features or social perception to ascribe a specific asylum seeker category in this terminology. Through an overview of important cases from different European national courts, the chapter will illustrate the development of the perception of SOGI asylum seekers from being faced to the “Discretion test” to be entitled to international protection. Again, in order to well understand the main problematics concerning the objective assessment of SOGI applicants, a comparison between SOGI and women categories as asylum seekers. Such comparison will be useful to provide a greater insight in regards of what the concept of “particular social group” entails, as well as the principle of persecution and fear of persecution.

Finally the third and last chapter will take in analysis the perception of SOGI asylum seekers within the European legal framework. This section will take in consideration Mary Neals’ concept of vulnerability for certain groups and how this is applied by the European Court of Human Rights (ECtHR). In particular, the chapter will analyze how the group of SOGI asylum seekers can be considered as vulnerable group by exploring verdicts of the ECtHR and how, notwithstanding these verdicts, the ECtHR’s employment of the principle of “European Consensus” keeps an heteronormative interpretation of the European Convention on Human Rights (ECHR). Furthermore, this chapter will also take into account the employ of “Safe Country List” by the Common European Asylum System (CEAS) and it will highlight the problematics that this system entail for SOGI refugees. Specifically, it will focus on how, despite the fact that certain countries have specific laws for the protection of LGBTQ+ people, this might not have concrete effects on the daily protection of these categories and of SOGI asylum seekers. Finally, after having analyzed all the hindrances that SOGI asylum seekers have to face within the cultural and legal perspective, the chapter will focus on

the interviews conducted on the process of evaluation of SOGI asylum seekers and, particularly, on which elements to ask LGBTQ+ applicants in order to guarantee an assessment as objective as possible.

Methodology

This study aims to analyze the objective perception of SOGI asylum seekers as subjects entitled to the asylum status. The study will have an approach of qualitative analysis and will take in consideration different academic studies on the topic of LGBTQ+ asylum seekers. Despite the fact that the first chapter of this thesis contains an anthropological and cultural analysis of the perception of the legal evaluation of SOGI asylum seekers, most of the analysis will be based on the qualitative analysis of previous cases judged by international and national courts. Moreover, in the analysis of these cases, there will be a particular focus on the comparison between similar categories of asylum seekers. In addition to that, the researches of this study have been conducted by interviews. Specifically, the interview technique employed is what has been defined as “semi-structured/semi-directive interview”¹⁰. This kind of interviews has been selected for the “good balance between structure and flexibility”¹¹; indeed, due to the lack of homogenous and precisely equal question during the process of evaluation of SOGI asylum seekers, this technique allows to furtherly analyze certain aspects relevant for the study while keeping similarity in the typology of questions. Despite the fact that such interviews have not been conducted directly in presence of SOGI asylum seekers – both for privacy reasons and delays due to the closure of NGOs during the Covid-19 pandemic, a degree of symmetry has been observed in both cases interviewed. Specifically, both subjects interviewed have several years of experience in supporting SOGI asylum seekers along the process of asylum application and work for non-governmental associations. In both cases, several questions have been asked concerning the typology of colloquial through which SOGI asylum seekers undergo, what kind of questions can be considered as inappropriate in these situations and what kind of obstacles inappropriate questions entail. The two associations have been chosen because of the national context within which they operate, specifically Italy and Sweden. The choice over these two countries is due to the differences that, notwithstanding their membership to the European Union, present from a cultural and immigration perspective: on one hand, Italy is a country with many arrivals from different countries¹², on the other hand Sweden is far from any of the most important migration routes. Similarly, according to the ILGA ranking of most LGBTQ+ friendly countries in Europe, Sweden appears to rank a much higher position in comparison to Italy¹³. Such differences allow to further analyze and elaborate the results of the interviews as well as to appreciate potential similarities between the two contexts. Finally, notwithstanding the author of this study does not have a legal background and the strong legal elements of this thesis, it is important to point out that this has allowed a different and original approach – free from an already interiorized juridical way of thinking - on the whole topic of SOGI asylum seekers all along the

¹⁰ Morin Jean-Frédéric, Olsson Christian & Atıkcı Ece Özlem, “Research Methods in the Social Sciences – an A-Z of key concepts”, *Interdisciplinarity*, Oxford University Press, 2021, p.151

¹¹ Ibid.

¹² UNHCR, “Operational Data Portal – Refugee Situations Italy”, <https://data2.unhcr.org/en/situations/mediterranean/location/5205>

¹³ ILGA Europe, “Rainbow Europe 2021”, <https://www.ilga-europe.org/rainboweurope/2021>

thesis.

Chapter 1 – SOGI Refugees and their credibility: when constructed stereotypes meet legal testing.

This chapter aims to introduce and analyze the main problematics of Sexual Orientation and Gender Identity (SOGI) applicants in the international asylum system. Before focusing on the specific challenges that this category of asylum seekers encounters, I will briefly illustrate the contemporary thought which characterizes the need of a proof of applicants' claims.

Based on the theoretical framework provided by the text of Fassin and Kobelinsky¹⁴ - about the "Moral Economy" of the asylum system, the chapter will briefly cover the evolution of this principle and it will illustrate the origins of the concept of a fake applicant. The chapter will then focus on the practices employed within the asylum evaluation towards SOGI applicants. After having briefly introduced the topic by a comparison between religious and SOGI applicants, this research intends to illustrate several procedures established to determine the role of the body in proving asylum claims based on sexual orientation. Within this part, some attention will also be given to the role of the cultural expert and cultural test, as a guiding, parallel element in the process of evaluation of SOGI refugees. Finally, we will describe the anthropological and methodological flaws intrinsically connected to the bodily evaluation of SOGI applicants. This chapter will also utilize a variety of legal examples from different European countries which present interesting source of reflection to better illustrate the concepts treated.

The Moral Economy of the Asylum System and the False Refugee

Migrant flows represent an extremely important topic within different countries' politics. As the Danish government has recently shown by revoking residence permits to Syrian refugees¹⁵, the right to seek the refugee status has been changing depending on the political contexts and still raises comprehensive debates on the criteria considered in the evaluation process. On a metaphorical level, refugees can be seen as external agents to the "body" of a specific State which employs his immune system to select the "positive external agents". Out of metaphor, the immune system applied by the State can be individuated in the principle of the moral economy described by Fassin and Kobelinsky¹⁶ as being an expression of political power over a part of the population, namely asylum seekers. Such principle appears more explicit if it is considered as an application of what Foucault described as State biopower – the rule of society as a "social body which needs to be protected in a quasi-medical sense"¹⁷, migration policies rigorously aim at regulating the access and living of alien people to a state according to its nation needs. Such regulation has been changing across time and space and it has affected different categories of asylum seekers, including SOGI applicants.

¹⁴ Fassin Didier & Kobelinsky Carolina, « Comment on juge l'asile : l'institution comme agent morale », *Revue Française de Sociologie*, 53-4, 2012, p. 660

¹⁵ McKernan Bethan, "Denmark strips Syrian refugees of residency permits and says it is safe to go home", *The Guardian*, 14th of April, 2021, <https://www.theguardian.com/world/2021/apr/14/denmark-revokes-syrian-refugee-permits-under-new-policy>

¹⁶ Fassin Didier & Kobelinsky Carolina, « Comment on juge l'asile : l'institution comme agent morale », *Revue Française de Sociologie*, 53-4, 2012, p. 660

¹⁷ Ane Apatanga Gervin, "Biopower and Migration: A Biopolitical Perspective on anti-migration policies", *IISTE*, Vol.7, No.20, 2017, p.39

In Fassin and Kobelinsky study, the concept of “Economie Morale” indicates the totality of those values and sensibility perceived in the approach of a social topic like immigration¹⁸. However, moral economy is influenced by socio-political developments. Thus, due to the worldwide economic crisis in the 70s and the end of the Soviet Union in the 80s, the international asylum system assisted to a gradual restriction of immigration and to a consequential change in values of the moral economy of it. According to Fassin and Kobelinsky, the case of France has been a good example of this shift. Before the migration reforms aiming to restrict the access to refugee status, obtaining a contract of work was easier than having the status of refugee and even the individuals entitled to demand asylum would settle for the first. After the reforms, the situation drastically changed and the growing number of applications for refugee status should be interpreted as the only instrument - besides the access to a country towards working contracts - apt to guarantee those rights established by the Geneva convention, signed by France¹⁹. Nevertheless, the consequential booming trend in the applications for asylum has generated suspicion towards migrants for unjustly demanding the refugee status for economic reasons. This has reoriented the moral economy of the asylum system and of its institutions towards the idea of “false refugees”²⁰ and the necessity to reveal them. In France, for instance, such sentiments have been deeply institutionalized along the years with an exponential drop in the acceptance of asylum demands²¹.

As clearly identifiable in the French example, specifically in the Code de l’entrée et du séjour des étrangers et du droit d’asile, article L.741-4, this has been translated with the legal possibility of refusing any application for asylum which is deemed to be based on a fraudulent demand or presented with the purpose to nullify an order of expulsion from the State²². It is also relevant to highlight that, on an international level, the concept of bogus applicants has further been enforced by two other factors. In the first place, the rhetoric of spreading human rights in other areas of the globe – the stereotypical “gift from the west to the rest”²³ – entails the improvement of human rights in these areas and, therefore, a lack of motivations in forced migration which imposes again to discover those fake applicants. In the second place, the general “comfort”²⁴ of thinking that the legal asylum system currently applied adequately depicts refugees’ experiences, as well as the comfort of advocates in implicitly legitimizing this system whenever they defend asylum seekers’ cases, contribute to reinforce the idea of the existence of bogus applicants. Therefore, the moral economy of the asylum system is characterized by the dual research of culpability and truth among the refugee seekers.

As such, like Olivia Guaraldo’s analysis highlights²⁵, the totality of administrative and jurisdictional practices inevitably tends to furtherly victimize the migrant subjects. This should not be perceived as an attempt to govern refugee seekers by emphasizing the inferiority of their status but as a “symbolic violence” intrinsic to most legal practices²⁶. Indeed, such processes assess that the human being is an autonomous and independent subject, hence anyone that does not comply with this archetype is

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Belorgey, Jean-Michel. *Le droit d’asile* Paris: LGDJ, 2013, p.97

²³ Toufayan Mark, “Suffering the Paradox of Rights? Critical Subaltern Historiography and the Genealogy of Empathy”, Oxford University Press, 2014, p.174

²⁴ Bruce-Jones Eddie, « Death Zones, Comfort Zones : Queering the Refugee Question », *International Journal on Minority and Group Rights* 22, 2015, pp. 101 – 127 (p.108)

²⁵ Guaraldo Olivia, “Prefazione – Fra corpi e storie: ambiguità e potenzialità del dispositivo SOGI”, *Migranti LGBT – Pratiche, politiche e contesti di accoglienza*, edizioniETS, 2020

²⁶ Guaraldo Olivia, Ibid.

considered weak and in need of protection. Only by proving the truth about someone's vulnerability, it is possible to gain access to this protection²⁷. Being rooted within this anthropological postulate, the jurisdictional administration of the asylum system is then shaped on the collection of concrete proofs. As mentioned in Fassin and Kobelinsky's study, these might include several documents such as the card of a political party, medical or psychological certificates, as well as newspaper articles regarding clashes to which the applicant declares to have participated²⁸.

It is interesting to remark that the process of collecting proofs occurs despite the fact that in the Geneva Convention²⁹ – the founding legal document of the contemporary concept of refugee – there is no indication concerning the necessity of determining an applicant's demand quality³⁰. It also does not establish what is required as evidence that proves that one's fears persecutions³¹. However, in addition to the requiring of concrete proofs, the evaluation process usually also entails that persons seeking refugee status might be individuated in the provision of a convincing and detailed narration of their case. Particularly, this is demanded to those asylum seekers whose application reasons are difficult to evaluate, like the SOGI refugees. Indeed, like Kobelinsky states in her paper³², as the administration of proofs is fundamental in the asylum demands, whenever the applicants base their claim on reasons of sexual orientation, it is the sexuality itself and the risks that this characteristic entails that must be proven. Given the difficulty that this task entails, even more whenever the asylum request is based not on persecutory events that have happened, but exclusively on the fear of persecutions, it is important to further illustrate some of the administrative analysis aiming to determine whether the candidate is really homosexual. Indeed, the assessment of someone's sexuality has been for a very long time – and still is in some cases – the fundamental element to guarantee asylum status to SOGI asylum seekers within the international asylum system's moral economy. In order to better understand the form of evaluation process which SOGI applicants face, it is interesting to compare such category of asylum seekers to the one of religious asylum seekers.

Religious Applicants, SOGI Applicants: a test to evaluate their belonging to a specific group?

In addition to asylum requests based on religious motifs, those on grounds of sexual orientation or gender identity are very rarely accepted due to the difficulty of proving what is claimed. Before analyzing the evaluation process of SOGI applicants, it is important to briefly introduce the dynamics of asylum applications based on religious grounds and then compare the two typologies of assessment methods applied in these different categories. Indeed, both categories share the fact of basing their asylum demand on difficult grounds to be proved: how is it possible to assess that an individual belongs, or is perceived as belonging, to a specific religious group? In light of this question, it is worth stressing the relevance, especially during what it had been recently defined as migration crisis in the Italian context, of the "cultural test, [...] a set of pre-established questions a judge [or the asylum officer] has to answer in order to decide whether or not to accept a cultural claim made by a migrant

²⁷ Ibid.

²⁸ Fassin & Kobelinsky, p. 670

²⁹ Clapham, Andrew, Paola Gaeta, and Marco Sassòli. *The 1949 Geneva Conventions : A Commentary* First edition. Oxford: Oxford University Press, 2015.

³⁰ OHCHR, "Convention relating to the Status of Refugees", 28th of July, 1951, <https://www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx>

³¹ Belorgey, Jean-Michel, p.159

³² Kobelinsky Carolina, "L'asile gay : jurisprudence de l'intime à la Cour nationale du droit d'asile", *Droit et Société*, 82/2012

or members of cultural minorities”³³.

The Cultural Test is composed of three parts: the first part (the *Objective Evaluation*) wants to examine the requirements which allow the acknowledgement of a cultural practice by investigating its objective characteristics; the second part (the *Subjective Evaluation*) aims to individuate the association between the culture declared and its authentic manifestation in several personal identities; and the third part (the *Relational Evaluation*) which should assess the relation between cultural needs in connection with those of others, namely the largest part of the fleeing society³⁴. In this test, the cultural expert plays a fundamental role in making the cultural needs of the applicants visible to the judge who evaluates their asylum demand. This seemed to be justified by the fact that “if the applicant would have kept being discreet and would have not assumed a displayed behavior, they would have not being threatened”³⁵. Such levels of discretion, especially in the personal religiosity of an individual, are highly subjective and difficult to establish. Indeed, the epistemological condition of faith has got to be conceived as conjectural and, thus, less tangible than the corporeality of biology and race³⁶. However, this approach could be challenged by stating that religion can be seen “as something inherited or naturalized through habitus and which is manifested in bodily practices”³⁷. Therefore, demonstrating the belonging to a religious group without having to prove a real belief in a faith, might result easier than in the case of SOGI asylum seekers because usually religion entails the knowledge of symbols, rituals and behaviours that follow widespread traditions. On the contrary, proving the true sexuality or its social perception seems more complicated since it tends to be connected more with aspects that intertwine both specific cultural perception that vary region by region and feelings which changes from an individual to another.

