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MIGRATIONS AND  
FUNDAMENTAL RIGHTS:  
THE WAY FORWARD

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“ARE YOU ACTUALLY GAY?”  
MAIN CRITICALITIES IN THE PROTECTION OF LGBT  
REFUGEES WITHIN THE EUROPEAN UNION  
*Anna Fazzini\**

SUMMARY: 1. Introduction. – 2. The protection of LGBT refugees: the international and European framework. – 3. Analysis of the major differences and criticalities in the European State-sponsored practices. – 4. The issue of credibility: establishing the LGBT identity among stereotypes and practices that affect human dignity. – 5. Conclusions.

1. *Introduction*

An increasingly significant number of those who seek international protection within the European Union are forced to flee due to persecution based on their sexual orientation or gender identity.<sup>1</sup> According to the latest annual report by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA),<sup>2</sup> issued in May 2017, despite a general improvement of human rights, there are still too many countries in the world where lesbian, gay, bisexual and transgender people (LGBT) continue to be subjected to strong discrimination in every field, to both physical and psychological violence and to forms of “institutionalized” persecution, especially with reference to those States where same-sex relations are considered a criminal offence. If, according to updated data, there are about 70 countries, especially Asian and African States, where homosexuality is considered a criminal offence and where

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<sup>1</sup> Sexual orientation can be defined as “the ability of a person to experience a deep emotional and sexual attraction and to have intimate relations with people of different gender, of the same gender or of more than one gender”; gender identity can be defined as “the intimate and individual experience, for each person, of one’s gender, which may or may not correspond to the sex assigned to their birth, and which includes the perception of one’s own body and other manifestations of gender, including the way of dressing, talking and acting”, see ICJ, *The Principles of Yogyakarta -Principles on the application of international human rights law in relation to sexual orientation and gender identity*, Geneva, 2007, Preamble.

<sup>2</sup> THE INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION (ILGA), *State-Sponsored Homophobia*, [http://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf) (7/18).

measures including fines, imprisonment and torture are implemented (in 13 of these countries the death penalty is applied), quite a few problems may be found also in Western countries. Indeed, in the European Union, even if there are differences among States, a climate of homo-lesbo-transphobia<sup>3</sup> is still perceived, along with inadequate legal safeguards, forms of discrimination in the labour, social and health dimension, episodes of violence, abuse and aggression.

The *Organization for Refuge, Asylum & Migration* (ORAM), an official partner of the UNHCR which focuses exclusively on those refugees who are considered the most vulnerable, including the LGBT refugees, believes that nowadays lesbian, gay, bisexual, transgender and intersex people are among the most persecuted individuals in the world. LGBT people also live in an extremely vulnerable condition since “*the scant survival mechanisms normally available to other refugees are often closed off to them*” because they are “*doubly marginalized, as forced migrants and sexual minorities*”.<sup>4</sup>

The *double* vulnerability of LGBT refugees, however, “collides” with the European asylum system which is inadequate to provide effective protection of their rights and to answer their specific needs. In addition, this is a neglected phenomenon, since the national authorities do not collect any data and, as noted in a report<sup>5</sup> issued in 2017 by the European Union Agency for Fundamental Rights, there are no official statistics nor documentation about the applications for international protection for SOGI (sexual orientation and gender identity) reasons. As a result, only partial and thus misleading estimates can be accessed.

Therefore, the aim of this article is to highlight the main critical aspects of the protection of LGBT refugees within the European Union, particularly as far as the absence of a specific legislation is concerned.

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<sup>3</sup> What is meant for homophobia, lesbophobia, transphobia is a vast set of hostile attitudes and behaviors in reference to people who identify or are perceived as gay, lesbian, bisexual, transgender. The ensemble includes forms of antipathy, contempt and prejudice, as well as forms of violence (verbal and otherwise) and, in the case of institutions, discriminatory laws and policies, see ORAM, *Sexual orientation, gender Identity and gender expression: essential terminology for the humanitarian sector*, <http://oramrefugee.org/wp-content/uploads/2016/04/Glossary-PDF.pdf> (7/18)

