

Fleeing Homophobia

Sexual orientation, gender
identity and asylum

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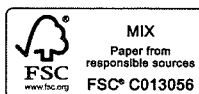
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10 Sexual identity, normativity and asylum

*Thomas Spijkerboer**

In this chapter, I begin with an overview of the legal developments that followed the acceptance of sexual orientation and gender identity as a persecution ground. Quite often, important steps forward turn out to be followed by new obstacles, which can be so formidable as to undo the effects of the preceding advantages. How can we begin to understand this? In my analysis, what currently are important issues in academic writings, case law and practice are expressions of a limited number of debates about sexuality which keep re-appearing in different refugee law contexts. Having made that point, I will try to analyse how it is possible that these issues seem irresolvable and keep reappearing. This will be done by turning to the work of Foucault and Sedgwick. From Foucault, I take that sexual identity is not a cause but an effect, and from Sedgwick the inherently instability of sexual identity. The contradictions inherent in sexualities, combined with the contradictions inherent in law, create options and possibilities to do justice to lesbian, gay, bisexual and transgender (LGBT) asylum applicants, by eliminating transphobic and homophobic notions from decision making practice, as well as by formulating alternatives for pieces of legal doctrine negatively affecting LGBT claimants. But these contradictions can also be exploited by actors aiming to undo such steps forward. In this sense, I offer a more sceptical analysis than Millbank in this volume, despite the affinity between our approaches.

In this contribution, I focus on the refugee definition in the narrow sense of the word, so excluding topics such as country of origin information (Dauvergne and Millbank 2003; Swink 2006; LaViolette 2009), training (LaViolette in this volume), safe third countries (Young 2010) and reception (Cragolini in this volume). A more comprehensive analysis than the one I undertake to make here has still to be written.

10.1 The return of the repressed

The 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention) was drafted under the spectre of totalitarianism. It protected against the risks of which the drafters were aware: persecution of

political opponents as well as extermination of Jews and Kulaks in Nazi Germany and the Soviet Union. Although the refugee definition in the 1950s and 60s raised problems (as evidenced by Atle Grahl-Madsen's 1966 standard work), conceptual innovations were not necessary. Innovative efforts were aimed at deleting the temporal and geographical limitations (successful in the form of the 1966 Protocol) and at creating a subjective and enforceable right for refugees to be granted asylum (unsuccessful, see Grahl-Madsen's frustrated 1980 book).

Thinking about innovations regarding the refugee definition itself only began to develop when the so-called 'new refugees' (Goodwin-Gill 1986) entered the European scene. American and Portuguese draft evaders posed initial challenges, but their urgency disappeared with the respective finales, in 1975, of the colonial endgames in Vietnam, Angola and Mozambique. More enduring were the refugees fleeing civil strife in 'peripherous' countries: Christians and Kurds from Turkey, civilians caught up in the civil wars in Central America and Sri Lanka, civilians fleeing conflicts in Africa which are often characterised by an intractable combination of globalisation and ethnicity (Markard 2012). Now, innovations in the refugee concept did occur, and most of them stuck. Non-State agents have come to be considered as potential agents of persecution, but at the price of acceptance of the internal flight alternative and an increasingly extensive notion of agents of protection (Battjes 2012; European Court of Human Rights 28 June 2012, *A.A. and Others v Sweden*, Application 14499/09). Imputed political opinion has become a relevant persecution ground, but it is often directly or indirectly required that the intention of the agent of persecution is shown to be aimed at the purported persecution ground (persecutory intent).¹ What these innovations have in common is that they seek to apply an unchanged refugee definition to cases which did not occur in the Refugee Convention case law up until the mid-1970s.

Another wave of innovations occurred in a different context, that of equality. Feminists argued that the refugee definition was tilted, biased to the disadvantage of women. In order to do justice to the specificity of the experiences of women fleeing violence, the refugee definition had to be applied without a male bias. This gender-neutral or gender sensitive approach was sometimes thought to require amending the refugee definition (by adding a sixth persecution ground being gender), but for a mix of principled and pragmatic reasons, quite soon most agreed that membership of a particular social group would suffice. As a consequence, it became possible to base a claim to asylum on sexual violence in the context of an ethnic conflict, in a domestic setting or during interrogations. Sexual violence was reconstituted as something that was public in a normative sense, and not just tough luck. Likewise, women's activities catering for political activists or fighters, as well as activities relating to their position as women, were reframed as expressions of their political or religious opinions. At an abstract level, one might say that the feminist critique of the public/private distinction was imported in refugee

law (for an overview, see Anker 2012; Crawley 2001; Spijkerboer 2000: 107–147 and 163–188). This was made feasible in part by the fact that women's issues were increasingly conceived of as human rights issues (beginning with Charlesworth, Chinkin and Wright 1991) while simultaneously the refugee definition was reconceived as being fundamentally about human rights (of which Hathaway's 1991 book is a clear expression).

