UNIVERSIDADE NOVA DE LISBOA

European Master's Degree in Human Rights and Democratisation
A.Y. 2014/2015

Not That Kind of Gay

Credibility Assessment and the Concept of Sexual Orientation in European Asylum Law

Author: Raphael Ruppacher
Supervisor: Helena Pereira de Melo

Abstract

Recently, more and more countries have recognised sexual orientation as a ground for asylum. This has led to a shift from rejecting such claims because of a lack of recognition of the ground under asylum law to a "culture of disbelief" of the applicant's claimed sexuality. When assessing the credibility of the claimant's sexual orientation, case workers and judges often take an approach loaded with heteronormative and culturally insensitive stereotypes of homosexuality.

This thesis uncovers how the history of sexual orientation asylum claims has led up to a very recent judgement by the Court of Justice of the European Union (*ABC*) that puts an end to the most evident human rights violations in credibility assessments. Furthermore, this thesis postulates that the problems that still prevail in the after-math of this judgement are conceptual. The misconception lies in focusing on assessing the true sexual orientation of the applicant rather than the perceived difference and persecution.

This thesis has a strong theoretical focus and argues for a radical shift away from trying to prove the sexual orientation of asylum applicants by re-interpreting the concept of sexual orientation in European asylum law in the light of queer theory, intersectionality and international human rights standards.

Acknowledgements

Although only my name appears on the cover of this thesis, a lot of people have contributed to the completion of this work through their advice, support and thoughts.

First and foremost, I would like to thank my parents for always believing in me and having unconditionally supported me throughout my studies.

Secondly, my gratitude is to my supervisor, Dr.ª Helena Pereira de Melo, who has guided me throughout the process of drafting this thesis and has provided me with valuable input.

I am very grateful to everybody working in the asylum and LGBTI field who took the time to talk to me and share their thoughts on the issue. A special thank you to Marta Ramos from ILGA Portugal for triggering the final creative process. I am indebted to Inês Carreirinho from the Portuguese Refugee Council for delineating me the situation in the Portuguese asylum system. Thank you to Corina Drousitotou for giving her input on credibility assessments in LGBTI asylum claims in Cyprus. In addition, my sincere gratitude goes to Gábor Gyulai from the Hungarian Helsinki Committee for sharing resources and giving very decisive input in the final stage of the drafting process. A special thank you to my former work supervisor Mag.ª Beatrix Pusch for planting the seed of this thesis, the continuous input she has given me and for being my friend.

Many friends have helped me to stay sane during the stressful times. I thank them for their encouraging words and understanding. Special thanks to: Lisa and Michela for the continuous dialogue and for being my partners in crime; Teresa for always lending me her ears and providing me with new motivation; Cian and Malin for becoming my family in Lisbon and putting me back on track in the hard times.

Finally, all of this would not have been possible without the support of my E.Ma classmates, the E.Ma staff in Venice, our incredible national E.Ma director Dr.ª Teresa Pizarro Beleza and my friends and family in Austria.

List of Abbreviations

APD	Asylum Procedures Directive
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IRO	International Refugee Organisation
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
NGO	Non-governmental organisation
QD	Qualification Directive
PSG	Particular social group
RCD	Reception Conditions Directive
SOGI	Sexual orientation and gender identity
TEC	Treaty on the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	(Office of the) United Nations High Commissioner for Refugees

Table of Contents

1 Introduction 7

1.1 Methodology and Structure 10

2 Legal Aspects of Asylum Claims Related to Sexual Orientation 12

2.1 Asylum and Sexual Orientation at the UN-Level 14

2.1.1 The Development of International Refugee Law 14

2.1.2 The Refugee Convention and Claims Based on Sexual Orientation 16

2.1.3 Yogyakarta and International Human Rights Law 19

2.1.4 UNHCR's Mandate and Response 20

2.1.5 Conclusion 25

2.2 The Council of Europe and Asylum Claims Based on Sexual Orientation 27

2.2.1 The Applicability of the ECHR to Asylum Cases 27

2.2.2 Jurisprudence on Expulsion Cases Related to Sexual Orientation 29

2.3 European Union Law and LGBTI Asylum Claims 33

2.3.1 X, Y and Z v. Minister voor Immigratie en Asiel 34

2.3.2 A, B, C v. Staatssecretaris van Veiligheid en Justitie 37

3 Legal Concepts of Sexual Orientation 40

3.1 The ECHR and Non-Discrimination Related to Sexual Orientation 41

3.1.1 De-Criminalisation and Early ECtHR Case Law 41

3.1.2 Family Law and Related Fields 44

3.1.3 Homosexuality and the Public Sphere 45

3.1.4 Analysing the "Court's Homosexual" 45

3.2 The European Union and Non-Discrimination Related to Sexual Orientation 48

3.2.1 Legal Foundations in EU Primary Law 48

3.2.2 The Concept of Sexual Orientation in Secondary Non-Discrimination Law . 49

3.2.3 Interpreting the Employment Equality Directive 50

3.2.4 Case Law of the CJEU *53*

3.2.5 The Léger Case *55*

3.3 Concepts of Sexual Orientation in Asylum Law 59

3.3.1 Resulting Gaps in the Protection – Credibility Assessment in LGBTI Asylum Claims *64*

4 Alternatives to the *Probatio Diabolica* 72

4.1 A Post-Categorical Approach to Asylum Law 72

4.1.1 Queer Theory and the Global Human Rights Discourse *73*

4.1.2 Queering Law *74*

4.1.3 A Short Intersectional Analysis of Asylum Law *81*

4.2 Practical suggestions – The DSSH Model 86

5 Conclusion 91

6 Bibliography 96

6.1 EU Documents 102

6.2 UN Documents 103

6.3 Selected Case Law 103

6.4 Newspaper Articles 108

6.5 Interviews 108

1 Introduction

"*The fact is that a huge gulf has opened up in attitudes to and understanding of gay persons between societies on either side of the divide. It is one of the most demanding social issues of our time. Our own government has pledged to do what it can to resolve the problem, but it seems likely to grow and to remain with us for many years.****"***[1]

The "huge gulf" in attitudes towards sexual orientation and gender identity that Lord Hope refers to in this quote, which has been taken from the landmark decision in the case *HJ (Iran) and HT (Cameroon)* before the UK Supreme Court, has in light of recent developments grown ever wider and wider. While the US Supreme Court ruled that same-sex marriages should be legalised across the United States on 26 June 2015, thereby making the USA the 21st country in the world to do so, 66 countries around the world still criminalise consensual homosexual activities between adults, in 12 of which they are punishable by death[2]. While governments in Western Europe and the Americas are moving more and more into the direction of granting equal rights to LGBTI[3] persons, some African and Eastern European states like Uganda or Russia seem to be heading the opposite way. The "gulf" in protection that has opened up has led to an increasing number of LGBTI people feeling compelled to flee persecution in their home countries and seek asylum in states that have adopted a more liberal policy towards the issue.

The study "Fleeing Homophobia" that covers sexual orientation and gender identity (SOGI) asylum claims across the Member States of the European Union estimates that around 8.0000 to 9.000 LGBTI persons claim asylum in Europe every year[4], with an increasing trend suggesting that more cases based on these grounds will be filed in the

[1] UK Supreme Court, *HJ (Iran) and HT (Cameroon)*, 7 July 2010, par. 3.
[2] Statistics from 30 June 2015; see http://www.washingtonpost.com/graphics/world/gay-rights/ [last consulted: 30 June 2015].
[3] LGBTI stands for Lesbian, Gay, Bisexual, Transgender and Intersex identities and has emerged historically out of the struggles for recognition of people with alternative sexualities or gender identities. The author is aware of the limitations of the term applied and that many people define themselves beyond these 5 characters. In this thesis, the term "LGBTI" is adopted as a strategical choice due to analytical purposes and simply because it has become one of the most widely used acronyms when referring to issues of sexual orientation and gender identity (SOGI). It is in line with the usage of the term by ILGA-Europe and the European Union. Finally, it is more inclusive than the acronym "LGBT" that does not take into account people with intersex identities.
[44] Jansen & Spijkerboer, 2011, p. 15.

next few years. This huge number of claims encountered little academic attention initially[5], but lately the topic has gained increased resonance in media, academia and advocacy. In 2008, an international NGO was founded that advocates solely for the rights of LGBTI refugees[6], the above mentioned study "Fleeing Homophobia" was conducted in 2011 and the Office of the United Nations High Commissioner for Refugees (UNHCR) has published Guidelines on the adjudication of SOGI asylum claims in 2012.

The field has made enormous legal progress recently and many countries, including lately Brazil[7], have started to grant asylum to people that are persecuted due to their sexual orientation and/or gender identity. One major trend that has been identified by scholars is that jurisdictions that become more sensitive to LGBTI asylum claims tend to move towards a "culture of disbelief", in which asylum applicants are rejected because they are found not to be credible[8]. This is especially true for cases relating to sexual orientation. Hence, L, G and B refugees have increasingly been confronted with the dilemma of having to "prove" their sexual orientation. This has led to infringements of the right to privacy of asylum applicants due to intrusive questioning methods, use of sexually explicit footage of the applicants in asylum procedures and even degrading medical "tests"[9]. Strikingly, even though the European Union has adopted a Common European Asylum System (CEAS), the study Fleeing Homophobia has uncovered huge discrepancies in how credibility assessments are carried out in the EU's member states. As Sabine Jansen has pointed out still in 2014, SOGI asylum decisions are in most EU member states based on "subjective notions"[10], i.e. stereotyped assumptions about homosexuality. In December 2014, the Court of Justice of the European Union (CJEU) has responded to the human rights violations and other aspects of credibility assessment in SOGI cases in the judgement of *A, B and C,* which concerned a preliminary ruling referred by a Dutch court.

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[5] Jansen & Spijkerboer, 2011, p. 13.
[6] http://oraminternational.org/en/about-us [last consulted 30 June 2015]
[7] See http://www.acnur.org/t3/portugues/noticias/noticia/perseguidos-por-sua-orientacao-sexual-refugiados-lgbti-conseguem-protecao-no-brasil/ [last consulted 30 June 2015]
[8] See Millbank, 2009.
[9] Jansen, 2014, p. 23.
[10] Ibidem.

One of the premises of the *ABC* judgement is spelled out in paragraph 52:

"It follows that, although it is for the applicant for asylum to identify his sexual orientation, which is an aspect of his personal identity, applications for the grant of refugee status on the basis of a fear of persecution on grounds of that sexual orientation may, in the same way as applications based on other grounds for persecution, be subject to an assessment process, provided for in Article 4 of that directive."[11]

How asylum authorities across Europe interpret this is that the sexual orientation of an applicant can be subject to verification like any other "material fact" of an asylum case. This leads us to the question what sexual orientation is. International refugee law awards protection to people that belong to certain persecuted "groups". Hence, asylum seekers have to fit into one of these categories. LGB asylum seekers are confronted with the expectation to conform with the category of "homosexual". But in order to assess the membership of one of the protected groups, this category first has to be conceptualised[12].

This thesis therefore approaches the issue of asylum claims based on the ground of sexual orientation from a conceptual perspective and seeks to answer the question, how sexual orientation is construed by international and European asylum law and which consequences such a conceptualisation has. In addition, we will try to explore how this leads to exclusionary practices in the credibility assessment of such cases. Due to the very recent decision of *ABC*, we will have a strong focus on the situation in the European Union (EU), even though developments in other regions of the world will be taken into account.

Even though practical suggestions will be made at the end of this thesis, it is not intended as a handbook or manual for asylum practitioners to guide them on how to assess credibility in SOGI asylum claims. Rather, it is intended as providing theoretical input for advocacy purposes of refugee and/or LGBTI organisations in order to push for a higher level of protection for LGBTI asylum applicants. In addition, it tries to advance

[11] ABC Case, par. 52.
[12] Middlekoop, 2013.

the academic research in the field of sexuality and human rights, since the recent developments in asylum law have so far not been analysed from a queer perspective.

1.1 Methodology and Structure

Given the theoretical approach taken by the author of this thesis and given the fact that the study "Fleeing Homophobia" has provided comprehensive data on the way SOGI asylum claims are adjudicated across Europe, this work does not try to provide empirical evidence on how credibility assessments are conducted in these cases. Rather, it takes the given data as a point of venture to explore how the history of LGBTI asylum claims and the underlying concept of sexual orientation employed by human rights and asylum law influence the way that credibility is assessed.

Therefore, our theoretical voyage will start with a detailed analysis of the legal developments in SOGI asylum claims that have led up to the judgement of *ABC* from 2 December 2014. Taking into account our focus on the EU's asylum system, we will first delineate the international legal bases, before examining legal standards stemming from the European Convention on Human Rights (ECHR) and European Union law.

In the second section of this work, we will explore the concepts of sexual orientation that underlie European human rights law in general and asylum law in particular. For these purposes, we will draw on theoretical works on human rights law and sexual orientation and will subsequently analyse the legal provisions of asylum law delineated in the first section.

In a third step, we will see which consequences the history of SOGI asylum claims and the underlying concept of sexual orientation have for the way in which credibility is assessed in these cases. We will try to make out whether the category of "homosexual" leads to exclusionary practices. Therefore, we will also explore alternatives to the way sexual orientation is conceptualised by law. By applying a social science perspective on the legal aspects of sexuality, our aim is to propose improvements to the current asylum systems in order to enhance the level of protection for people that are persecuted because of their sexual orientation. In this last section, we will also include practical

suggestions for asylum procedures and findings drawn from interviews with experts in the field of asylum law and sexual orientation.

2 Legal Aspects of Asylum Claims Related to Sexual Orientation

As noted above, the first part of this thesis will deal with the legal aspects that govern the way how asylum claims related to sexual orientation are adjudicated. The conclusions that we will draw from this analysis and the structures that we will make out, will help us with analysing the underlying concepts of sexual orientation in refugee law in a second step.

The legal developments around the issue can be traced back to 1981, when asylum was granted for the first time on the grounds of persecution due to the applicant's sexual orientation[13]. The case of *ARRvS* was decided by the Afdeling Rechtspraak Raad van Staate in the Netherlands and was the first to extend the scope of the Geneva Convention to asylum seekers basing their claim on sexual orientation[14]. However, it was not until the early 1990s that the discussion picked up momentum and coherent trends of granting asylum on the basis of homosexuality were to be made out. Until now, significant developments have been taking place in this regard and binding and non-binding legal documents and a rich case law on the issue have emerged. While initially, the courts and legislators were particularly concerned with the question whether the scope of the international asylum law could be interpreted as encompassing protection against persecution on the grounds of sexual orientation, the challenges arising nowadays circle around the issues whether a person can be required to conceal his or her sexual orientation in the country of origin or how to differentiate legitimate and "bogus" claims.

The following analysis will be organised in three parts: In the first section we will focus on the international level and the legal developments that have been taking place in the regime of the United Nations (UN) in the past few years. Thereby, we will accord particular importance to the standpoint of the United Nations High Commissioner for Refugees (UNHCR) and thematically, we will mainly deal with the recognition of sexual orientation as a ground of asylum in classical refugee law.

[13] FIDH & ILGA-Europe & ICJ, 2013, § 6.
[14] Lawson et al., 2008, p. 24.

The second part will analyse the human rights regime implemented by the Council of Europe (CoE). Even though we will not be dealing with classical refugee law here, the increased intertwinedness of human rights and refugee law is emblematically manifested in the issue of LGBTI asylum claims. Therefore, we will analyse how the European Court of Human Rights (ECtHR) has dealt with the issue of homosexuality in cases involving expulsion and the threat of *refoulement*.

In a last section, we will explore the legal regime of the European Union, which has adopted a rather progressive approach towards the issue and has also passed legislation that explicitly refers to sexual orientation as a ground for asylum. Thematically, we will be focussing on the requirement of discretion upon return to the country of origin and the question of credibility assessment, as two preliminary rulings have recently been passed by the Court of Justice of the European Union (CJEU)[15].

As a last remark before immersing into our legal analysis, we wish to emphasise that this section deals with asylum claims based on the ground of sexual orientation rather than with LGBTI asylum claims in general. However, in most legal documents, international guidelines, Court cases, but most importantly the legal-academic discussion, the issue is mostly dealt with under the headline of asylum claims related to sexual orientation and/or gender identity (SOGI). This is why in the following chapters, the terminology might oscillate between LGBTI asylum claims or asylum claims related to sexual orientation, depending on the legal context and the document or issue discussed.

[15] Case of *XYZ* from November 2013 and the case of *ABC* from December 2014.

2.1 Asylum and Sexual Orientation at the UN-Level

National courts and administrative bodies have been slow in the recognition of asylum claims based on sexual orientation. In the US and Canada, it was not until the 1990s that courts started to grant refugee status to applicants that claimed to be persecuted due to their sexual orientation[16]. Similarly, the UN system has been reluctant to respond to this issue. Nevertheless, recent developments reflect a global positive trend to (1) recognise sexual orientation as a ground of persecution protected by the Refugee Convention 1951 and (2) to address particular problems that are characteristic for such claims. One of the reasons for the slow pace at which the international refugee regime has been able to give an answer to LGBTI asylum claims is the history of the international protection of refugees and the inherent structure that follows from it. Therefore, it will be necessary to briefly outline the crucial developments that lead to existing mechanisms in refugee protection, before we can start analysing their relevance for applicants persecuted due to their sexual orientation. Consequently, we will explore how these international legal documents have responded to asylum claims based on sexual orientation.

2.1.1 The Development of International Refugee Law

The founding document from which present-day asylum law stems is the 1951 Geneva Convention on the Status of Refugees. Before its adoption after World War II, there were already symptoms that pointed to the drafting of a universal legally binding instrument. In the *interbellum*, the protection of refugees was seen as an obstacle, because they were per definition outside of the diplomatic protection of their home countries, but also had no legal status in the respective receiving country[17]. As a result, the League of Nations pushed for the adoption of the 1933 Convention relating to the International Status of Refugees, which according to Hathaway[18] can be regarded as one of the first codifications of human rights.

At a global level, the United Nations established the High Commissioner for Refugees and on 28 July 1951, the Geneva Convention on the Status of Refugees (the Geneva Convention, Refugee Convention) was opened for signature. Initially, the applicability

[16] La Violette, 2010, p. 75.
[17] Hobe & Kimminich, 2004, p. 425.
[18] Hathaway, 2005, p. 87.

of the provisions of the Geneva Convention was geographically limited to Europe, which has lost significance since the adoption of its 1967 Protocol, which expanded the effects to the entire globe. Most of the signatory states of the Geneva Convention are today also part of the 1967 Protocol. As the rights set out in the two documents are identical, state parties to the Protocol do not have to adhere to the Geneva Convention.

Even though the Universal Declaration of Human Rights (UDHR) from 1948 can be regarded as having influenced the drafting of the Refugee Convention in the sense that also economic and social rights for refugees have been included[19], the actual right to asylum guaranteed by Art. 14 (1) UDHR[20] was not implemented by international refugee law[21].

The core principle that dominates the regime of international protection installed by the 1951 Geneva Convention is the principle of non-refoulement[22]: If asylum is granted to an applicant, expulsion to the country of origin is prohibited. Non-refoulement in relation to the threat of torture on the other hand constitutes customary international law[23].

Fortunately, the evolution of the international refugee law regime did not come to an end after the setting up of the Refugee Convention in 1951. Codified and legally-binding international human rights law has encompassed some aspects of refugee protection that the 1951 Convention had not envisaged[24].

Since 1975, the trend in the development of international refugee law has been to interpret existing refugee rights rather than formulate new ones: This usually happens by the adoption of "Conclusions" by the contracting parties passed as resolutions. These conclusions may offer a high political authority, but are not legally binding[25].