Even in the case of Queer applicants – notwithstanding the absence of a similar test for proving somebody’s sexuality – a similar approach seems to also have been applied towards SOGI applicants and, as Kobelinsky states in her paper, in the conception of homosexuality as something visible on the body of the asylum seeker.³⁸ Indeed, the body has been the meter to measure the credibility of asylum claims based on SOGI reasons and this has been translated in different legal-administrative procedures. This was the case, in 2010, in the *HJ and HT v Home Secretary*³⁹ case at the Supreme Court of the United Kingdom: after two men - an Iranian and a Cameroonian citizen - had been refused the refugee status on the grounds of their sexual orientation, as they would not have suffered persecution if they had concealed their sexuality. The appeal pursued by the two applicants was based on the assessment of risk if they would had to go back to their countries of origins. Instead of the aforementioned “Cultural Test”, it was decided that – in order to establish the risk of threat the two applicants could risk by going back - a “Discretion Test” had to be performed. The latter would have to be applied to answer why the applicants should have hidden their sexuality: specifically, if this had been done only for avoiding social humiliation (and not for more serious fears of persecution). As

³³ Ruggiu Ilenia, “The Cultural Test as Cultural Expertise: Evolution of a Legal-Anthropological Tool for Judges”, *Laws*, 2019, p.7

³⁴ Ruggiu Ilenia, p.10

³⁵ Belgery, Jean-Michel, p.153

³⁶ March Andrew F., “Speech and the Sacred: Does the Defense of Free Speech rest on a Mistake about Religion?”, *Political Theory* 40, no. 3 (2012): 319-46.

³⁷ Idib. P.7

³⁸ Kobelinsky, p.598

³⁹ European Database of Asylum Law, “HJ and HT v Home Secretary”, *UK Supreme Court*, July 7th, 2020, <https://www.asylumlawdatabase.eu/en/case-law/uk-supreme-court-7-july-2010-hj-iran-v-secretary-state-home-department-2010-uksc-31>

such, the claim would have resulted invalid.⁴⁰ Nevertheless, the adoption of this test, aiming to evaluate how much the applicant's sexual orientation could be hidden or was manifest, was put aside by the UK Supreme Court: indeed, as stated in the final judgement, "sexuality [...] is a characteristic that may be revealed, to a greater or lesser degree, by the way the members of this group behave. In that sense, because it manifests itself in behaviour, it is less immediately visible than a person's race. But, unlike a person's religion or political opinion, it is incapable of being changed. To pretend that it does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are"⁴¹. Hence, the question here was if it was fair to return the applicants to their country but there was no doubt that both sexual orientation and gender "dysphoria"⁴² could be seen or perceived in the SOGI asylum seekers.

The research of proofs on the bodies of SOGI applicants has been carried out also through medical-legal procedures like penile plethysmography (PPG) and vaginal photoplethysmography (VPG)⁴³. Such techniques require any tool which measures alterations in the dimensions of organs consequent to variations of the blood flow or of the volume of surrounding air⁴⁴ and aim to test the sexual arousal. In some European countries, like Czech Republic, this procedure has been employed in several refugee evaluation cases. Indeed, being already employed in criminal law and in civil cases, photoplethysmography has been requested by the Czech national asylum authorities⁴⁵. The employ of this method for researching proofs of their claims on the bodies of SOGI applicants has been strongly criticized. Specifically, such practices have been the object of several concerns from the UNHCR which, in 2010, has defined them as "invasive testing which raises several human rights, human dignity and ethical concerns – including the rights to privacy and bodily integrity"⁴⁶. Furthermore, the research of bodily manifestation of SOGI applicants – as a feature supposedly to be seen - can be individuated also in the asylum office employees' official responses of many cases. Indeed, certain magistrates consider to be possible to notice an applicant's homosexuality on how they appear and behave⁴⁷. As Kobelinsky reports on her study, the French National Court magistrate's comment about the case of a young Pakistani applicant denotes such belief to be very common. The magistrate would have stated that "to be honest, [the applicant] didn't look gay at all and was clearly not effeminate enough"⁴⁸. Another example of this idea of visibility in SOGI refugees applicants might be individuated in the words of a judge declaring "Vous avez une grande famille, Monsieur. Comment ça se fait qu'on ne se soit pas douté que vous êtes homosexuel ? [...] Dans vos écrits vous dites que parfois on pouvait voir dans la rue, dans la démarche... et effectivement parfois il est possible de voir"⁴⁹.

⁴⁰ Keenan, Bernard. "'Discretion Test' Redundant after Asylum Seeker's Ruling." *Socialist Lawyer*, no. 56 (2010): 30- 31.

⁴¹ EDAL, p.6, X

⁴² Here, I use the term dysphoria for the necessity of keeping the textual aside short. However, I do not agree with the employ of this medicalized word when talking about transexual people. For more info: Asher, Noa-Ben, "The necessity of Sex Change: a Struggle for Intersex and Transsex Liberties", *Harvard Journal of Law and Gender*, Vo.29, 2006

⁴³ ORAM, "Testing Sexual Orientation – a Scientific and Legal Analysis of Plethysmography in Asylum & Refugee Status Proceedings", December, 2010, <https://www.refworld.org/docid/524c0d274.html>

⁴⁴ Idib. P. 3

⁴⁵ UNHCR, "UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation", <https://www.refworld.org/pdfid/4daeb07b2.pdf>

⁴⁶ UNHCR, "The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees", September 22nd, 2010, <https://www.refworld.org/pdfid/4cff9a8f2.pdf>

⁴⁷ Kobelinsky Carolina, "Judging Homosexuality, Granting Asylum", October 3rd, 2016, <https://booksandideas.net/Judging-Homosexuality-Granting-Asylum.html>

⁴⁸ Idib.

⁴⁹ Kobelinsky, p.598

Moreover, by considering the psyche as intrinsic part of a person's totality and the body as the external borders of an applicant's subjectivity, psycho-legal test had started to be carried out as further evaluation element of SOGI asylum seekers' claimants on their sexuality. For example, in the *Case C-473/16 F*⁵⁰, a psychologist was appointed by the Hungarian Immigration Asylum Office in order to assess the applicant's personality from which his sexuality could be deduced. After a study on the applicant's personality and several psychological tests (like the Rorschach's test and Szondi's test), the psychologist determined that the test did not confirm the applicant's homosexuality⁵¹. However, the psychologist's verdict was criticized mostly due to the "projective test of personality, since the interpretation of such tests inevitably involves the use of stereotyped notions as to the behaviour of homosexuals"⁵². The final remarks on the case focus on the admissibility of a psychological test under some conditions of respect of the applicant's human rights⁵³. Nevertheless, the different processes of legal evaluation present also several anthropological obstacles which entail "racialized, gendered and classed standards"⁵⁴.

The Anthropological Flaws of SOGI Evaluation: the concept of "Gay International" and its impact on queer refugees' asylum applications

The influence of established sexual schemas are very common and institutionalized among the asylum system. Indeed, preconstructed stereotypes based on gendered criteria heavily impact both the SOGI applicants as well as the magistrates or immigration office employees conducting the interviews with the applicants. The research of the archetype becomes, in this way, doubly legitimized both by the applicants and by the interviewers. This is extremely important because, as analyzed in Mascia's study⁵⁵, "everyday decisions of front-line public workers determine individuals' access to rights, which in turn redefine public policy as experienced by those individuals"⁵⁶. For example, in Belgium – Mascia's case study – migration officers seem not to base their decisions on legal texts but rather on "their legal knowledge which is constructed through the sharing of experience"⁵⁷. This means that the outcomes of certain complicated cases are based on previous decisions and this might to repeat unfair patterns. In the context of SOGI applicants, this brings to a further enforcement of those constructed interviews which are supposed to allow immigration office workers to individuate applicants' sexuality. In addition to that, due to the deficiency of resources, migration officers might not always be aware of the verdicts established by the courts and this causes further discrepancies between "the perception of migration officers and actual jurisprudence"⁵⁸. This applies inevitably also to asylum demands based on sexual orientation and gender identity motivations: the practices employed by front-line public workers do not always reflect the advancements in the field of

⁵⁰ Reports of Cases, "Opinion of Advocate General Wahl", October 5th, 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CC0473&from=EN>

⁵¹ Idib.

⁵² EDAL, "CJEU: Opinion AG Wahl in Case C-473/16 F", <https://www.asylumlawdatabase.eu/en/content/cjeu-opinion-ag-wahl-case-c-47316-f>

⁵³ Idib.

⁵⁴ Murray, David A.B. "Real Queer: Authentic LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System", *Anthropologica*, Vol.56, No.1, 2014, pp. 21-32 (p.27)

⁵⁵ Mascia Carla, "How bureaucracies shape access to rights: the implementation of family reunification in Belgium", pp. 2127-2143, <https://www-tandfonline-com.ezproxy.ulb.ac.be/doi/full/10.1080/1369183X.2020.1726734?scroll=top&needAccess=true>

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

jurisprudence and contribute in the shaping of a right to asylum even more complicated to access for applicants than how it already is. This is also caused by the fact that often front-line public workers do not necessarily have a legal formation and, consequentially, base their decision on their personal experience⁵⁹. For these reasons, it seems important to restate the more and more fundamental role played by the cultural mediator.

A good example of what the totality of these stereotypes implies for the asylum demands grounded on sexual reasons is the fact that the migration flows based on SOGI reasons have brought to the emergence, particularly in Western countries, of another social concept called “homonationalism”⁶⁰. This principle stresses the welcoming of sexual discriminated groups as model of “West’s progressiveness and cultural superiority”⁶¹. This, within asylum evaluation interviews, has sometimes brought SOGI asylum seekers to shape their narrative in generating “racialist, colonialist discourse that impugns the nation-state from which the asylum seekers come”⁶². But what is the main reason for the diffusion of these elements?

Firstly, it is important to remember that the concept of homosexuality itself cannot be considered and codified as having the same value in the different geographic areas around the globe. Indeed, “the homosexual construct (like race) is cultural heuristic, not a precise diagnostic”⁶³. Nevertheless, the homosexuality researched at Immigration Offices entails the characteristics of what Joseph A. Massad has described as the “Gay International”⁶⁴. This concept originated in the Western universalization of “gay rights” - which took place within the last twenty-five years - and had been used especially in the context of Muslim countries.⁶⁵ The notions diffused by Western activists aim to “practitioners of same-sex contact into subjects who identify as *homosexual* and *gay*”⁶⁶. For example, such identities would constitute a foreign element in Muslim societies where, despite the presence of homoerotic practices, “there is no word for homosexuality [...] and there are no heterosexual either”⁶⁷. In the Persian sexual tradition, for example, men desire is described only as the lust for “a particular body part, as if this part was dissected from the entirety of the person’s body”⁶⁸. Specifically, Iran results a very clear example of how homosexuality is differently perceived: indeed, “in a society where same-sex camaraderie is a way of life, it is normal for two men or women to hold hands in public but such gestures are taboo for heterosexual couples regardless of their age because they denote sexuality”⁶⁹.

Another proof of the extraneity of the concepts spread by the global sexualization in similar gendered-segregated societies is that young people often declare to have practiced same-sex erotic activities and considered to be “not heterosexual or homosexual but, rather, sexual”⁷⁰.

⁵⁹ Ibid.

⁶⁰ Murray David A.B.

⁶¹ Murray David A.B.

⁶² Murray David A.B.

⁶³ Jeffery John Austin, *Two Behavioral Hypotheses for The Evolution of Male Homosexuality in Humans* – “The Evolution of Sexuality”, Springer International Publishing, 2015, pp.207 – 219.

⁶⁴ Massad, Joseph. "Re-Orienting Desire: The Gay International and the Arab World." *Public Culture* 14, no. 2 (2002): 361-86.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Babayan Kathryn and Afsaneh Najmabadi, “Islamicate Sexualities”, *Chapter 8 – Types, acts or what? Regulation of sexuality in nineteenth-century Iran*, Harvard University Press, London, 2008, p.276 (pp.275 – 290)

⁶⁹ Papan-Matin Firoozeh, “The Case of Mohammad Khordadian, an Iranian Male Dancer”, *Iranian Studies*, Vol.42, No.1, February 2009, pp.127 – 138 (p.137)

⁷⁰ Mahdavi, Pardis. "Passionate Uprisings: Young People, Sexuality and Politics in Post-Revolutionary Iran." *Culture, Health & Sexuality* 9, no. 5 (2007): 445-57 (p.451)

In such different perceptions of homosexuality, the concept of Gay International strongly influence the way in which SOGI applicants' asylum demands are shaped. As a proof on the influence of this anthropological aspect over the asylum system, it suffices to stress that, in order to grant the refugee status based on SOGI motivations, the Geneva Convention imposes two conditions to asylum applicants: they must declare their homosexuality and "manifest it in their outward behaviour"⁷¹. Because of the cultural differences in comparison to the idea of homosexuality within the western world, asylum seekers might not declare to belong to that specific social group, as required by the Geneva Convention, and compromise their asylum request. The declaration and manifestation required by the Geneva Convention turns out to be a fundamental element of the way in which the Geneva Convention is applied on the asylum demands of SOGI applicants. In these regards, it is worthy to remark the fact that it was only in 2000s that LGBTQ+ individuals have been recognized as a social group entitled to international protection, as stated by the Geneva Convention. Moreover, the very first official guidelines of the UNHCR on this matter has been published only in 2012 and still does not seem to tackle the anthropological issues raised in this chapter⁷². Notwithstanding the disputable mechanisms of the assessment of asylum seekers, it is worthy to mention – in 2000 – the case of an Iranian man which never publicly claimed his homosexuality but to whom was granted asylum because he was perceived as such in his country of origin⁷³. This case represents an extremely interesting source for thinking how to reframe SOGI asylum demands assessment not basing it on the jurisdictional attempts to discover an applicant's sexuality but more on the perception of the social context from which the applicant is fleeing. With this purpose in mind, the next chapter of this study will attempt to contextualize more in details the Geneva Convention and the identification of SOGI individuals as entitled to the refugee status.

Chapter 2 "SOGI Asylum Seekers and the Geneva Convention"

An Introduction to the Refugee Concept

After the atrocities of War World 2, the international community assisted to the birth of several global treaties which aimed to guarantee protection to the number of people which had been deracinated by their home countries during the conflict. A first attempt to provide a remedy to that situation could be individuated in the 1948 Universal Declaration of Human Rights which, within Article 14, stated that "Everyone has the right to seek and to enjoy in other countries asylum from persecution"⁷⁴. Built over this specific article of the declaration which - as such - lacks of legally binding terms, the UN

Convention of the Refugee took form in 1951 as legal, international instrument.⁷⁵ At the moment of

⁷¹ Kobelinsky, "Judging Homosexuality, Granting Asylum"

⁷² UNHCR, "Guidelines on International Protection No.9", October 23rd, 2012, <https://www.unhcr.org/509136ca9.pdf>

⁷³ Kobelinsky, "Judging Homosexuality, Granting Asylum"

⁷⁴ Universal Declaration of Human Rights, *Institut de Recherche en Afrique*, 2013

⁷⁵ Hansen–GammeltoftThomas& Hansen–GammeltoftHans, "TheRighttoSeekRevisited.Onthe UNHumanRights Declaration Article 14 and Access to Asylum Procedures in the EU", *European Journal of Migrant Law*, 10 (2008), pp.439 - 459

its creation, the Convention was meant to be applied by the signatory States in order to provide asylum only to the people fleeing from Europe and from the events which happened before 1951⁷⁶. However, with the additional Protocol of 1967, these limits were abolished and the right to demand asylum was applied to people from all the world as well as at any time⁷⁷. Besides the fact that its principles have to be applied without discrimination, the Convention sets forth in clear terms how to define a refugee. Specifically, Article 1(A,ii) states that a refugee is someone “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”⁷⁸.

As Tuitt has remarked⁷⁹, the Convention’s definition of refugee is based on the attempt to use international law to limit as much as possible the “costs of displacement”⁸⁰ and, consequentially, it implies an extremely selective concept of the refugee persona that can be applied only to few categories. For example, as it is formulated, Article 1 of the Convention does not include people targeted by economic crisis, civil conflicts and natural cataclysms. There are nonetheless some exceptions: it is the case of “refugees *sur place*”⁸¹ which are individuals who did not fit the definition of refugee when they leave their country of origin but that, following some political or social changes in their country of origin, do have acquired the needed characteristics. Indeed, on a concrete level, people applying for the refugee status need to prove that their demand is built on five conditions which are: *a*) the impossibility or unwillingness to come back to their home country, *b*) due to persecution (or fear of it), *c*) by the hand of the government or other subject which the government cannot handle, *d*) on the grounds of *e*) one of the elements expressed within the Convention.