<sup>4</sup> ORAM, *Sexual & gender minorities*, [http://oramrefugee.org/sexual-and-gender-minorities/\(7/18\)](http://oramrefugee.org/sexual-and-gender-minorities/(7/18))

<sup>5</sup> EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), *Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers* <http://fra.europa.eu/en/publication/2017/march-monthly-migration-focus-lgbti> (7/18)



Moreover, as proven by the Fleeing Homophobia<sup>6</sup> report, two key issues will be addressed:

1) the significant differences in the way each European State examines the SOGI-based asylum applications, because they conform to divergent interpretations of the Community law, thus ensuring that the aim of having the CEAS regulations harmonised continues to be disregarded;

2) the reporting of state practices which appear to be below the international and European standards on human rights and refugee rights, because they are based on discriminatory and stereotyped logic, which are an integral part of the operating methods adopted for the recognition of the international protection status, and because they sometimes imply the use of controversial and illegitimate methods, which are detrimental to human dignity and infringe fundamental human rights.

## *2. The protection of LGBT refugees: the international and European framework*

As is widely known, the 1951 Geneva Convention on the Status of Refugees does not explicitly provide for sexual orientation and gender identity among the grounds that would warrant the well-founded fear of being persecuted. Currently, the main international treaties dealing with human rights do not explicitly provide for these two concepts, as it was considered that the non-discrimination clauses based on “every other condition” should also refer to sexual orientation and gender identity, thus guaranteeing the implicit protection of the LGBTs’ human rights. These two concepts were expressly codified only in 2006 in the *Yogyakarta Principles*, which were issued in Geneva back in 2007.<sup>7</sup>

Similarly, since the ‘90s a change in the interpretation of the concept of “belonging to a particular social group” as a reason for persecution (listed in Article 1 letter. a. 2 of the 1951 Geneva Convention) has be-

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<sup>6</sup> Sabine Jansen e Thomas Spijkerboer, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, Netherlands and VU University of Amsterdam, Amsterdam, 2011

<sup>7</sup> The principles of Yogyakarta, although not binding, represent the first attempt to give a united expression to the international human rights law of LGBT people, hitherto implicitly guaranteed by the main treaties on the subject, but never explicitly foreseen, see Carmelo Danisi, *Tutela dei diritti umani, non discriminazione e orientamento sessuale*, Editoriale Scientifica, Naples, 2015, p. 68 ss.

come possible. Such an evolution allowed the inclusion of the concepts of sexual orientation and gender identity among the pre-conditions for recognizing the refugee status. Indeed, the requirement of “belonging to a particular social group” has been understood in an increasingly broader context, providing a definition of refugee which is more consistent with the spirit and purpose of the Convention itself. As the UNHCR clarifies, it is necessary to read this expression in the light of the constant transformations affecting both human groups within societies and the international regulations concerning human rights, since there is no precise list of groups that can be included in the definition of “particular social group”.<sup>8</sup>

In order to clarify the actual meaning of “social group” according to the Convention, two prevailing interpretative approaches have been adopted within the common law systems:

1) the “protected characteristics” approach, according to which a group that is “united by an immutable characteristic or by a characteristic which is so important for human dignity that a person should not be forced to give up”<sup>9</sup> falls within the definition of “particular social group”;

2) the social perception approach, according to which a group that “shares a common characteristic which makes it recognizable or distinguishable from the rest of society”<sup>10</sup> falls within the definition of “particular social group”.

Civil law systems also referred to the same approaches but focused more on deciding whether the risk of persecution was real rather than on elaborating the criteria to identify the “particular social group”.

The UNHCR, according to which the two approaches must necessarily be integrated, also provided a unitary definition of “social group”: *“a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”*.<sup>11</sup>

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<sup>8</sup> See UNHCR, *Guidelines on international protection: “membership of a particular social group” within the context of Article 1A (2) of the 1951 Convention and / or its 1967 Protocol relating to the Status of Refugees* <http://www.refworld.org/docid/3d36f23f4.html> (7/18).

<sup>9</sup> *Ibid.*, p. 3.