[19] Ibidem, p. 95.
[20] "Everybody has the right to seek and enjoy in other countries asylum from persecution."
[21] Hobe & Kimminich, 2004, p. 427.
[22] Art. 33 Refugee Convention
[23] Hobe & Kimminich, 2004, p. 427.
[24] Hathaway, 2005, p. 110.
[25] Ibidem, p. 113.

2.1.2 The Refugee Convention and Claims Based on Sexual Orientation

The 1951 Convention and its 1967 Protocol succeeded in establishing a common global definition of who should be entitled to international protection. The relevant provision of Art. 1A (2) sets out which criteria have to be fulfilled in order to speak of a "Convention Refugee". It can be summed up as follows:

The person must

(1) be outside of the country of origin,
(2) be unable or unwilling to seek protection from this country or return there,
(3) have a well-founded fear of persecution
(4) and this persecution must be based on one of the "prohibited grounds" of either race, religion, nationality, membership of a particular social group or political opinion.[26]

Convention refugees might also be referred to as "statutory refugees" to distinguish them from other groups (e.g. internally displaced persons) under the protection of UNHCR[27].

Relating to asylum claims based on persecution due to an applicant's sexual orientation, the most contested element (besides the actual persecution) has been the ground of persecution. As we have seen, sexual orientation is not explicitly mentioned as one of the "prohibited grounds" of persecution and can also not easily be subsumed to one of the grounds provided for in Art. 1A (2) Refugee Convention. When LGBTI asylum claims were started to be filed, the crucial battle was to get sexual orientation recognised under one of the prohibited grounds of the Convention.

Even though the grounds of religion and political opinion can and have been brought into play[28], the "membership of a particular social group" lends itself most to a broader interpretation encompassing claims of LGBTI people.

[26] See Goodwin-Gill &McAdam, 2007, p. 37.
[27] Ibidem. p. 49.
[28] Crawley, 2001, p.171.

Historically, the category of a "particular social group" did not comprise people of the same sexual orientation. At the time of drafting, it was most probably designed to provide a basis for asylum for landowners and capitalists fleeing from newly socialist countries[29]. However, state practice has shown that a variety of groups defined by a common characteristic and facing persecution can fall under the definition of "a particular social group". UNHCR has given guidance on the interpretation by issuing Guidelines[30], which state that even though there is no "closed list" of grounds that can be invoked under the umbrella of "membership to a particular social group" (paragraph 3), not any group can be recognised as falling under the definition (paragraph 2). In Paragraph 1 of the mentioned Guidelines, UNHCR also already considers homosexuals as being eligible for forming a particular social group, even though it is more of an allusion than a true recognition.

In the following paragraphs, we will see how people fleeing because of their actual or perceived sexual orientation have been conceptualised as being a particular social group that the Refugee Convention is applicable to. For this purpose, we will also swiftly discuss some landmark decisions of national jurisdictions that sustainably influenced the discussion on an international level and were decisive for how and when international documents relating to the issue were drafted.

In the early 1990s, when asylum claims based on sexual orientation started to be filed in North America, international documents still provided little guidance on how to interpret the notion of a "particular social group". The UNHCR Handbook that already existed at this time merely spoke of "persons of similar background, habits or social status"[31].

One of the most important judgments in determining who belongs to a particular social group was the case of *Canada (AG) v. Ward*[32]. The case concerned an Irish national who had applied for refugee status in Canada due to feared persecution because of his

[29] Goodwin-Gill & McAdam, 2007, p. 74
[30] UNHCR Guidelines on International Protection.
[31] UNHCR, 1992, par. 7.
[32] Canada (Attorney General) v. Ward, [1993], 2 S.C.R. 689.

membership in a terrorist organization (particular social group). By interpreting the meaning of Art. 1A (2) Refugee Convention, the Canadian Supreme Court identified three groups of people that would qualify for constituting a particular social group. According to the Court's reasoning, the first of these would be defined by an "innate or unchangeable characteristic"[33], which would also encompass homosexuals. Sexual orientation is therefore construed as innate and unchangeable and not as a flexible or fluid category. As we will see below, social science argues for a reconceptualisation of sexual orientation as not being stable and especially not since birth.

At the basis of the reasoning of the Canadian Court lay the fundamental insight that the application of today's refugee regime has to rely on international human rights law. Goodwin-Gill and McAdam have emphasized in a similar manner that the principle of non-discrimination linked to human rights forms the basis of determining a persecuted social group[34]. In addition, they argue that recent case law tends to interpret the category of a particular social group as being constituted by a "conjunction of internal characteristics and external perceptions"[35].

A concern to take both, a common characteristic protected by human rights and ascriptions from society into account, has also been expressed by UNHCR and is reflected in two types of "tests" that are put forward in order to determine the membership to a particular social group: The first, which is usually referred to as the "protected characteristics approach", applies human rights terms to identifying groups by granting protection to members of those groups that are defined either by "immutable" characteristics or because the affiliation to the group is the expression of a fundamental human right[36]. The "social perception approach" places the emphasis on the fact that the group is perceived as standing apart from society[37]. Both tests lead to the conclusion that homosexuals constitute a social group that merits protection[38].

[33] Canada (AG) v. Ward, p. 78.
[34] Goodwin-Gill & McAdam, 2007, p. 86.
[35] Goodwin-Gill & McAdam, 2007, p. 75.
[36] UNHCR, 2003, p. 294.
[37] UNHCR, 2003, p. 296.
[38] UNHCR, 2003, p. 304.

2.1.3 Yogyakarta and International Human Rights Law

For a better understanding of the following chapters, we make a short digression on the interrelationship of international human rights law and refugee law at this point.

The trend towards recognition of "non-traditional" social groups as protected groups by the Convention can be seen as a manifestation of the increased inter-connectedness of international refugee law and international human rights law[39]. What is important to note in this context is that the recognition of LGBTI persons as a particular social group can thus be traced back to a specific legal reasoning by practitioners and not to the extra-legal pressure of lobbying groups[40].

When the Refugee Convention was drafted in 1951, the UDHR was still a not enforceable General Assembly Resolution. Nowadays, the UDHR is widely accepted as legally binding for several reasons and in addition, various conventions have been set up that codify international human rights law[41]. Especially the rights set out in the International Covenant on Civil and Political Rights (ICCPR) are important to refugees and have closed certain gaps in the international protection of asylum seekers[42]. Most importantly and as we have seen above, international human rights law has often become the basis of the refugee definition, simply because at the time of drafting of the Geneva Convention, it was clear who a refugee was and therefore no guidance had to be given in the document[43].

In regard of the application of international human rights law to LGBTI issues, the "Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity" (the Yogyakarta Principles) give important guidance. They were drafted by a group of international experts that gathered in Indonesia in 2006. When talking about the Yogyakarta Principles, it is crucial to keep in mind that even though they have gathered remarkable momentum in the past decade, they are not legally binding and merely constitute a declaration by human rights

[39] See McGhee, 2001, p. 20.
[40] See ibidem. p. 39
[41] See Oráa Oráa, 2009, 220.
[42] See Hathaway, 2005, p. 122.
[43] Mole & Meredith, 2010, p. 11.

scholars. So far, no comparable document has been issued officially by the United Nations.

Despite the lack of an official endorsement by the UN, the Yogyakarta Principles have had a considerable impact. This is due to the fact that various international documents refer to them and rely on the definitions set out therein, which has been shown by a comprehensive study for the period of 2007-2010[44]. They also establish a definition of sexual orientation and gender identity that is nowadays widely respected and applied in international documents, as for example in the UNHCR Guidelines on Sexual Orientation and Gender Identity (paragraph 8). Sexual Orientation hereby is defined as follows:

"Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."[45]

Most remarkably, the Yogyakarta Principles stipulate a right to asylum of LGBTI people that have a well-founded fear of persecution in their countries of origin (Principle 23).

Other human rights implications of LGBTI asylum claims, such as the prohibition of non-refoulement due to the threat of torture or inhuman or degrading treatment or human rights violations occurring in asylum procedures will be discussed below in the sections on the level of protection by the Council of Europe respectively the European Union.

2.1.4 UNHCR's Mandate and Response

As we have seen in the previous chapters, early developments on the issue of asylum claims based on sexual orientation and/or gender identity have mainly orbited around the question of how to subsume such claims under existing international refugee law. In most cases, membership of a particular social group and resulting persecution has been applied in order to establish the recognition of such claims. Through the mutual

[44] Ettelbrick &Trabucco Zerán 2010.
[45] Yogyakarta Principles, p. 6, fn. 1.

reinforcement of international refugee law and international human rights law, LGBTI persons having a well-founded fear of persecution have been granted asylum in various countries, starting with the Netherlands in 1981[46].

State practice concerning the recognition of such asylum claims has been diverse and often contradictory, which has also been identified recently as an issue in the European Union[47]. Aspects that have been treated in a different manner by various jurisdictions and even courts within the same country relate to problems of credibility assessment, evidence, late disclosure, third country information etc. Consequently, LGBTI applicants have been found to encounter specific obstacles when applying for asylum.

Under Art. 35 of the 1951 Refugee Convention, the UNHCR has the mandate to give guidance on emerging issues in refugee law. The most important sources under this power include: The Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook"), various Guidelines, Position Papers and Guidance Notes. While the proliferation of such sources has led to confusion in several other fields[48], the UNHCR was remarkably silent on the issue of LGBTI asylum claims and has only recently provided comprehensive and coordinated guidance for state parties.

Even though the UNHCR Guidelines on Gender-Related Persecution from 2002 (Gender Guidelines) already included a reference to persecution based on the claimant's "sexuality or sexual practices" in their paragraph 16[49], the first time that UNHCR addressed the issue directly was in 2008 by publishing the "*Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*"[50] (SOGI Guidance Note).

The most notable achievement of this document was the acknowledgement of a specific set of problems that LGBTI applicants might encounter in their claims. However, critics

[46] FIDH & ILGA-Europe & ICJ, 2013, par. 6.
[47] See the extensive study on this issue: Jansen & Spijkerboer, 2011.
[48] Hathaway, 2005, p. 118.
[49] UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees.* UN doc. HCR/GIP/02/01, 2002. Accessible online: http://www.refworld.org/docid/3d36f1c64.html.
[50] UNHCR, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 2008.* Accessible online: http://www.refworld.org/docid/48abd5660.html.

have argued that it did not constitute a comprehensive legal analysis of the issue[51]. Taking into account that other international organisations have been reluctant to make clear statements on the protection of human rights of LGBTI persons, the Guidance Note can still be regarded as a strong signal[52].

In relation to earlier documents issued by the UNHCR, the Guidance Note made specific reference to the Gender Guidelines. Behind this lies the reasoning that the problems encountered by sexual minorities often stem from the non-conformity with accepted gender roles. One evident correlation are the agents of persecution, which in both cases are often non-state actors who try to enforce traditional gender expectations.[53]

In its paragraphs 17-25, the Guidance Note already contests the practice of applying a "discretion requirement", which suggests that homosexuals can be required to conceal their sexual orientation in their country of origin in order to avoid persecution (the "closet" as an internal flight alternative).

In her assessment of the Guidance Note from 2008, Nicole LaViolette has argued that the document failed to address bisexuality and intersexuality adequately[54]. In addition, she holds that paragraph 36 referred to stereotyped notions of how a certain sexual orientation is expressed in specific mannerisms, but fails to take into consideration the culturally specific context of refugees[55].

In the meantime, the Guidance Note from 2008 has been replaced by the *"Guidelines on International Protection No. 9: Claims of 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"*[56](SOGI Guidelines), issued

[51] La Violette, 2010, p. 176.
[52] Ibidem, p. 180.
[53] Ibidem, p. 183
[54] Ibidem, p. 191.
[55] Ibidem, p. 194.
[56] UNHCR, *Guidelines on International Protection No. 9: Claims of 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.* UN doc. HCR/GIP/12/09, 2012. Accessible online: http://www.refworld.org/pdfid/50348afc2.pdf.

in 2012. The Guidelines also constitute a soft law instrument, even though they are more authoritative than a Guidance Note, which usually serves as a first attempt to address an emerging issue[57].

In a similar manner as the Guidance Note, the Guidelines explicitly have the objective to ensure a "proper and harmonized interpretation" of the guarantees of the 1951 Convention (paragraph 4).

Unlike the Guidance Note, the Guidelines explicitly mention the right to asylum of people persecuted on accounts of their sexual orientation or gender identity (paragraph 7), which has been set out in Art. 23 of the Yogyakarta Principles as well. The Guidance Note had just made reference to the Yogyakarta Principles, but not mentioned this specific right.

In general, the Guidelines give a broader and more comprehensive assessment of the issue of asylum claims based on sexual orientation and/or gender identity than the respective Guidance Note of 2008. They reflect jurisprudence and debates on the issue and give guidance on how to deal with the specific problems that LGBTI claimants might encounter: Particularly, they address the issue of *sur place* claims, which are common in LGBTI related cases, as the sexual orientation and/or gender identity of an applicant might change over time[58]. In addition, they offer an explanation of the terminology applied that even goes into more detail than the Yogyakarta Principles[59].

The Guidelines particularly focus on the issue of what constitutes persecution, as many LGBTI asylum claims have been rejected because no well-founded fear of persecution has been found. For our purposes, we will focus on the Convention grounds that might be invoked in claims based on sexual orientation and/or gender identity and on the standards set out for the credibility assessment.

The Guidelines recognise that not only the ground of "membership of a particular social group" might be relevant, but also those of "religion" or "political opinion" – depending

[57] See LaViolette, 2010, p. 177.
[58] UNHCR SOGI Guidelines, para. 57.
[59] UNHCR SOGI Guidelines, para. 10.

on the specific cultural and social context[60]. The Guidelines on Social Group Membership by UNHCR build on the discussions delineated above, which place the emphasis on an "innate, unchangeable or otherwise fundamental" characteristic[61]. In this sense, the SOGI Guidelines go further and make reference to the two approaches of "protected characteristics" and "social perception"[62] discussed above. Remarkably, they do not completely follow the jurisprudence of putting the sole emphasis on the "innate and immutable" character of sexual orientation, but acknowledge that sexual orientation can also be perceived as a characteristic "so fundamental to human dignity that the person should not be compelled to forsake" it[63]. Finally, they contest the argument that LGBTI persons would fail the social perception test, because they do not associate or are not visible to each other in some societies[64] and set out that sexual identities may be evolving[65].

Evidentiary issues are at the heart of human rights violations in relation to asylum claims based on sexual orientation and/or gender identity. In this regard, the Guidelines provide for procedural standards, such as: LGBTI asylum procedures should not be subjected to "safe country of origin" concepts, which has been a major issue in Germany lately[66]. Furthermore, the Guidelines emphasise the importance of trust and confidence between interviewers and applicants, state that cultural sensitivity when dealing with applicants is essential and the language applied by government officials can be crucial[67].

Specifically on the issue of credibility assessment, UNHCR sets out the following: The interview should be as non-confrontational as possible (§ 63), self-identification is an indicator of the applicant's sexual orientation (§ 63i), questions about the childhood of the applicant can be helpful (§ 63ii), as well as questions about the "coming-out" (§

[60] Ibidem., para. 40.
[61] UNHCR PSG Guidelines, para. 11.
[62] UNHCR SOGI Guidelines, para. 45.
[63] Ibidem, para. 47.
[64] Ibidem, para. 48.
[65] Ibidem, para. 49.
[66] Referred to as *"Sicheres Herkunftsland"* in German jurisprudence. See: TAZ, 02 March 2015, "Die ewige Angst: Transsexuelle bekommt kein Asyl".
[67] UNHCR SOGI Guidelines, para. 60.

63iii) and the experience of being different (§ 63v). Furthermore, the guidelines suggest that narrations on the applicant's relationship with his family, with sex partners and the LGBTI community as such can be of particular importance for an assessment of the claimant's credibility (§§ 63vi, vii and viii). Even though the Guidelines establish a favourable approach for specific difficulties that LGBTI applicants may face and for example state that "[d]etailed questions about the applicant's sexual life should be avoided"[68], they also state that knowledge about the LGBTI scene in the country of refuge can be an indicator of the claimant's credibility. This can be regarded as a stereotypical approach to dealing with LGBTI applicants and will further be assessed below.

On evidentiary issues, the Guidelines also explicitly contest the practice of medical examinations in §65, whereas they merely set out that documentary or photographic evidence of sexual acts should not be asked for by the authorities. Hence, they do not give guidance on the question whether such evidence that is brought forward voluntarily should be accepted.

2.1.5 Conclusion

The international documents produced by the UNHCR relating to asylum claims based on sexual orientation and/or gender identity thus have given important guidance for national courts and legislators on issues that have long been contested. They build on a debate that has its roots in the early 1990s, when LGBTI asylum claims started to be filed in North America. We have seen that in this first phase of the debate, the discussion mainly focused on the question if persecution on the basis of sexual orientation would fall under the protection of the Refugee Convention as such.

While a general trend of measuring international refugee law with the standards of international human rights law can be noticed, this also became manifestly evident in the recognition of LGBTI asylum claims: The reasoning of applying the "membership of a particular social group" criterion to LGBTI persons has drawn on human rights language and the principle of non-discrimination by implying that sexual minorities have an "innate and immutable" characteristic or otherwise that sexual orientation and

[68] Ibidem, para. 63vii.

gender identity are so fundamental to human dignity that they ought not to be changed following pressure from outside. This twofold approach has also been integrated in the official documents adopted by UNHCR.

Looking at the history and structure of international refugee law has shown that the criterion of the social group inherently bears the risk of essentialising sexual orientation. Sidestepping the debate, whether gender identity or sexual orientation are unchangeable and inherent is one way of international organizations to avoid possible critique from the social sciences that fear an implicit homogenisation or conceptual essentialisation of people having the same sexual orientation.

Developments in international human rights law have also helped to find an acceptable definition of what constitutes homosexuality. The generally good reception of the Yogyakarta Principles has aided to promote an understanding of sexual orientation as a "capacity" rather than an identity, which is reflected in the definitions of the UNHCR SOGI Guidelines. This definition will be very helpful to overcome the difficulties that stem from construing sexual orientation as an identity. As we will see below, the definition employed by these Guidelines is unfortunately not always reflected in recent trends of jurisprudence in Europe.

While national jurisprudence is extremely diverse on the issue, the UNHCR provides basic Guidelines that can generally be regarded as progressive, even though critical points have been identified.

2.2 The Council of Europe and Asylum Claims Based on Sexual Orientation

As we have delineated above, the issue of asylum claims based on sexual orientation lies at the intersection of international human rights law and the international refugee regime. IHRL has contributed to interpreting the definition of the term "refugee" simply because at the time of drafting of the Refugee Convention in 1951, it was clear who a refugee was. In addition, human rights law has become crucial in determining if asylum procedures infringe fundamental rights or the inherent dignity of applicants. Another aspect that has not yet been touched upon in this work, but will be at the heart of the following chapter, are additional forms of granting asylum that do not build on the classical refugee regime, but are based on principles of human rights law. These mainly include the prohibition of *non-refoulement* stemming from the right to life and the freedom from torture and inhuman or degrading treatment.

The European Convention of Human Rights (ECHR) was drafted in 1951 and has established a powerful regional human rights regime among the presently 47 member states of the Council of Europe. Even though all member states of the Council of Europe are bound by the 1951 Geneva Convention, the European Court of Human Rights (ECtHR) can only rule on obligations under other treaties, if rights set out in the ECHR are at stake[69]. Therefore, it will first be crucial to assess the relationship of the ECHR and asylum issues, before we can analyse the jurisprudence of the Strasbourg Court on LGBTI asylum claims.