Thus, it seems clear that to bring evidence of all these requirements can be a hard task to accomplish. The difficulty seems particularly hard to address whenever it concerns the proofs of “persecution or well-founded fear of it” and whenever such persecution happens because of motivations connected to one of the criteria before mentioned. A first obstacle can be found in the definition of these two factors. In fact, despite the fact that the refugee definition provided by the Convention is applied in a very selective way, it is worthy to remark that there is no clear and universally accepted signification of what should be intended as “persecution or fear of being persecuted” and that should be at the base of asylum seeker’s application. The only clarification on this merit can be individuated in Article 33 of the Convention which describes a persecution as any form of threat to the life or the liberty of an individual, as well as other human rights violations based on the reasons abovementioned.

Moreover, the inclusion of the words “well-founded fear of being persecuted” within the Convention presents another complicated element in their application. Indeed, if on the one hand the requirements

that the Convention establish to recognize the refugee status are extremely precise - to the point that they might be considered as restrictive - on the other hand the concept of “well-founded fear of being persecuted” presents more nuanced aspects.

⁷⁶ UNHCR, Introductory Note to the Convention and Protocol Relating to the Status of Refugees, Geneva, December 2010, <https://www.unhcr.org/3b66c2aa10>, p.4

⁷⁷ Ibid.

⁷⁸ Convention and Protocol Relating to the Status of Refugee, 1951, Geneva

⁷⁹ Harvey Colin, “False Images: The Law’s Construction of the Refugee. Book Review”, *Journal of Refugee Studies*, Vol. 10 (4), p.507

⁸⁰ Ibid.

⁸¹ UNHCR, “Refugee Protection and International Migration”, <https://www.unhcr.org/4a24ef0ca2.pdf>

Indeed, the concept of fear presents a subjective part which will have to be taken in account during the process of evaluation of an asylum seeker⁸²: this means that the authorities responsible for the assessment will have to consider the personality traits of the individual under evaluation, as well as his or her personal experiences, personal interpretations of the facts and of the belonging to a specific group⁸³. At the same time, the need of well-founded reasons has to be interpreted as an objective counterpart to keep in account when analysing asylum seekers' demands. This means that the national authorities responsible to evaluate the application will not judge the general situation of the country of origins but they will put in this context the statement of the asylum seeker⁸⁴. In this way, the authorities responsible to assess the case can base their judgement on less abstract grounds.

Whenever focusing more the subjective or objective vision of the Geneva Convention to the cases of SOGI asylum seekers, the legal assessment employed can also constitute the reason for which SOGI refugees often go through evaluation process which are not always conform to the UNHCR Guidelines on International Protection No.9⁸⁵. Such guidelines, specifically conceived for the protection of SOGI asylum seekers, highlight the importance of well approaching the forms of persecution and fear of persecution towards queer applicants since this might shape interviews in appropriate or inadequate ways. Indeed, as it has already described in the first chapter of this study, often the assessment process has had stereotypical criteria of evaluation as well as illegal medical testing of the asylum seekers' sexuality. Moreover, the subjective and objective required aspects of the fear of persecution have been criticised on the considerations that – even if a “fear of persecution were to be well-founded from an objective standpoint”⁸⁶ – the applicant might not mention his own subjective fear and that this requirement might exclude people who do not have the intellectual means or are incapable to express their fear.⁸⁷ This is the case, for example, of post-traumatic victims or children. In addition to that, it is worthy to remark that, due to the lack of data and anthropological studies, it might not always be possible to have a clear knowledge of the factors of SOGI applicant's home country that cause “well-founded fear of persecution”, such as the legal system in use or the safeguarding instruments at disposal. Because of the common SOGI applicants' impossibility to bring any forms of evidence, the UNHCR recommended that – in these situations – the examiner should make his decision only on the asylum seeker's declarations⁸⁸. A reason for the current difficulties in observing and correctly applying the above mentioned guidelines can be individuated in the recent timeframe during which these guidelines appeared as well as the arising on an international level of the question of LGBTQ+ rights. Indeed, having the topic of LGBTQ+ rights emerged only during the last part of the 21st century, it appears plausible that certain aspects of law – such as queer migration – might not work as they should. In these regards, suffice to think how extremely recent certain

⁸² UNHCR, “Guide des procédures et critères à appliquer pour déterminer le statut de réfugié au regard de la Convention de 1951 et du Protocole de 1967 relatifs au statut des réfugiés”, 40,

<https://www.unhcr.org/fr/publications/legal/4ad2f7fa383/guide-procedures-criteres-appliquer-determiner-statut-refugie-regard-convention.html>

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ (Already Cited in Chapter 1) 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”, 2012,

<https://www.refworld.org/docid/50348afc2.html>

⁸⁶ International Commission of Jurists, “Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioners' Guide”, February 2016, <https://www.refworld.org/docid/56cabb7d4.html>, pp.1 – 301 (p.57)

⁸⁷ International Commission of Jurists, p.57

⁸⁸ International Commission of Jurists, p.68

moments of sexual liberation have been for the international queer community. For example, it is worthy to mention that it was only in 1990s that homosexuality was removed from the “International Classification of Diseases”⁸⁹ and it is important to remark, as analysed by Redman⁹⁰, the great impact that the recent legalization of same-sex marriage in 2000s had on society’s attitudes towards homosexuality.

However, if one of the first passages to recognize the refugee status is to evaluate the level of persecution – or risk of persecution – another difficulty relies in the proofs that such persecution happens on the base of nationality, race, religion, political opinion or on the membership to a specific group. In particular, for what concerns specific group, this appears to be very difficult for SOGI applicants since “unlike other traditionally oppressed groups, sexual orientation is not necessarily a visible characteristic; it has to be revealed and is likely to be experienced for some time in isolation and secrecy”.⁹¹ However, once again, the main problem in addressing this question stems from the fact that the Convention do not provide a clear definition of a specific “social group”. Therefore, before keeping analysing how the Refugee Convention is applied in relation to SOGI demands, it is worthy to focus on the interpretations of this concept and on which basis LGBTQ+ people might ascribe to a “social group” category. In order to better clarify the different observations and problematics, it is useful also to compare the alleged membership to a social group of SOGI asylum seekers to another similar case, namely the one of women seeking asylum because of their gender. Such comparison will allow to put in evidence the main difficulties in assessing when and how a social category might be ascribed to the definition of social group. Indeed, sharing many elements in common – such as the great quantity of people that both gender and sexuality might entitle to asylum as well as the complicated cultural matters attached to these features – women and SOGI legal comparison will contribute in furtherly studying the problematics of the evaluation process and on the reasoning of how to readdress it.

SOGI Asylum Seekers as Social Group

The text of the Convention does not provide any definition of what a “social group” is. The only reference can be found in the “travaux préparatoires” which describe how, in addition to the grounds already explained in Article 1 of the Convention, “the Swedish amendment sought to add the further ground of membership of a social group”⁹². Because of the blurred concepts that the classification of

⁸⁹ World Health Organization, “Stop Discrimination against Homosexual Men and Women”, 17th of May, 2011, <https://www.euro.who.int/en/health-topics/health-determinants/gender/news/news/2011/05/stop-discrimination-against-homosexual-men-and-women>

⁹⁰ Redman Shane M., “Effects of Same-Sex Legislation on Attitudes toward Homosexuality”, *Political Research Quarterly*, Vol.71, No.3, September 2018, pp.628 - 641

⁹¹ Berg Laurie; Millbank Jenni, “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants,” *Journal of Refugee Studies* 22, no. 2 (2009): 195-223

⁹² UNHCR, “The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis”, p.236, https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html?cf_chl_jschl_tk=36e88369e9546ddb731533276bd1d432e048cb-1624296428-0-Aa6izneO1inXMbOIWpqwVqZiNhYUjtgg6P7DkVIQzsU2XaU-PF9suEF5vYBvihCamDimR1IRK1rG8JfKM4_4MCsRLICWK_kzmVftaOMtliScg2MMe44EZWulbFBkPFKOtIILfwp24meoH5_3vQr4crhXELR8SDRdjv3A0L6YpBPqvL-pTUAfEtfsDPjhd6RV9cv0cmCojaZ82VhiT4xir-lLkQQYQ1ql-GhV3HfKh6ngfH9keBF5enySP_ZN4x_d56PaWeKg70thv0iJ5X0gOITxiQw4SvpAEx2GoR4gvhD4xIFDg2PVSUp0MyB4cZPO_scmxDb6QgPF3-fhFOiFCW8TDjHf9XcDQw87HJNcnQu3MZW3N-iuOH3KNnMLySNlfP8BaFYAKoP4unmXgENs9WEURp84N3w761j3sQ1Fa8EqX0ElDb7al_ZBZ2uyGA7MjnPe80XznKe_ZaLk_xlWNh6KnzKNnQCpGtTDSx28rOPj-4MLsFi6F97FtCBsoX1KmHQU2c24WA6HXHKetgyuk6oUZ4SltSIK3gc_FLGyIALG

social group can cover, it has been defined as an “amorphous category”⁹³. In particular, it is worthy to remark that “Courts and jurists have taken widely differing views as to what constitutes 'membership of a particular social group' for the purposes of the Convention [...]. In the result, courts and tribunals [...] have given many decisions which cannot be reconciled with each other, having regard to their material facts.”⁹⁴.

In order to address this ambiguity which characterizes the concept of social group, the Office of the United Nations High Commissioner for Refugees (UNHCR) has tried to provide a first, clearer interpretation by defining a social group as a category of “persons of similar background, habits or social status. [...] A claim of to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality”⁹⁵. Notwithstanding this clarification, the legal bounds to which the definition of social group can be applied seem still very flexible since the only condition that the asylum seeker needed to prove is to have a “similar background” to a group of persons⁹⁶.

Nevertheless, the lack of a clear definition can be seen also as a specific political choice made back at the time of the Convention’s ratification. Indeed, as stated in Helton’s article about refugees’ membership to a social group⁹⁷, the inclusion of membership to a social group within the criteria to apply for the refugee status should be considered not like an attempt to correct previous oppressions of social groups but instead as a way to safeguard people from forthcoming persecutions. Specifically, Helton defines the addition of the social group category as “meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up.”⁹⁸ These motivations are perfectly exemplified by the case of SOGI applicants, an asylum seeker category which has started to appear only several years later the ratification of the Convention and following the evolution of certain societies toward a more LGBTQ+ friendly behaviour. As a result, at the end of the last century, different European countries had to deal with asylum seekers’ application based on SOGI motivations and whether they could fit in the definition of social group. First legal decisions in this sense are worthy to be remarked like the one expressed by the Federal Republic of Germany’s Court in the 1980s⁹⁹. The verdict, regarding an Iranian asylum seeker who identified as homosexual, granted him the refugee status since homosexual people were judged to constitute a specific social group. In particular, the Court declared that the pivotal element to acknowledge a social group can be individuated in whether a community perceives such group as intolerable – like in the stigmatization process of the Iranian society towards homosexuals¹⁰⁰. Similarly, in the *Binbasi* case, the United Kingdom’s Court considered that a particular social group had to be characterized by shared and unchangeable features¹⁰¹. Despite the fact that, eventually,

⁹³ Dimopoulos Penny, "Membership of a Particular Social Group: An Appropriate Basis for Eligibility for Refugee Status," *Deakin Law Review* 7, no. 2 (2002), pp. 367-386 (p.368)

⁹⁴ Ibid. p. 368

⁹⁵ Parish T. David, "Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee," *Columbia Law Review* 92, no. 4 (May 1992): 923-953

⁹⁶ Ibid.

⁹⁷ Helton, C. Arthur, "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status", *Columbia Human Rights Law Review*, Vol.15, No.1, Fall 1983, pp. 39-68

⁹⁸ Ibid. p. 45

⁹⁹ Henes Brian F., "The Origin and Consequences of Recognizing Homosexuals as a Particular Social Group for Refugee Purposes," *Temple International and Comparative Law Journal* 8, no. 2 (Fall 1994): 377-402

¹⁰⁰ Henes Brian F., Ibid.

¹⁰¹ Henes Brian F., Ibid.

the Court did not provide the refugee status to the asylum seeker, it did recognize that LGBTQ+ people could have been considered like a particular social group as described in the statement of the applicant. Specifically, as the asylum seeker pointed out, homosexual men could fit in this definition since: “we have certain sexual and physical characteristics which we cannot change, we live together in a sexual relationship, unlike other men, we share our finances and domestic arrangements and plan our futures like married couples, we congregate socially at places where other homosexuals are to be found, we recognize and find comfort in socializing with each other, and we are identified by society at large as a group, to which epithets can be attached by way of identification, some of which, such as Gay, are neutral, others such as Queer or Poof are derogatory”¹⁰². Such definition seems fitting and applicable for also the other categories of SOGI asylum seekers. Nevertheless, the Supreme Court of the United Kingdom rejected the applicant’s demand as it considered that homosexuals could be a specific social group only if these people were living their sexuality in an open way¹⁰³. These two legal cases constitute an example of how the LGBTQ+ individuals have been categorized as a social group.

However, several critics have risen in these regards. In particular, it seems that the strains about the classification of LGBTQ+ people as a particular social group are related to the historical principles contained in the UN Refugee Convention and to the role that social perception plays as pivotal nexus in the well-founded fear of persecution of SOGI applicants. On the matter of the Convention’s historical principles, Alida Leistra individuated several motivations for which LGBTQ+ asylum seekers should not be recognized as a particular social group¹⁰⁴, specifically: the appanage of international law of interdicting in a broad sense behaviour considered immoral on religious basis, the absence of any reference to sexuality in the Universal Declaration of Human Rights and the consequential unsuitability of homosexuality in the human rights category, and lastly the respect for the “historical order”¹⁰⁵ which has been used in the moment of the writing of the UN Refugee Convention excludes homosexuality as grounding motivation for the refugee status.

Other kind of motivations have to do with the reasons why LGBTQ+ people should not be entitled to asylum as a category because of the inconsistency of their well-founded fear of persecution such as members of a particular social group. In their article, Hathaway and Pobjoy¹⁰⁶, have focused on how the concealment of the sexual orientation in the asylum seekers’ home country might be considered a rational choice taken precisely in order to avoid potential oppressions. Hence, if the potential source of external persecutions is precluded, so is the main motivation to seek asylum as member of a discriminated group. This paradox has been highlighted also by John Dyson when he commented a case about SOGI applicant for asylum. He stated “How can a gay man, who would have a well-founded fear of persecution if he were to live openly as a gay man on return to his country, be said to have a well-founded fear of persecution if on return he would in fact live discreetly, thereby probably escaping the attention of those who might harm him if they were aware of his sexual orientation? . . . [I]t might be thought that this should lead to the conclusion that, if a gay man would live discreetly on return and thereby avoid being harmed or persecuted on account of his sexual orientation, he could

¹⁰² Henes Brian F., Ibid.

¹⁰³ Henes Brian F., Ibid.

¹⁰⁴ LaViolette Nicole, "The Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward," University of Toronto Faculty of Law Review 55, no. 1 (Winter 1997): 1-42

¹⁰⁵ LaViolette, Ibid.

¹⁰⁶ Hathaway James C. & Pobjoy Jason, “Queer Cases Make Bad Law”, N. Y. U. J. Int’l L. & Pol. 44, no. 2 (2011): 315-88.

not have a well-founded fear of persecution within the meaning of article 1(A)(2) of the Convention.”¹⁰⁷. Notwithstanding the specific employ of such topics about queer asylum applicants, a development of similar issues has been addressed also in relation to other groups. In order to better understand these points, it might be useful to compare the legal problematics arisen whenever defining SOGI asylum applicants to another largely discussed category of asylum seekers, namely women as members of a particular social group.