<sup>10</sup> *Ibidem.*

<sup>11</sup> *Ibidem.*

According to both approaches it was possible to include LGBT people in the definition of “particular social group”, since sexual orientation and gender identity are characteristics “correctly attributable to the reason for belonging to a specific social group”,<sup>12</sup> as well as “characteristics of such fundamental importance for human dignity that a person should not be forced to give them up”.<sup>13</sup>

The Common European Asylum System was not exempt from this kind of development; therefore, it explicitly provides for international protection status to be accorded on the basis of sexual orientation and gender identity (Art. 10 of the Qualification Directive). However, there is no specific legislation regarding the protection of LGBT refugees, leaving the interpretation of aspects relevant to recognition of international protection status for SOGI reasons to the discretion of the member States. With respect to these aspects, which mainly concern the well-founded fear of persecution, the main existing guidelines are those developed by the UNHCR. However, as attested by examination of the European national case-laws, they have only been partially implemented.

Recently, even the Court of Justice of the European Union was called upon to comment on the interpretation of some relevant aspects, which did not fail to raise doubts. An overview of the major discrepancies found within the interpretative approaches of the member States is provided below.

### *3. Analysis of the major differences and criticalities in the European State-sponsored practices*

The aforementioned *Fleeing Homophobia* report produced a detailed analysis of European state practices, by collecting data from academic and governmental bodies, advocacy groups for LGBT refugees, associations operating in the field and from NGOs. The complex amount of cases that were analyzed identified the main differences among the interpretative approaches that characterize national case-laws and pointed out that there are no common standards in the application of European legislation concerning the right of asylum.

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<sup>12</sup> UNHCR, *Guidelines on international protection n. 9*, p. 20 <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=52d8f87b4> (7/18).

<sup>13</sup> *Ibidem*.

Apart from the peculiarities relating to the theme of reception and its problems, the report focuses primarily on those aspects that are relevant to recognition of the status of international protection.

Two aspects concerning verification of the well-founded fear of persecution, on which the Court of Justice of the European Union expressed a view in the judgment *X., Y., Z.*,<sup>14</sup> deserve to be analyzed: the issue of the criminalization of homosexuality and the so-called “requirement of discretion”.

The first aspect refers to whether or not to consider the criminal legislation according to which homosexuality is a criminal offence in the asylum seekers’ home countries as a form of persecution relevant to the purpose of recognizing refugee status. In fact, it was found that in most member States it is necessary to prove that the laws criminalizing homosexuality are effectively applied in the home country in order to have the refugee status recognized. This requirement is reflected in the jurisprudence of the European Court of Human Rights (ECHR) which, since the '90s, has often regarded the appeals of LGBT applicants as inadmissible on the basis of the lack of proof that the penal code was *de facto* applied.<sup>15</sup>

However, these practices considerably differ from the UNHCR indications which, instead, advise to consider the provisions criminalizing homosexuality as persecutory regardless of their application. This is because the mere fact that they exist leads to a highly discriminatory climate and to the proliferation of abuse and acts of violence, not to mention the fact that persecution is often carried out through illegal detentions and ill-treatment perpetrated by the police without formal court proceedings.<sup>16</sup>

The issue remains controversial, since in the above judgement the Court of Justice also stated that the mere existence of a legislation criminalizing homosexuality is not so serious as to be considered persecution, unless it is effectively enforced by the home country in question. This was stated in spite of directive 2004/83/CE, on whose interpretation the Court was called upon to express its view, which contemplates among the acts of persecution

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<sup>14</sup> CJEU, judgment issued on 7<sup>th</sup> of November 2013, *X, Y. and Z v Minister Voor Immigratie en Asiel*.

<sup>15</sup> See, among others, ECHR, judgment of 10/02/1990, n. 16106/90, *Z.B.v United Kingdom*; judgment of 12/20/2004, n. 2035/04, *I.I.N v the Netherlands*; judgment of 06/22/2004, n. 17341/03, *F. v. United Kingdom*.

<sup>16</sup> UNHCR, *Guidelines on international protection n° 9*, cit., p. 13 ss.