2.2.1 The Applicability of the ECHR to Asylum Cases

In their analysis of the interrelationship of asylum and the ECHR, Nuala Mole and Catherine Meredith (2010) have identified four main areas of intersection: Expulsion cases involving Art. 3 ECHR, the extraterritorial application of other ECHR provisions, procedural aspects of asylum cases and issues that do not involve the protection from expulsion.

As we have seen, there is no provision in the ECHR that would set out a right to asylum. However, Art. 3 ECHR that stipulates the prohibition of torture and inhuman or

[69] Mole & Meredith, 2010, p. 8.

degrading treatment, has been interpreted by the Strasbourg Court as encompassing the obligation of a State not to extradite a person to a country where he or she would face the risk of being tortured or subjected to inhuman or degrading treatment. One of the most prominent cases relating to this extraterritorial application of Art. 3 ECHR is *Soering v. The UK* (1989)[70] where the "death-row phenomenon" was seen as amounting to a violation if the person would be extradited to the US. In the case of *Cruz Varas v. Sweden*[71], the principle enounced in *Soering* was applied to an asylum procedure, where the applicant was facing expulsion[72]. Hence, even though there is no explicit right to asylum, a similar effect can be achieved by the extraterritorial application of Art. 3 ECHR, which has now been codified for EU Member States in §15 of the further to be discussed Qualification Directive ("subsidiary protection").

Strictly speaking, this form of extraterritorial application of the ECHR only exists for Art. 3 ECHR. However, the Court has held that the right to life (Art. 2) enjoys a similar protection[73]. Articles 5, 6 and 8-14 ECHR can result in a prohibition of extradition/expulsion, if there is a "flagrant breach" of these provisions in the country of origin[74]. In *Dudgeon v. the UK* (1981)[75], the ECtHR has ruled that sexual orientation falls under the protection of the right to private life (Art. 8 ECHR). Concerning the extraterritorial application, the Court has held in *F. v. the UK*[76] that no extraterritorial application is awarded to Art. 8 for cases involving the criminalisation of homosexual acts, simply because "on a purely pragmatic basis, it cannot be required that an expelling state only returns an alien to a state that is in full and effective enforcement" of the rights guaranteed by the ECHR[77].

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[70] ECtHR, *Soering v. The UK*, Application no. 14038/88, Plenary, 7 July 1989. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619.
[71] ECtHR, *Cruz Varas and others v. Sweden*, Application no. 15576/89, Plenary, 20 March 1991. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57674.
[72] Mole & Meredith, 2010, p. 21.
[73] Ibidem, p. 89.
[74] Ibidem, p. 88.
[75] ECtHR, *Dudgeon v. UK*, Application no. 7525/76, Plenary, 22 October 1981. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473.
[76] ECtHR, *F. v. United Kingdom*, Application no. 17341/03, Fourth Section, 22 June 2004. http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-24020.
[77] Mole & Meredith, 2010, p. 101.

Concerning procedural guarantees, the ECHR provides for the right to a fair trial in its Art. 6. However, this provision is only applicable to court procedures to determine "civil rights and obligations" and "criminal charges". Even though the interpretation of these legal areas is very wide according to the case law of the Court and is not bound to domestic definitions of civil or penal law, asylum cases have been traditionally regarded as being part of the core public obligations of a state. Thus, Art. 6 ECHR is not applicable to asylum cases. The only safeguard for the quality of asylum procedures is therefore Art. 13 ECHR, which sets out the right to an effective remedy. In addition, Art. 6 ECHR can apply in extradition cases, if the applicant is charged with a criminal offence.[78]

Asylum cases before the ECtHR that did not involve the threat of expulsion have concerned unlawful detentions (Art. 5 ECHR)[79], infringements of the freedom of movement (Art. 2 Additional Protocol 4)[80], cases of family reunion falling under the protection of the right to private life (Art. 8 ECHR)[81] and non-discrimination linked to the uncertain legal status of refugees (Art. 14 ECHR)[82].

2.2.2 Jurisprudence on Expulsion Cases Related to Sexual Orientation

As we have seen above, the lack of a provision setting out a right to asylum in the ECHR does not allow the Strasbourg Court to adjudicate in "classical" refugee matters. However, the extraterritorial application of some articles of the Convention has provided for the establishment of the prohibition of expulsion in certain cases, most importantly those involving a threat of torture or for the life of the applicant in the country of origin.

The cases involving homosexual asylum seekers before the European Court of Human Rights have thus also concerned infringements of Art. 3 ECHR, as the Court has rejected an extraterritorial application of Art. 8 in LGBTI asylum cases (see above). Besides the question of whether persecution based on sexual orientation in fact amounts

[78] Ibidem, pp. 124-125.
[79] Ibidem, p. 133.
[80] Ibidem, p. 140.
[81] Ibidem, p. 181.
[82] Ibidem, p. 202.

to a breach of Art. 3 ECHR, the Court has adopted a very controversial jurisprudence on whether a person can be requested to conceal his or her sexual orientation in order to avoid persecution.

The International Federation for Human Rights (FIDH) has provided a thorough synopsis of the Court's case law on LGBTI issues[83] in 2013. Concerning asylum cases respectively cases involving the threat of expulsion, the FIDH has, alongside other NGOs, pointed out that there is a consensus amongst Council of Europe Member States that the expulsion of a person to a country where he or she has to fear persecution due to his or her actual or perceived sexual orientation amounts to a breach of Art. 3 ECHR. Nevertheless, the Court has ruled in two cases in 2004 (*F. v. the UK*, *I.I.N. v. The Netherlands*) that the situation for homosexuals in Iran did not reach the necessary threshold for constituting a violation of Art. 3, thereby declaring both applications inadmissible. In addition, the Court could only reach such a conclusion, because of an underlying assumption that the applicants would conceal their sexual orientation in their country of origin[84]. This "discretion criterion", that has been established by the jurisprudence of several national courts, has been openly opposed by the UNHCR in the SOGI Guidelines from 2012 (§31) and has also been revoked by the Supreme Court of the UK[85].

Despite the opposition towards a "discretion criterion" in Europe in the past few years, the ECtHR reaffirmed its practice in the judgment *M.E. v. Sweden* from 2014. The case concerned a male Libyan applicant that had applied for family reunion with his husband in Sweden. The Swedish authorities rejected the application, because according to domestic procedural provisions, the application had to be filed in the country of origin. The applicant argued that the requirement to return to Libya in order to apply for family reunion with his partner of the same sex would expose him to ill-treatment due to his sexual orientation. The Court ruled that expelling the applicant to Libya for a period of 4 months in order for him to apply for family reunion from there would not amount to a breach of Art. 3, because he could conceal his sexual orientation for this time: "*In the*

[83] FIDH, 2013.
[84] Ibidem, p. 15.
[85] Landmark judgment of *HJ (Iran) and HT (Cameroon) v. SSHD* [2010].

Court's view, this must be considered a reasonably short period of time and, even if the applicant would have to be discreet about his private life during this time, it would not require him to conceal or suppress an important part of his identity permanently or for any longer period of time."[86]

Hence, the Court, even though not reaffirming a general requirement of discretion, has still upheld this reasoning by applying a "reasonable tolerable" test. The dissenting opinion of Judge Power-Forde is particularly remarkable in this case, as she harshly criticises the majority ruling. She argues that the developments in the past ten years, such as the aforementioned UK Supreme Court judgment, the adoption of the UNHCR Guidelines and the later to be discussed CJEU-case of *X, Y, Z v. Minister voor Immigratie en Asiel*, all point towards the abolishment of the discretion criterion. In particular, she compares the requirement of the applicant to "return to the closet" to rejecting an asylum application of Anne Frank, because she could be required to return to the attic and hide her religion[87]. Most importantly, she affirms that sexual orientation is not merely about sexual conduct as the majority ruling suggests, but that it is "inherent to one's identity and that it can be expressed in a myriad of ways"[88]. In her last paragraph, Judge Power-Forde reminds us that the ECtHR has ruled in *Slyusarev v. Russia*[89] that depriving a person of his reading glasses for some months amounts to a violation of Art. 3 ECHR. For the same Court, forcing the applicant to conceal his sexual orientation for the same amount of time does not.

The judgement was delivered on 26 June 2014, but has been referred to the Grand Chamber on 17 November 2014. A final judgment is to be expected in summer 2015.

In conclusion, the case law of the Strasbourg Court on the issue of LGBTI asylum cases is scarce and only involves cases of homosexual applicants facing expulsion to their countries of origin. So far, even though a general discretion criterion seems to have been

[86] ECtHR, *M.E. v. Sweden*, Application no. 71398/12, Fifth Section, 26 June 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145018. § 88.
[87] M.E. v. Sweden (2014), p. 33.
[88] Ibidem.
[89] ECtHR, *Slyusarev v. Russia*, Application no. 60333/00, Third Section, 20 April 2010. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98331.

abandoned, a temporary concealment of an applicant's homosexuality has been seen as in line with the provisions of the ECHR in the *M.E. v. Sweden* judgment in 2014. This jurisprudence is not in line with international standards such as the UNHCR SOGI Guidelines and reduces homosexuality to a mere sexual behaviour, while the global trend has pointed into the direction of perceiving a person's sexual orientation as an integral part of one's identity.

2.3 European Union Law and LGBTI Asylum Claims

For the 28 Members States of the European Union, 4 different legal regimes are applicable in relation to asylum and expulsion cases: The 1951 Geneva Convention and its 1967 Protocol, EU legislation, the 1984 Convention on the Prevention of Torture and the 1950 European Convention on Human Rights. The EU as a supranational organisation has played a key role in harmonising asylum procedures by passing legislation that is directly applicable in the Member States.

Since the Treaty of Lisbon, asylum law has become a matter of common interest for the EU and now constitutes one of the competencies of the Union as a legislator. Art. 67 (2) and Art. 78 of the Treaty on the Functioning of the European Union (TFEU) provide the legal basis for that and speak of a "common policy on asylum, subsidiary and temporary protection" that must be in accordance with the standards set out in the Geneva Convention of 1951. In addition, the Charter of Fundamental Rights of the EU is now legally binding: Art. 6 (1) of the Treaty on the European Union (TEU) provides that the Charter has the same legal value as the Treaties, which makes it primary union law. This renders the right to asylum set out in Art. 18 CFR and the principle of non-refoulement of Art. 19 CFR applicable whenever Member States are applying EU legislation.

Concerning asylum matters and EU legislation, three very important legal instruments have emerged: The Qualification Directive (QD), which sets out criteria for the determination of asylum status or the status of subsidiary protection, the Reception Conditions Directive (RCD) and the Asylum Procedures Directive (APD).

The Qualification Directive from 2011 is of particular importance for the assessment of asylum claims based on sexual orientation, since the practice amongst the EU Member States in this regard has been identified as everything but uniform[90]. The Qualification Directive and the other Directives relating to asylum law aim at the creation of a uniform asylum system and a common status of asylum across the European Union.

[90] Jansen & Spijkerboer, 2011, 7.

It is important to note, that the QD explicitly mentions that the Geneva Convention constitutes the corner stone of asylum law[91] and that the directive itself only provides guidance on the interpretation and application of this international document. In this sense, it sets out a very clear standard on which characteristics qualify for constituting a "particular social group" in the sense of Art. 1A (2) Geneva Convention. With a strikingly similar rhetoric as international jurisprudence and documents of the UNHCR, Art. 10 (1) d QD stipulates that a particular social group either shares unchangeable characteristics or characteristics so fundamental to human identity or conscience that they should not be renounced *and* this group is perceived as different in the country of origin. Most importantly, Art. 10 (1) d QD explicitly mentions a common sexual orientation as being eligible for forming the basis of a particular social group. With this important step for the recognition of LGBTI asylum cases, the EU has made it clear that asylum cases based on persecution due to sexual orientation should be subsumed under the ground of a "particular social group" and not to religion or political opinion.

In Art. 9, the Qualification Directive provides an interpretation of the term "persecution" and stipulates that persecution means such acts that by their nature or repetition constitute a severe violation of basic human rights or measures that affect an individual in a similar manner. It sets out explicitly that disproportionate or discriminatory punishment (thus also criminalisation of consensual same-sex activities) can constitute persecution. Furthermore, the QD makes the nexus requirement between the grounds of persecution and the acts of persecution explicit.

After having assessed the legal basis for asylum matters in European Union law, the way how this legal regime deals with asylum claims related to sexual orientation is best analysed by looking at the two landmark judgments of the Court of Justice of the European Union (CJEU) in this regard.

2.3.1 X, Y and Z v. Minister voor Immigratie en Asiel

The case of *X, Y and Z v. Minister voor Immigratie en Asiel* was based on the request for a preliminary ruling by the Raad van State of the Netherlands to the Court of Justice of the European Union (CJEU) according to Art. 267 TFEU. The joined cases

[91] Recital 3 of the Preamble to the Qualification Directive.

concerned a Senegalese, a Ugandan and a Sierra Leonean national (all male) that had requested asylum in the Netherlands and had been refused a fixed permit of stay. The questions asked to the CJEU encompassed three main areas: (1) Can homosexuals constitute a particular social group in the meaning of Art. 10 (1) d QD? (2) Can homosexuals be returned upon the assumption that they have to disclose their sexual orientation in their country of origin? (3) Does criminalisation of consensual sexual activities between two individuals of the same sex amount to persecution in the sense of Art. 9 QD and the Geneva Convention? The judgment was delivered on 7 November 2013.

Referring to the first question, the CJEU ruled that homosexuals can constitute a particular social group, because (1) sexual orientation falls under the definition of characteristics so fundamental to a person's identity that he or she should not be forced to renounce it (§ 46 of the judgment) and because (2) the criminalisation of homosexual acts points towards a social perception that this group is different (§ 49). In the meantime, sexual orientation has been explicitly admitted as a ground of persecution in Art. 10 (1) d QD.

Concerning the interpretation of the term persecution in relation to criminal sanctions against consensual homosexual acts, the Court decided that mere criminalisation as such did not amount to persecution *per se*. However, criminalisation with a term of imprisonment that is actually applied constitutes persecution in the sense of Art. 9 (1) read in conjunction with Art. 9 (2) c QD. Consequently, the Court does not regard the infringement of Art. 8 ECHR respectively Art. 7 CFR (right to private life) by criminalisation that is not applied as a "severe violation of basic human rights" that Art. 9 (1) QD speaks of (§ 61 of the judgement). This is not in line with the standards set out in § 27 of the UNHCR SOGI Guidelines. If we consult the case of *Dudgeon v. The UK* (1981) from the European Court of Human Rights, we might also easily make out incongruences between the jurisprudence of Strasbourg and Luxembourg. The ECtHR had ruled that the mere existence of laws criminalising homosexuality in Northern Ireland can cause "fear, suffering and psychological distress" that amounts to a breach

of Art. 8[92]. Even though it can be argued that this does not constitute a "severe breach" of a Convention right as set out in Art. 9 (1) a QD, the Court does not even consider that mere criminalisation could constitute an "*accumulation of various measures, including violations of human rights*" that has a similar effect (Art. 9 (1) b QD). Especially taking into account that the ECtHR has noted in *Norris v. Ireland*[93] that criminalisation of homosexual acts strengthens the general prejudice and misapprehension in society[94], the reasoning of the CJEU is not comprehensible[95]. In the light of the planned accession of the EU to the ECHR as provided for in Art. 6 (2) TEU, which will make Luxembourg's judgements be subject to review through the Strasbourg Court, the decision does not seem wise also from a political and legal perspective.

Also in light of the answer to question 2 posed by the Raad van State, the jurisprudence of the CJEU diverges significantly from the Strasbourg case law, namely the decision taken in *M.E. v. Sweden*, where the requirement of discretion was reaffirmed (see above). This time, the CJEU provides for a broader scope of protection by explicitly renouncing the requirement of an applicant to conceal his or her sexual orientation upon return to the country of origin in order to avoid persecution (§ 70 of the judgment). This reasoning is based on three crucial legal arguments: First, it follows from the recognition of homosexuality as a characteristic so fundamental to identity that the applicant should not have to renounce it, that the discretion requirement would make the whole legal logic inconsistent (§ 65). Furthermore, the Court sets out to compare the ground of adherence to a particular social group to "religion" and states that the Qualification Directive explicitly protects the public manifestation of religion as well[96]. As a consequence, making one's sexual orientation public must also be protected (§ 69). This interpretation of sexual orientation suggests that the Court sees it as encompassing a private and a public side and thus much more than mere sexual behaviour. The third argument is also based on the comparison with the ground of religion and the fact that

[92] Dudgeon v. UK, (1981), § 37.
[93] ECtHR, *Norris v. Ireland,* Application no. 10581/83, *Plenary*, 26 October 1988. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57547.
[94] Norris v. Ireland, § 33.
[95] See also: Chelvan, 2013, p. 6.
[96] Art. 10 (1) b Qualification Directive.

the rules for the assessment of the risk of persecution set out in Art. 4 QD do not mention taking into account the possibility to abstain from the public manifestation of religion. *E contrario* and *per analogiam*, homosexuals can also not be required to abstain from making their sexual orientation public in their country of origin (§ 74).

2.3.2 A, B, C v. Staatssecretaris van Veiligheid en Justitie

Credibility issues in LGBTI asylum cases have a very specific implication and go beyond general concerns of credibility. For our purposes, credibility concerns refer to whether the asylum or immigration authorities believe that the applicant is "really" L, G or B respectively whether he or she has a well-founded fear of being persecuted on the ground of sexual orientation in the country of origin. In her extensive study on Australian and Anglo-Saxon case law, Jenni Millbank[97] has argued that credibility issues are especially salient in jurisdictions that are already sensitive to LGBTI asylum applicants. Wherever the requirement of discretion is abandoned, cases based on sexual orientation and/or gender identity tend to be rejected because the applicant is not found to be credible. This trend can also be noted in various EU Member States[98] and has led to a preliminary ruling by the Court of Justice of the European Union (CJEU) on 2 December 2014[99].

The Case *A, B, C v. Staatssecretaris van Veiligheid en Justitie* refers to a preliminary ruling by the CJEU requested by the Dutch Raad van State according to Art. 267 TFEU. The Staatssecretaris had rejected the asylum claims of the applicants because they were not able to prove their homosexuality. In the case of applicant C, the particular issue was the late disclosure of his homosexuality, because he had not based his first application on this ground. He had even delivered as an "evidence" a video of himself with another man showing them performing intimate acts (§ 28 of the judgment). In the appeal procedure to the Raad van State, the applicants brought forward the argument that a person's sexual orientation should be assessed by the statements made by the applicant and not through other methods or intrusive questioning. The Raad van State

[97] Millbank, 2009.
[98] See Jansen / Spijkerboer, 2011, p. 47.
[99] CJEU, *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, joint cases C-148/13 to C-150/13, Grand Chamber, 2 December 2014.
http://curia.europa.eu/juris/document/document.jsf?docid=160244&doclang=en.

concluded that Art. 4 QD on the specific procedures relating to the assessment of facts and circumstances of the application does not give enough guidance on the issue. Therefore, the Court asked the CJEU for a preliminary ruling on the question whether Art. 4 QD in conjunction with Art. 3 and 7 of the Charter of Fundamental Rights, which set out the right to the integrity of the person respectively the respect for private and family life, impose restrictions on the methods applied for the assessment of the credibility of a person's sexual orientation. Furthermore, the Court asked whether these limits were different from the limits on the assessment of the credibility of other grounds (§ 43).