It would be incorrect to say that the advocates for considering human rights violations against LGBTs as grounds for asylum merely copied feminism. The Dutch Council of State recognised sexual orientation as a species of the persecution ground social group as early as 1981,² and this was before second wave feminism reached refugee law. Nevertheless, the conceptual manoeuvre is similar (compare Millbank 2004 on sexual orientation, human rights and refugee law). LaViolette (2007) convincingly argues that gender, sexual orientation and gender identity are closely related as bases for asylum claims. In any case, the push for including issues of sexual orientation and gender identity in the refugee concept postdates the feminist advocacy efforts. A major point, eagerly taken up in part because it lends itself to easily formulated demands and recommendations, is recognition of sexual orientation and gender identity as a persecution ground by using particular social group.³ It took considerable advocacy to get this accepted, but in an important way this was just the beginning. Once this hurdle was taken, four new obstacles came into view.

First, decision makers now considered the violence against LGBTs as *discrimination* not amounting to persecution. In classical refugee law doctrine, physical violence, including deprivation of liberty, was in itself considered as amounting to persecution.⁴ In contrast, denial of access to the labour market, education, housing and health care were considered as only exceptionally amounting to persecution, especially when a person's life became unbearable by a combination of such measures. Surprisingly, in cases turning around sexual orientation and gender identity, physical violence was often considered as merely constituting discrimination (Spijkerboer 1998: 201–207; LaViolette 2009: 450–454; compare Saxena 2006).⁵ As a consequence of the categorisation as discrimination (and not as persecution), such acts of violence were examined under the more stringent gauge of whether it made a person's life unbearable. Instead of being considered as acts of persecution, LGBT applicants must establish, for example, that such acts of violence are systematic.

A second problem that came up once sexual orientation and gender identity were recognised as a persecution ground was the idea of *discretion*. The idea behind discretion reasoning is that in many countries, even those where homosexual or transgender behaviour and/or identity are criminalised, people can live according to their identity without major risks, provided that they behave discreetly. Parks in Teheran, touristy beaches in Gambia, and the privacy of the bedroom are possibilities to which applicants are referred and where – or so decision makers claim – they can enjoy the privacy rights to

which international human rights law entitles them without running excessive risk. Implicitly, the privacy rights which amount to the right to sexual autonomy are often limited to the right to have sex. These privacy rights are argued not to include the right to 'flaunting', 'conspicuous' and 'unnecessarily risky' behaviour. Applicants are, in other words, denied international protection because they are expected to protect themselves by keeping a low profile.⁶ In practice, LGBT people will be expected not to share with their friends, relatives, colleagues and fellow students how they spent their weekend; they should not be seen too often with their partner; if they visit places that are marked as LGBT venues they should keep it a secret that they have gone there. They should not even think of cohabitation. And they will have to figure out an explanation for not marrying. For many people, this will mean they have to conceal, in most of their social contacts, those parts of their lives that mark them as sexual minorities. And they will have to do so for life. Relying on the rallying cry that LGBT asylum applicants should not be 'sent back to the closet', a rather successful campaign for abolishing discretion reasoning has been made (New Zealand, Australia, the Netherlands, the United Kingdom, Sweden, Finland and Norway formally abolished discretion reasoning between 2003 and 2012).⁷ As with particular social group, the success of this campaign is made possible in part by the clear cutness of its demand: ban one particular ground for denying refugee status.