“judicial actions or disproportionate or discriminatory penal sanctions” (art. 9 paragraph 2 letter c) and “legislative, administrative, police and/or judicial measures, that are discriminatory by their nature or that are implemented in a discriminatory manner” (art. 9 paragraph 2 letter b), thus not referring to the actual application of the penal code.<sup>17</sup>

In relation to this subject, Italy can be considered a case of good practice. In fact, it is documented that the Italian courts do not verify the possible applicability of the legislative provisions that criminalize homosexuality because they consider their mere existence as a valid element for the recognition of the refugee status.

With respect to the other controversial aspect, the so-called “requirement of discretion”, reference is made to the general trend of denying the refugee status because it is thought that the person can hide his/her sexual orientation or gender identity in order to avoid persecution. Again, the practices are discordant. The case of France, for example, is peculiar since the opposite of the requirement of discretion is requested (it is called: non-discretion), that is to say: having publicly disclosed one’s own sexual orientation in the home country is considered to be a positive element for recognizing the refugee status. This practice is justified on the basis of a questionable interpretation of the concept of social perception, which is used to prove membership within the “particular social group” under the 1951 Geneva Convention. According to the French line of thinking, in fact, since the “particular social group” is perceived as different from society on the basis of certain common characteristics, a person who does not openly manifest his/her sexual orientation or gender identity cannot be perceived as different and therefore cannot be identified as belonging to that particular group. Such a practice is questionable because the approach of social perception is theorized in reference to the group and not to the individual. It is the group that is perceived as different from the rest of society and, for this reason, represents a vulnerable category, whereas the individual, in this case the LGBT person, belongs to the group in any case, whether he/she came out or lived his/her sexuality secretly.

Sweden can be considered a case of good practice. The country rejects the point of discretion, but at the same time it tries to understand whether the asylum seekers, once back in their own country, would want to hide their identity for personal reasons or because of social pres-

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<sup>17</sup> Adele Del Guercio, *La protezione dei richiedenti asilo nel diritto internazionale ed europeo*, Editoriale Scientifica, Naples, 2016, pp. 331 ss.

tures. In the latter case, not the former, fear of persecution would be ascertained.

However, even Swedish practices do not completely comply with the UNHCR's indications according to which the claim of secrecy represents a violation of human rights because sexual orientation and gender identity are essential characteristics for human identity: even if you wanted to hide your sexuality for personal reasons this would not exclude the risk of persecution, which should be the main element to be ascertained.

It will be interesting to analyze the effects that the aforementioned CJEU's judgment will produce in the legal systems of the States, since it is fully in line with the UNHCR's indications regarding the issue of discretion. Actually, it states that it is not legitimate to expect asylum seekers to hide their homosexuality in order to avoid persecution because this is "contrary to the recognition of such a fundamental characteristic for one's identity that the people concerned should not be forced to renounce it".<sup>18</sup> This position also significantly departs from the jurisprudence of the ECHR which applied the requirement of discretion quite openly in a number of cases.<sup>19</sup>

Finally, it might be useful to mention other controversial aspects that emerged from the analysis of the European state practices. With reference to persecution by non-governmental actors,<sup>20</sup> it was noted that several member States require proof that the asylum seeker had asked the State authorities for protection even if the State itself is among those that criminalize homosexual relations. This differs from the UNHCR's indications that once again advice taking into account the particular situation of LGBT people: it is unlikely that they require protection from the state authorities which are supposed to persecute them by law.

The High Commissioner for Refugees hopes to have the specific nature of the LGBT refugees' experience taken into account also with respect to the option of internal protection. This implies rejection of the application for international protection on the grounds that the applicant

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<sup>18</sup> CJEU, *X, Y, Z v. Minister Voor Immigratie en Asiel*, cit., paragraph 70-71.

<sup>19</sup> For more information about the position of the two Courts on the matter see Thomas Spijkerboer, "Gender, Sexuality, Asylum and European Human Rights", *Law and Critique*, Vol. 29, Issue 2, 2018.

<sup>20</sup> According to art. 6 of the Qualification Directive the persecution by non-state actors is ascertained for the purpose of recognizing the status of international protection if it can be proved that the State or the parties and organizations that control the State do not want or can not offer protection.

can move to another area of the State considered to be more secure (as provided for by art. 8 of the Qualification Directive). That area must be assessed on the basis of precise and up-to-date COI (country of origin information) coming from relevant sources.