First and most importantly, the CJEU holds in § 52 of the judgment that the declared sexual orientation of the applicant may be subject to an assessment procedure according to Art. 4 QD just as any other ground of persecution. Secondly, concerning the methods of assessment of the credibility, the CJEU sets out in § 63 that stereotyped questions about the sexual orientation of the applicant, such as questioning his or her familiarity with LGBTI NGOs, can be useful, but the national authorities still have the obligation under Art. 4 (3) c QD to assess the individual situation. Therefore, the inability to answer to such questions cannot in itself constitute a ground for the non-credibility of the declared sexual orientation. § 64 of the judgment stipulates that interview questions relating to the sexual practices of the applicant are contrary to the right to privacy set out in Art. 7 CFR. Similarly, Art. 65 declares that "tests", the performance of sexual acts or photographic or video documents of intimate acts violate the applicant's dignity (Art. 1 CFR). In addition, the Court also doubts the evidentiary value of such "proof". Finally, § 71 states that, given the delicate nature of details around one's sexuality, an applicant cannot be considered uncredible merely because he or she did not disclose the ground of sexual orientation at the first possibility.

This judgement has triggered a discussion on the credibility assessment of asylum claims based on the ground of sexual orientation and can in some aspects be regarded as a missed opportunity. The International Lesbian, Gay, Bisexual, Trans and Intersex Association for Europe (ILGA-Europe) has put forward the claim that the credibility assessment should be based on the statements made and that the self-definition of the

applicant in relation to his or her sexual orientation should be acknowledged[100]. Otherwise, stereotyped assumptions about how the person should express his or her sexual orientation can and will enter the asylum process. It is especially noteworthy in this context, that the self-definition is so crucial, because expressions, definitions, manifestations and interpretations of sexual orientation vary greatly all over the world and within one socio-cultural setting. The principle of self-identification has also been endorsed by the UNHCR in §§ 60-64 of the SOGI Guidelines and by the Yogyakarta Principles (Principle 3).

In conclusion, the legal regime of the European Union by now provides for a broad protection of the rights of LGBTI asylum applicants. The two preliminary rulings of the CJEU that we have discussed above also have touched upon very delicate questions and do lead into a good direction, even though they do not give full guidance on some contested issues. Especially the problem of the credibility assessment in asylum claims related to sexual orientation is still not solved as we will see below. The study "Fleeing Homophobia" by Jansen and Spijkerboer[101] that has tried to identify divergent practices among EU member states in relation to LGBTI asylum claims, has found that in most fields of concern, the jurisprudence is all but uniform despite the creation of a Common European Asylum System (CEAS). The judgement of *ABC* gives guidance in a lot of regards, but restricts itself to setting out, which practices clearly violate the applicants' human rights, whereas governments are left in the void regarding the question how to assess the applicant's credibility.

[100] Jansen, 2014, p. 20.
[101] Jansen & Spijkerboer, 2011.

3 Legal Concepts of Sexual Orientation

In order to analyse the underlying concept of sexual orientation that leads to exclusionary practices in the field of (European) asylum law, we will first have a look at how other European legal regimes regulate sexuality. We will concentrate our analysis on anti-discrimination legislation and jurisprudence in the two European human rights regimes: the system of the European Convention of Human Rights (ECHR) and the legal regime of the European Union (EU).

Studying the concept of sexual orientation that informs European anti-discrimination law will help us to also disentangle the conceptual basis of European asylum and refugee law. Both legal regimes are interconnected because they both stem from international human rights law. In addition, the principle of non-discrimination linked to human rights forms the basis of determining who is part of a persecuted social group that should be awarded international protection[102]. Since persecuted homosexuals are regularly subsumed under the ground of "membership to a particular social group", such an evaluation is indispensable. Finally, the conceptual and legal developments in both fields simply do not occur totally isolated from each other, but are interdependent and inform each other, especially since the Refugee Convention can also be regarded as an anti-discrimination instrument[103].

In general terms, the situation for sexual minorities in Europe has improved significantly during the past few decades and legally speaking, the field of non-discrimination has made immense progress. The Council of Europe (CoE) and the European Union (EU) have had a leading role in the promotion of human rights and equality and have managed to implement a strong legal regime for the protection of the diversity of sexual orientations. Partly due to the judicial activism of the two big Courts in the region, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) respectively, the principle of prohibition of sexual orientation discrimination has become a core value throughout the EU and many non-EU member states of the Council of Europe.

[102] Goodwin-Gill & McAdam, 2007, p. 86.
[103] Markard, 2013, p. 83.

3.1 The ECHR and Non-Discrimination Related to Sexual Orientation

Non-discrimination in the context of the European Convention of Human Rights is based on Art. 14 ECHR, a provision which has often been criticised as having less salience than it should have. Due to the fact that it can only be invoked in conjunction with another right set out in the Convention, it has even been entitled a "Cinderella provision"[104]. In addition, the ECHR dates back to 1951, a time when many European countries were still criminalising consensual homosexual behaviour between adults. Thus, Art. 14 does not include "sexual orientation" as a prohibited ground of discrimination. In this chapter, we will see how the premise of the Strasbourg Court that the Convention is a "living instrument" has contributed to building a rich case law around the issue of sexual orientation, even though the ECHR does not explicitly refer to this form of discrimination.

As a note to ourselves we should keep in mind that Additional Protocol 12 of the ECHR provides for a stand-alone non-discrimination provision, thereby setting out an imperative of equal treatment for all public authorities in terms of legal rights. Even though sexual orientation has not been included explicitly again in the document, the Court's case law suggests that it is covered by the wording of "other status"[105]. So far, 18 countries of the CoE have ratified the Protocol.

Despite the Convention's silence on the issue, the ECtHR has been identified as the leading judicial body in Europe in the recognition of equal rights for L, G and B persons[106]. Regarding European legislatory trends in general, it can also be regarded as the judicial trendsetter across the region, which is why its case law on sexual orientation is particularly salient.

3.1.1 De-Criminalisation and Early ECtHR Case Law

In relation to sexual orientation discrimination, Paul Johnson has published a comprehensive analysis of the case law up to 2010, in which he has identified a general trend from sex rights to love rights[107]. While the first refer mostly to the de-

[104] European Commission, 2015, p. 15.
[105] Johnson, 2013, p. 145.
[106] Gonzalez-Salzberg, 2014, p. 371.
[107] Johnson, Paul, 2010, p. 79.

criminalisation of consensual homosexual acts between adults, the latter concern family law and social rights linked to the recognition of same-sex partnerships. Thus, non-discrimination cases before the ECtHR related to sexual orientation can be divided into two big categories: criminal law and family law plus related fields. In the following paragraphs, we will have a look at the most important criminal law cases and will try to delineate the concept of sexual orientation that has resulted from this very special situation of discrimination.

The first cases before the European Court of Human Rights relating to sexual orientation were cases filed against Germany in the 1950s for criminalising consensual same-sex activities between adult men. Since German domestic law only prohibited homosexual acts between men and not between women, the applicants resorted to a breach of Art. 8 (right to private life) in conjunction with Art. 14 (non-discrimination) due to gender discrimination. All of these cases were ruled inadmissible because the protection of health and morals was seen as a valid justification by Germany[108]. For our purposes, it is important to note that the argumentation by the applicants in these early cases was strongly based on a concept of homosexuality as being stable and innate and thus an "inescapable fate" which would make criminalisation unjustified.

The landmark judgement concerning sexual orientation discrimination before the Strasbourg Court concerned the case of *Dudgeon v. The UK* delivered in 1981[109]. In this case, sexual orientation was for the first time invoked as a ground of discrimination of Art. 14. The Court subsequently found a violation of Art. 8 ECHR, declaring that the criminalisation was interfering with the applicant's private life. However, the Court did not move on to assess a violation of Art. 14[110].

Paul Johnson has argued that the judgment of *Dudgeon v. UK* has sustainably influenced the evolution of legislation on sexuality across Europe[111]. This is definitely true for considering homosexual conduct as a part of one's protected private sphere,

[108] Grigolo, 2003, p. 1029.
[109] ECtHR, *Dudgeon v. UK*, Application no. 7525/76, Plenary, 22 October 1981. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473.
[110] Grigolo, 2003, p. 1030.
[111] Johnson, 2010, p. 69.

which was the core concern for LGBTI activists at the time. On the other hand, conceptualising homosexuality as only consisting of a private manifestation and denying the right to publicly identify as being L, G or B, infringes on a crucial part of the lives of the people concerned. The judgment of *Dudgeon v. UK* however explicitly limits the scope of protection in paragraph 62 by stating that "some degree of control over homosexual conduct" is necessary in a democratic society. This refers to the public manifestation of homosexuality in order to "protect" children and youth. This clearly expresses a concept of homosexuality as being deviant, but innate and unchangeable: Consequently, homosexuals should have the right to live accordingly privately, but not bother the public with it or even lead others on to that deviant way.

Another important judgment along the way to carving out the "Court's homosexual" was delivered in 1997 on the case of *Sutherland v. The UK*[112]. It concerned a difference in the age of consent for consensual intercourse between same-sex couples and opposite-sex couples and stressed once again the immutability of homosexuality. In addition, the "coming out" of a person played an important role and was framed as the "discovery and realization of something which has always existed within the subject"[113]. Two other cases that also concerned a difference in the age of consent were filed against Austria and delivered in 2003[114]: In the judgements, Grigolo has identified a move towards minoritisation of homosexuality in addition to resorting to the supposed characteristic of immutability[115].

Concludingly, the criminalisation of all or some homosexual activities has resulted in a concept of homosexuality that emphasises the immutability and stability of sexual orientation. Some cases have also resorted to the minoritisation and thus under-privileged position of homosexuals in society. In any case, homosexuality is construed as a "fate" that the people affected by it cannot escape.

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[112] ECtHR, *Sutherland v. UK*, Application no. 25186/94, Commission (Plenary), 1 July 1997. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-45912.
[113] Grigolo, 2003, p. 1031.
[114] ECtHR, *S.L. v. Austria*, Application no. 45330/99, First Section, 9 January 2003. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60877 and ECtHR, *L. and V. v. Austria*, Applications nos. 39392/98 and 39829/98, First Section, 9 January 2003. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60876.
[115] Grigolo, 2003, p. 1032.

3.1.2 Family Law and Related Fields

Concerning family law and not criminal law, Strasbourg generally gives bigger leeway to the Member States of the CoE. In principle, the Court has found that discrimination on the basis of sexual orientation can be justified in terms of family law[116]. However, in *Karner v. Austria*[117], Strasbourg held that there have to be weighty reasons that legitimise a differential treatment[118].

A breakthrough for the protection against sexual orientation discrimination could be celebrated in 2003 with the delivery of the judgement *Salgueiro Da Silva Mouta v. Portugal*[119]. The case also concerned family law, namely the denial of custody rights to a homosexual man over his daughter from a previous opposite-sex marriage. The ECtHR for the first time found a violation of Art. 8 in conjunction with Art. 14 ECHR and thereby declared that the man had been discriminated against by national authorities due to his sexual orientation[120]. In *Fretté v. France*, the Court had still held that an adoption of a child by a single homosexual could be denied on the ground of being a risk to the development of the child (the Court had argued that there was a lack of scientific proof of the opposite)[121]. This reasoning was finally overruled for adoption in *EB v. France*[122]. In the light of the usually very progressive judicial activism and considering the fact that Strasbourg regards the Convention as a "living instrument"[123], the reasoning on marriage equality in the case of *Schalk and Kopf v. Austria* surprises: Even though the ECtHR has reiterated several times that the Convention is to be interpreted in the light of today's developments, it argued in this case that Art. 12 ECHR clearly only envisaged a union between man and woman at the time of

[116] ECtHR, *S. v. the UK*, Application no. 11716/85, Commission (Plenary), 14 May 1986. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-596.
[117] ECtHR, *Karner v. Austria*, Application no. 40016/98, First Section, 24 July 2003. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61263.
[118] Grigolo, 2003, p. 1036.
[119] ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Application no. 33290/96, Fourth Section, 21 December 1999. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58404.
[120] Grigolo, 2003, p. 1038.
[121] Ibidem.
[122] Gonzalez-Salzberg, 2014, p. 380.
[123] Johnson, 2010, p. 68.

drafting[124]. Such an argumentation has not only meant a leap 50 years back in time, but has also reaffirmed the Convention as a heterosexual document.

In conclusion, the case law of the ECtHR on family law and especially marriage equality is not very much in favour of an equal treatment of homosexuals and heterosexuals. Thus, homosexuality is again construed in a binary opposition to "normal" and "rightful" heterosexuality. This results in a conception of homosexuals as deviant that should not enjoy all human rights, especially because traditional and "normal" families should be protected.

3.1.3 Homosexuality and the Public Sphere

In matters not concerning marriage equality or criminalisation, the case law of the Strasbourg Court has however made considerable progress in extending the protection awarded against sexual orientation discrimination from a purely private matter to the public sphere as well: Johnson has argued that the Court has in its early case law focused on the protection of the private life of homosexuals under Art. 8, while the public sphere was construed in heterosexual terms. In cases like *Baczkowski and Others v. Poland*[125] and *Alekseyev v. Russia*, the ECtHR has reaffirmed that the protection of homosexuality encompasses the public sphere as well (the same is true for the asylum case *X,Y,Z* before the CJEU, whereas the extradition case of *M.E. v. Sweden* before the ECtHR differs in this regard). In *Vedjdeland v. Sweden* the Court ruled that this public sphere also entailed a negative protection against hate speech based on sexual orientation[126].

3.1.4 Analysing the "Court's Homosexual"

Contemplating the trajectory of the Court's jurisprudence on sexual orientation, we can define two basic sexual rights: the right to choose one's own sexual activity and the right to form a family[127]. Grigolo has also argued that this right to choose should be free from forcing people into pre-defined categories of sexual behaviour along the poles of

[124] Gonzalez-Salzberg, 2014, p. 384.
[125] ECtHR, *Baczkowski and Others v. Poland*, Application no. 1543/06, Fourth Section, 3 May 2007. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80464.
[126] ECtHR, *Vejdeland and Others v. Sweden*, Application no. 1813/07, Fifth Section, 9 February 2012. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046.
[127] See Grigolo, 2003, p. 1039.

heterosexual vs. homosexual: "Within this cultural and legal framework, any categorization or minoritization that is too strict risks becoming oppressive, if not artificial."[128] Grigolo argues that the Court risks of oppressing people's free choice of sexual behaviour by not applying a "universal sexual legal subject", but rather narrowing this freedom down to homosexuals. A need to define one's own sexual behaviour in terms of categories limits the diversity of sexual identities and even runs the risk of perpetuating a structure of heteronormative oppression that only accepts homosexuality as a "mirror image" of heterosexuality. Only recently has reference been made to "other sexual minorities" in the case law (*Alekseyev v. Russia*[129]) of the ECtHR[130].

The "mirror image" of heterosexuality is however *per definitionem* construed as being the counterpart of rightful sexual behaviour. It is accepted because of an open-minded, tolerant ethos, but still deviant:

"Therefore, even though the Court's homosexual is supposedly presented as the stable counterpart of the heterosexual subject, his/her legal existence is marked from the outset by the impossibility of fitting into the right(ful) side of the binary."[131]

The inequality of heterosexuals and homosexuals is exemplified by the limitation of marriage to heterosexual couples, which, according to Grigolo can only be overcome by deleting Art. 12 ECHR that sets out the right to marriage for opposite-sex couples and thereby "privatising" marriage into the realm of Art. 8[132]. Also Gonzalez-Salzberg has argued that the Court constructs the homosexual legal subject as unequal, because the Court grants a very wide margin of appreciation where there is no European consensus (for example, concerning the issue of the right to adoption for same-sex couples). Gonzalez analyses the ECtHR case law along several binaries, one of which is the

[128] Ibidem.
[129] ECtHR, *Alekseyev v. Russia*, Applications nos. 4916/07, 25924/08 and 14599/09, First Section, 21 October 2010. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257.
[130] Gonzalez-Salzberg, 2014, p. 373.
[131] Ibidem.
[132] Grigolo, 2003, p. 1042.

couple versus uncouple binary[133]: The Court has made it very clear that no right to marry is enshrined in the Convention for same-sex couples and a differential treatment of civil partnerships is possible[134].

According to Gonzalez-Salzberg's brilliant analysis, the Court's homosexual is not only construed as unequal, but also as inferior[135]: Legal differences are inherent to the anti-discrimination doctrine of the Court, which allows for differential treatment in cases, where this is justified by "very weighty reasons": This leads us to one important question: Is treating issues of sexual orientation under the consisting legal framework of non-discrimination by definition biased and can only result in unequal treatment? Gonzalez-Salzberg has affirmed this question and held that the Court has constructed the homosexual as the "other" in contrast to the "normal" heterosexual. As a possible way out of this structurally discriminatory jurisprudence, he suggests putting an end to this conceptual "othering" and making the sexual orientation / identity of applicants legally irrelevant[136]. Only if human rights law becomes blind to categories like homosexual / heterosexual will true equality be achieved. In our opinion, this is definitely true for the case law of the ECtHR and the resulting gap in extending the right to marriage to same-sex couples. For asylum law, we can adopt a similar approach, since people that are persecuted due to their "sexual orientation" do not have to fit into one of the categories of sexual minorities.

[133] Gonzalez-Salzberg, 2014, p. 383.
[134] ECtHR, *Schalk and Kopf v. Austria*, Application no. 30141/04, First Section, 24 June 2010. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605.
[135] Gonzalez-Salzberg, 2014, p. 381.
[136] Gonzalez-Salzberg, 2014, p. 386.

3.2 The European Union and Non-Discrimination Related to Sexual Orientation

3.2.1 Legal Foundations in EU Primary Law

Since the coming into force of the Treaty of Lisbon, the legal structures of the European Union have changed significantly: The Union has acquired legal personality, the pillar system that has been emblematic for the complicated construct has been abolished and most importantly for the field of human rights, the Charter of Fundamental Rights of the European Union (CFR) has become legally binding. The idea is a new human rights regime that should govern and control the acts of the EU and Member States when implementing EU law. Art. 6 of the Treaty of the European Union (TEU) gives the Charter even more salience: The Charter shall have the same legal value as the Treaties and thus constitutes a part of EU primary law.

Art. 21 CFR is the basis of the principle of non-discrimination in the Union and includes "sexual orientation" as a prohibited ground of discrimination. The Charter has thus become the first international human rights instrument to do so[137]. Even though the provision takes a clear standing against sexual orientation discrimination, it is rather proclamatory in its legal value: Since the Charter is only applicable to EU institutions and when Members States implement EU law and in addition, Art. 6 TEU sets out that the provisions of the Charter do not extend the competencies of the EU as set out in the Treaties, not all discrimination in the EU is prohibited by the Charter. Family law for example is in principle totally outside of the scope of competences of the European Union, except a specific case before the Court of Justice of the European Union (CJEU) concerns a competence of the EU, such as employment.

Art. 19 TFEU (ex-Article 13 TEC) explicitly mentions the competence of the EU to pass legislation on combating discrimination because of, amongst other grounds, a person's sexual orientation, and thereby constitutes the legal basis for any secondary legislation on non-discrimination. Article 19 (1) reads as follows:

[137] European Commission, 2015, p. 25.

"Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

3.2.2 The Concept of Sexual Orientation in Secondary Non-Discrimination Law

Consequently and on the basis of the above-mentioned primary law provisions, two anti-discrimination directives have been passed, both in the year 2000: Directive 2000/43/EC, the so-called Racial Equality Directive, which prohibits discrimination on grounds of racial or ethnic origin (not sexual orientation) in the sectors of employment, housing, social advantages, social protection, education etc., and Directive 2000/78/EC (Employment Equality Directive) prohibiting discrimination in employment in the public and the private sector on various grounds, including sexual orientation. Racial and ethnic discrimination is thus prohibited in a much wider range of fields by EU law than discrimination on other grounds.

The two directives mentioned above are an expression of the trend of the EU evolving from a "market police" to a "value entrepreneur"[138]. The concept of sexual orientation that underlies these non-discrimination provisions shall be delineated in this chapter.