But discretion reasoning turns out to be a many-headed monster: once they succeeded in chopping off what brave advocates took to be its head, it turned out to have many others. For applicants who have not succeeded being discreet in their country of origin and already were in trouble there, the internal flight alternative is one such monster head. They can return to another region in the country of origin, and if they 'abide by the dominant cultural norms' (as decision makers expect they obviously will; anthropologist-style sensitivity meets refugee law restrictionism), they do not have a well-founded fear of being persecuted.⁸ Another monster head rephrases discretion reasoning as *sur place* reasoning (see on this topic the contribution of Battjes in this volume). This manoeuvre is made in cases where people have succeeded in remaining closeted in the country of origin. Decision makers rule that they have only begun to be openly LGBT in the country of refuge. Once the facts of the case have been rephrased as being about *sur place*, the concomitant restrictive pieces of doctrine get on board: a purported lack of continuity between behaviour in the country of origin and the country of refuge; the unreasonableness of attracting the attention of the home country authorities before or after return; suspicions about credibility. A third monstrous head holds that some people are voluntarily discreet, and can be expected to behave as they did upon return to the country of origin (see Weßels in this volume; compare Tobin 2012: 465–466). In this line of thought, it is found to be relevant whether in the country of origin the applicant had been discreet about his or her sexuality 'voluntarily' – out of a postulated 'natural' human tendency to be discreet about sexuality, or on account of the wish not to

offend relatives. In such situations, discretion is not *required* of the applicants upon return. Instead, it is held to be a reasonable *factual* prediction that, upon return, applicants will prefer to be discreet as they were before.⁹ For that reason, they do not face a risk of persecution, because the potential agents of persecution will (as a matter of fact) not find out that they are LGBT. A fourth variety of discretion reasoning occurs in the definition of particular social group. Since 2006, according to some US courts a particular social group must be recognisable, i.e. socially visible. In this view, particular social groups have characteristics that are 'highly visible' and therefore 'recognizable'.¹⁰ This may well result in denial of asylum to LGBT people who were not out in their country of origin. The social visibility approach may be used to argue that, as people who were not visibly LGBT, they were not members of the relevant particular social group which consists of people with 'highly visible' characteristics. It might be argued furthermore that upon return to their country of origin, they will most likely not be visibly LGBT (or they can be reasonably expected to be so), with the consequence that they will not be a member of the relevant particular social group.¹¹ Such an approach would lead to the denial of asylum to LGBT claimants on the basis of their concealment of the sexual orientation or gender identity in the past, and the expectation that they will conceal it again upon return to their country of origin. Marouf has remarked that the social visibility test may be particularly harmful for lesbians, whose social visibility tends to lower than that of gay men (Marouf 2008–2009: 87).¹² The same is true for bisexuals.

Yet another variety of the discretion requirement is at issue in one of the debates about the UK Supreme Court judgment in *HJ (Iran) and HT (Cameroon)*.¹³ Discussing the question whether there is a nexus between the harm feared and the persecution ground membership of a particular social group, Hathaway and Pobjoy qualify the kind of behaviour which will count in considering whether there is a link between the harm feared and the persecution ground of membership of a particular social group. Only 'activities properly understood to be inherent' (Hathaway and Pobjoy 2012: 335) in sexual orientation (or gender identity) should be included in the 'protected interest' (Hathaway and Pobjoy 2012: 336). This excludes 'relatively trivial activity that could be avoided without significant human rights cost' (Hathaway and Pobjoy 2012: 335, 382).¹⁴ In sum: while Hathaway and Pobjoy agree that concealment constitutes persecution (see below), the debatable notion that LGBTs can be reasonably expected to refrain from some activities expressing their sexual identity now pops up at another location in the refugee definition: whether or not the harm feared is 'on account of' the individual's sexual identity.¹⁵

So the second obstacle to recognition as a refugee, the discretion requirement, has been abolished in many jurisdictions but has the tendency to pop up in the context of the internal flight alternative; in rephrasing discretion cases as *sur place* cases; in the notion of 'voluntary' discretion; in the definition of the particular social group; or in the nexus between persecution

and persecution ground. The issue of discretion presently is before the Court of Justice of the European Union.¹⁶