In this regard, UNHCR recommends to carefully assess the possibility of internal protection for LGBT refugees, since it is unlikely that a homo-transphobic climate does not extend to the whole country, even to those areas that are considered “safe”, especially if such a climate is legitimized by criminal law. Furthermore, with respect to the acquisition of accurate and up-to-date COI, some States tend to consider the lack of official data on the status of LGBT people as proof that they are not persecuted. These States do not consider that LGBT people are often subject to silent acts of violence which are not reported: it is therefore important to find other sources of information, such as the testimonies of the persons involved and NGOs’ reports.

#### *4. The issue of credibility: establishing the LGBT identity among stereotypes and practices that affect human dignity*

The issue of assessing the credibility of asylum seekers, which by now implies verification of their sexual orientation and gender identity for recognition of the refugee status, is among the most controversial aspects.

It raised a lot of criticism, starting from the implementation of scientifically ineffective tests that included illegitimate practices and were in use in the Czech Republic until 2009. These tests were intended to ascertain the sexual orientation of asylum seekers by assessing their physical reactions when presented with pornographic material.

Apart from these widely reported facts, there are widespread practices that involve medical examinations and psychological tests to ascertain sexual identity, and interviews and assessments of asylum applications that are largely driven by stereotypes, prejudices and clichés about LGBT people.

The Fleeing Homophobia report “catalogued” most of the stereotypes used in the examination of SOGI-based asylum applications.

For example, many people believe that LGBT people are “something less” than the heteronormative role model; hence the prejudices according to which gay men are not “real men” (as they do not possess the characteristics that are usually attributed to the “typical” male represen-

tation), necessarily effeminate, they do not dress in a manly manner and do not do military service. Similarly, lesbian women are considered to be necessarily masculine, they do not get married and do not have children. Accordingly, if the asylum seekers do not comply with such a representation, they are not deemed credible.

According to other prejudices, LGBT people are expected to move in the “gay” circles of their country of origin and to know famous compatriots who have come out. Above all, sexual orientation is believed to correspond more than anything else to a conduct which can be verified by means of explicit questions on sexual acts. It is not considered as expression of the human emotional-affective dimension, with the consequence that evasive answers given during the interrogations inevitably compromise the reliability of the asylum applicant.

Clearly, there is a total lack of preparation on SOGI themes, but also lack of “an accurate, nuanced understanding of the complexities of human behavior in general and of human sexuality in particular”.<sup>21</sup>

Moreover, there is a total lack of intersectional skills that are necessary in order to take into account the many other aspects that intersect with human sexuality.

Human sexuality is expressed in ways, forms, attitudes, languages that vary depending on the uniqueness of the person and identity characteristics, such as ethnicity, religion, culture, geographical origin, etc. Therefore, the sole Western categories related to sexuality and SOGI issues are totally inadequate to understand the experience of LGBT refugees (consider just the fact that the “LGBT” definition may not be recognized or even understood, as it is a completely Western construct).<sup>22</sup>

With regard to these aspects, the CJEU judgment, *A., B., C.*<sup>23</sup> issued on 2<sup>nd</sup> of December 2014 must be cited. This judgment concerned the interpretation of art. 4, Directive 2004/83, as well as art. 3 and 7 of the Charter of Fundamental Rights of the European Union. It stated that the procedures for assessing the asylum application cannot include examinations aimed at “demonstrating” homosexuality or the assumption, as

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<sup>21</sup> ORAM, *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings*, p. 9 <http://oramrefugee.org/wp-content/uploads/2016/04/oram-phallometry-paper-2010-12-15.pdf> (7/18)

<sup>22</sup> Nina Held, *What does a genuine lesbian/gay relationship look like in the eyes of asylum decision makers?* <https://discoversociety.org/2017/05/02/what-does-a-genuine-lesbiangay-relationship-look-like-in-the-eyes-of-asylum-decision-makers/> (7/18)

<sup>23</sup> CJEU, judgment issued on 2<sup>nd</sup> of December 2014, *A, B and C v Staatssecretaris van Veiligheids Justitie*.