After the CJEU had failed to approximate the protection afforded by the Equal Treatment Directive to encompassing sexual orientation discrimination in the case of *Grant v. South West Trains Ltd.*[139], legal protection under EU law for the equality of homosexuals and heterosexuals in the field of employment could only be awarded by adopting a separate legally binding document. Consequently, Directive 2000/78/EC, usually referred to as the Employment Equality Directive, was passed in November 2000. It sets out the principle of non-discrimination, amongst others on the ground of sexual orientation, in the fields of employment and occupation.

[138] Gerhards, 2010, p. 6.
[139] Waaldijk & Bonini-Baraldi, 2006, p. 21.

Concerning the concept of sexual orientation that is employed in the Directive 2000/78/EC, we must resort to preparatory materials and case law, since no definition can be found in the document itself. The Commission explanatory memorandum offers a quite dubious definition: It states that sexual orientation is protected, whereas "sexual behaviour" is not[140]. Regarding the case law of international human rights institutions and the history of the legal concept of sexual orientation that is very much rooted in the de-criminalisation of sexual *behaviour*, this "clarification" seems surprising. Sexual behaviour is a fundamental manifestation of sexual identity. It seems as if the Commission was trying to justify protection against sexual orientation discrimination by unnecessarily clarifying that it does not encompass criminalised sexual behaviour. Such a clarification suggests that homosexuality is linked to paedophilia or other forms of penalised sexual activity and is shameful for an organisation like the European Union that bases its work on the principles of tolerance and equality. In addition, the reference to sexual behaviour is simply too broad for the purposes of the Directive.

Since the Directive itself does not give any further guidance on the concept of sexual orientation, it is left unclear whether the protection awarded by it only refers to L, G or B people or also to other lifestyles, behaviours or identities that deviate from heteronormativity[141].

3.2.3 Interpreting the Employment Equality Directive

Waaldijk and Bonini-Baraldi[142] have analysed the protection guaranteed by the Employment Equality Directive against sexual orientation discrimination by looking into the provisions of the document and corresponding CJEU case law. In order to determine the scope of protection of the Employment Equality Directive, they have identified the parallel structure of sexual orientation and religion as a prohibited ground of discrimination by looking first at Strasbourg case law: Both features (religion and sexual orientation) are construed as personal characteristics that encompass an internal and an external dimension; the internal being attraction respectively faith, the external behaviour. Waaldijk and Bonini-Baraldi argue that Strasbourg jurisprudence not only

[140] Ibidem, p. 32.
[141] European Commission, 2015, p. 7.
[142] Ibidem, p. 38.

protects the internal dimension of BEING homosexual, but also the external of homosexual behaviour: One example is the case of *Karner v. Austria* about a different age of consent for homosexual sexual acts and heterosexual sex.

This terminological distinction between internal and external dimension is misleading and should not be followed. In relation to the internal dimension, they refer to something that is considered as innate and constituting the specific features of the individual. However, identity is not construed internally, but only consists in relation to the outside world. This "relationality" makes it fluid and situational, which is different from a stable, innate conception.

In addition, the distinction between internal and external dimensions of sexual orientation can easily be confused with similar conceptions that differentiate between a protected private (internal) realm of sexual orientation (de-criminalisation of consensual homosexual behaviour) and the protected public (external) manifestation.

Following the distinction of Waajdik and Bonini-Baraldi of internal characteristic and external manifestation or not, their analysis of whether the Employment Equality Directive applies a concept of sexual orientation that only encompasses "sexual identity" or if behaviour is also protected, is very valid for our purposes. In this regard, they suggest that Art. 2 (5) of the Directive, which sets out that measures justified in order to protect public health, the rights and freedoms of others, public order etc. are not prohibited by the Directive. Such a provision would not have any sense in relation to sexual orientation, if behaviour was not protected as well[143]. Thus, the question raised by the Commission's Explanatory Memorandum whether sexual behaviour is protected as well, has to be answered in the affirmative, even though the wording would suggest something different.

Concerning the distinction between private and public sphere, we can hold that the Directive protects the public manifestation of one's sexual orientation as well. Thus, Waaldijk and Bonini-Baraldi suggest that the concept of sexual orientation applied by the Employment Equality Directive also entails the "coming out" at work. Therefore,

[143] Waaldijk & Bonini-Baraldi, 2006, p. 39.

discrimination because of a public declaration of one's sexual orientation at work is prohibited through the Directive[144]. This would also entail a declaration of one's heterosexuality.

The similarities between religion and sexual orientation are especially salient for our analysis of how credibility assessment is carried out in asylum claims related to sexual orientation. Both grounds are invisible, but not innate. Even though we hold that it is true that both elements of human personality entail a public and a private sphere or a notion of "subjectivity" and one of "behaviour", we must also acknowledge that the subjective notion of sexual orientation, thus as the Yogyakarta Principles have put it, the capacity to enter into sexual or emotional relationships, hence the "orientedness", is extremely complex and can maybe not even be properly or coherently expressed by the subject self. Religion on the other hand can be subject to a proper assessment by questioning about knowledge, because it usually draws from a specific cultural set of behaviour and thinking patterns that is absent in the case of homosexual asylum applicants.

Art. 4 (2) of the Directive stipulates an exception for churches and other ethos-based organisations regarding their employment practices. This provision was adopted in order to reconcile the principles of equality and non-discrimination with the freedom of thought, conscience and religion. The exception makes it possible for the above-mentioned organisations to discriminate on the ground of religion when hiring their employees. However and even though it has been misinterpreted by the public opinion in a lot of cases, it does not allow for discrimination on the ground of sexual orientation[145]. As the European Commission has pointed out in the report on sexual orientation discrimination from 2015[146], even the Supreme Court of Hungary and the Polish Minister for Equality (in a publicised television programme in 2010!) have misinterpreted the provision in this way.

[144] Waaldijk & Bonini-Baraldi, 2006, p. 40.
[145] European Commission, 2015, p. 39.
[146] Ibidem, p. 66.

According to the Employment Equality Directive, assumed sexual orientation is also covered by the protection against sexual orientation discrimination: Thus, a person that is being discriminated against does not actually have to "have" the assumed sexual orientation – it is enough that he or she is perceived as gay, lesbian or bi[147].

In the future, it will be desirable to extend the protection against sexual orientation discrimination to other fields than employment and occupation. Such a proposal for a new equality directive has already been pending for some time. It would cover the same scope as the Racial Equality Directive[148].

3.2.4 Case Law of the CJEU

The case law of the Court of Justice of the European Union (CJEU) concerning sexual orientation is by far not as rich as the jurisprudence of the ECtHR. All cases that have been adjudicated in Luxembourg have concerned preliminary rulings as set out in Art. 267 TFEU. This means that a national court has forwarded a question on the interpretation of a provision of primary or secondary Union law to the CJEU. So far, three judgements concerning sexual orientation have been delivered on the interpretation of the Employment Equality Directive (*Maruko, Römer, Hay*), one on the Equal Treatment Directive (*Grant*), one case has concerned homophobic hate speech (*ACCEPT*), two were asylum procedures relating to homosexuality (*X, Y, Z* and *A, B, C*) and one very recent judgement was given on the banning of homosexuals from blood donation (*Léger*).

Generally, the CJEU has in the past decades assumed the role of very proactively interpreting European Union law. This "juridical activism" has led to a certain degree of "constitutionalisation" of primary Union law (the Treaties and the Charter of Fundamental Rights) and in a certain regard, Luxembourg has even seized the role of a European supreme court[149]. De Waele and van der Vleuten have analysed this "juridical activism" in the field of sexual orientation and have reached the conclusion, that the CJEU is putting citizen's interests over the national interests of the Member States,

[147] Ibidem, p. 35.
[148] European Commission, 2015, p. 83.
[149] De Waele & van der Vleuten, 2011, p. 641.

which is precisely what a European supreme court or human rights tribunal would do. Even though the EU's competence on LGBTI issues is very limited, Luxemburg has slid into place as "an autonomous norm-setter"[150]. Other authors have argued contrarily that the CJEU's jurisprudence is not very progressive in the field of sexual orientation, especially because the Court has failed to expand the meaning of "sex discrimination" to entailing sexual orientation discrimination like other fora[151]. In any case, the CJEU has awarded great importance to cases related to sexual orientation, which has been shown by the large number of judges that sit in these cases[152].

The first case concerning the application of the Employment Equality Directive was the case of *Maruko v. Versorgungsanstalt der deutschen Bühnen*[153], which was adjudicated in 2007. The question raised by the German tribunal was whether differential treatment of unmarried same-sex couples and married opposite-sex couples was amounting to discrimination if the rights in question were tied to the status of being "married". In the present case, this concerned benefits from a pension scheme that the civil partner of a deceased employee was denied, while German domestic law did not allow same-sex couples to marry. The CJEU ruled that national legislators were autonomous to create rules on marriage, but only within the framework of EU legislation, i.e. not contradicting anti-discrimination law in the field of employment and occupation[154]. The Court found that the pension scheme was directly discriminatory on the ground of sexual orientation. Even though the benefits were tied to the status of being married and not to the prohibited ground of the affected person's "sexual orientation", the Court held that the provisions were not apparently "neutral" because German law did not provide for the possibility for same-sex couples to marry. Therefore, the Court relied on direct discrimination rather than resorting to indirect discrimination.

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[150] Ibidem.
[151] Kochenov, 2007, p. 472.
[152] De Waele & van der Vleuten, 2011, p. 655.
[153] CJEU, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, case C-267/06, Grand Chamber, 1 April 2008. http://curia.europa.eu/juris/document/document.jsf?text=&docid=70854&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=339768.
[154] European Commission, 2015, p. 45.

Another case from Germany, *Römer v. Freie und Hansestadt Hamburg*[155], was decided in 2008. The facts of the case were similar to *Maruko* and thus the judgment was based largely on the reasoning in this case. Most importantly, Luxembourg promulgated in this judgement that the protection of "marriage and the family" could not be invoked as a justification for the discrimination of homosexual couples. As an argumentative basis, the CJEU draws on the Charter of Fundamental Rights, which protects the diversity of sexual orientations alongside the family. Hence, the jurisprudence of the CJEU differs from the Strasbourg case law: In *Karner v. Austria*, the ECtHR had struck down a national provision based on the justification of protecting the traditional family due to reasons proportionality. In the *Römer* case, the CJEU has confirmed that under EU law, such a justification would not be possible under any circumstances[156].

In the *ACCEPT*[157] case the CJEU had found a niche to rule on hate speech, because an employer had not distanced himself from a homophobic statement relating to the recruitment procedures: Here a manager of a football club had said that he rather would close the club than hire a gay player[158].

All of the above-mentioned cases rely on a concept of homosexuality as an identity rather than a mere behaviour. Very recently, the CJEU has delivered a judgement that clearly draws on conceptualising homosexuality as a "behaviour", which will be discussed in the following section. A judgement that would draw on the definition of the Yogyakarta Principles as seeing sexual orientation as a capacity has so far not been delivered.

3.2.5 The Léger Case

A very recent judgement from 29 April 2015 has concerned discrimination of homosexual men in the access to donating blood in the case of *Léger v. Ministre des*

[155] CJEU, *Römer v. Freie und Hansestadt Hamburg*, case C-147/08, Grand Chamber, 10 May 2011. http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=80921&occ=first&dir=&cid=169916.
[156] European Commission, 2015, p. 15.
[157] CJEU, *Asociaţia Accept v. Consiliul Naţional pentru Combaterea Discriminării*, case C-81/12, Third Chamber, 25 April 2013. http://curia.europa.eu/juris/document/document.jsf?text=&docid=136785&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=204985.
[158] European Commission, 2015, p. 51.

Affaires sociales, de la Santé et des Droits des Femmes[159]. The judgement has not yet received any resonance in the literature, which is why it will be given special attention in this paper.

Mr. Léger's blood donation had been refused in France because he had had sexual relations with another man. The Council and the Parliament had passed a Directive on assuring the safety of blood donations, which stated that it was possible to permanently exclude people from donating blood, whose "sexual behaviour puts them at high risk to acquire severe infectious diseases transmitted by blood" (Point 2.1 of Annex III of Directive). The French domestic law referred to men having had sexual relations with another man as a group that was at this high risk (§ 23 *Léger* Case).

In the national proceedings, the French Court decided to ask for a preliminary ruling of the CJEU according to Art. 267 TFEU of a question that can be summed up as follows: Does the fact that a man has had sex with another man constitute sexual behaviour that puts him at such a risk mentioned in Annex III of the Blood Donation Directive that a permanent deferral is justified or does the risk have to be assessed on an individual basis? In short, this means if a blanket ban for men engaging in homosexual activities can be justified.

In order to assess the case, the Court took the specific situation of France into account, where 48% of new infections with HIV between 2003 and 2008 had concerned men who had sex with men (MSM). Since France was implementing an EU directive with the regulation on blood donations, the Charter of Fundamental Rights was applicable and the question had to be assessed in the light of the non-discrimination provision of Art. 21 (2) CFR.

In this regard, it must be noted that under Art. 52 of the CFR, discrimination can be justified under certain circumstances. First of all, the exceptional discrimination must be provided for by law, which was the case because the regulation that excluded MSM

[159] CJEU, *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes*, Case C-528-13, Fourth Chamber, 29 April 2015. http://curia.europa.eu/juris/document/document.jsf?text=&docid=164021&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=204985.

from donating blood was stipulated in a French decree[160]. In a second step, we have to assess if the discriminatory measure is proportionate, thus if the exception pursues one of the legitimate aims provided for by the Charter in an appropriate, necessary and proportionate manner. Clearly, the provision aims to protect public health, which is one of the legitimate aims set out in the CFR. The measure is also appropriate, which means that it is suitable to achieve the legitimate aim of protecting public health. The critical point is whether the measure is necessary, i.e. if there are no less onerous means to achieve the legitimate aim. This is where the Court has held that the provision is most likely infringing the human right of homosexuals not to be discriminated against. The EU Directive sets out that every blood donation has to be tested on HIV in any case. The problem that the French national authorities have made out is that recent infections cannot be detected and are therefore a risk for public health (§ 62 *Léger* Case). Nevertheless, the CJEU has held that interviews and/or a questionnaire on the actual sexual behaviour of the donor are less onerous means than excluding the whole group of MSM (§ 66).

The press release to the judgement states that the principle of proportionality regarding discrimination against people on the ground of their sexual orientation might not be respected. In fact, the question has not been answered at all by the judgment of the CJEU, since the Court merely reiterates established principles of EU fundamental rights law and leaves the assessment entirely to the referring court. Unfortunately, this judgement is truly a missed opportunity to speak up against the discrimination of homosexuals in this field.

The methods of assessing who should qualify for donating blood should rather focus on the actually risky sexual behaviour rather than excluding a whole group of people because of their sexual orientation. The concept of homosexuality applied in this judgement is officially “MSM”, thus a concept focusing on the sexual behaviour. The French decree excludes “men who have had sex with men” and therefore also excludes homosexuals who have lived in a monogamous relationship for years and are at no risk

[160] Here we have to note that the law does not have to be a “law” in the terminology of the domestic legal order, but can be any official act that has general normative effect.

of getting infected with HIV. Hence, even though the argumentation pretends to be tied to the supposedly neutral criterion of “sexual behaviour” it actually feeds into the construction of a group of “homosexuals” that all share the characteristic of being a risk to public health.

3.3 Concepts of Sexual Orientation in Asylum Law

Generally speaking, the concept of sexual orientation employed by asylum and refugee law definitely builds on the legal developments in other fields. Especially concerning the early trends of LGBTI advocacy and the responses that law has given to them, we can see that the elements of "immutability" and "fate" are also present in discussions on the recognition of L, G and B asylum claims. However, the specificities of asylum law and the regime of international protection have made it necessary to apply a special understanding of sexual orientation. In this section, we will try to delineate this concept drawing on the legal analyses of the first chapter of this paper and will disentangle its relationship to the concept of sexual orientation applied in European anti-discrimination law. Subsequently, we will try to identify gaps in the protection of L, G and B asylum applicants due to the underlying concept of sexual orientation.

Most fundamentally, the concept of sexual orientation employed by asylum law relies strongly on the subsumption of homosexuality under the ground of "membership of a particular social group" as set out in 1A (2) Refugee Convention. The fact that the Refugee Convention was drafted in 1951 and has ever since not changed, has made it necessary for courts and international organizations to interpret it progressively. Since the Convention was drafted at a time when it was clear which people should be granted international protection, this aging system had to be adapted to the evolving challenges of flight and migration in an increasingly globalising world.

As delineated above in Chapter 1, cases of applicants facing persecution due to their sexual orientation are usually subsumed under the ground of "membership of a particular social group" and not under other protected grounds such as "political opinion" or "religion", even though they have been brought into play[161]. This not so axiomatic subsumption suggests that "sexual orientation" is something factual and stable and has led to an "essentialisation" of the concept[162].

[161] Crawley, 2001, p.171.

[162] By essentialising of identities we mean that characteristics like origin, language, sexuality etc. are understood in absolute terms and as leading to certain kinds of behaviour.

As we have seen in our first chapter, landmark judgements like the one of *Canada (AG) v. Ward* have helped with the construction of homosexuality as something innate and unchangeable, which therefore should enjoy international protection. This argumentation can be seen as parallel to the early emancipatory claims of LGBTI activists that attacked the criminalisation of consensual homosexual acts between adults. The pressure of construing homosexuality as a "fate" in order to push for the recognition of international protection has impeded the integration of more fluid or open concepts of sexual orientation as promulgated by the social sciences.

Analysing the ground of "membership of a particular social group", we have seen that it is made up of a conjunction of internal characteristics and external perceptions. Especially the United Nations High Commissioner for Refugees (UNHCR) has been very active in promoting an interpretation of the concept that also entails the perception of the group as being "different". As seen above in Chapter 1, the UNHCR SOGI Guidelines refer to the social perception approach and thereby contest the criticism that applicants basing their claim on the ground of sexual orientation would fail the social perception test, because they are usually invisible and do not associate in countries where they are persecuted. Therefore, homosexuals are construed as the other in opposition to homosexuals, as we have also seen in ECtHR case law.

Concerning the binary identity and behaviour, certain legal instruments like the UNHCR Guidelines have based their definition of sexual orientation on the one employed by the Yogyakarta Principles. This definition circumscribes "sexual orientation" as a "capacity" for "attraction" and "relations"[163]. Thus, we have to understand sexual orientation as an identity and a behaviour, or as Matthew Waites has put it as "subjectivity + behaviour"[164].

Generally speaking, the construction of the homosexual as the "deviant" other and the essentialisation of homosexuality in ECtHR case law is also true for the asylum cases that have been adjudicated by the Strasbourg Court. However, the application of the

[163] Yogyakarta Principles, Footnote 1.
[164] Waites, 2009, p. 144.

discretion criterion in the expulsion case of *M.E. v. Sweden* suggests an interpretation of homosexuality that places the emphasis on behaviour rather than identity.

Also EU law strongly draws on the ground of "membership of a particular social group": The Qualification Directive explicitly mentions people persecuted due to their sexual orientation as being eligible for being part of such a group and speaks of "unchangeable characteristics" or characteristics "so fundamental that they ought not to be changed"[165]. In addition, the perception as being "different" is also part of the definition of EU law, which will be important for our later analysis of how to properly assess the credibility of LGBTI asylum seekers. Thus, homosexuality is also in EU asylum law construed as an identity rather than a behaviour.

One landmark judgement that has been very influential in the discussion around the concept of sexual orientation in asylum law is the verdict of the UK Supreme Court in the cases of *HJ (Iran) and HT (Cameroon)*. Hathaway and Pobjoy[166], even though they welcome the progressive judgement that has been indispensable for overcoming the judiciary practice of applying the "discretion requirement", argue that the reasoning of the Court is wrong and makes "bad law".