A third obstacle for refugee status that came into view once the issue of the persecution ground had been settled was the relevance of *criminalisation*.¹⁷ In cases where homosexual or transgender identity or behaviour constituted a criminal offence in the country of origin, decision makers decided that this was insufficient for refugee status. Even when they admitted that, in light of the fundamental nature of sexuality, homosexual and trans people are likely to regularly engage in criminalised behaviour, they required evidence of enforcement of the criminal laws concerned. The burden of proof that enforcement (and sometimes systematic enforcement) took place remains with the applicant, and in this way the fact of criminalisation (itself already a violation of international human rights law) became irrelevant for refugee status determination. Any lack of information on enforcement became the applicant's problem. Furthermore, the fact that criminalisation makes people defenceless against extortion or violence from the side of the authorities or fellow citizens is disregarded, while human rights information on such practices is likely to be absent. Lastly, the permanent fear and anguish which results from criminalisation (the forced modification of fundamental behaviour constituting 'endogenous harm', Hathaway and Pobjoy 2012: 358 *et seq.*¹⁸), even if it is not formally enforced with some frequency, is held to be irrelevant for refugee status. In short, the fact that behaviour in which people are likely to engage is a criminal offence in the country of origin would seem to be an argument strongly in favour of the grant of refugee status, but it is made to evaporate. The recent judgment of the Italian Court of Cassation, ruling that criminalisation of homosexual acts constitutes persecution, goes against this trend.¹⁹

A final example of the obstacles to refugee status for LGBT claimants is about *credibility*. As the title (as well as the content) of Millbank's 2009 article 'From discretion to disbelief' aptly captures, when rules are adapted which favour the grant of refugee status to applicants who invoke sexual orientation or gender identity, there is a tendency among decision makers to doubt whether the people invoking such rules actually are LGBT. In doing this, they often rely on staunch stereotypes (compare Berg and Millbank 2009; Morgan 2006; O'Leary 2008). Gays may be expected to behave effeminately, know about Oscar Wilde, have gone through the stages of coming out identified in Western psychology. Lesbians may be expected to behave in a masculine way, know LGBT journals in their country of origin or LGBT symbols such as the rainbow and the pink triangle (compare Middelkoop's contribution to this volume). Remarkably, transgender asylum seekers do not frequently run into credibility problems (compare the contribution of Berg and Millbank to this volume), probably because transgender is seen as a medical condition, and not 'merely' as subjective orientation or preference.²⁰

10.2 Sexual identity: a tilted concept

Advocates of granting refugee status for sexual orientation and gender identity based persecution have addressed the legal problems they encountered one by one. Initially, they tackled the issue of the persecution ground. Subsequently, they argued against improper use of the concept of discrimination, against discretion reasoning, for giving proper weight to criminalisation, and against the use of stereotypes in credibility assessment. In other words, they fought against incorrect applications of the law. However, we saw that what those advocates consider as legal improprieties keep popping up. When arguing for refugee status for persecuted LGBT people, they rely on the concept of sexual identity in one way or another. I want to point out that the improprieties seem to be merely variations of a limited number of mainstream notions about sexual orientation and gender identity. While the notion of sexual identity is crucial for formulating claims that seek to combat the exclusion and oppression of sexual minorities, that same notion at the same time is deeply influenced by such exclusion and oppression. It does not only have the potential to liberate, but also to marginalise. Asylum practice illustrates that the notion of sexual identity, while not being a poisoned gift, is a mixed blessing. I deal with three notions which play a role in the concept of sexual identity: sexual autonomy, the comprehensibility of sexual identity and sexual identity as act or identity.

A first notion is about sexual autonomy. The idea that sexual minorities must settle for less than straight people is fundamental in refugee law doctrine and practice. Even in jurisdictions where LGBT rights formally are equal to those of straight and cisgender²¹ subjects, the idea that LGBT asylum seekers can be returned to situations where these rights are denied in form and substance has great plausibility for many decision makers. This can take more than one form. An extreme version holds that minority sexualities, unlike minority race, religion and political opinion, are not protected categories, and therefore cannot constitute a persecution ground. This extreme version has become rare in asylum law.²² But there are less draconic versions of denial of sexual autonomy to sexual minorities. One of those (expressed through discretion reasoning) holds that people may be expected to repress their sexuality so as not to get in trouble – they are expected to participate in the denial of themselves. Sex (in secret) is enough, things like being open about who one's partner is are niceties which LGBT people can do without.²³ Another version presumes that physical violence, which would arguably be enough for refugee status when the applicant is, say, an Iranian democrat, is considered insufficient when it concerns violence against LGBT people. This version is implicated in the subsumption of physical violence under the concept of discrimination, and assumes that some extent of violence against LGBT people is only natural, something that one will have to put up with, and that therefore does not count. Yet another reincarnation of the denial of sexual autonomy is expressed by the notion that criminalisation of sexual