evidence, of video recordings containing intimate acts. Moreover, it cannot be based on stereotypical notions about homosexual people or detailed interrogations concerning sexual practices, because this violates human dignity and the private and family life of the applicant. The Court also states that it is unlawful to consider asylum seekers not to be credible only because they had revealed their sexual orientation at a later time and said that this was a reason for persecution. Although art. 4 par 1 of Directive 2004/83 states that it is necessary to present all the elements motivating the application for international protection as soon as possible, we must take into account the individual situation, the personal circumstances and therefore, in this case, the sensitivity of the issues relating to the intimate aspects of one's life, which the applicant may be reluctant to disclose.<sup>24</sup>

In addition, the recent judgment F.<sup>25</sup> of January 25<sup>th</sup> 2018, in which the Court of Luxembourg comments on the interpretation of art. 4 of the new Qualification Directive (2011/95), states that the competent authorities cannot make psychological assessments aimed at verifying the veracity of the declared sexual orientation through projective tests, also configuring this conduct as a disproportionate interference with the private life of persons.

Apart from the illegitimacy of such practices, it must be said that they are totally ineffective.

First of all, the ascertainment of one's sexual orientation and gender identity is an artificial and tricky operation by its very nature. Sexual orientation and gender identity are defined by processes of self-identification, hence they cannot be identified from the outside without causing dysfunctional consequences.

The use of medical and psychiatric examinations,<sup>26</sup> which are highly invasive and may be justified only if they have a legitimate purpose (i.e. if they became necessary according to the law to “serve a specific pur-

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<sup>24</sup> The issue of the “subsequent revelation” is another aspect on which States adopt different interpretations. The possibility that an asylum seeker may later induce his own sexual orientation as a reason for persecution is generally negatively evaluated for the purpose of recognizing the refugee status, for further information see Jansen and Spijkerboer, *Fleeing Homophobia*, cit., p. 67 ss.

<sup>25</sup> CJEU, judgment issued on 25<sup>th</sup> of January 2018, *F. v Bevándorlásiés Állampolgársági Hivatal*.

<sup>26</sup> In this regard, it should be recalled that the Principle 18 of the Yogyakarta Principles states that no one can be forced to undergo any form of test, medical or psychological examination because of their sexual orientation or gender identity.

pose [...] in a democratic society”,<sup>27</sup> that is to say, if they are proportionate), is useful to ascertain the traumas and ill-treatment suffered by asylum seekers, not to ascertain their sexual orientation and gender identity, since these are not a clinical problem.

The action of determining one’s sexual orientation and gender identity also implies that the authorities must identify certain characteristics in the asylum seeker on the basis of which they can establish his/her sexual identity, as if there existed a kind of reference paradigm defining the characteristics and behaviour of LGBT people. However, since such a paradigm does not exist, because sexual orientation and gender identity are human characteristics that have been subject to a violent categorization process within Western culture, the only available model for the authorities appears to be the stereotypical representation of LGBT people.

The use of many stereotypes and clichés, as briefly mentioned before, points out that it is necessary to develop a model to assess the credibility of the applicant and of asylum application in general, which does not focus on an assessment of sexual orientation and of gender identity. Such a model should focus instead on the overall assessment of the consistency of the applicant’s personal story, as indicated by UNHCR, and on appropriate and specific guidelines for conducting interviews and on interrogating methods.

Therefore, it is necessary and essential to train the authorities responsible for examining asylum applications on the SOGI themes and issues and to provide them with the appropriate expertise to interview LGBT applicants.

## 5. Conclusions

As it has been briefly explained, it is clear that a greater and more effective protection of LGBT refugees can only be achieved through a technical, but also cultural, reform of the European asylum system. It is essential to harmonize the legislation in this matter and to lay down specific and detailed provisions on the basis of which state approaches and practices can be standardized. At this time, asking for international protection for SOGI reasons can have very different outcomes depending on the member State examining the application. The aim of achieving a common asylum policy as pursued by the European Union, and as envisaged by art. 78 TFEU, remains clearly disregarded.

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<sup>27</sup> Jansen and Spijkerboer, *Fleeing Homophobia*, cit., p. 52.