They criticise that the UK Supreme Court has in *HJ and HT* subsumed a big range of forms of behaviour under "sexual orientation" that do not necessarily fall under the protection of the Geneva Convention[167]. In addition, Hathaway and Pobjoy argue that "it is not the case that refugee status is owed whenever serious harm is threatened by reason only of an applicant having engaged in some activity that is vaguely or stereotypically associated with homosexuality"[168].

Even though the Court may not have consistently applied refugee law in this case, as Hathaway and Pobjoy have shown, because the nexus requirement is applied too broadly to actions that could be avoided without "significant human rights cost"[169], the

[165] See Par. 46 X,Y,Z Case.
[166] Hathaway & Pobjoy, 2012.
[167] Hathaway & Pobjoy, 2012, p. 384.
[168] Ibidem, p. 388.
[169] Ibidem, p. 335.

underlying concept of "sexual orientation" has to be re-interpreted in order to grant protection on every level.

Similarly, Nora Markard has argued in her brilliant queer reading of LGBTI asylum cases that homosexual behaviour is construed as the expression of an inherent homosexual identity[170]. Markard has analysed this conundrum ingeniously and postulated that homosexuals and especially homosexual asylum applicants have to become part of the "other" in order to be "equal".

In the same way that Paul Johnson has identified the construction of homosexuality as an "inescapable fate" in the jurisprudence of the ECtHR, legal theorists have made out the same in asylum cases relating to sexual orientation persecution. In the landmark judgement of *HJ and HT* the UK Supreme Court has noted that homosexual applicants have the right to live their lives in "the way that is natural to them"[171]. Generally, the judgement has been delivered in a rather eccentric way and has even made reference to male homosexuals drinking "exotic cocktails" and going to "Kylie Minogue concerts".

Markard has argued that this fate/nature argument is essential for the recognition of gay asylum cases, because their "fatal inclination" *("schicksalshafte Neigung"*[172]) to homosexual behaviour and thus the "inescapability" of getting involved in homosexual acts makes them more worthy of international protection. As with the early gay activism that opposed itself to discriminatory "sodomy laws", homosexuality is conceptualised as "natural" rather than a choice.

Thus, in order to be granted asylum, L, G and B applicants must either constitute their identity as "being" homosexual respectively bisexual or must show that they are part of a "*Schicksalsgemeinschaft*", thus a community that shares the same fate[173]. This is parallel to the analysis of ECHR case law that has shown us that the Strasbourg jurisprudence employs a concept of sexual orientation that draws on the elements of

[170] Markard, 2013, p. 76.
[171] Hathaway & Pobjoy, 2012, p. 328.
[172] Markard, 2013, p. 77.
[173] Markard, 2013, p. 77.

innate identity traits and fate. In any case, such a subsumption under the ground of "membership to a particular social group" risks essentialisation.

In addition, it is important to note that the practice of credibility assessment and basing decisions on certain stereotypes of homosexual "demeanour" suggests that the underlying concept of sexual orientation is one of a "lifestyle" rather than a capacity to have sexual or emotional relationships with somebody[174]. Arguing with the notion of capacity that is suggested by the Yogyakarta Principles will be very helpful for our purposes, not only because applying a common human rights language makes sense in the light of creating synergies between advocacy groups or talking with a common voice. It is also crucial, because it avoids construing sexual orientation as an identity. In this thesis, we want to put forward the thought that sexual orientation is not an identity per se, but an element of human personality that can lead to the construction of an identity. Like skin colour does not automatically lead to a certain behaviour or mannerism, socialisation and the incorporation of a certain "habitus"[175] can lead to a common pattern of behaviour, mannerisms or knowledge. However, these patterns are also very much subject to the cultural and social context and develop through "association", thus spending of time and reciprocal influence, between people that share a common feature, such as their alternative sexual orientation. This is important to note, because such association can also be rather random if we take into consideration the association of the LGBTI movement that assembles people that are characterised mainly by their "deviance" from heteronormativity. For the purposes of our thesis, it is important to note that such an association will not always happen in a context of suppression. Or it may happen in a very different way than it happens in the European Union. Thus, a "gay", "lesbian" or "bi" identity will not always develop, because sexual orientation does not always lead to that. Thus, bringing into play the notion of capacity is much more neutral than construing sexual orientation as an identity. To extend the level of protection also to the public manifestation of a sexual orientation (or actually, the common identity resulting from association with people with a similar orientation), it can still be argued that this protected under the freedom of expression.

[174] See Gyulai, 2015, p. 67.
[175] Bourdieu, 1997.

In conclusion, the concept of sexual orientation in asylum law does not differ a lot from the concept employed in European anti-discrimination law. Especially the jurisprudence of the ECtHR that has essentialised homosexuality as a fate or an identity is very similar from how courts have reasoned about sexual orientation in relation to international protection. In this paper, we try to argue that applying a view of sexual orientation as a fluid and relational social construct is preferable to thinking of it as a fixed category, an identity or a "fate". This is not only due to the fact that such a discourse helps to construct homosexuals as the "deviant other" in opposition to heterosexuals and therefore has an influence on the public discourse and perception of non-heteronormative forms of living. Such a construction also leads to gaps in the protection of asylum applicants that are persecuted exactly because they do not fit into a "heteronormative matrix" and do not meet expectations of conformity that are construed around that matrix. In the next section, we will therefore identify the gaps of protection that result from the exclusionary concept of homosexuality that we have delineated above in order to build our argument for a reform of refugee law.

3.3.1 Resulting Gaps in the Protection – Credibility Assessment in LGBTI Asylum Claims

Fights for recognition of a certain status like being granted international protection due to the persecution of a hitherto not recognised ground of asylum such as sexual orientation, always have to oscillate between emphasising the difference while being the same. As Nora Markard has argued, homosexuals have had to be constructed as the "other" in order to be regarded as "equal"[176]. This results in the essentialisation and homogenisation of a social group, whose members are to be regarded as the "equal others", while everybody who does not fit into this categorisation is left outside of the scope of protection by being the "different other". In this section, we will analyse gaps of protection in refugee law that result from the homogenising categorisation of "being homosexual". We will thereby focus on the exclusionary practices that result from the pressure of proving something that is not to be proven.

[176] Markard, 2013, p. 77.

In general terms, the binary opposition of genuine / bogus claims has moved to the fore front in the dominant discourse on asylum[177]. In her analysis of recent trends in refugee law in Australia, Jenni Milbank has identified that courts in jurisdictions that have become more sensitive to the issue of LGBTI asylum claims and have overcome the exclusionary discretion jurisprudence, tend to reject such applications more and more due to "credibility issues"[178]. She argues that L, G or B people are often confronted with expectations of conformity with a stereotypical Western image of how a "true homosexual" should act that they cannot fulfil. Consequently, they are often asked stereotypical questions about things that are identified as being typically homosexual, such as certain kinds of literature or music.

Credibility assessments are always a difficult legal, factual and political decision and are often at the heart of an asylum procedure[179]. For asylum claims based on sexual orientation, the credibility of the actual "group membership" is crucial, as a disbelief of being "truly gay" will immediately lead to the rejection of an application[180].

In addition, the landmark judgement of *HJ (Iran) and HT (Cameroon)* of the UK Supreme Court has shown in a very eccentric way how L, G and B asylum seekers are supposed to be open about their sexuality and not voluntarily conceal it in order to be granted asylum[181].

Similarly, the comprehensive study "Fleeing Homophobia"[182] that was published in 2011 and covers the EU's Member States' jurisprudence on the issue of LGBTI asylum claims has identified significant malpractice in the field of credibility assessment, that ranges from "phallometric examinations" and measuring applicant's reaction to pornographic material to questioning people about "typical homosexual literature".

In summary, the report has identified the following problems arising from assessing a person's sexual orientation: In 8 countries of the European Union, medical or

[177] McGhee, 2001, p. 21.
[178] Millbank, 2009, p. 399.
[179] Millbank, 2009 (a), p. 2.
[180] Ibidem, p. 4.
[181] See Lewis, 2014, p. 961.
[182] Jansen & Spijkerboer 2011.

psychological assessments were carried out in order to identify if a person was truly gay, lesbian or bi. This is not in line with the global trend of de-pathologising homosexuality, can violate the applicants' private sphere and even entail issues of giving consent to medical examinations, because they are under pressure of proving something that is not to be proven[183].

In addition, the study has shown how applying questioning methods is crucial to the quality of the asylum procedure[184]. In the case of sexually explicit questions, it is obvious that such intrusion can cause anxiety in the applicants that can lead to evasive or even no answers. Furthermore, questions can also rely on stereotypes and it is exactly in this field, that asylum procedures have to be "queered" or at least become more sensitive to the huge variety of experiences that can constitute having an alternative sexual orientation.

Under assumed knowledge or behaviour, the study summarizes court practices like expecting an applicant basing his or her claim on sexual orientation that he or she must be familiar with local gay scenes, cannot be a parent or in a heterosexual marriage or having a sound knowledge of the criminal sanctions for homosexual conduct in the country of origin[185]. In conclusion, the stereotypical assumptions about sexual orientation that have been identified in asylum procedures by the study, can be clustered around the following three main categories: (1) homosexuals lack the "real thing" and thus homosexual men for example do not want to serve in the army, (2) homosexuals constitute a homogeneous social group and share common interests, views and tastes and (3) all homosexuals undergo a phase of "coming out", where they "find out" about their "stable" sexual orientation[186]. Similarly, Jenni Millbank has shown in 2009 how truthfulness of queer asylum claims is often tied to a certain way of demeanour, which is, especially in the asylum context of cross-cultural encounter, a very unreliable way of assessing the credibility of accounts[187]. In addition, since homosexuality is construed as

[183] Jansen & Spijkerboer 2011, p. 49.
[184] Ibidem, p. 54.
[185] Jansen & Spijkerboer, 2011, p. 61.
[186] Jansen & Spijkerboer, 2011, p. 62.
[187] Millbank, 2009 (a), p. 7.

being stable over time, applicants that have been in a heterosexual relationship, are married or have children, have been reported to be found incredible simply on these grounds[188]. In the same way, decision-makers often rest their reasoning on assumptions about certain knowledge that homosexuals should have, such as stereotypical homosexual literature, night clubs or certain LGBTI NGOs[189].

The conclusion of the study is that establishing the sexual orientation of a person should be a matter of self-identification as also set out in the Yogyakarta Principles[190]. In addition, LGBTI sensitive trainings should be launched in order to make decision makers aware about the detrimental effects of applying stereotypical assumptions about LGBTI people[191].

In her presentation on credibility issues in LGBTI asylum claims, Jansen has also identified an extremely high risk of refoulement, if applicants are approached with stereotypical assumptions on sexual orientation[192]. By stating that stereotypes are inevitable if you try to assess a person's sexual orientation, she inherently expresses the same concern that we are putting forward in this paper: Thinking of sexual orientation as a fate / nature or fixed identity rather than a social construct will lead to exclusionary practices because applicants will have to try to conform with a stereotyped view of homosexuality that (1) is culturally insensitive and (2) homogenises a group in a way that does not conform with reality.

Looking at the very recent judgement of *A, B, C v. Staatssecretaris van Veiligheid en Justitie* that we have analysed above in Chapter 1, we can state that even though the CJEU has spoken out against practices that clearly infringe the human rights of applicants such as medical examinations or accepting sexual video material of the

[188] Millbank, 2009 (a), p. 15.
[189] Millbank, 2009 (a), p. 19.
[190] Art. 3 Yogyakarta Principles.
[191] Jansen & Spijkerboer, 2011, p. 79.
[192] Jansen, Sabine, *Credibility, or how to assess the sexual orientation of an asylum seeker.* Presentation at EDAL Conference 2014: Reflections on the Current Application of the EU Asylum Acquis Workshop Sexual Orientation, Gender Identity and Human Dignity. Accessible online: http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Credibility%20of%20sexual%20orientation,%20%20presentation%20Sabine%20Jansen%20at%20EDAL%20conference%20Jan%202014.pdf. P. 4.

claimants, the case is a missed opportunity if we consider the gaps of protection that we have made out above. The CJEU has clearly stated in § 52 of the judgement that an applicant's sexual orientation may be subject to an assessment by the national court just as any other ground for asylum.

This leads to the conclusion that the "true" sexual orientation of the applicant forms a part of the material facts of the case that should be proven. In summary, the judgement in *ABC* does away with three main problems: It sets out a clear NO to sexually explicit questioning, forbids accepting pornographic video or photo material, stipulates that the fact that a person has only disclosed his or her sexual orientation later in the asylum procedure cannot solely lead to a rejection and stereotypical reasoning can also not only be a ground for not granting asylum.

Gyulai Gábor, an asylum expert from Hungary who has participated in the study of "Fleeing Homophobia", has argued in an interview conducted for the purposes of this thesis, that *ABC* is not a totally new development. It must be noted however, that even though it might seem obvious that intrusive questioning and medical tests violate human rights standards, such practices have continuously been happening across Eastern Europe. Even though *ABC* has shortcomings, it offers practitioners the possibility to litigate cases that clearly go against the judgement[193].

One major gap that still prevails after the judgement in the case of *ABC* is the use of stereotypical assumptions in asylum cases that relate to sexual orientation. As Jenni Milbank has pointed out in 2009 in her comprehensive study on credibility assessments in LGB asylum claims, a large amount of cases where applicants are found not to be credible with regard to their sexual orientation, were rejected out of reasons of plausibility that rested on the demeanour, knowledge or other stereotypical assumptions concerning homosexuals[194]. Sabine Jansen has drawn attention to the fact that even though basing decisions on stereotypical assumptions about a person's sexual orientation runs contrary to the standards for an impartial and objective assessment as

[193] Interview via Skype with Gábor Gyulai, Refugee Programme Director, Hungarian Helsinki Committee, Budapest, 25 June 2015.
[194] Millbank, 2009 (a), p. 32.

laid out in Art. 8 (2) Asylum Procedures Directive of the European, the assessment of credibility as it is dealt with in most European member states is based on "stereotypes and subjective notions"[195]. Taking this assessment into consideration, the CJEU's rhetoric on "useful stereotypes" seems particularly striking. In addition, the Court having failed to give guidance on how to assess the credibility in such asylum claims without basing the decision on stereotyped notions renders the judgement truly a missed opportunity.

Clearly, the wording of the judgement does not rigidly prohibit the use of stereotypes in these asylum claims. However, the Hungarian Helsinki Committee has published a manual on credibility assessment in these asylum cases, in which the judgement is interpreted in the way that it offers a clear NO to stereotypes[196]. Confronted with this in an interview, the editor of the manual stated that he is aware that this is controversial. However, after discussing with the author of the chapter on SOGI cases, they decided to interpret the judgement in light of the UNHCR SOGI Guidelines and thus in a way that stereotypes are not allowed[197].

Another gap that has been identified by Gyulai is the fact that the CJEU does not make it clear, what is to be understood by "medical testing". Regarding the practice of subjecting applicants basing their asylum claim on sexual orientation to psychological assessments in Hungary, it is not clear if *ABC* prohibits that or not, since the judgement merely speaks of "medical tests"[198]. The history of LGBTI asylum claims in Europe and the developments that have lead up to the judgement suggest that the court only envisaged phallometry or similar practices. Thus, Member States are left with the discretion whether to allow psychological assessments or not. It must be noted that such psychological assessments are unscientific and cannot lead to a proper conclusion over the sexual orientation of an applicant. *"This is not phallometry, I mean, this is not an inhumane or degrading treatment, but is just scientifically totally wrong. We have some of these expert opinions, which have nothing to do with what science thinks about*

[195] Jansen, 2014, p. 24.
[196] Gyulai et al., 2015, p. 71.
[197] Interview with Gábor Gyulai, 25 June 2015.
[198] Ibidem.

sexual orientation, at least in the Western world."[199] As we will see in the next chapters, social science argues that sexual orientation is too complex to be understood by somebody else than the subject self[200]. However, Gyulai has also pointed out that these assessments usually lead to a positive outcome for the asylum applicant, which means that NGOs often do not have the possibility to litigate this issue[201].

S. Chelvan, a leading UK barrister in asylum law, has pointed out that the CJEU has also missed the opportunity to actually give guidance on how to assess the credibility of an applicant in cases relating to sexual orientation[202]. The judgement limits itself to putting legal barriers on clearly violating practices, but at the same time reaffirms the conceptual fallacy of assessing a person's sexual orientation. Considering the fact that applying a concept of sexual orientation that sees it as a fate or a stable identity leads to malpractice in the field of credibility assessment, we have to acknowledge that the CJEU could have contributed to a paradigm shift in this regard. Rather than assessing the true sexual orientation of a person, which will never be possible, the CJEU should have continued what it started with the jurisprudence in *XYZ*: In this case, the CJEU reaffirmed that homosexuals can constitute a "particular social group" as set out in Art. 1A (2) Refugee Convention, because they are perceived to be "different". Thus, in *ABC*, the CJEU could have guided governments to focus on this experience of difference and stigma rather than suggesting to prove the actual sexual orientation of the applicant.

As Nora Markard has argued, the construction of a homosexual collective with a common fate and a common identity can thus result in a "collectivity trap"[203]. The re-conceptualisation of this underlying construct of sexual orientation seems to be the only way out of this dilemma. As we have seen, the social group category and jurisprudence referring to homosexuality as a "fate" or a "stable identity" lie at the heart of the problems of credibility assessment. Applicants are required to prove what is not to be proven. This *probatio diabolica* has not only lead to human rights violations against

[199] Ibidem.
[200] See Chelvan 2014.
[201] Ibidem.
[202] Chelvan, 2014.
[203] Markard, 2013, p. 81.

LGB applicants in the past few years, but is also likely to further infringe the rights of lesbian, gay and bi applicants. Breaking up this circle of exclusion will only be able by critically re-visiting the legal concepts applied. In the next section, we will see how applying a post-categorical approach to asylum law and sexual orientation legislation in general and to asylum procedures can help us achieve a better level of protection.

4 Alternatives to the *Probatio Diabolica*

4.1 A Post-Categorical Approach to Asylum Law

As we have delineated in the previous chapters, the construction of sexual orientation that underlies refugee law (respectively anti-discrimination law) results in gaps of protection for asylum seekers that base their claims on persecution due to their sexual orientation. This stems mainly from the fact that sexual orientation is construed as something innate, unchangeable, as a fixed identity or an inescapable fate. The dilemma that this groupism imposes on homosexual applicants has resulted in practices that strive to "prove" the sexual orientation of a person that are clearly violating human rights. The issue at stake is thus that people have to try to fit into a category that is constructed as fixed and homogeneous, whereas it can also be regarded as a social construct that is fluid, situational and relational. The most important approach in social and legal sciences that has put forward such an understanding of sexual orientation is queer theory. Consequently, we will analyse how queer legal theory has reacted to the integration of sexual orientation in the global discourse on human rights and how this critique can help us to re-conceptualise asylum law.

As we have seen in the previous chapters of this thesis, when law is regulating matters of sexual orientation, it draws on a certain set of pre-defined social assumptions about homosexuality or bisexuality. Sexual orientation is mostly construed as something innate and as an inescapable "fate" like in *Dudgeon v. The UK* and homosexuality is brought into a binary opposition to the "normal" heterosexual way of loving and living. Even though emancipatory movements and legal developments recognising sexuality rights have a truly noble intention and are seeking to protect the human dignity of people that do not fit into the heteronormative framework, they run the risk of essentialising categories and construing new forms of exclusions.