orientation and gender identity is in itself insufficient for refugee status. Such criminalisation is considered a violation of the right to private life even in the absence of any enforcement (*Dudgeon, Norris, Modinos*²⁴) if it occurs in Europe, but removal of a person to a country where such a violation occurs is not a violation of the same right to private life. Human rights are universal, but apparently some are more universal than others. Obviously, one may counter this idea by pointing out that while violations of Articles 2 and 3 of the European Convention on Human Rights stand in the way of removal, for the other provisions of the Convention only flagrant violations are sufficient.²⁵ This overlooks, however, that the intense fear and anguish which are the result of criminalisation have in other contexts been considered as a violation of Article 3 blocking removal.²⁶ Criminalisation is not acceptable for domestic purposes, but this is considered as a luxury item of Western lifestyle which, ultimately, one can do without if one happens not to live in the West. Therefore people can be returned to countries where their sexuality is a criminal offence.

So, even when it has been accepted that sexual orientation and gender identity are categories protected by refugee law, the debate keeps reappearing whether sexual autonomy concerns a freedom that one needs less of than political or religious freedom; and whether people in non-Western countries can do with less of it than people in the West. Yes, it is nice and desirable that LGBTs are granted equal rights. But, as we can see from asylum law, these equal rights are not fundamental, people can do without them because we can send LGBT people back to situations where equal rights are denied in significant ways. Equal rights for sexual minorities are good, but apparently not fundamental. This notion is problematic for asylum seekers, but ultimately is threatening for sexual minorities in the receiving countries as well – and not just for those seeking asylum. Apparently, LGBT rights can be undone without touching the fundamentals of our constitutional systems. Minority sexualities are considered as less valid, less important, less fundamental than mainstream sexualities. Sexual minorities are, in other words, subdominant.

A second phenomenon that keeps popping up is that sexualities which deviate from the dominant norm are only comprehensible if they take a particular form. This is most easily visible in credibility assessment. It is assumed that a young Pakistani gay man has gone through the stages of denial, insecurity, guilt and potentially acceptance of his sexuality. If he has not followed this sequence, decision makers find it hard to understand how he really could be gay. Apparently, it is hard to see why an Iraqi man should be believed when he has a male partner but says he would not know whether he is gay. And how, apart from artificial insemination, can a woman claim to be lesbian *and* have a child, or be married to a man and be prepared to remain so? Non-standard sexualities are only comprehensible if they do not interfere with the stability of mainstream sexualities. LGBT people are assigned to a specific and quite narrow space where we can be LGBT – but one category at a time,

preferably for life, and only to the extent they identify with one of those exact categories (Rehaag 2008; Hojem 2009: 7; Walker 2000). Another remarkable thing is that sexuality, if it is not mainstream, is to be taken quite seriously. Not only does it require (in liberal versions: passing) feelings of insecurity and guilt, but also it is presumed that one reads the journals, knows one's classics and identifies with the symbols. If one can expect a Marxist to know about Marx, why not expect a gay man to know about Oscar Wilde? And if we presume that a Christian sees the cross as an important symbol, might not a lesbian be presumed to know that the rainbow is a symbol of sexual diversity? Even if people claim to have been persecuted by their relatives or neighbours, they are supposed to have studied the law and know what the punishment for homosexuality is. Although people can have dominant sexualities without ever thinking about it, deviating from the standard is not to be taken lightly. Mainstream thinking is sure that one will not lightly accept being LGBT. Straightness is the comfortable default option; not being straight has to be a troubled and deliberate situation, because everyone who has a choice would prefer to be straight (compare Rehaag 2008: 15).

LGBT claimants are only comprehensible (and therefore credible) if they conform to the identity categories which are prevalent in receiving countries. These categories have important normative elements (such as straightness as the default option). The importance of fixed identity categories is that it allows for the construction of majority sexuality as coherent, stable and given. Being LGBT is supposed to require processes (of self-discovery, identifying the label that becomes you, coming out, dealing with shame and frustration), it consists of becoming. Straightness on the other hand simply *is*, and does not need discovery or naming. In other words, the identity of sexual minorities is assigned to a limited space, subjected to clear-cut expectations about what constitutes a real LGBT identity – it is put in a box.