Nonetheless, a reform that takes into account only these elements would not be sufficient considering the problems that have been encountered. These problems pertain to a sort of systemic ignorance regarding SOGI issues. Ignorance is “systemic” because it does not concern individual or sporadic deficiencies, but has more profound, structural deficiencies, which are at the basis of the European asylum system itself and, ultimately, at the basis of Western culture.

It is paradoxical that the only practice concerning the examination of SOGI-based asylum applications which is common and valid for all the member States seems to be the “logic of prejudice” against LGBT people. This logic follows the same stereotyping processes and uses the same clichés in recognizing the status of international protection.

The problem, therefore, pertains to the very foundations of the Western culture, whose moral, social and juridical norms have historically been structured around a paradigm that could be defined as “the heteronormativity assumption”. Heteronormativity is the belief that “there is a correct sexual orientation, the heterosexual one; there is a coincidence between biological sex and gender; there is a natural and necessary complementarity between men and women”.<sup>28</sup> The discriminating and stereotyping processes deriving from this assumption are continually reproduced within every context devoid of awareness and training. They provide the only categories, the heteronormative ones, through which the various human experiences are understood, thus being deprived of value, voice and possibility of self-representation.<sup>29</sup> In a context as delicate as that of asylum, these processes are incapable of guaranteeing the effective protection of LGBT people’s human rights and are indeed in their direct violation.

A cultural reform of the asylum system can be achieved only by “filling” systemic ignorance with an equally systemic knowledge. The proposal is to introduce the so-called “lgbt cultural competence”,<sup>30</sup> that is to

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<sup>28</sup> Alexander Schuster, “L’abbandono del dualismo eteronormativo della famiglia”, in Alexander Schuster (ed.), *Omogenitorialità, filiazione, orientamento sessuale e diritto*, Mimesis Editions, Milan-Udine, 2011, p. 35.

<sup>29</sup> Reading every human experience starting from the assumption (and therefore from the reference categories) of heteronormativity creates all the prejudices according to which LGBT people are “something less” than the “dominant” representation, see above.

<sup>30</sup> See Nicole La Violette, “Overcoming Problems with Sexual Minority Refugee Claims: Is LGBT Cultural Competency Training the Solution?”, in Thomas Spijkerboer (ed.), *Fleeing homophobia: sexual orientation, gender identity and asylum*, Routledge, New York, 2013, pp. 189 – 216.

say a permanent and specific training on issues related to sexual orientation and gender identity. The “lgbt cultural competence” must provide the authorities responsible for examining the SOGI-based application with awareness, knowledge and skills. Awareness, as the training must start from the acquisition of tools capable of deconstructing and broadening the consideration of stereotypes and dominant schemes borrowed from one’s own culture since they often operate in ways of which people are not quite aware. Knowledge, because one must learn the LGBT themes and the intersectional competences. Skills, because, thanks to awareness and knowledge, one can acquire the right expertise to interview and relate to LGBT refugees.

However, the limits (in terms of resources and time) that such a training could encounter in its practical implementation are also evident.<sup>31</sup> The authorities responsible for examining the asylum application are generally overloaded with work. They have limited possibilities to access training and they must cover different aspects, not only the very specific SOGI themes. Moreover, there are criticalities deriving from the current European context, which is wholly directed towards anti-migratory solutions: countries seem to be more interested in reducing the number of refugees than in expanding their access to international protection. As a consequence, the fairness of the refugee detection systems and the correct application of the very definition of “refugee” are threatened by reforms that have a negative impact on asylum seekers, such as those aimed at speeding up the decision-making process, at setting procedural obstacles, at reducing the levels of appeal, at increasing the detention of refugees, etc.

In such a restrictive climate, the specific issues regarding the protection of LGBT applicants are added to the broader ones regarding the refugee community. This highlights the urgent need for an effective right to asylum that is able to protect the most vulnerable among the vulnerable.

For them, it is important to reiterate the need to work on the development of a common guidance, which may take into account specific guidelines on the examination of SOGI-based asylum applications, in order to eliminate the discretion of the States, the stereotypes, clichés and harmful practices that violate human rights and the rights of refugee, as well as the regulatory gaps from the methods and practices applied.

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<sup>31</sup> *Ibidem.*