Not only the gay rights movement has faced such a dilemma: Also emancipatory feminist movements that try to ensure the legal and actual equality between the genders have run the risk of essentialising the categories of "men" and "women". The recognition of "women's rights" as "human rights" has had to face the critique that establishing such a legal regime might help to achieve better protection for a group of

people that has traditionally been under-privileged, but at the same time reinforces the supposedly "natural" binary of the two genders[204].

In this chapter, we will see how the discussion around the recognition of sexuality rights has evolved from the claim to respect for homosexuals to an approach that tries to wipe out categories in order to achieve full equality. We will try to analyse criticism that the gay rights movement has been confronted with and will look into the relationship of this critical "queer theory" and international human rights law. In a second step, we will try to apply this criticism to the current regime of protection under refugee law and will analyse if such a critique can be an added value to the discussion around the recognition of asylum claims for people that are being persecuted for their sexual orientation.

4.1.1 Queer Theory and the Global Human Rights Discourse

Early movements of emancipation in the field of LGBTI rights were focused on the liberalisation of legislations that criminalised consensual homosexual acts between adults. Consequently, legal developments were responding first to this claim and later moved to the recognition of equal rights in the field of family law. As Wintemute[205] has put it, the case law moved from the recognition of "sex rights" to the recognition of "love rights", which has also been identified in the jurisprudence of the ECtHR by Paul Johnson[206]. In terms of LGBTI advocacy, pride movements have strongly focused on the recognition of the identity of being homosexual and tried to reinterpret the notions of "gay" respectively "lesbian" or "bi".

Similarly to the female emancipation movement, the debate focused strongly on the recognition of rights for homosexuals as "human rights". As an example, the leading human rights NGO Amnesty International launched a campaign in 1998 entitled "gay rights are human rights"[207]. At the level of the United Nations, LGBTI rights have long not been on the agenda due to political resistance from several countries. Thus, sexuality is absent from most human rights documents. The Charter of Fundamental Rights has been the first document to include sexual orientation explicitly in the scope

[204] Butler, 1990, p. 2.
[205] Wintemute, 2005.
[206] Johnson, 2010, p. 79.
[207] Gross, 2013, p. 99.

of protection. Older documents like for example the Universal Declaration of Human Rights (UDHR) are based totally on a heteronormative conception of the world and are subject to predefined assumptions about gender and sexuality that privilege heterosexuality[208].

Only recently and due to feminist and LGBTI advocacy, have "sexual rights" started to be recognised. The landmark judgement of *Toonen v. Australia* of the United Nations Human Rights Committee (UNHRC) that declared the criminalisation of same-sex consensual acts as contrary to the discrimination clause of the International Covenant on Civil and Political Rights (ICCPR) was delivered in 1994. Especially since 2006, after the International Conference on LGBT Human Rights in Montreal and the launch of the Yogyakarta Principles at the newly created Human Rights Council, the discussion on LGBTI rights has been picking up[209].

In 2008, a statement was read by Argentina on behalf of 66 states at the General Assembly of the UN on the legal recognition of LGBTI rights. However, this statement was contested by 57 countries with the argumentation that the concepts of "sexual orientation" and "gender identity" have no legal foundation[210].

4.1.2 Queering Law

What is crucial for our assessment is the political discourse employed by LGBTI activists, because this discourse reflects itself in the legal conceptions of "sexual orientation" and "gender identity". As we have seen above in Chapter 2, the legal concept of sexual orientation was strongly influenced by the peculiar situation that LGBTI activists had to fight for de-criminalisation of consensual homosexual behaviour. This resulted in a concept of sexual orientation that resorted to the notions of "immutability" and the "fate" of being homosexual. Taking into consideration the implications of a "queer theory" as proposed by social scientists since the 1990s, we must acknowledge that fixed and essentialised concepts of sexual orientation that have

[208] Waites, 2009, p. 140.
[209] Waites 2009, p. 141.
[210] Waites 2009, p. 142.

been used for political mobilisation clash with a fluid and postmodern view of identities.

Parallel to the endeavours pursued by LGBTI rights activists, social science has picked up the debate around the recognition of sexuality rights. However, especially queer theory has not responded in a very positive way to the legal developments that have coined the past two decades.

Starting in the early 1990s, social scientists like Judith Butler and Eve Kosofsky Sedgwick have promoted a post-categorical approach to sexual orientation, thereby stating that a binary construction of homosexuality and heterosexuality reinforces the privileged position of the latter and does not achieve to break up the subjugating hierarchies of heteronormativity[211]. What queer theorists propose is adopting a view of sexual orientation as a social construct rather than a transhistorical and transcultural fact. Queering is inherently subversive and seeks to dismantle hierarchical structures and traditional forms of oppression.

"Queering law" on the other hand is a term employed by queer legal theory and stands for adopting a critical queer theory and putting it into practice by applying it to law. Morgan has summarized the corner stones of a queer legal theory as follows:

"Applied to questions of law, queer practice entails examining the assumptions about identity and identities which are built into legal systems. It involves questioning the place of the subject / citizen in liberal democratic theory and hence in the law. It means rejecting some of the assumptions about identity upon which legal texts (institutional, judicial and academic) are based."[212]

What is important to note in the relationship to the history of the recognition of LGBTI rights and queer theory is that queering law moves beyond these struggles of equality[213]. Queer legal theory does not aim at including "homosexuals" in the existing framework, but at breaking up hierarchies and challenging the "normal". It is essential to keep in

[211] Fineman, 2009, p. 5.
[212] Morgan, 2000, p. 217.
[213] Otto, 2007, p. 120.

mind the basic assumption of queer theory that constructing a gay-straight opposition implicitly legitimises the privileged position of heterosexuality. From a post-structuralist perspective, binaries always help to reinstate and reinforce hierarchies.[214]

In relation to human rights law, queer theorists have criticised that the recognition of LGBTI rights in jurisprudence and the drafting of documents like the Yogyakarta Principles are an expression of the reproduction of a heteronormative matrix. Heteronormativity refers to institutionalised heterosexuality that is manifested in law, organisations and politics[215]. It is established though the binarisation of homo- and heterosexuality. Queer theory, as noted above, is not concerned with integrating LGBTI rights into this logic, but with the way how heterosexuality manages to remain in its privileged position. It therefore often applies a descriptive, rather than a normative approach.

Another attempt to "queer" international human rights law has been undertaken by Wayne Morgan in 2000. He has analysed the legal developments in Europe in the 1990s and especially focused on the jurisprudence of the ECtHR. Thereby, he identified that the concepts of tolerance and privacy are often used in a way that reinforces heteronormativity.[216]

"*The predominating notion of 'tolerance' in the human rights field is a common technology of liberalism, effective in maintaining an 'otherizing' and 'subordinating' hierarchy at the same time as it grants 'rights' from its position of passionless neutrality."*[217]

What Morgan wants to express in this statement is that the notion of "tolerance" *per definitionem* functions on the premise that "others" are accepted into a pre-existing structure, in this case the "heteronormative matrix". Tolerance thus implies

[214] Pickel, 1997, p. 485.
[215] Buss, 2007, p. 123.
[216] Morgan, 2000, p. 218.
[217] Ibidem., p. 220.

subordination according to this logic. In addition, he argues that the privacy discourse silences other forms of sexuality by making homosexuality invisible[218].

Speaking with Foucault, Morgan holds that law has two forms of exercising power: juridical power, which imposes certain forms of behaviour and disciplinary power, which normalises, produces and colonises identities[219]. This refers to the suppressive power of discourses such as law, which help to reproduce patterns of subordination and reinforce hierarchies.

Matthew Waites has produced a brilliant queer analysis of human rights law in 2009 entitled "Critique of 'sexual orientation' and 'gender identity' in human rights discourse: global queer politics beyond the Yogyakarta Principles". In this article, he argues that the concept of sexual "orientation" is surprisingly widely used in international legal documents, even though it has witnessed substantive critique from social sciences[220]. He postulates that the discourse around LGBTI rights as human rights tends to simplify sexual orientation to a homo- and heterosexual binary, whereas bisexuality is either left out or construed as a third category in between like in the Yogyakarta Principles[221]. Moreover, he criticises the Yogyakarta Principles for rendering the concept of "sexual orientation" transcultural and transhistorical[222]. Similarly, Aeyal Gross has argued that the "Yogyakarta Principles offer freedom of, but not freedom from, sexual orientation and gender identity"[223], thus forcing people again into pre-defined categories that claim to be universal.

This reasoning accords perfectly with the exclusionary problems of the concept of sexual orientation that is currently applied in asylum law. People that face persecution due to their sexual orientation are forced into categories upon arrival to a host country respectively when basing their asylum application on this ground. This leads to problems in the assessment of the credibility of the applicants as discussed above.

[218] Morgan, 2000, p. 220.
[219] Morgan, 2000, p. 212.
[220] Waites, 2009, p. 144.
[221] Ibidem, p. 151.
[222] Ibidem, p. 144.
[223] Gross, 2013, p. 128.

What Waites has also criticised is that international NGOs like the International Gay and Lesbian Association (ILGA) are contributing to the promotion of a "universal language of identity politics" rather than resorting to less culturally specific concepts[224].

Thus, Waites suggests to critically assess the concept of sexual orientation as such, because it suggests stability and coherence[225]. However, he has argued that as a conceptual framework, "sexual orientation" is flexible enough to be open to reinterpretation:

"[S]exual orientation is potentially a flexible enough concept to be redefined and expanded in meaning, to be applicable to an individual's subjectivity understood as potentially changeable rather than as a continuous state." [226]

What Waites suggests is not that the concept of "sexual orientation" should be abandoned in human rights law, but that politics and legal practitioners should be made aware of the negative implications and the exclusionary potential that it entails[227].

Speaking with Stychin and Pickel, the legal regulation of identities always opens discursive spaces for the re-negotiation of concepts, which means that the norm-setting in the sphere of sexual orientation has inadvertently created a struggle for identification that will be open-ended: *"Legal regulation frequently and inadvertently creates discursive spaces for the articulation of identity(ies) through the agency of the excluded 'other'"*[228].

Queer theory has often been criticised as being utopian, merely theoretical and without any practical implications[229]. Even if we acknowledge that sexual orientation is a fluid social concept and is experienced differently by everybody, we might argue that law in any case has to work with categories. Or we might say that even if equality legislation is reproducing existing hierarchies, there is no alternative to it. Or even worse, queer

[224] Waites, 2009, p. 143.
[225] Ibidem, p. 146.
[226] Ibidem, p. 150.
[227] Ibidem, p. 151.
[228] Pickel, 1997, p. 486.
[229] Morgan, 2000, p. 222.

practice could be regarded as opposed to the recognition of equal rights or the granting of asylum status to LGBTI people. Arguing with Wayne Morgan, we would like to disagree with this criticism. On the premise that categorisations are exclusionary, we have to acknowledge that the only way to overcome practices that leave some people outside of the scope of protection of human rights or refugee law, is contesting the fixity of sexual categories wherever they are applied. In addition, only if we become aware of the oppressive power of law that "colonizes identities"[230], we can break up heteronormative patterns of subordination. Finally, we have shown that by applying an essentialist concept of sexual orientation as asylum law is at the moment, certain people are left outside of the scope of protection of international refugee law.

Breaking up the heteronormative matrix in human rights and refugee law entails conducting a queer analysis as proposed by this thesis and re-interpreting the concept of sexual orientation that underpins legal definitions.

If we apply such a radical view on the application of the category of sexual orientation in law or not depends on our purposes. Frankly speaking, making law blind to different sexual orientations is reasonable in the sense that we construe a "universal sexual legal subject" as Grigolo[231] has suggested. However, as argued already above, the notion of construing sexual orientation as a "capacity" rather than an identity would also fulfil our purposes of avoiding that sexual orientation is seen as a fixed identity. It is true, that global identity politics that are pursued by international NGO's like ILGA and a uniform and universal human rights regime can lead to homogenisations that do not conform with the complexity of social reality, but at the same time, we have to take a decision when advocating for the protection of sexual minorities. What we can take from a queer analysis of law is the way that sexual orientation is construed as being in a binary opposition to heterosexuality. The recognition of LGBTI rights has often functioned in a way that alternatives to heterosexuality have been included in a heteronormative matrix rather than deconstructing this system of structural oppression. We have to be aware of the conceptual implications that law has. For our purposes of

[230] Morgan, 2000, p. 212.
[231] Grigolo, 2003.

raising the level of protection in LGBTI asylum claims, we can draw the conclusion from queer theory that sexual orientation is very complex and should not be construed in a dichotomy of hetero- and homosexual.

It is important to note at this point that postmodern theories of identity play a crucial role in understanding that categories like "sexual orientation" or "ethnicity" are not fixed. We have to acknowledge that for "identities" like this, there is an underlying element of human personality that makes people associate, be it in our case sexual attraction or in the case of ethnicity filiation, thus being born into a certain group. Common patterns of behaviour or reasoning are then incorporated in the individual through a process of social learning that results in a certain habitus, as social theorists like Bourdieu[232] have argued.

In the case of ethnicity, anthropologists like André Gingrich[233] have argued that identity is not a fixed category, but draws on a set of cultural, personal and social traits that can be reassembled and employed according to the context and the situation. The same is true for sexual orientation. Sexual attraction is the underlying element that can lead to the construction of a common identity, thus the socialisation into an LGBTI world. This may in some cases entail "Kylie Minogue concerts" or "exotic cocktails" like the judges in *HJ/HT* have argued. In other cases it may not entail any association and thus construction of a common identity at all, even though cultural and social stereotypes of homosexuality will always influence the self-perception of the individual.

Therefore, we can conclude from our queer analysis that concepts of sexual orientation in law have homogenising effects, can lead to exclusions and function within a heteronormative matrix. Even very well intended documents like the Yogyakarta Principles do not move beyond the reinforcement of a hetero-homo-binary. However, law is a social construct and will only be able to operate by applying social constructs of phenomena. That these social concepts will never be able to match the complexity of social reality is part of the deal of regulating society through law. However, we can try to approximate legal categories as much as possible to this social reality. This is why

[232] Bourdieu, 1997.
[233] Gingrich, 1998.

accepting that the constituting element of sexual orientation is attraction is so fundamental. We would argue for reading the Yogyakarta Principles in a queer way rather than deconstructing and dismissing them for operating in a heteronormative matrix. We have to be aware of these implications and this is what queer theory can help us to understand, but the definition of sexual orientation as a "capacity" rather than an identity is still the most applicable for our purposes.

Concerning the verification of sexual orientation in asylum cases, if we take queer theory seriously, sexual orientation is so complex that it can only be understood by the subject self[234]. This means, that proving sexual orientation is impossible and should not be part of the "material facts" that are assessed in asylum procedures. The judgement of *ABC* has definitely spoken up against practices that clearly go against the human dignity of asylum applicants. However, it does not manage to tackle the misconception that the sexual orientation of the claimant can be assessed. In the contrary, it even explicitly holds that the membership to a particular social group constituted by a common sexual orientation can be subject to assessment[235]. It is unclear from the formulation of the Court (and maybe this is intentional), if the sexual orientation as such should be subject to assessment (thus, the fitting into a category like "homosexual") or if it could also be interpreted as simply not conforming with heterosexual expectations.

4.1.3 A Short Intersectional Analysis of Asylum Law

Not only should sexual orientation not be categorised as queer theory suggests, but also is it subject to cultural considerations. Being a lesbian woman or a gay man in Europe can mean something totally different and entail completely different experiences than being homosexual in Iran for example. This has to be taken into consideration when arguing for "proving homosexuality". The concept of intersectionality helps us to understand that differences within categories can lead to intersecting forms of oppression and experiences of disadvantage that are very diverse.

In this section, we will therefore touch upon the concept of intersectionality, which can help us to understand that applying fixed categories in asylum procedures is also not

[234] Chelvan, 2014.
[235] Par. 52 ABC Case.

appropriate if we take into consideration cultural differences and diverse societal settings. The concept of intersectionality will provide us with another approach that challenges the fixity of identities and moves beyond the application of categories in law.

The early feminist movement has not only been criticised by queer theory for fixing the binary opposition between men and women as we have seen above, but has also had to face the critique of seeing the oppression of women from a white middle-class perspective, without taking oppressive experiences of other groups of women into account. The result has been the critique of "Black Feminists" or women from the Global South that have pointed out that not all women suffer the same experience of discrimination and that anti-discrimination measures should be sensitive to these experiences.[236]

Even though this critique was there before, the conceptualisation of "intersectionality" was achieved by Kimberlé Crenshaw in 1991[237]. The theory takes its starting point from a feminist perspective and thus initially argued that all women experience discrimination differently because gender, race and class intersect. The theory is concerned with making "differences within" groups visible and opposes itself against the homogenisation of categories such as "men" or "women". In this regard, it has many similarities with queer theory as discussed above, but it draws very much on the idea that intersecting inequalities are not additive, but mutually constitutive[238].

The concept has been identified as one of the most important theoretical contributions by feminist studies[239] and has experienced a wide reception in legal theory as well. Even though the concept starts from the premise that discrimination against women is not the same transculturally or transhistorically and is subject to considerations of class, race and other categories such as ability or aboriginality, the concept is open to be applied to any forms of oppression.

[236] McCall, 2005, p. 1771.
[237] Crenshaw, 1991.
[238] Solanke, 2009, p. 725.
[239] McCall, 2005, p. 1771.

One of the implications of the theorem of intersectionality for the issue of asylum claims based on sexual orientation is the fact that if we take the stance seriously that intersectional discrimination is not additive, but mutually constitutive, we have to acknowledge that sexual orientation discrimination by asylum authorities can be a reality even in a context, where sexual orientation discrimination is absent. This consideration is important to keep in mind, but should be subject to an empirical anthropological or maybe sociological study.

Most importantly for our purposes, several legal theorists have appropriated the concept in order to argue for a new approach to policy- and law-making that moves beyond categories. This reception will be quickly discussed drawing on three concepts of how to deal with the exclusionary character of categories employed in anti-discrimination law or, as in our context, in the realm of asylum law.

The premise of this legal approach is that categories like gender, sexual orientation, race or ethnicity are social constructs that over-simplify the social realities and do not make up for the complexity of the lived experience[240].

In her article *"Putting Race and Gender Together: A New Approach to Intersectionality"* from 2009, Iyiola Solanke has analysed anti-discrimination law from an intersectional perspective. By revisiting the categorical approach that law employs, she argues that the application of categories is not preordained, but has historical and political reasons[241]. The same is true for the Geneva Convention that explicitly defines who is worthy of international protection by applying certain categories.

Solanke also holds that categories per se are not the problem, but their underlying concepts. She says that grounds that are worthy of protection (in our case: international asylum status), are usually those that are identified as being characterised by "immutability", which is definitely true if we look at the early immutability jurisprudence in LGBTI asylum claims as analysed above[242]. She however fails to take into consideration that the jurisprudence has advanced from a pure reasoning of

[240] McCall, 2005, p. 1777.
[241] Solanke, 2009, p. 724.
[242] Solanke, 2009, p. 737.

immutability to including characteristics that ought not to be changed due to their fundamentality for the human personality.

What Solanke proposes is a new approach to anti-discrimination law that does not completely put away with the use of categories, but instead works with the concept of "stigma" that would lead to a shift in jurisprudence[243]. This shift in jurisprudence would entail moving from assessing on which ground people are discriminated against (but why) to taking the social context that informs the discriminatory act into account (but how). In my opinion, such a shift would make a lot of sense for our purposes as well. Instead of trying to fit applicants into a category, the focus should be on how people have experienced discrimination and persecution. What we can take from Solanke's analysis is that the nexus requirement in cases based on sexual orientation has to be revisited: Starting from the premise that classic asylum law asks whether a person is being persecuted for one of the prohibited grounds (in these cases usually adherence to a particular social group), jurisprudence should shift from trying to analyse the "stigma" behind the persecution and take into account how the adherence to the "group" of homosexuals is socially constructed. Further below, we will assess how the DSSH model proposed by S. Chelvan works with the concept of "stigma" rather than the category of "homosexuals".