SOGI Asylum Seekers and Women as Asylum Seekers: a Comparison

Similarly to SOGI asylum seekers, women too are denied by a clear protection from the current text of the Convention. Indeed, as stated by Alexandra Korsakoff¹⁰⁸, the main legal treaty about asylum has been built over the male (straight) experience of persecution. This is easily individuated in the fact that often, even though the text of the Convention is supposed to protect every individual with no distinction on the ground of gender, gendered patterns are applied in asylum policies and prevent women to obtain the status of refugees. For example, in the evaluation of the asylum demand itself, just like in SOGI asylum seekers’ interviews, women can be interviewed by male immigration officers which could be influenced by patriarchal power dynamics and could make problematic for women asylum seekers to talk about the specific violence they have endured¹⁰⁹. An example of this might be individuated on the diffused idea – in the asylum context – that, in political asylum seeking, women usually cover a more marginal role and that women’s actions are not connotated by the same political element as those of men.¹¹⁰ Thus, this vision is reflected also in the gendered application of the text of the Convention. In particular, as Crawley has highlighted, “It is men who have been considered the principal agents of political resistance and therefore the legitimate beneficiaries of protection from resulting persecution”¹¹¹. In addition to that, particular persecutions such as female genital mutilations and imposed weddings have not been considered for a very long time – until the beginning of the 21st century¹¹² - to fall between the five grounds of the Convention which are necessary in the asylum application¹¹³. This phenomenon embodies the representation of institutionalized cultural relativism¹¹⁴ which sees as endogenous of some cultures – and hence not really possible to be justified for asylum because of the predominance of community rights over women rights – this kind of persecutions. Therefore, when women obtain the refugee status, it is usually for other reasons but not because they constitute a particular social group per se¹¹⁵. As some authors have remarked, the lack

¹⁰⁷ Hathaway and Pobjoy, Ibid.

¹⁰⁸ Korsakoff Alexandra, “L’édifi de la prise en compte du genre dans l’identification des réfugié.e.s”, *Revue Européenne des Migrations Internationales*, 2020, 36 (4), pp.189-196

¹⁰⁹ Freedman Jane & Jarry Anna, “Introduire le genre dans le débat sur l’asile politique L’insécurité croissante pour les femmes réfugiées en Europe”, *Centre d’Enseignement de Documentation et de Recherches pour les Etudes Féministes*, Vol.12, 2004

¹¹⁰ Freedman Jane & Jarry Anna, Ibid.

¹¹¹ Freedman Jane, “Protecting Women Asylum Seekers and Refugees: from International Norms to National Protection?”, *International Migration*, Vol.48 (1), 2010

¹¹² Dilorio Tiziana “Migrazioni, Mutilazioni Genitali Femminili e Status di Rifugiato. Strategie Europee tra Corpi Violati e Diritti Ineludibili,” *Vergentis: Revista de Investigacion de la Catedra Internacional conjunta Inocencio III* 8, no. 1 (2019): 75-110

¹¹³ Freedman Jane, Ibid.

¹¹⁴ Valji Nahla, De la Hunt Lee Anne & Moffet Helen, “Where Are the Women? Gender Discrimination in Refugee Policies and Practices”, *Agenda: Empowering Women for Gender Equity*, 2003, No.55, Women. The Invisible Refugees (2003), pp. 61-72

¹¹⁵ Freedman Jane, Ibid.

of a specific gendered refugees' protection is also due to the "floodgate argument"¹¹⁶ which relies on the supposition that classifying women as a particular social group would create a too broad and problematic category since violence against women is "endemic and universal"¹¹⁷.

These elements are potentially strictly connected with characteristics of the SOGI applicants. Indeed, in both cases, the obstacles for granting asylum seekers have originated in the funding principles of the Convention. Moreover, the same vagueness and broadness that might bring to the "floodgate" effect is also at the core of the queer asylum applicants: being a non-visible feature and strongly influenced by cultural relativism, sexual orientation entails the same vagueness and consequential problematics of the particular social group constituted by women. However, both categories present also common features which have been considered adequate in the legal process of constituting a particular social group. Specifically, both gender and sexual orientation have been deemed to be central in an individual's integrity and identity within many jurisdiction, like the US for example¹¹⁸. Nevertheless, taking in consideration all the variants that concern gender and sexual orientation, it is important to stress that the definition of a particular social group does not necessarily entail the showing of immutable elements¹¹⁹: this aspect would seem to be to the detriment of the "born this way" theory¹²⁰ according to which individuals should have inherent, specific elements from the birth in order to obtain protection of their rights. In a more general way, if the immutability – and consequentially the incapability of exercising control over something – was at first judged by the national courts of Belgium, Finland, Germany and the Netherlands¹²¹ as the essential feature for recognizing the right to seek asylum of a social category¹²². However, legal examples have provided also source of inspiration for highlighting how, no matter how variable or voluntary one feature might be, if such feature touches the personal conscience there should be no reason for preventing an asylum seeker to apply for the refugee status. For example, in the case of *Inaudi* within the Canadian asylum system¹²³, the degree of mutability of the sexual orientation was not really relevant as "even if homosexuality were a voluntary condition, it is one so fundamental to a person's dignity that a claimant ought not to be compelled to change it"¹²⁴. Such statements put into the context of asylum policies the opinion of feminist and queer scholars "that all genders and sexualities are constructed and performed through daily as well as historical acts"¹²⁵. In the light of the particular social group context, identity change should not prevent either women or LGBTQ+ people's suitability to asylum if they can prove the reasons for which their identity – no matter how variable it can be – is essential to their personal experience¹²⁶.

The elements that have arisen from this comparison allow to come to different conclusions in regards of the SOGI applicants. In the first place, notwithstanding the lack of reference to either gender and sexuality, the text of the Conference should not be interpreted as strictly bounded to the historical time of when it has been conceived. Such principle has been included also by the same assembly that

¹¹⁶ Valji Nahla, De la Hunt Lee Anne & Moffet Helen, Ibid.

¹¹⁷ Valji, De la Hunt & Moffet, Ibid. p. 68

¹¹⁸ Connor Cory, "The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities," Georgetown Journal of Gender and the Law 20, no. 3 (2019): 577-604

¹¹⁹ Connor Cory, Ibid.

¹²⁰ Connor Cory, Ibid.

¹²¹ LaViolette, Ibid.

¹²² LaViolette, Ibid.

¹²³ LaViolette, Ibid.

¹²⁴ LaViolette, Ibid.

¹²⁵ Connor Cory, Ibid. p.592

¹²⁶ Connor Cort, Ibid.

developed the Convention: as it is possible to read in the Final Act, “The Conference expresses the hope that the Convention relating to the Status of

Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.”¹²⁷ Hence, already within the Convention itself, there is an important element which calls for a flexible employ of the UN Refugee Convention and that, consequentially, represents a very different appreciation of the abovementioned Leistra’s concept of “historical order”. In practical terms, this promotes the inclusion of refugees social groups whose grounds have received the deserved attention only in the last years – namely women and queer refugees. Therefore, on a similar level, the absence of sexual orientation in the Universal Declaration of Human Rights can be addressed by the fact that there are two provisions within the declaration itself which allow a wide range of interpretation: specifically, Article 1 and 2 of the Declaration which restate the equality between all human and the entitlement to all rights without any distinction¹²⁸. Moreover, in the regards of the ways through which international law could prohibit behaviours deemed religiously immoral, it is important to state that international law should be considered as “universal law [...] since states consented to it by means of treaty”¹²⁹.

From the comparison between women and LGBTQ+ people as a particular social group entitled to asylum, there is another very important element to take into account. Indeed, in both cases, it is their social perception within the society from which they’re fleeing that determine their situation. While - in the case of women refugees as a persecuted group - social perception appears to be shaped more on institutionalized and cultural levels, the same aspect impact in a different way queer applicants. Specifically, in the case of SOGI asylum seekers, this is epitomized by the fact that the concealing of the sexual orientation appears to be the element invalidating the eligibility to asylum in several states. Such impediment has been addressed also by the International Commission of Jurists which defined the concealment of sexual orientation as a proof of well-founded fear of persecution since, even if they would hide their sexuality once they returned to their country, such concealment is not a choice and fear of persecution would persist¹³⁰. However, the importance of social perception appears to be extremely relevant in the attempt that this thesis tries to make in answering how to readdress the evaluation process of SOGI applicants. Indeed, as highlighted among the UNHCR guidelines for SOGI asylum seekers¹³¹, the two approaches to determine the belonging of SOGI asylum seekers can rely either on “protected characteristics” or on “social perception”¹³². The UNHCR guidelines expressly invite immigration office workers to avoid to take decision based on stereotypical traits that might denote an individual’s sexuality¹³³. With this in mind, it is relevant the focus on the “social perception” methodology which “requires neither that the common attribute be literally visible to the

¹²⁷ Worster William Thomas, "The Evolving Definition of the Refugee in Contemporary International Law," Berkeley Journal of International Law 30, no. 1 (2012): 94-160, p.106

¹²⁸ Vitucci Maria Chiara, “The Protection of Sexual Orientation in International Law: between the principles of non-discrimination and human dignity”, *Europa Ethica*, Vol.76, Fasc.3/4, 2019, pp. 115 - 119

¹²⁹ Cismas Ioana, “Religious Actors and International Law”, Chapter I: Religion and International Law Revisited, *Oxford University Press*, 2014, pp.17 – 49 (p.22)

¹³⁰ International Court of Jurists, *ibid*.

¹³¹ UN High Commissioner for Refugees (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”, October 23rd, 2012, <https://www.refworld.org/docid/50348afc2.html>

¹³² UNHCR, *Ibid*.

¹³³ *Ibid*.

naked eye nor that the attribute be easily identifiable by the general public. [...] The determination rests simply on whether a group is “cognizable” or “set apart from society” in a more general, abstract sense.”¹³⁴.

At the light of this perspective, the next chapter will focus more into details on the process of evaluation and whether a “social perception” methodology applied to the assessing questions for SOGI asylum seekers might assume different and better legal interviews. Before this, the next chapter will define the main instruments at disposal on an European level for guarantying asylum and will specially focus on the “EU Recast Qualification Directive”. The chapter will go through the experience of two different associations which support SOGI asylum seekers, namely one Swedish and one Italian. This will result helpful in better understanding the general questions and the legal context of the interviews conducted for this thesis. In particular, the interviews will be conducted with two associations that legally support SOGI applicants. One is located in Sweden (“RFSL – Malmo”) ¹³⁵ and one in Italy (“Avvocato di Strada – Bologna”) ¹³⁶.

Chapter 3 – Heteronormativity of the European Legal Framework and the readdressing of the evaluation process of LGBTQ+ asylum seekers

Notwithstanding the UNHCR guidelines concerning the assessment of SOGI asylum seekers, the evaluation process of these applicants still entail several obstacles that are intrinsically part of the international legal framework. Specifically, this regards both the ECtHR heteronormativity application of the European Convention on Human Rights and the effects of the European Consensus on the evaluation of LGBTQ+ queer applicants. Before taking into analysis the application of the EU Recast Qualification Directive on the asylum applications of queer immigrants, it is important to further consider how the ECtHR conceives the vulnerability of SOGI asylum seekers and how this concept is applied.

Social Perception of SOGI Asylum Seekers in the European Framework: the European Court of Human Rights as an ambivalent instrument

In the same way through which social perception is determinant in defining the identity of a social group and of which it has been thoroughly discussed in the previous chapter, so the degree of vulnerability – and therefore the proportional access to protection – relies on the interrelations with other subjects. Indeed, as Mary Neal states in her article “The extent and intensity of my vulnerability at a particular moment, or with regard to a particular need or harm, may be affected by my age, my sex, my degree of capacity, my health, my social status, my wealth, and a variety of other factors. Nevertheless, even the least vulnerable human being is still fundamentally, and inescapably, vulnerable in the negative sense, since none of us can meet her basic needs and satisfy her core desires without the co-operation of others”¹³⁷.

Such principle regulates also the dynamics for which SOGI asylum seekers are considered by the European Court of Human Rights (ECtHR) as entitled to protection. According to Peroni and

¹³⁴ Ibid.

¹³⁵ <https://malmo.rfsl.se/verksamhet/newcomers-malmo-2/>

¹³⁶ <https://www.avvocatodistrada.it/sedi-locali/bologna/>

¹³⁷ Neal Mary, “Not Gods but Animals: Human Dignity and Vulnerable Subjecthood”, *Liverpool Law Review*, 2012, pp.177-200

Timmer¹³⁸ analysis of the ECtHR application of the concept of vulnerability, the Court's use of this principle is characterized for being "relational, particular and harm-based"¹³⁹. This means that, whenever valuating specific cases, the Court does not situate vulnerability in a singular subject but in the collective sphere which might develop vulnerability itself¹⁴⁰. Moreover, the ECHR would seem to perceive the concept of vulnerability as particular to a component of a group vulnerable because of particular group-based events¹⁴¹. Finally, the degree of vulnerability is based on the harm procured to a determined individual belonging to a social group: this can be shaped in different forms being stigmatization, social disadvantage or material deprivation¹⁴². For example, in the case of *L. v. Lithuania*, the ECtHR established "the positive obligation upon States to ensure respect for private life, including respect for human dignity and the quality of life in certain respects"¹⁴³ due to their position of social vulnerability.

In light of this analysis, SOGI asylum seekers might be identified as a vulnerable group entailing all the characteristics of the ECtHR's conception of vulnerability as it has been assessed in several cases¹⁴⁴. Also, SOGI asylum seekers constitute a group doubly vulnerable in the eyes of the Court. Indeed, as already stated by the Court in the case of *M.S.S. v. Belgium and Greece*¹⁴⁵, the final verdict pointed out that "In the present case the Court must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously"¹⁴⁶. In addition to this element, SOGI asylum seekers ground their demands on sexual orientation, therefore the Court will guarantee international protection on the basis of the violation of Article 2 and 3 of the ECHR. Hence, due to the lack of any mention to sexual orientation in the European Convention, it is responsibility of the Court to interpret the text to guarantee the protection of all LGBTQ+ people which transit under the legislation of a signatory state of the Convention¹⁴⁷, thus also of SOGI applicants. In these regards, several academics have been analysing how, besides the fact that the Convention is a "living" instrument which is interpreted in light of the social changes, the Court grounds its interpretation of the ECHR on the principle of "European Consensus, [the] practice of inferring whether the majority of Member States of the Council of Europe (CoE) would support a particular reading of the ECHR"¹⁴⁸. Such focus has allowed to highlight how, along the

¹³⁸ Peroni Lourdes & Timmer Alexandra, "Vulnerable Groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, Vol.11 (4), 2013, pp. 106-1085

¹³⁹ Peroni Lourdes & Timmer Alexandra, *IBID*.

¹⁴⁰ Peroni Lourdes & Timmer Alexandra, *Ibid*.

¹⁴¹ Peroni Lourdes & Timmer Alexandra, *Ibid*.

¹⁴² Peroni Lourdes & Timmer Alexandra, *Ibid*.

¹⁴³ European Court of Human Rights, *Case of L. v. Lithuania*, Application No. 27527/03, September 11th, 2007, <file:///C:/Users/Fabio/Downloads/CASE%20OF%20L.%20v.%20LITHUANIA.pdf>

¹⁴⁴ This is the case of *Genderoc-M v. Moldova, Nikolay Viktorovich BAYEV and two other applicants v. Russia or O.M. v. Hungary*. See "Cases Before the European Court of Human Rights", ILGA Europe, <https://www.ilga-europe.org/what-we-do/our-strategic-litigation-work/cases>

¹⁴⁵ European Court of Human Rights, *Case of M.S.S. v. Belgium and Greece*, Application No. 30696/09, January 21st, 2011, <file:///C:/Users/Fabio/Downloads/CASE%20OF%20M.S.S.%20v.%20BELGIUM%20AND%20GREECE.pdf>

¹⁴⁶ Peroni Lourdes & Timmer Alexandra, *Ibid*.

¹⁴⁷ Viljoen Frans, Buckley Carla M., Donald Alice, Leach Philip, "Minority Sexual Orientation as a Challenge to the Harmonised Interpretation of International Human Rights Law", *Towards Convergence in International Human Rights Law*, 2017, Vol.5, p.156-192

¹⁴⁸ O' Hara Claerwen, "Consensus, Difference and Sexuality: Que(e)rying the European Court of Human Rights' Concept of European Consensus", *Law and Critique*, 2021, pp. 91 – 114; Dzehtsiarou Kanstantin, "European Consensus and the Legitimacy of the European Court of Human Rights", *Cambridge University Press*, October 27th, 2015

years, Court's decisions about LGBTQ+ rights have been started developing a value of identity principles in defence of this social group¹⁴⁹. Indeed, as O' Hara defines in his study, "the Court has begun weaving together its various findings of European consensus in sexuality-related cases to form one, overarching European consensus in support of LGBTQ+ rights"¹⁵⁰. Such European approach has had a double effect: on the one hand, it promoted a sort of homonationalism exclusive to Europe – being the neoliberal sexual politics through which certain countries promote an image of advanced civilization compared to others - and, on the other hand, it had furtherly reinforced a specific rhetoric, already existing but still enhanced by the Court, against asylum seekers which did not take into consideration the effects on SOGI asylum seekers. As O' Hara remarks in his study, a clear example of this was the exploitation made by the Hungarian Prime Minister that in 2016 commented how the migrant crisis would have "import crime, terrorism, homophobia and a brand of anti-Semitism that sets synagogues ablaze"¹⁵¹. Nevertheless, the "European Consensus" principle applied by the Court has also emphasized another element among the Member States of the Council of Europe. Indeed, several States have been taking position – more and more often – not only against immigration but also against LGBTQ+ human rights. Surely, this impacts also the SOGI asylum seekers which happen to travel along the Balkan route towards Europe: in these cultural contexts, it appears evident the high risk of incorrect evaluation process and of further accentuating the vulnerability of SOGI asylum seekers. Undoubtedly, at the base of the communication strategy of certain CoE members States which oppose to the European LGBTQ+ identity values, it exists a "special relation between the European integration project¹⁵² and sexual equality"¹⁵³. This is the case of Hungary where, notwithstanding the words of the prime minister in 2016 concerning the risk of imported homophobia, the Hungarian Parliament has recently approved a law on the banning of LGBTQ+ contents¹⁵⁴ which – according to Amnesty International Hungary – contributes to the stigmatization of the LGBTQ+ community¹⁵⁵. Similarly, other countries have undertaken anti-LGBTQ+ actions; this is the case of Russia whose 2013 "gay propaganda" law has provided a legal model of the abovementioned Hungarian one¹⁵⁶. It seems evident that, in countries with similar approaches towards the LGBTQ+ community, SOGI asylum seekers have intrinsic problems in the recognition of subjects both as asylum seekers and as members of the LGBTQ+ community. In particular, since the limitations for the right to demand asylum have been already settled – even if with some ambiguities mentioned in the previous chapters – within the international treaty of the UN Convention of the refugee, SOGI asylum seekers might risk of encountering several problems for their refugee application. This is due to the social perception of homosexuality and its limitation

¹⁴⁹ O' Hara Claerwen, Ibid.

¹⁵⁰ O' Hara Claerwen, Ibid.

¹⁵¹ Euronews, "Hungary: PM Orban blames refugees for undermining Christian Europe", March 15th, 2016, <https://www.euronews.com/2016/03/15/hungary-pm-orban-blames-refugees-for-undermining-christian-europe>

¹⁵² As also stated in another study on the same topic by Ayoub and Paternotte, the "European Integration Project" is to be referred to a "more fluid conception of Europe which goes beyond the institutions and elites of Brussels and Strasbourg"

¹⁵³ Ayoub Phillip & Paternotte David, "Europe and LGBT rights: A conflicted relationship", *The Oxford Handbook of Global LGBT and Sexual Diversity Politics*, April 2019

¹⁵⁴ Specifically, the new Hungarian law "prohibits sharing content on homosexuality or sex reassignment to people under 18 in school sex education programmes, films or advertisement"; "Hungary's controversial anti-LGBT law goes into effect despite EU warnings", *FRANCE 24*, July 7th, 2021, <https://www.france24.com/en/europe/20210707-hungary-s-controversial-anti-lgbt-law-goes-into-effect-despite-eu-warnings>

¹⁵⁵ Rankin Jennifer, "Hungary passes law banning LGBT content in schools or kids' tv", *The Guardian*, June 15th, 2021, <https://www.theguardian.com/world/2021/jun/15/hungary-passes-law-banning-lgbt-content-in-schools>

¹⁵⁶ Amnesty International, "Hungary: proposed law a new frontal attack against LGBTI people", June 11th, 2021, <https://www.amnesty.org/en/latest/news/2021/06/hungary-proposed-law-a-new-full-frontal-attack-against-lgbti-people/>

of expression in some areas of Europe where they find themselves at the moment of the demand. For example, as the details of the case *Alekseyev v. Russia*¹⁵⁷, human rights violations and asylum incompatibility might happen since homosexuality is interpreted as “a matter of principle, because propaganda promoting homosexuality was incompatible with religious doctrines and the moral values of the majority, and could be harmful if seen by children or vulnerable adults”¹⁵⁸. Despite in *Alekseyev v. Russia* the Strasbourg Court ruled in favour of the applicant, it appears obvious that the lack of an homogeneous regulation of rights towards the LGBTQ+ community in the CoE (especially between western and eastern Europe) might constitute a potential problem for those SOGI asylum seekers in similar contexts¹⁵⁹.

Moreover, as pointed out in Ornella Odituro’s analysis, several “systemic deficiencies”¹⁶⁰ – concerning the “reception of asylum seekers and their integration”¹⁶¹ – as well as human rights violations concerning SOGI applicants seem to exist at the general level of the European Asylum System. In particular, in anti-LGBTQ+ contexts like Hungary, Odituro’s perception seems to find confirm in exemplificatory verdicts of the Strasbourg Court. For example, in *O.M. v. Hungary*¹⁶², the Iranian applicant entered in Hungary and applied for the refugee status because of his homosexuality for which criminal procedures had been started in his home country. In the process of the application for the asylum status, the Hungarian authorities have been judged by the Court to have failed in the reception of the applicant by illegally detaining him and, thus, violating Article 5(1) of the Convention¹⁶³. In addition to that the Court established that, during the detention, Hungarian authorities did not take in consideration the applicant’s sexual orientation. Indeed, in its final sentence, the Court stated that “the authorities failed to do so when they ordered the applicant’s detention without considering the extent to which vulnerable individuals – for instance, LGBT people like the applicant – were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. Again, the decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant, member of a vulnerable group by virtue of belonging to a sexual minority in Iran”¹⁶⁴.

Similarly, in *Rana v. Hungary*¹⁶⁵, the Hungarian authorities have been judged guilty by the Court for violating the Article 8 of the Convention. The case referred to a transgender refugee to which it was refused to change his name and documented sex because he did not have a birth certificate from Hungary¹⁶⁶. In these regards, the Court expressed in favour of the applicant by stating that the “State has failed to comply with the positive obligation to secure the applicant’s right to respect for his private life, in particular by not providing him with a procedure allowing him to have his gender

¹⁵⁷ ECtHR, “*Alekseyev v. Russia*”, 4916/07, 25924/08 and 14599/09,

<file:///C:/Users/Fabio/Downloads/CASE%20OF%20ALEKSEYEV%20v.%20RUSSIA.pdf>.

¹⁵⁸ ECtHR, “*Alekseyev v. Russia*”, Ibid.

¹⁵⁹ Wieland Raoul & Alessi J. Edward, “Do the Challenges of LGBTQ Asylum Applicants Under Dublin Register With the European Court of Human Rights?”, *Social and Legal Studies*, Vol. 30, 2021, pp.405 – 425 (p.419)

¹⁶⁰ SOGICA, “Sexual Orientation and Gender Identity Claims of Asylum: a European Human Rights Challenge”, *SOGICA Conference*, 7th – 9th of July, 2020, https://www.sogica.org/wp-content/uploads/2020/08/SOGICA-conference_abstracts_v8.pdf

¹⁶¹ SOGICA, Ibid.

¹⁶² ECtHR, “*O.M. v. Hungary*”, 9912/15, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-164466%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-164466%22]})

¹⁶³ ECtHR, “*O.M. v. Hungary*”, Ibid.

¹⁶⁴ ECtHR, “*O.M. v. Hungary*”, Ibid.

¹⁶⁵ ECtHR, “*Rana v. Hungary*”, Application No. 40888/17,

<file:///C:/Users/Fabio/Downloads/CASE%20OF%20RANA%20v.%20HUNGARY.pdf>

¹⁶⁶ ECtHR, “*Rana v. Hungary*”, Ibid.

identity legally recognised in the absence of a Hungarian birth certificate”¹⁶⁷. Therefore, the judgements of the Court highlight a certain degree of inconsideration towards the double vulnerability of SOGI applicants in anti-LGBTQ+ contexts.

However, the Court proceedings reveal also another relevant element in the legal perception of SOGI asylum seekers. Besides a lack of consideration of some national courts or laws in the regards of SOGI asylum seekers’ legal vulnerability, it is important to remark that most of the SOGI asylum seekers’ appeals to the Strasbourg Court are grounded on the Article 3 of the Convention – as it is possible to remark by an overview of the SOGI cases presented to the ECtHR in the last 30 years¹⁶⁸. This is probably due to the fact that, in many cases, the decision of the national court not to provide asylum status to the SOGI applicant does not analyse on an enough individualistic way the perception and the consequential risks that the applicant would encounter if he had to return to his country of origin. In these regards, despite the fact that a judgement has not yet been delivered by the Court, it appears interesting to take in consideration *L.B. v. France*¹⁶⁹. In this case, a Moroccan applicant – an intersexual person – has undertake a process of gender reassignment in France. After the decision of the *Office français de protection des réfugiés et des apatrides* to deny the refugee demand with the application of the article L.711-6 of the Code of Entry and Residence of Aliens, the applicant claimed that the decision violated Article 3 of the Convention because in the applicant’s country of origins intersexuality is not accepted and he is perceived as an homosexual. Therefore, the repatriation would cause him social condemn and the penal pursuit by the local authorities¹⁷⁰. The analysis of this case presented to the ECtHR allows to highlight the difficulties which, the use of “European Consensus” instead of a homogenous definition of LGBTQ+ human rights in all CoE member States, could cause to SOGI asylum seekers. Specifically, notwithstanding the fact that the Court did not pronounce on this specific case yet, the case presents the will of the applicant to appeal to the violation of Article 3 of the Convention which is often be interpreted in a “sexuality biased way” by the Court. Indeed, as the Court has demonstrated in other occasions¹⁷¹, it still is a heteronormative comprehension of human rights which has been employed in the Court of Strasbourg¹⁷². Indeed, many academics¹⁷³ - like Danisi and Ferreira - have identified the need to go through a process of queering of asylum law by also generally queering human rights¹⁷⁴ which, in practical terms, means to guarantee a wider access to the safeguard of queer migrants by reinforcing regional LGBTQ+ human rights. The reason of such process is the fact that “queering asylum law is not enough to protect SOGI minorities claiming asylum in Europe if human rights law supports contrasting views”¹⁷⁵. *L.B. v. France*, in particular, has several characteristic in common with another case illustrated in Danisi and Ferreira study. Here, the case of a SOGI applicant is taken as example to demonstrate the Court’s

¹⁶⁷ ECtHR, “*Ranav. Hungary*”, Ibid.

¹⁶⁸ Sexual Orientation and Gender Identity Claims of Asylum, “Table 1: Council of Europe SOGI Jurisprudence”, *University of Sussex*

¹⁶⁹ ECtHR, “*L.B. v. France*”, 67839/17, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22002-13217%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13217%22]})

¹⁷⁰ ECtHR, “*L.B. v. France*”, Ibid.

¹⁷¹ See also *X, Y and Z v. The United Kingdom*

¹⁷² Danisi Carmelo & Ferreira Nuno, “Queering Asylum... or Human Rights in Europe?”, *Accademia Diritto e Migrazioni*, February 2021

¹⁷³ See also Thoreson Ryan Richard, “Queering Human Rights: the Yogyakarta Principles and the Norm that Dare Not Speak ItsName”, *Journal of Human Rights*, pp. 323 - 339

¹⁷⁴ Danisi & Ferreira, Ibid.

¹⁷⁵ Danisi & Ferreira, Ibid.

heteronormative approach. Specifically, in *B and C v.*

Switzerland, a Gambian asylum seeker demanded refugee status on the grounds of his sexual orientation to the Swiss authorities which refused it to him because his sexuality would have probably got unnoticed by the police and population of his home country¹⁷⁶. Even if the Court eventually made important comments in favour of the defendant, thus going beyond Dyson's concept of discretion which has been illustrated in the second chapter of this thesis, it also took an unexpected position regarding the penalisation of homosexual acts. In particular, the Court expressed that "the mere existence of laws criminalising homosexual acts in the country of destination does not render an individual's removal to that country contrary to Article 3 of the Convention"¹⁷⁷.

Such approach also introduces another element which has to be considered in asylum applications grounded on the reason of sexual orientation. Indeed, in the whole process of application through which SOGI asylum seekers have to undergo, the country of origin also represents another element of social perception that has started to be taken in consideration in order to create a first distinction between more and less relevant applications based on sexual orientation.

Criminalization of Non-heterosexual behaviours in SOGI applicants' countries of origin: a wrong social perception and its consequences on the European immigration system

As the interpretation of Article 3 of the Convention made by the Strasbourg Court in the *B and C v. Switzerland* has highlighted, despite the presence of laws penalizing homosexuality in the country of origin, a SOGI applicant might be denied of the refugee status since – according to the asylum authorities of the receiving State – there might not subsist a real danger for the applicant. In order to access these information, judges usually base their knowledge on ethnographic data collected by specialists of certain geographic areas. In some cases, this has pushed national asylum authorities to reject SOGI asylum seekers' application: for example, regarding an application of an homosexual Mauritanian applicant, a French judge from the Court of Asylum refused the application because "Mauritania is very hypocritical: the law provides a death sentence for homosexuality but in fact it is tolerated among men from wealthy background and if they remain discreet"¹⁷⁸. Despite the fact that such verdicts are expressed exclusively on the basis of written reports but without usually a personal knowledge from the judge evaluating the asylum application¹⁷⁹, might make seem appropriate to question the reliability of the "list of safe countries" which is widely used within the Common European Asylum System (CEAS)¹⁸⁰. Indeed, having the ECtHR been releasing verdicts in order to guarantee the respect of asylum seekers' human rights, it appears interesting to analyze in which ways the CEAS applies such verdicts. Indeed, the CEAS has been defined at the end of 1990s as the totality of shared principles and guidelines of the European Union in order to guarantee that "asylum seekers are treated equally in an open and fair system – wherever they apply"¹⁸¹. The system is regulated by five legal tools which include the Asylum Procedures

¹⁷⁶ Danisi & Ferreira, Ibid.

¹⁷⁷ Danisi & Ferreira, Ibid.

¹⁷⁸ Giametta Calogero & Havkin Shira, "Mapping Homo/Transphobia: the Valorization of the LGBT Protection Category in the Refugee – Granting System", *ACME – An International Journal for Critical Geographies*, 2021, 20(1): 99 - 119

¹⁷⁹ Giametta & Havkin, Ibid.

¹⁸⁰ European Commission – Migration and Home Affairs, "Common European Asylum System", https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en

¹⁸¹ "Common European Asylum System", ibid.