As we have seen above, moving beyond categories does not always entail rigorously rejecting the use of categories in law. Reflecting on the use of categories in social science from an intersectional perspective, Leslie McCall[244] has suggested three ways how we can deal with the exclusionary character of categories: The anti-categorical approach works totally without categories, but has the problem that social complexity is difficult to be grasped without categories. The inter-categorical approach works with a kind of "thick description" as proposed by Clifford Geertz[245], whereas the "intra-categorical approach" adopts categories as a heuristic tool while acknowledging that they are socially constructed and potentially homogenising. For the purposes of asylum law, we can draw conclusions from all three approaches: The anti-categorical approach

[243] Solanke, 2009, p. 741.
[244] McCall, 2005.
[245] Geertz, 1994.

will be very difficult to be applied and would only work if international asylum law as such is rethought in a post-categorical way. The intra-categorical can be applied in asylum procedures and has the potential to shift the focus in asylum cases on the personal narrative of the applicant as suggested in the study "Fleeing Homophobia"[246]. The inter-categorical approach on the other hand can lead us to accept the use of categories in asylum law as a tool that helps us to grasp the complexity of social realities, while at the same time keeping in mind that these categories are socially constructed and do not live up to the reality. Such a conclusion would lead us to understand that a re-interpretation of the concept of sexual orientation as suggested by queer theory is possible.

Lewis has argued with the concept of intersectionality in relation to the credibility assessment of LGBTI asylum claims and shown how discourses of legality and illegality of asylum seekers depend strongly on considerations of the intersections of gender, race, class and sexuality. She argues that lesbian asylum seekers of colour are disproportionately disadvantaged in the asylum procedure due to how the narratives of sexuality are constructed. In addition, the prevailing practice in the UK of bringing pornographic material as evidence, that was abolished with the judgement in the *A, B and C* case before the CJEU, created exclusionary practices for queer female migrants of colour[247].

Lewis holds that because gender and sexuality are separated conceptually in asylum cases, persecution is often seen as being unrelated to sexual orientation[248]. In addition, she argues that the intersection of gender and sexuality discrimination leads to a "hypersexualisation" of lesbian asylum seekers that results in intrusive sexually explicit questioning methods[249].

Analysing asylum law from an intersectional perspective, Lewis postulates that this legal field is, like any other, inherently gendered and dominated by heteronormative

[246] Jansen & Spijkerboer, 2011, p. 79.
[247] Lewis, 2014, p. 960.
[248] Lewis, 2014, p. 964.
[249] Lewis, 2014, p. 965.

perceptions of the world. She argues that the closer an asylum applicant gets to the image of a "male political activist fleeing an oppressive regime, the more likely one is able to obtain asylum"[250].

In conclusion, an intersectional analysis of asylum law in relation to sexual orientation cases can help us to refine law in two important ways. First of all, intersectionality theories provide us with a post-categorical understanding of law that aids us to move beyond legal categories. As we have seen above, the abolishment of categories such as sexual orientation will not be totally possible, but at least by following the "intercategorical approach" proposed by McCall in 2005, we can deconstruct these categories and at the same time use them as a heuristic tool to process the complexity of discrimination / persecution. Secondly, we have seen how the intersectionality lens renders the exclusion of queer female asylum seekers evident. Since law forms a heteronormative matrix, forms of oppression intersect in the application of asylum law and result in exclusionary practices for lesbian women of colour.

4.2 Practical suggestions – The DSSH Model

Applying a different approach to asylum law that moves beyond the use of categories is merely one suggestion that we can give in order to improve the protection for asylum applicants that base their claim on the ground of sexual orientation. Another way of dealing with the issue is trying to change the way in which credibility is assessed by decision-makers. Jenni Milbank has made out two ways in which credibility assessments in asylum cases can be improved: Either, limiting the discretion of first-instance adjudicators juridically or improving the competence of decision-makers[251]. Millbank claimed that structuring the way decision-makers can adjudicate in such asylum claims has in the past few years only pointed into a negative direction[252]. However, with the judgement in the case of *ABC*, the CJEU has definitely taken a step into the right direction, even though there are still considerable gaps in the guidance for decision-makers. Limiting the discretion has thus already been initiated on the level of the European Union.

[250] Lewis, 2014, p. 967.
[251] Millbank, 2009 (a), p. 22.
[252] Ibidem, p. 23.

As a second option, Millbank suggests to improve the quality of decision-makers by either conducting trainings on issues of sexual orientation or creating in-house focal points for special issues[253].

As noted above, the *ABC* judgement of the CJEU can be regarded as a progressive and forward-looking judgement. It provides a clear no to medical testing, lays out that late disclosure in LGBTI asylum claims follows from the specific characteristics of these claims and specifies that decisions cannot be solely based on stereotypes. In this regard, the judgement spells out guidance for the EU Member States in a novel way. Nevertheless, we also have to regard the judgement as what it is: It spells out human rights principles and defines, where the limits of the scope of protection offered by the CFR and the ECHR lie. Therefore, it does not offer a lot of novelties to asylum practitioners. In an interview with Corina Drousioutou from the Future World Center in Cyprus, an expert in asylum law that has also contributed to the study "Fleeing Homophobia", she pointed out that *ABC* does not offer new guidance to asylum practitioners[254].

In line with this reasoning, S. Chelvan, a UK barrister that has been involved in "Fleeing Homophobia" as well, has suggested a model that gives guidance on how to conduct credibility assessments in asylum claims based on sexual orientation. The Hungarian Helsinki Committee has produced a high-level and comprehensive manual on credibility assessments in asylum cases that also covers the issues of sexual orientation[255]. The manual provides exercises and ideas for trainings with asylum practitioners that should make them more sensitive for the issue of sexual orientation. Most importantly, the publication also introduces the DSSH model that has been developed by Chelvan.

The above mentioned manual starts from the consideration that sexual orientation is neither a disease nor a choice or merely a lifestyle, but is linked to a person's *current*

[253] Ibidem, p. 30.
[254] Interview via Skype with Corina Drousitotou, Senior Legal Advisor, Future Worlds Centre, Nikosia, 23 June 2015.
[255] Gyulai et al., 2015, pp. 59-93.

identity and human dignity[256]. As we have argued above, the credibility of an asylum applicant with an alternative sexual orientation should thus not be assessed in a way that tries to "prove" a certain sexual orientation, but should rather focus on other factors. As our intersectional analysis of the topic has shown, one way of avoiding the exclusionary character of using categories such as hetero- or homosexual, is to move from the categories to the concept of stigma. Also the DSSH model is based on the consideration that a person's sexual orientation cannot be subject to prove and that adjudicators should better focus on the experience of difference (D), stigma (S), shame (S) and harm (H) of homo- or bisexual applicants[257]. Based on the premise that categories homogenise social realities, the DSSH model focuses on what is common to all LGBTI asylum applicants: the experience of not fitting into a heteronormative narrative[258]. The model has been made implicit reference to in the UNHCR SOGI Guidelines in paragraph 62 and is currently being applied in Finland, Sweden, the UK and New Zealand[259].

Concerning difference, the model makes clear that this experience does not only relate to sex, but entails various aspects of life and already can develop before puberty. Many LGBTI people experience their difference already in childhood, others only later. It is also important to note that such an experience of difference must not always conform with stereotypes. In addition, the feeling of being different may come at one certain turning point, which is often central in sexual orientation narratives[260]. The model suggests to ask open questions about the experience of being different and explicitly states that asking when somebody realised that he or she was gay will not be helpful, because this usually happens in a gradual way.

"Stigma" in relation to this model is defined as recognising society's disapproval with non-heteronormative conduct or identities. This may range from labelling homosexuality as disgusting, ridiculous or inferior to marking it as sinful or dangerous

[256] Gyulai et al., 2015, p. 69.
[257] Chelvan, 2014.
[258] Gyulai et al., 2015, p. 77.
[259] Ibidem.
[260] Gyulai et al., 2015, p. 79.

to the well-being of a society. Stigma stems from the being perceived as different and is interrelated to this experience. Therefore, decision-makers should ask questions that center around how or by whom people experienced stigmatisation[261].

As a third element of the model, "shame" refers to feelings that one's alternative sexual orientation or gender identity should be hidden or is something that people should be ashamed of. This results in people staying "in the closet" and developing other "avoiding strategies" like being very discreet about sexual relationships or not engaging in them at all. Trigger questions for the narrative of the asylum applicant should focus around the feeling of shame and the coping and avoidance strategies[262].

Finally, what is actually characteristic for a refugee, is that he or she experienced harm in the country of origin. While the first three elements of difference, stigma and shame focused on the experience of having an alternative sexual orientation that is common to homosexuals all over the world, harm focuses on the specific experience that makes a refugee a refugee. Harm can entail amongst others legal harm like criminalisation, socio-economic harm following from structural discrimination or physical harm such as "corrective rape". Questioning should focus around the experience of harm or the fear of future harm[263].

As stated above, the DSSH is officially part of trainings for asylum adjudicators in the UK. However, a comprehensive study[264] of practice of asylum adjudicators has shown that the model is not applied in a way that ensures that inappropriate questions are not asked. The study lays out that still a lot of cases are based on stereotyped assumptions and the training seems to present the DSSH model as a compilation of questions under four different headings[265] rather than a framework that aims to implement an approach to sexual orientation that moves beyond pushing people into certain categories and trying to prove who is gay or not. This has also been confirmed in an interview carried out with a UK home office employee conducted for the purposes of this thesis:

[261] Gyulai et al., 2015, p. 81.
[262] Ibidem, p. 83.
[263] Ibidem, p. 84.
[264] Vine, John (2014)
[265] Ibidem, p. 20.

"You know, it is easier to tell you what we cannot ask them and cannot do, if that makes sense. We cannot ask about behaviour, because that has happened in the past and it was not a brilliant way of doing things. This is what the guys from Stonewall and Spectrum told us: Most people will be able to tell you, when they realised that they are not the same as the culture they are in. And asking that will help you understand. And focus on feelings more than anything else. Same with relationships, when did you meet? How did the relationship develop?" [266]

Thus, some principles of the DSSH model are present in the narrative of the home office employee (for example the focus on the experience of difference), but it is not explicitly applied in interviews.

In conclusion, the DSSH model offers valuable guidance for asylum adjudicators on how to assess the credibility of LGBTI applicants in a way that avoids forcing them into pre-defined and fixed categories. What is important to note is that self-definition should always be taken as a starting point in asylum claims based on sexual orientation. Then, we would suggest asking certain "trigger questions" in order to instigate a narrative of the asylum applicant. Having seen above how applying categories in law leads to exclusions, this model applies a post-categorical approach and without exerting the pressure of conformity in asylum procedures. Concerning the legal developments in the past few years and especially the landmark judgement of *ABC* from December 2014, this model gives detailed guidance that no court case or legal provision has managed to give. Regarding its endorsement by UNHCR in the SOGI Guidelines, it is even more surprising that the CJEU has failed to make reference to it and has instead decided to leave a wide margin of discretion for adjudicators when assessing the credibility of LGBTI asylum applicants.

[266] Interview via Skype with Anonymous, Executive Officer, Asylum Casework Directorate, UK Home Office, 23 June 2015.

5 Conclusion

A *probatio diabolica* is a legal requirement of proof for something that cannot be proven. It is thus a diabolic proof, a proof that will impose an unsurmountable obstacle for an applicant in a legal proceeding. Usually, legal regimes answer the phenomenon with inversing the burden of proof, thus giving the applicant the presumption of truthfulness or the benefit of the doubt. As we have argued in our analysis, asylum cases relating to sexual orientation are still adjudicated in a way that poses on applicants the responsibility to prove the improvable.

This dilemma has been the point of venture of a journey that has tried to explore the legal, historical and conceptual implications of the fields of European human rights and refugee law in order to shed new light on the issue of credibility assessment in SOGI asylum claims.

Delineating the legal developments that have taken place in the past two decades in the field of international and European law has shown us how human rights and refugee law are deeply intertwined in the issue of asylum claims based on sexual orientation. Serious human rights concerns have been raised by dubious methods of "testing" the sexual orientation of applicants, intruding into their private sphere by sexually explicit questions or accepting of pornographic footage. We have also shown how the international human rights regime and the notion of non-discrimination have been crucial in the fight for recognition of LGBTI asylum claims. International refugee law and the regional / national regimes that stem from it provide international protection to people that are persecuted on specific prohibited grounds. L, G and B applicants are usually subsumed under the ground of membership of a "particular social group". As we have seen, legal documents like the EU´s Asylum Qualification Directive base this inclusion on the premise that sexual orientation is a characteristic that is so fundamental to human dignity that it should not have to be changed. Human rights considerations have thus substantively influenced this development.

Looking into the legal developments and disentangling the intertwined nature of human rights and refugee law has made us understand how the "particular social group" reasoning is indispensable for SOGI asylum claims. The latest legal developments in the

field of credibility assessment with the case of *ABC v. Staatssecretaris fer Immigratie en Asiel* before the CJEU have yet again brought the application of human rights norms to the fore in asylum cases based on persecution due to the applicant´s sexual orientation.

In a second step, we have tried to delineate the underlying concept of sexual orientation in asylum law. Since we have already established that human rights and asylum law are mutually constitutive and reinforce each other, we have found it necessary to start our analysis of sexual orientation in asylum law from an analysis of the concept of sexual orientation in European human rights and anti-discrimination law.

In relation to our question how sexual orientation is conceptualised in European asylum law and the repercussions that this concept has for the way in which credibility is assessed in SOGI asylum claims, we can conclude the following:

First, as mentioned above regarding the history of international refugee law, it is crucial to note that the reasoning of including people with an alternative sexuality into the category of a "particular social group" is strongly based on a reasoning of human rights law. Even though early Court decisions like the one of *Ward v. Canada* have stressed the innateness and fixity of sexual orientation, later the argumentation has shifted towards including homo- and bisexuals in the regime of international protection, because sexual orientation constitutes an element of human personality that ought not to be changed. This is a neutral category than can be subject to reinterpretation if need be. What is most salient about the susbsumption of sexual minorities under the category of a particular social group is that the wording suggests "coherence", shared knowledge or behaviour or a specific cultural pattern of thinking. Especially in the contexts of suppression of alternative sexual behaviour to heterosexuality, such an "association" or sharing of a common "culture", as it is indeed sometimes witnessed in more liberal countries like some member states of the EU, will not always happen, because homosexuals can be isolated from each other and not be able to build a common identity or simply draw on different cultural expressions of sexuality.

Second, we have seen how European anti-discrimination and asylum law conceptualise sexual orientation. In a nutshell, we can say that law sees homosexuality as an identity rather than a behaviour, whereas the Yogyakarta Principles on an international level set out that sexual orientation is rather a capacity and thus entails both, subjectivity and acting (or at least being able to act) upon this subjectivity.

What is most salient, especially also in the light of the *ABC* judgement, is that the sexual orientation of an applicant is seen as something that can be subject to assessment and proof. However, we argue that homosexuality is invisible, thus something that can only be understood by the person him- or herself. In our eyes it does not make sense to focus on the "real" sexual orientation of an applicant in the asylum procedure, but rather should the attention be shifted to the experiences of persecution and the feelings of the person affected. The *ABC* judgement does not fully achieve that and rather focuses on delineating, which credibility assessment practices, such as phallometry, are definitely infringing the applicant's human rights. However, it fails to shift the attention of the asylum authorities away from the sexual orientation to the experienced persecution. If something cannot be proven, clear guidance should be given not to try to prove it.

ABC has closed several gaps in the protection of the human rights of LGBTI applicants. However, it has left the application of stereotypes at the discretion of governments, which can be especially problematic in countries that do not have a long tradition of tolerance towards homosexuals. In addition, the judgement does not specify whether psychological assessments and expert opinions on the applicants "true" sexual orientation should be allowed or not.

Hence, we have shown that even though European law has made enormous progress in tackling human rights violations in credibility assessments in asylum claims based on sexual orientation, the underlying conceptual flaw has not been addressed at all. Regarding all the above said and the theoretical analysis of the problem, we can propose three different solutions to the problem: First, on a meta-level, we could envisage a re-conceptualisation of international refugee law by applying a post-categorical approach. This would mean not subsuming homo- or bisexuality under the ground of "a particular

social group" in the first place, but create a separate ground. However, regarding the progressive jurisprudence and continuous re-interpretation of the Geneva Convention, this can also be achieved by case law.

Regarding the European law level and the ground of "sexual orientation", it is important to note that the crucial element of such asylum claims is not which sexual orientation the applicant really has, but that he or she is perceived as not fitting into a heteronormative narrative. Since "actual" and "perceived" sexual orientation are in any case covered by the protection of modern asylum law, this should not be a problem.

Conceptually, this can be achieved by making the above said explicit in law or at least adding this thought to the discussion around the topic. We hope that this thesis will contribute in a way that this can be achieved.

Legally, and this is especially true for the judgement of *ABC*, we have to start interpreting European asylum law in the light of the UNHCR SOGI Guidelines[267] and the Yogyakarta Principles[268], two documents that are very helpful for our purposes. Especially the emphasis on self-definition of the applicant's sexuality that is put forward by both soft law instruments is essential. In addition, in accordance with the de-pathologisation of homosexuality, psychological assessments and expert opinions have to be interpreted as not forming part of a proper assessment of credibility in asylum claims.

Finally, the European Union should give guidance to its Member States on how to assess the credibility in cases relating to sexual orientation, as the study Fleeing Homophobia has laid open a huge diversity in practice across the EU. What we have proposed as a practical solution is applying questioning methods that do not try to assess what sexual orientation the applicant exactly has, but rather focus on elements that surround this sexual orientation. This is in line with what we have argued for in our queer analysis of law. Sexual orientation is constituted by the element of sexual attraction, or as the Yogyakarta Principles have put it, a capacity that can be acted upon

[267] §§60-64 SOGI Guidlelines.
[268] Principle 3 Yogyakarta Principles.

or not, which means that all other elements of identity that surround sexual orientation (like mannerisms, behaviour etc.) are interchangeable and the result of a socialisation process. Therefore, questioning should focus on the experience of realising one's sexual orientation that does not fit in a heteronormative narrative and the experience of stigma and consequently persecution.

As future prospects, we suggest that trainings for case workers and asylum practitioners are intensified concerning issues of sexual orientation, thereby including questioning methods that shift the attention of adjudicators from the actual sexual orientation of the applicant to the feelings of difference, stigma, shame and harm. The training manual[269] developed by the Hungarian Helsinki Institute will be very helpful in this regard.

Since the judgement of *ABC* has provided a lot of guidance already for EU member states on how to assess credibility in SOGI asylum cases, it is possible that problems arising will shift from credibility to other fields. One issue that has raised concerns recently is the application of fast-track procedures and safe country of origin policies to SOGI asylum claims that do not meet the requirement of a detailed assessment in such cases[270]. Future research and advocacy will have to tackle these issues.

[269] Gyulai, 2015.
[270] See: TAZ, 02.03.2015, "Die ewige Angst: Transsexuelle bekommt kein Asyl".

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6.5 Interviews

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Interview via Skype with Anonymous, Executive Officer, Asylum Casework Directorate, UK Home Office, 23 June 2015.

Interview via Skype with Corina Drousitotou, Senior Legal Advisor, Future Worlds Centre, Nikosia, 23 June 2015.

Interview via Skype with Gábor Gyulai, Refugee Programme Director, Hungarian Helsinki Committee, Budapest, 25 June 2015.