Directive, the Reception Conditions Directive, the Qualification Directive, the Dublin Regulation and the Eurodac Regulation¹⁸². As clearly illustrated in Ferreira's analysis of the CEAS¹⁸³, recent reforms to the CEAS have concerned the concept of vulnerability (also discussed in the previous paragraph) of Article 2 of the Proposed Reception Conditions Directive¹⁸⁴ and the notion of "safe country of origin"¹⁸⁵. Indeed, on one hand the modification concerning vulnerability regarded especially the European Parliament's proposal to include LGBTQ+ asylum seekers in the group of "applicant[s] with specific reception needs"¹⁸⁶, on the other hand the revisions of the Procedures Directive entailed also the possibility to abbreviate the duration of asylum applications whenever these are considered to be based on inconsistent grounds¹⁸⁷. In the case of SOGI asylum seekers, which might flee from countries that are considered by EU Member States as "safe", this means that the authorities of the State where they present the asylum application might adopt rapid evaluation approach and eventually judge the demand unacceptable¹⁸⁸. At present, the EU countries which rely on a safe countries list are Austria, Belgium, Germany, France, Malta and Hungary¹⁸⁹. However, the spreading of the use of a safe countries list policy within EU Member States would not seem to be the result of an authentic improved situation in the countries considered as safe. Indeed, as highlighted in Cathryn Castello's analysis, the choice of which countries can be included in the list appears to have a close relation with the control of migration flows, therefore with the moral economy of the asylum system mentioned in the first chapter of this study. Specifically, the political elements to keep in consideration whenever adding a country to the safe countries list can be sum up as being "a way of imposing policies on neighboring countries who want to avoid being the weakest link in a certain subregion of Europe, (ii) the ratio of numbers of asylum seekers coming from countries of origin to their acceptance rate, and (iii) political considerations, most importantly of enlargement prospects, as a way to whitewash the human rights record of countries or origin"¹⁹⁰. In addition to these political motivations that can cause the inclusion of certain countries¹⁹¹ in the safe countries list, it is important to remind that the inclusion within this list is based on the legal framework of the singular countries of origins¹⁹². However, especially applied on the case of SOGI asylum seekers, this focus entails several problems due to the fact that persecution and human rights violations can still happen notwithstanding the lack of explicit laws criminalizing LGBTQ+ behaviours. Indeed, it might exist an incompatibility between *the law in books* and *the law in action* on LGBTQ+ people¹⁹³. South Africa, for example, is the only country in the African

¹⁸² "Common European Asylum System", *ibid.*

¹⁸³ Ferreira Nuno, "Reforming the Common European Asylum System: Enough rainbow for queer asylum seekers?", *GenUS- Rivista di Studi Giuridici sull'orientamento sessuale e l'identità di genere (special issue on SOGI asylum)*, 2018/2, pp.25 - 42

¹⁸⁴ "Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)", *Official Journal of the European Union*, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>

¹⁸⁵ As pointed out in the Directive 2013/32/EU, the notion of Safe Country of Origin relies on 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"

¹⁸⁶ Ferreira Nuno, *Ibid.*

¹⁸⁷ Ferreira Nuno, *Ibid.*

¹⁸⁸ Ferreira Nuno, *Ibid.*

¹⁸⁹ Ferreira Nuno, *Ibid.*

¹⁹⁰ Castello Cathryn, *Ibid.*

¹⁹¹ Like Serbia, Albania, Bosnia and Herzegovina, Yugoslav Republic of Macedonia, Kosovo, Montenegro and Turkey

¹⁹² Castello Cathryn, *Ibid.*

¹⁹³ Dicklitch Susan, Yost Berwood & Dougan Bryan M., "Building a Barometer of Gay Rights (BGR): A Case Study of

continent having specific laws which aims to ensure legal equality to the LGBTQ+ community¹⁹⁴. However, SOGI refugees which have applied for asylum in that country have also spoken of “false freedoms and [...] of a gulf between their legal rights and their everyday lives”¹⁹⁵. This has also been confirmed by NGOs operating in other regions: for example, the organization “Heartland Alliance International” has pointed out how in Lebanon LGBTQ+ refugees “suffer continued persecution from community members, other refugees, state actors, and sometimes even humanitarian workers”¹⁹⁶. Therefore, the application of a safe countries list entails itself several problematics for SOGI asylum seekers and in their perception as applicants.

Having established some of the main problematics in the assessment of the legal perception of SOGI asylum seekers within the European legal framework, it is relevant to now furtherly develop the findings of the interviews conducted with two different associations supporting SOGI asylum seekers in the process of evaluation. The associations taken into consideration are *RSFL*, based in Sweden and supporting SOGI applicants both in the legal procedures as well as in the integration phase, and *Avvocato di Strada*, which is located in Italy and provides legal support to people which cannot pay for legal assistance.

Sweden and SOGI asylum seekers: an objectification of the evaluation process within RSFL association

As declared in the AIDA report¹⁹⁷, the Swedish Migration Agency grounds its information on the Countries of Origin of SOGI migrants on reports produced by international organizations and other States. Moreover, asylum officers work on the continuous updating of these reports. Nevertheless, this could not prevent a misleading interpretation of certain information as it happened in the past. Specifically, this has been applied in transgender applicants coming from Iran which had their application rejected “because in Iran it is possible to undergo a sex reassignment operation”¹⁹⁸. However, the situation of trans persons seems far more complex than that. As is noted in the report ‘Unknown people’, “people who transgress gender norms in Iran are given the choice of living as criminals or go through sex reassignment surgery”¹⁹⁹. In addition to that, Sweden do not accept asylum requests from countries where the criminalization of homosexuality is not implemented²⁰⁰. Such procedures can be seen as part of the wider European strategy – as it has been in the previous paragraph - to facilitate the evaluation process for asylum seekers. However, as already mentioned, this might entail having several difficulties for SOGI asylum seekers demanding asylum in Sweden.

Uganda and the Persecution of Homosexuals”, *Human Rights Quarterly*, Vol.34, No.2, May 2012, pp.448 - 471

¹⁹⁴ Olaronke Alo, “Homosexuality decriminalization and LGBT Rights in Africa - See di African nations weyget legalization testament alias accept homosexual practices as nature of sexual orientation but not immorality”, *BBC News*, July 1st, 2020, <https://www.bbc.com/pidgin/tori-53231922>

¹⁹⁵ Marnell John, Oliveira Elsa & Khan Gabriel Hosain, “It’s about being safe and free to be who you are: Exploring the lived experiences of queer migrants, refugees and asylum seekers in South Africa”, *Sexualities*, Vol.24 (1-2), 2021, pp. 86 - 110

¹⁹⁶ Heartland Alliance International, “No place for people like you – an analysis of the needs, vulnerabilities and experiences of LGBT Syrian Refugees in Lebanon”, December 2014, https://www.sogica.org/wp-content/uploads/2019/04/no-place-for-people-like-you_hai_2014.pdf

¹⁹⁷ AIDA – Asylum Information Database, “Country Report Sweden”, 2020, https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-SE_2020update.pdf

¹⁹⁸ Jansen Sabine & Spijkerboer Thomas, “Fleeing Homophobia – Asylum claims related to sexual orientation and gender identity in Europe”, *COC Nederland/Vrije Universiteit Amsterdam*, 2011 p. 72 IBID.

¹⁹⁹ Jansen Sabine & Spijkerboer Thomas, “Fleeing Homophobia – Asylum claims related to sexual orientation and gender identity in Europe”, *COC Nederland/Vrije Universiteit Amsterdam*, 2011

²⁰⁰ Jensen & Spijkerboer, Ibid.

This can be interpreted also as a legal difficulty which finds the grounds on the perception of SOGI applicants also during the evaluation process. The association “RFSL – Malmö” aims exactly to facilitate the procedure by providing “legal, social, cultural and wellbeing support for LGBTQ+ individuals, asylum seekers and refugees who recently arrived in Malmö/Skåne”²⁰¹. All the difficulties based on social perception of SOGI asylum seekers have been witnessed also by the project manager of “RFSL – Malmö”, Karl Yves Vallin. Indeed, during our interview, he stated that it still occasionally persists asylum officers which base their evaluation process on intrusive questions²⁰² based on the private life of the applicant: “There might be some investigators that ask stupid questions but the lawyer stop them if the question is out of place”²⁰³. In the light of the problematics that still characterize the evaluation process of SOGI asylum seekers, the Swedish asylum agency approach seems to have tried to reach an impartial level by reshaping the focus of the examination not on the assessing of the applicant’s sexuality but on his credibility. Hence, as Karl Yves Vallin stated in the interview, “they [asylum officers] are going to ask [the applicant] if he is familiar with the psychological theory which basically states that there are typical steps towards the acknowledgement and acceptance of their own sexuality and coming out”²⁰⁴. Nevertheless, the psychological theory – namely the theory which assess the credibility of the application on the development of the individual’s sexual awareness - might sometimes entail difficulties concerning the sexual self-awareness of the applicant. This has been brought up also during the interview which highlighted how “an issue is represented by the fact that many SOGI asylum seekers come from a restrictive background like the Middle East or Asia and they might not be comfortable to open up on their sexualities or they might even not know how to represent themselves in the western perception of the LGBTQ+ community”²⁰⁵. Namely, as also described in the ethnographic interviews of Hector Carillo²⁰⁶, such psychological process does not always follow the order of the western representation of someone’s sexual awareness which concludes with a coming out but it might assume different orders. This has brought, for example, to the rejection of a teenager asylum seeker supported by RFSL “because he was not able to verbally formulate in sufficient detail his inner thoughts and emotions regarding his sexual orientation”²⁰⁷. Nevertheless, the psychological test is just one part in the assessment test of SOGI applicants. Indeed, the second part of the evaluation is based on the country of origin (what can be defined as the geographic test) of the SOGI asylum seeker: “they [asylum officers] ask you more information about whether you have been persecuted or tortured, by national authorities or non-state agents, what would it happen if you were sent back to your home country”²⁰⁸. The whole process takes several hours “because they [asylum officers] are going to check if the emotional journey is consistent and if the thoughts behind the story make sense”²⁰⁹. Again, in this process, it is the lawyer which guarantees for the correct perception and

²⁰¹ RFSL – Malmö, “RFSL Newcomers Malmö”, <https://malmo.rfsl.se/en/areas-of-work/newcomers-malmo/>

²⁰² As pointed out in Juss Statvinder, “Sexual Orientation and the Sexualisation of Refugee Law”, *International Journal on Minority and Group Rights*, Vol.22, No.1, 2015, pp.128 – 153 (p.144); Examples of Intrusive questions might be “Was it loving sex or rough?”, “So you had intercourses with him not just blow jobs?”

²⁰³ Interview, Karl Yves Vallin

²⁰⁴ Ibid., Karl Yves Vallin

²⁰⁵ Ibid., Karl Yves Vallin

²⁰⁶ Carillo Héctor, “Pathways of Desire – The Sexual Migration of Mexican Gay Men”, *University Chicago Press*, 2017

²⁰⁷ FRA–EuropeanUnionAgencyfor Fundamental Rights, “Current Migration Situation inthe EU:Lesbian, gay, bisexual, transgender and intersex asylum seekers”, March 2017, pp. 1 – 20 (p.6)

²⁰⁸ Ibid., Karl Yves Vallin

²⁰⁹ Ibid., Karl Yves Vallin

protection of SOGI asylum seekers since that “it is with him [the lawyer] that the applicant faces the evaluation. There is no such figure like the cultural mediator [in these proceedings] and, therefore, it is up to the lawyer to inform himself and the court on the context from which the applicant comes from”²¹⁰. The interviews do not follow a rigid structure, like “the cultural test” which has been presented in the first chapter, but it varies on the singular cases.

Specifically, the interview with the project manager of RSFL emphasized how the case can change – and therefore the questions of evaluation as well – according to the information declared to the moment of the presentation of the demand: “If you [applicant] came to asylum Sweden and you applied on the basis of a political background but you mention that you are also gay this would make asylum officers try you on both cases, namely political asylum and sexual asylum. However, it is also possible to apply for asylum status on political basis and then get rejected. Then, applicants can apply on the basis of other grounds, like sexual.”²¹¹ In addition to that, the asylum process of SOGI applicants includes also particular integration mechanisms along the period of the pending asylum application. The interview with “RSFL – Malmö” stressed how “the Sweden government provides for food and financial assistance for SOGI asylum seekers. Furthermore, designated specific housing for LGBTQ+ asylum seekers. However, these places are very limited: this means that the few available places are often took over by other typologies of refugees and that SOGI asylum seekers have been humiliated, harassed or even physically attacked by other refugees”²¹².

Italy and SOGI asylum seekers: an objectification of the evaluation process within “Avvocato di Strada” association

Unlike other EU countries, Italy has been identified as a good example for providing asylum to SOGI applicants due to the fact that “the mere criminalization of homosexual behaviour is sufficient for granting refugee status”²¹³. Indeed, with a verdict in 2012, the Italian Court of Cassation declared that the mere condition of establishing a penalization of on the grounds of sexuality obstructs “the fundamental right to live freely their sexual and emotional life as well as being a serious interference in their private life”²¹⁴. Moreover, in 2020, the Italian Supreme Court also established that “a judge cannot resort to personal opinions to evaluate a SOGI claim but needs to use neutral criteria (e.g. plausibility and coherence of the claim) to assess the fear of persecution.

Therefore, arguments like ‘the lack of a painful process of self-discover’ of one’s SOGI or ‘the lack of same-sex sexual encounters’ in Italy cannot be used to assess the asylum requests of SOGI claimants”²¹⁵.

In 2012, Federico Lera started his activity as a lawyer supporting SOGI asylum seekers at the “Avvocato di Strada” association which aims to provide legal support to people victim of social exclusion²¹⁶. As it emerged during the interview, the Italian system has very much evolved since

²¹⁰ Ibid., Karl Yves Vallin

²¹¹ Ibid., Karl Yves Vallin

²¹² Ibid., Karl Yves Vallin

²¹³ Jansen Sabine & Spijkerboer Thomas, Ibi

²¹⁴ SOGICA – Sexual Orientation and Gender Identity Claims of Asylum, “Italy”, https://www.sogica.org/en/case_studies/italy/

²¹⁵ SOGICA– Sexual Orientation and Gender Identity Claims of Asylum, “Supreme Court, decision no. 23891”, June 30th, 2020, <https://www.sogica.org/database/supreme-court-30-june-2020-decision-no-23891-italy/>

²¹⁶ Avvocato di Strada, “Obiettivi”, <https://www.avvocatodistrada.it/chi-siamo/obiettivi/>

Lera's specialization towards asylum claims based on sexual orientation. This can be clearly observed in the territorial commission, being the first body dealing with the evaluation process, which "have started to be integrated, not only by administrative officers but also by medical personnel, ethnopsychologists and sociologists to have a more complete understanding of asylum applicants and, specifically, of SOGI asylum seekers"²¹⁷. With an enormous flow of immigration as well as of asylum claims rejection (more than 60%)²¹⁸, Lera has described how the Italian system has moved from a more stereotyped evaluation approach to a more neutral and reliable kind of interview towards SOGI applicants. Therefore, typical questions would have been "Have you ever been attracted by a woman? What does it mean being homosexual? Could you describe an homosexual act?" which are extremely far from the UNHCR guidelines on SOGI asylum seekers of 2016. As Lera stated during the interview, "it is not this element that can assess the veracity of an evaluation interrogation. For example, the question – do you like women? – could produce an affirmative answer even from a bisexual or pansexual person but this should not hinder their credibility of being persecuted"²¹⁹. Such critique, for example, is part of the wider topic on the exclusion that other less represented categories within the LGBTQ+ group go through in the process of asylum application. Suffice to think to Peyghambarzadeh's words on the necessity of safeguarding the LGBTQ asylum seekers community by "excluding these liars. These fake cases can decrease the chances for the real cases in the asylum process"²²⁰. Therefore, as Lera stated in the interview²²¹ it is important to highlight the transitioning – also in the Italian case – towards the geographic approach and the psychological approach. According to Lera, the previous typology of interviews provided not only an incorrect ground on which basing the evaluation process but it also provided a facilitation for those applicants faking an asylum claim on sexual grounds since "reproducing a specific behaviour, a certain way of dressing or holding a membership card of a gay club is very easy. This, however, does not mean to be part of a particular social group but just knowing the most common and stereotyped characteristics"²²².

On the contrary, the psychological and geographic approach towards the evaluation of SOGI applicants provides the immigration officer with the needed instruments to distinguish between false and true perception of the applicant as part of the LGBTQ+ community in a certain cultural context. In the analysis of the psychological test, the research is focused on the emotional development and on the coherence of it. Lera stressed that this does not mean that the emotions investigated should entail questions such as "what does it mean for you to be attracted to a person of the same sex?" because it does not exist a correct answer for every individual. Moreover, according to Lera, the intrinsic mistake made by the courts or asylum officers whenever asking this kind of questions is that some answers would have been considered false on the wrong grounds and because of the legal context that might have pushed the applicant to self-censure or not being coherent. During the interview, Lera highlighted also the importance of distinguishing between social perception and self-perception. Indeed, often these two spheres tend to overlap and furtherly enhance the difficulty of assessing a singular case. During the interview, Lera provided by stating

²¹⁷ Interview, "Avvocato di Strada", Federico Lera

²¹⁸ SOGICA – Sexual Orientation and Gender Identity Claims of Asylum, "Dati Asilo 2015 – 2016"

²¹⁹ Ibid., Federico Lera

²²⁰ Zeynab Peyghambarzadeh, "Why are bisexual asylum seekers almost completely invisible?", *ILGA Europe*, September 23rd, 2019, <https://www.ilga-europe.org/blog/why-are-bisexual-asylum-seekers-almost-completely-invisible>

²²¹ Ibid., Federico Lera

²²² Ibid., Federico Lera

how “In Gambia, most of the LGBTQ+ community members have developed an awareness of their sexual orientation in response to a rape happened in their childhood. Due to the sexual tourism in Gambia, many applicants have been victim of violations during their childhood and have come to term with this by delivering a sense of willingness to their exploitation”²²³. This example provides a clear understanding of how the different levels of perception can furtherly complicate the evaluation process and it also clarifies the entitlement of subjects which are perceived as belonging to a particular social group to asylum status. Therefore, the shifting towards a more objectivized and less stereotyped evaluation process necessarily entails to assess not the actual belonging of a SOGI asylum seeker to the LGBTQ+ community but the even alleged belonging to the LGBTQ+ community. On this aspect, Federico Lera highlighted the difficulty of this further evaluation because “the assessment of the veracity of the application is not exclusively linked to the reasons for which a person is persecuted but on the total veracity of the person. Therefore, a good evaluation process will have to investigate also on the side details of what the applicant has declared: in the case of the exploited people from Gambia, this means to provide a description of the work conditions, the context of exploitation and other details. Whenever a person has high credibility markers about several elements, it is very probable that the same person will have the same credibility in other elements such as the reason for seeking asylum”²²⁴.

Moreover, unlike Sweden, Italy has not a highly functioning system of reception and this has had important consequences also on the perception of security which SOGI refugees in Italy enjoyed. Specifically, according to Lera²²⁵, with the Salvini decrees of 2018 – 2019, Italy had stopped being considered as a safe place for SOGI applicant due to the daily use of hate speech towards both the LGBTQ+ community and the immigrants. This had brought several countries, like Sweden and the Netherlands, not to send back those asylum seekers that, for the Dublin Directive, should have apply for asylum in Italy. However, the situation has changed with the modification of the decrees at the end of 2020 which has been described by the UNHCR as a positive progress made by Italy²²⁶.

General Conclusions

As it emerges from the interviews conducted, the question of an adequate evaluation process for SOGI asylum seekers it is not yet completely acquired. Indeed, both interviews have confirmed the persistent risk that the wrong questions might be asked to LGBTQ+ asylum applicants. Nevertheless, in light of the analysis of also the previous chapters, this seems connected to a lack of knowledge regarding how to legally evaluate such applications. As pointed out by Federico Lera of “Avvocato di Strada” association, the whole legal asylum system acquires new ways and new instruments through the knowledge that the asylum officers themselves obtain in the process of evaluating asylum applications. Therefore, such updating of the asylum system inevitably entails a continuous study and specialization of the personnel working in the different phases of the asylum evaluation. During this study, it emerged how it exists a substantial gap between the law in book and the law in action where

²²³ Ibid., Federico Lera

²²⁴ Ibid., Federico Lera

²²⁵ Ibid., Federico Lera

²²⁶ InfoMigrants, “Italian Security Decree: UNHCR calls it positive step forward”, 23rd of December, 2020, <https://www.infomigrants.net/en/post/29275/italian-security-decree-unhcr-calls-it-positive-step-forward>

the first still perpetuates – or has only recently modified its approach thanks to the verdicts of cases – legal practices based on gendered, racial and heteronormative social perceptions. Moreover, it is relevant to notice how similar problematics are present all across the international asylum system: for example, as it can be assumed by the interviews conducted in this study, the European regional system presents similar perceptions and problems in the assessing of SOGI asylum seekers even between different countries like Sweden and Italy. In addition to that, from the interviews it emerges not only intrinsic problems concerning the legal evaluation process, but also within the reception and integration phase during which SOGI asylum seekers' need might be neglected.

Regarding the establishing of a more fair and just form of evaluation interview for SOGI asylum seekers, it appears from the interviews that the approach must be based on the general truthfulness of the applicant. Hence, both the psychological and geographical approach must be used in the discovery of specific details that might confirm the authenticity of the storytelling made by the LGBTQ+ applicant. This does not entail to investigate the private details of the sexual life of the applicants but to verify the subjectivity of the individual's experience through objective particulars or accurate description of the awareness of their sexuality for example. The topic of SOGI asylum seekers deserves further research and constant update as it represents a still unexplored subject. The study conducted by SOGICA has also stressed out the importance of mandatory formation by expanding the “the current provision of effective training to the newly employed administrative officials for all parties, including all decision-makers sitting in Territorial Commissions, judges, interpreters, and service-providers, to improve their confidence in the quality of their work as well as to benefit SOGI asylum claimants”²²⁷.

Table of Interviews

SRFL – Karl Yves Vallin

What are the most relevant difficulties?

No difficulties on our side but usually the problems arise if the lawyer that supports SOGI asylum seekers does not have any knowledge of this specific case. Usually in Sweden the Asylum Office provides with a lawyer however not everyone is familiar with LGBTQ+ subject. So that's the first problem. The second issue is that if SOGI asylum seekers come from a restrictive background like the Middle East, Asia... for example, then they are not really comfortable to be open up on their sexualities or they don't even know how to represent themselves in the western perception of LGBTQ+.

On the legal side, LGBTQ+ asylum seekers are entitled to asylum because they are perceived as a particular social group. This is possible because either the “immutable features” or the “social perception” approach is applied. Is there one or another that prevails?

They ask both questions. They are just gonna evaluate whether you are part of the particular social group or not. They are going to ask you if you are familiar with the homosexual theory and with the psychological theory where basically everyone has few steps towards their own acceptance of sexuality and their coming out. So basically they use this theory to evaluate their emotional journey in the realization that they are different and they have been able to come out. So that's how they assess if they are part of a social group or not.

²²⁷ SOGICA, “Getting it right – 30 recommendations for improving the lives of people claiming asylum on the basis of sexual orientation or gender identity (SOGI) in Italy”, University of Sussex, https://www.sogica.org/wp-content/uploads/2020/07/Policy-recommendations_for-ITALY-EN-version-FINAL-1.pdf

So is it more based on private questions?

No, they do not really ask you private questions. There might be some investigators that ask stupid questions but then the lawyer usually tries to stop them if the question is out of the place. But the question are usually focused on the emotional journey.

And are these questions based on the emotional journey in the context from which the asylum seeker comes from?

Yes, basically they are going to ask starting when you realized to be an LGBTQ+ person and when you came to term with that. The second part of the interview is going to be focusing on your country of origin; they are gonna ask you if you have been persecuted or tortured by non-state agents and what would it happen if they went back to their country.

Sur place applications: is there any differences in the process?

It really depends. If you came to Sweden and you applied on the basis of a political background but you mention that you are also gay. Then during the interrogation they are gonna try on both cases, namely political and sexual. However, another possibility is that people apply on political ground and at the last step they get rejected. Then they can claim also another ground, like the sexual.

Have you ever met people or asylum seekers that seemed to pretend to be gay in order to get the refugee status?

There is always a possibility that people are pretending. That's why the asylum office is basing their question more on the emotional journey. This is because the interview is going to last around five hours and they are going to check if your emotional journey is consistent and if your thoughts behind the story make sense. As an organization we don't have any right to say which one is a true applicant or which one is not. If they are a member of the organization, Karl can write a paper which proves to the Asylum Office that the SOGI applicants has been active in the association. They usually do not provide with this paper to people that only came once to the organization.

Does this usually happen before the refugee status has been provided?

It depends, some people might come after the last rejection. Some people come after the initial. When people claim asylum on the basis of sexual orientation, they will receive information about RSFL. Then, it is up to them to decide if they want to come to RSFL or not.

Did you notice particular reactions from the Sweden Malmö community?

After the asylum has been claimed, the Office needs to provide housing and food during the whole process. Unless they have their own place or enough money to provide for themselves. So they don't really have much of interaction during the process. Especially there is a language barrier. Also, queer asylum seekers have the chance to learn Swedish. However, SOGI asylum seeker usually have a problem with other refugees. This is because some of them will be placed in the same house of war refugees, for example, and it did happen that some of them have been humiliated, harassed or even physically attacked.

Is there any way in which the Swedish authorities can prevent this? Are the motivation of SOGI asylum kept secret?

Yes and the immigration office have special places that are exclusively for LGBTQ+ people. However, those spaces are very limited and that's why they might get mixed with war refugee

It exists 2 types of approach "psychological approach" and "geographic approach. Whenever talking

about their experience with the court, do they have to convince someone? Are there specific questions?

It really depends. If the applicant is from a country on which the judge knows a lot about it, they are not gonna ask about that. But if you are from another country of the gray area, they are gonna interview more on the risks if the applicant's persecutions. So there is not a set of questions and this varies a lot. For example if they come with the family is different if they are alone.

Any specific cases that struck your mind?

Usually people have internalized homophobia and the lawyer helps a lot during the evaluation process.

Doesn't exist a figure like the cultural mediator?

No it's the applicant and the lawyer that have to have information.

AVVOCATO DI STRADA – Federico Lera

Come reindirizzare questa tipologia di domanda in una maniera più oggettiva. Dal momento che quello che cerca di fare un giudice è di stabilire se la persona è appartenente al gruppo sociale particolare LGBTQ+.

L'approccio si è molto evoluto. La materia della protezione internazionale è cambiata molto negli ultimi 20 anni. Quando, a partire dal 2010, si è sviluppata una nuova ondata migratoria proveniente dal Medio Oriente e dall'Africa subsahariana (mentre prima era principalmente dall'Europa dell'est), la tipologia di persecuzione è cambiata. Non si trattava più di persecuzioni meramente politiche, di delitti d'onore o dalle guerre dei Balcani. Si cominciano ad affrontare più ampie e disparate tipologie di discriminazione: ovviamente continuano le richieste d'asilo basate sulla discriminazione religiosa, razziale ma compaiono anche quelle basate su l'orientamento sessuale e l'identità di genere. Quest'ultimo dipende anche da come lo vivi, cioè non si limita solamente all'essere donna ma anche a specifiche tipologie di gruppi femminili all'interno del continente africano (matrimoni forzati, mutilazioni genitali, determinate caste femminili come le donne nigeriane).

Le COMMISSIONI TERRITORIALI sono gli organi che valutano in prima battuta la domanda di protezione internazionale e qui i richiedenti devono affrontare un'intervista. Questa intervista si evolve tuttavia, perché all'interno delle commissioni all'inizio c'era solo personale amministrativo ma poi è stato integrato con il personale asl, ashr, sociologi, etnopsicologi ma soprattutto è stata la fase successiva nella giurisprudenza. Lera ha iniziato la sua attività nel 2012 a La Spezia e è stato il primo avvocato che si è specializzato in questa tematica. All'inizio le interviste si basavano proprio su degli stereotipi: "non hai mai provato attrazione per una donna?", "cosa vuol dire essere omosessuale?", "sai descrivimi un rapporto omosessuale?" quindi delle domande che vanno contro anche alle linee guida dell'UNHCR e della dignità umana. Quindi un'intervista indecorosa. Non è quello il metro che giudica la veridicità dell'intervista; alla domanda ti piacciono anche le donne uno può rispondere sì ma questo potrebbe semplicemente categorizzarlo come bisessuale, pansessuale, ecc. Si tratta di una domanda che non ha senso. Questo ha portato a sviluppare due approcci: un APPROCCIO PSICOLOGICO e un APPROCCIO GEOGRAFICO.

L'APPROCCIO GEOGRAFICO va a toccare quegli elementi che una persona dovrebbe conoscere se effettivamente fa parte di una determinata categoria di persone. Ad esempio, se io sono un ragazzo omosessuale a La Spezia, probabilmente dovrei conoscere associazioni, persone o una rete di supporto e tutte quelle informazioni non strettamente individuali ma di appartenenza a una certa categoria perché si presume (ma resta comunque solo uno dei molti fattori d'analisi) che, se sei un ragazzo omosessuale in Nigeria e quindi sei perseguitato dalle autorità, probabilmente dovresti sapere anche dove trovare supporto, come nascondere certe caratteristiche, come affrontare una relazione all'interno

di un contesto sociale che non ti permette una libertà (che non c'è nemmeno in Italia) ma che è sicuramente più repressiva.

Tu avevi il ruolo dell'intervistatore?

Essendo avvocato, Lera segue solo la fase giudiziale successiva che comporta la lettura e valutazione del verbale di intervista. L'intervista in commissione è una fase prettamente amministrativa in cui gli avvocati non sono ammessi all'interno dell'intervista (c'erano ma sono stati mal tollerati perché l'intervista è la libera esposizione di una condizione). L'avvocato ha un ruolo tecnico che non ha senso quando una persona deve raccontare la propria storia.

Tu non contribuisce a stabilire?

No, ma Lera aiuta a trovare gli elementi giusti per comprendere la storia di una persona. Se la commissione sbaglia l'approccio, Lera deve spiegare perché e dove è stato sbagliato l'approccio e che possano dare torto o ragione alla mia tesi difensiva. Quindi Lera deve: 1) leggere il verbale di audizione 2) capire dove è sballato l'approccio 3) segnalare quello che dovrebbe essere l'andamento di un'intervista logica per valutare una condizione umana. Quindi non ci si può basare su dati esteriori a meno che non vengano stereotipizzati. Tra l'altro sono elementi che possono essere facilmente simulati: un atteggiamento, un modo di vestirsi o una tessera di un'arcigay. Ciò non vuol dire essere parte di una comunità ma vuol dire conoscere le abitudini di una comunità. È ovvio che arrivare alla comprensione piena di una persona vorrebbe dire affrontare il fenomeno in maniera molto più complessa e molto più lunga. Un etnopsicologo o un fine conoscitore dell'aspetto sociale e politico di un paese sono le persone più adeguate perché l'etnopsicologo affronta l'argomento sulla percezione del mondo che deve indagare (dal momento che la comunità LGBTQ+ in Italia è di un certo tipo, in Olanda è in un altro modo e la comunità LGBTQ+ in Nigeria ha delle caratteristiche completamente diverse). Ad esempio, in Gambia gran parte della comunità LGBTQ+ nasce da uno sfruttamento sessuale dei minori che quindi acquisiscono (se si può parlare di acquisizione) la consapevolezza dell'omosessualità attraverso una violazione in sede d'infanzia. Molti ragazzi gambiani si dichiarano omosessuali perché hanno subito sfruttamento a causa del turismo sessuale e hanno accettato questo tipo di violenza elaborando una volontarietà del gesto.

Però non è necessariamente il tuo orientamento sessuale?

No però viene espresso in questa maniera. All'interno della protezione internazionale, la percezione di sé e la percezione sociale sono molto importanti perché anche se tu non sei un ragazzo omosessuale gambiano ma, per il lavoro che hai svolto o per le dicerie che ci sono sul tuo conto, vieni considerato dalla società come omosessuale, sei in diritto di avere la protezione riconosciuta perché è il contesto sociale che ti discriminerebbe comunque. Quindi in realtà la protezione non riguarda solo se sei LGBTQ+ ma anche se sei percepito come parte. In un contesto particolarmente repressivo, anche la percezione dell'altro diventa motivo per la società (anche altamente punitiva a livello sociale non di autorità) può comportare dei problemi. Anche un ragazzo che ha rapporti omosessuali per mantenersi e viene preso dalla polizia, *lui diventa omosessuale* perché la percezione sociale è che lui sia omosessuale nonostante invece l'omosessualità sia un lavoro. Il pericolo (e le commissioni non lo capiscono questo) è che non dobbiamo solo indagare l'appartenenza vera o presunta alla comunità ma anche la percezione dell'eventuale appartenenza alla comunità. E questo è particolarmente difficile perché non sai più se è una storia finta e costruita ad arte: perché dichiarare di esserti prostituito, ti permette di definirti eterosessuale ma di aver solo fatto un mestiere. Di conseguenza si hanno delle grosse problematiche e la credibilità viene a spostarsi su mille aspetti diversi. Un ragazzo che si dichiara omosessuale facendo parte di una determinata città o determinata regione, viene a essere intervistato anche su determinate caratteristiche di quel luogo. La credibilità non diventa solamente più

il focus della persecuzione ma la credibilità tout-court della persona. Quindi se una persona ha dei markers di credibilità elevati da tanti aspetti, è molto probabile che tu lo sia anche in altre questioni. Se sai descrivere il lavoro, il contesto dello sfruttamento è automaticamente credibile anche per le percezioni successive che vengono fatte.

Quanto è diffusa la figura dell'etnopsicologo in Italia?

Ci sono ma pochi fortunati accedono al trattamento d'indagine di questo tipo. Viene utilizzato da quei giudici che devono comprendere a pieno la persona che si va a intervistare. Molto spesso, pur non intervenendo all'interno del processo, l'etnopsicologo crea delle linee guida per i tribunali. Ci sono degli etnopsicologi che formano i tribunali in modo tale che siano pronti ad affrontare un certo tipo di interviste. L'etnopsicologia non si insegna come percezione/scienza ma se bisogna focalizzarsi su un determinato aspetto, si può aiutare la persona a comprendere quelle determinate caratteristiche. Ad esempio, l'etnopsicologo serve molto per capire la refrattarietà a trattamenti medici, per intervenire all'interno di percezioni distorte in contesti familiari in cui la donna è succube del marito. L'errore più grosso che la società occidentale può fare è quello di uniformare la percezione LGBTQ+ a quella che abbiamo noi. Così come in altre materie, i rapporti famigliari di un cittadino nigeriano sono diversi seppur la Nigeria sia a maggioranza cattolica così come l'Italia. La necessità dell'etnopsicologo è proprio questa. L'avvocato deve avere una apertura mentale e cancellare tutte le sovrastrutture in modo tale da avere una conoscenza del contesto sociale che si andrà a giudicare.

È più facile dimostrare un'appartenenza a un gruppo religioso?

È più facile perché hai dei dati oggettivi diversi. Ad esempio, l'appartenenza ad un gruppo religioso spesso passa attraverso la conoscenza di simboli. Se dichiaro di essere convertito al cattolicesimo, si presume che abbia una conoscenza almeno marginale dei simboli o le abitudini del cattolico medio in Nigeria. Ancora, se io dico di appartenere a un partito politico del Biafra in Nigeria io devo conoscere questa informazione. Quindi, seppur resti un contesto scivoloso, dichiarare di appartenere a un contesto religioso o politico comporta conoscere determinati simboli e ideologie. Difficile è l'appartenenza alla comunità LGBTQ+ che, a volte, passa anche per la conoscenza di certi punti di riferimento.

L'approccio geografico riguarda anche il contesto all'interno del quale tu chiedi asilo?

Esatto

In ambito religioso/politico è stato creato un test culturale. Quando si parla di linee guide, si include anche un testo simile per i rifugiati SOGI? Ci sono domande molto specifiche/strutturate anche per i richiedenti asilo SOGI?

No, perché le linee guida dell'unhcr riguardano il trattamento della persona e perché la persona si considera rifugiato fino a prova contraria. In realtà è che la percezione diventa diversa. Normalmente nelle procedure civili l'onere della prova aspetta alla persona. Nel riconoscimento dello status di rifugiato è stato elevato il grado di cooperazione del giudice in maniera tale che debba essere valutata sì la credibilità del richiedente ma non al livello di dover lui provare qualcosa. Cioè se il richiedente da degli elementi coerenti e concreti, è il giudice che deve dimostrare che non è vero (quindi è la controparte che deve dimostrarlo, ministero). Bisogna provare di essere un rifugiato ma in maniera più blanda rispetto a una procedura di diritto comune. Perché non sempre il richiedente è in possesso degli strumenti culturali necessari. Non esiste un test che garantisce di rispondere alla domanda "Sei parte della comunità LGBTQ+?" perché non sempre quei soggetti hanno gli strumenti per identificarsi completamente all'interno di un modello. Infatti c'è spesso la negazione autoassolutoria o di protezione; molte persone che Lera ha assistito erano in fase negatoria: ad esempio, "io facevo solo

questo lavoro” perché volevano giustificare agli occhi di Lera di non essere LGBT.

In quella situazione come si comporta l'avvocato? Si basa su quanto detto dalla persona in quel momento o si trasforma in uno psicologo?

Lera cerca di manifestare la necessità di fiducia. La prima cosa di cui lui parla con richiedenti asilo è il cerchio di fiducia all'americana. La prima necessità è lavorare nel contesto in cui si svolgerà il meccanismo della domanda d'asilo. Lera lo sprona a raccontare tutto e a far capire che quello che non racconta potrebbe causargli danni. È necessario far capire che quello che racconterà è mantenuto all'interno di un ambiente protetto (quale è la commissione) perché c'è la necessità di mantenere il segreto sul verbale. Bisogna far capire alla persona che non è come in Nigeria in cui la polizia sa tutto ma bisogna far capire che sei libero di gestire le informazioni che fornisci. Questo avviene perché nel momento in cui un verbale circola troppo potrebbe avere delle ripercussioni nei centri di accoglienza dove alloggiano i richiedenti asilo (come è successo). Ad esempio un ragazzo nigeriano era stato preso di mira perché un operatore aveva lasciato il verbale aperto e un'altra persona l'aveva letto creando una catena di persecuzione all'interno del centro.

È per questo che non si trovano numeri riguardanti le tipologie di richiedenti asilo? Esatto, ci sono delle statistiche interne che non vengono pubblicate per non dare il la a degli studi percentuali.

Ovviamente i tribunali lo sanno quante persone fanno richiesta d'asilo per motivazioni di orientamento sessuale o identità di genere ma non vengono uniformate a livello di statistiche nazionali perché quello che interessa è esclusivamente l'asilo come persecuzione. Viene solo divisa a livello di tipologia di protezione conosciuta quindi l'asilo politico, la protezione sussidiaria o le protezioni di forma minore. Si cerca di tutelare il dato e di conseguenza l'individuo. Si cerca di rendere irricognoscibile una determinata presenza sul territorio.

Questo è fatto anche per evitare speculazioni politiche?

No ma diventa anche un modo per evitare la speculazione politica. C'è anche l'altro lato della medaglia: l'orientamento sessuale, essendo il più difficile da dimostrare, diventa anche il più facile da manipolare. Questo è visibile anche dal fatto che ci sono state molte persone condannate perché facevano i verbali fotocopia e istruivano i richiedenti asilo a dire di essere omosessuali, fornendo supporto strumentale come tessere di determinati gruppi. Oltre a questa premeditazione, esiste anche lo story shopping. Ovviamente se due richiedenti asilo appartengono allo stesso partito o si dichiarano entrambi omosessuali, avranno storie simili ma non identiche. Quindi merita un maggiore approfondimento perché è il dettaglio che cambia la vita delle persone. Se un richiedente dice che la polizia ti veniva cercare a casa perché sei omosessuale, saper descrivere l'uniforme della polizia ti può rendere credibile anche per il motivo per cui ti cercano. IL LIVELLO GEOGRAFICO è anche questo. Se tu sai di essere perseguitato e mi descrivi bene chi ti perseguita, sei più credibile. Possiamo dire che c'è stato un miglioramento negli anni più recenti.

C'è in atto una ricerca più basata su elementi oggettivi?

C'è stato perché l'UNHCR si è esposta nel 2016. Oggettivare la procedura vuol dire far venir meno quelle domande individuali di descrivere il rapporto, descrivere il sentimento perché non vuol dire nulla. “Cosa vuol dire per te essere attratto da un uomo?” è una domanda inaccettabile perché è esattamente per Lera essere attratto da una donna. Il sentimento alla base non me lo puoi descrivere. Non me lo puoi descrivere perché non c'è la differenza da come il singolo percepisce l'amore. Non si può pensare che l'espressione del rapporto sentimentale possa avere delle differenze eppure c'erano le commissioni che pensavano che, essendo un sentimento represso, in determinati contesti dovesse essere represso anche le modalità di espressione. Quindi se leggevano che un richiedente asilo dichiara

che “abbracciavo il mio fidanzato al parco” pensavano che non fosse possibile. Ma questo non è detto perché dipende dal parco o da come si vive il sentimento. A questo si aggiunge il fatto che queste sono persone che avrebbero dovuto parlare della loro intimità con degli estranei. In un contesto inquisitorio, non ci si può aspettare che il richiedente sia limpido, chiaro e spontaneo in una definizione. Cerchiamo di capire dei parametri psicologici ma sulla persecuzione che è la cosa che si può esprimere in maniera oggettiva.

Diverse tipologie di rifugiato: come si approcciano?

Ad oggi un rifugiato LGBTQ+ in Italia, non viene considerato al sicuro. Perché il contesto di esposizione a linguaggi d'odio o a repressione quotidiana a livello territoriale è elevato. Non siamo la Polonia o l'Ungheria ma non siamo nemmeno l'Olanda.

Ma come procedura avevo letto che l'Italia era un paese sicuro?

Sì ma a livello di procedura legale. Ad esempio all'epoca del governo Conte con Salvini, con i decreti sicurezza, alcuni paesi europei come l'Olanda non ci consideravano paesi sicuri in cui rimandare richiedenti asilo LGBT che avrebbero dovuto, per via del regolamento di Dublino, chiedere asilo in Italia. Nel biennio salviniano, l'Olanda non ci rimandava richiedenti asilo LGBT o particolari rifugiati politici. Perché c'era la percezione che il contesto sociale in cui si sarebbe dovuta svolgere la domanda d'asilo non fosse completamente oggettivo. Questo perché SOGI asylum seekers non potessero 1) ricevere l'adeguata attenzione alla domanda d'asilo 2) perché sei in un paese omofobo e anche la quotidianità rischia di esporre le persone a dei rischi. Quindi la giurisprudenza italiana è altamente formata e specializzata e dopo 10 anni si assiste a un'evoluzione delle commissioni. Questo inoltre contribuisce anche a un'evoluzione degli avvocati perché spinge gli avvocati a individuare dove sono ancora esistenti certi difetti. Questo sta migliorando anche la percezione dell'asilo perché c'è l'obiettivo di portare sempre di più all'oggettivazione dell'intervista. Come dicevamo prima la domanda oggettiva è una domanda che ti permette di avere il controllo sulla credibilità di un soggetto, a differenza della domanda sentimentale. Oltre agli elementi terzi perché non si concentra solo a un tipo di dichiarazione ma su tutto quello che è l'aspetto umano. Per questo è importante ampliare la percezione a 360° della problematica. 1) Il contesto sociale 2) La tua problematica individuale 3) Mettere insieme i tuoi dati soggettivi in base a quello che si va a toccare. Le unità COI studiano proprio le persecuzioni su determinati paesi e quindi di contestualizzare le dichiarazioni di un dichiarante. Il giudice deve conoscere il contesto sociale.

Convenzione del 1951: è stato evidenziato come ci fosse una parte soggettiva e una parte oggettiva. Nei contesti in cui non ci sono conoscenze che permettano di conoscere il contesto oggettivo di un luogo, si dovrebbe basare sulla parte più soggettiva. Questo però riguarda la parte della percezione della persecuzione?

Esatto, l'analisi soggettiva del passato 1) non avevano la rilevanza che si pensava avesse 2) non salvaguardavano la dignità della persona. Si tenderà sempre di più a preferire un'indagine oggettiva in cui l'aspetto soggettivo diventa il tassello di un quadro più grande e non il quadro in cui mettere l'aspetto sociale. L'aspetto sociale va sempre più approfondito per capire come si inserisce in quell'ambito la dichiarazione della persona. Qual è il contesto in cui ti inseriscono per arrivare a un determinato momento. Ragazzo omosessuale gambiano come sei arrivato a capire di dover difenderti da certe cose? Chi ti ha aiutato? Chi ti è stato vicino? Come hai vissuto la necessità di dover nascondere determinate cose e come ci sei riuscito? Questa è l'oggettività: essendo così, come ho vissuto la bolla in cui mi muovevo.

2 – 3 anni prima del 2016 quando dici che le interviste stavano prendendo una piega indecorosa ti riferisci

al contesto italiano?

Esatto, non dubito che anche all'estero fosse così.

Come Oggettivare il processo di valutazione?

L'aspetto individuale soggettivo viene inserito nel contesto oggettivo. Quindi oggettivizzare vuol dire prendere l'individuo e inserirlo non in un contesto soggettivo puro in cui deve raccontare sé stesso ma in cui sé stesso diventa parte di un contesto che si conosce a prescindere da lui. L'analisi soggettiva non poteva essere universalmente oggettiva. È l'individuo che entra nell'analisi oggettiva. Setu non mi dici che ti piacciono gli uomini ma cosa vuol dire che ti piacciono gli uomini in Gambia, l'aspetto soggettivo deve combaciare in un aspetto oggettivo. Perché non basta più dire sono omosessuale ma mi devi dire cosa vuol dire rischiare tornare indietro.

Ci sono due approcci per stabilire se una persona apparteneva a un determinato orientamento sessuale.

Quello delle caratteristiche protette e quello della percezione sociale. Essi sono alternativi ma non cumulabili. Questa cosa come varia? Le caratteristiche protette e immutabili può già essere scartata?

Sì ma anche le caratteristiche protette sono fondamentali sulla quale si crea la percezione e sono degli aspetti sui cui bisogna indagare. Ad esempio si può chiedere la storia con il proprio compagno ma non dal punto di vista sessuale o cosa vuol dire amare un uomo ma proprio descrivere il comportamento della coppia per capire la quotidianità della coppia. Quindi, visto che in Gambia non potevamo vederci, noi ci vedevamo a scuola e ci comportavamo così ecc. Identificare le caratteristiche in cui l'appartenenza si sviluppano nell'individuo (e questa è la parte individuale soggettiva) ma che non può prescindere dalla categoria dell'identificazione sociale in cui quei comportamenti e quelle condizioni fanno parte delle condizioni sociali che conosciamo. Quella linea guida ci dice come analizzare un elemento soggettivo.

L'elemento di immutabilità non esiste più però dal momento che il genere è un costrutto sociale e la sessualità è uno spettro?

Se nel 2016 parlavano di categorie protette per immutabilità di fattori, la letteratura di approfondimento psicologico, medico, sociale, ecc. è evoluta e se ci muoviamo in un contesto in cui certi aspetti non sono considerati, non si può dire come questa conoscenza si riverbera nel contesto sociale. Non si tratta più di giurisprudenza. Quando si tratta di percezione e individualità è importante far capire alle persone le conoscenze necessarie. Le categorie immutabili restano tali fino a quando non mutano i contesti sociali nei quali si trovano. Il concetto di donna è immutabile. Ma quindi la transizione MtF: una ragazza trans nigeriana viene discriminata perché donna o perché vittima di tratta? Ci si muove in un contesto che prima non c'era e adesso c'è. Inoltre, entrambe le motivazioni possono essere ragione di timore di persecuzione.

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