A third aspect of LGBT cases is the act/identity distinction. The distinction is crucial in discretion reasoning in all its varieties: some acts (most notably, having sex with somebody else or having gender reassignment surgery) are considered as inherent in sexual identity, while other acts (varying from dressing as a member of the opposite sex, holding hands in public, or living together, to drinking the now famous multi-coloured cocktails) are considered as peripheral to sexual identity.²⁷ The act/identity thing also plays an important role in credibility assessment, where identity ('is this woman lesbian') is often decided on the basis of whether or not someone has performed certain acts ('but he doesn't frequent the most famous gay bar in Dublin'; compare Hanna 2005). In this case, particular acts are required to be considered as LGBT.²⁸ Reversely, in some situations persecution on account of same sex sexual acts is not considered persecution on account of homosexuality, because for this particular person the same sex sexual acts are not an expression of sexual identity (as when a person has sex with someone of the same sex because she or he 'had no other option' such as in separated schools, work environments or in prisons). While *LeViolette* is a non-mainstream

sought to overcome the act/identity dichotomy by emphasising that LGBT people always refuse to behave in ways dictated by their biological sex and social classification (LaViolette 2007: 186; compare LaViolette 2010; Landau 2005; Neilson 2005a), in practice the ambiguity whether sexual identity is something you do or something you are is very much alive.

The strategy of LGBT advocates is based on the presumption that the problem is incorrect application of the law. This strategy has been useful. Acceptance of sexual orientation and gender identity as a persecution ground has made refugee status on those grounds possible, where that was not possible before. Abolishing discretion reasoning does lead to recognition as a refugee of people who were denied asylum before. But when the preconditions for sexuality based asylum have been met, it turns out that this is necessary but not sufficient. After refugee law doctrine has been adapted so as to be open for asylum claims by LGBTs, it became clear that even so the refugee definition can be applied in different ways so as to express different views on sexuality (compare Borg, Törner and Wolf-Watz 2010). In this way, asylum law is one of the arenas in which debates about the meaning and significance of sexual identity are waged. The successes of LGBT asylum advocates show that legal reasoning does not necessarily imply the notions on sexuality on which it was implicitly based in, say, the 1950s. The acceptance of minority sexualities in social and political discourse made it possible to articulate LGBT rights in legal discourse – asylum law, in our case. This, in turn, has reinforced the acceptance of minority sexualities in social and political discourse. But, in socio-political and in legal discourse, sexual minorities have been accepted only to a certain extent – as subdominant, boxed, and unstable categories, as I showed above. The debates about the meaning of sexuality continue, and cannot be legislated away. The mainstream notions about the subdominant, boxed and unstable nature of minority sexualities are highly mobile and adaptable. The idea that they can somehow be smoked out by doctrinal argumentation alone begins to seem futile. The debate about the legal technicalities of, say, particular social group is related to debates about sexuality.²⁹ As a consequence, legal technique matters. First, because the more convincing and tightly argued a position is, the more likely it is to hold; and, second, because some legal positions (such as the anti-discretion position), because of their formal status as law, can influence debates on sexuality (such as, LGBTs should be able to be just as flaunting as straights are all the time) in a way that I would find positive. But legal technique is merely one of the vocabularies in which the debate about sexuality takes place.

10.3 The tensions inherent in sexual identity

In the next two sections, I want to analyse a bit further the notions on sexuality which I found to be important in legal doctrine and practice, but without specifically focusing on either law or asylum. I do so by focusing on the work of two authors who I have found helpful in thinking about minority sexualities

10.3.1 Foucault's subject

In this section, I want to analyse how sexual identity is an inherently problematic concept. It is not only shaped by sexual minorities themselves in the process of liberating themselves, but also (and very much so) by dominant discourse. This can help us understand how homo- and transphobic tendencies can be an integral part of the concepts of sexual orientation and gender identity.

In his 1976 book, *La volonté de savoir*, Michel Foucault dismissed what he termed the repression hypothesis, i.e. the idea that authentic and true forms of sexuality are repressed by religious, social and legal prohibitions, and can be liberated by breaking these taboos. Instead, he argued that sexuality has been made into the favourite secret of our societies. In order to be an individual, one has to discover one's secret desires, to name them, to speak about them. This requires speaking a particular language and using it to make oneself understandable to both oneself and others. Behaviour which could also have been understood as amorphous or as a number of unrelated acts is organised into a subject position through this language. Using the double meaning of the word subject, Foucault argues that one can only become a comprehensible someone (a subject) by subjecting oneself to this language and the categories it contains. The experience of authentic sexuality is an *effect* of this discursive process, and not the *source* of it.

This has important consequences for sexual minorities. If we understand the identity categories of LGBT not as expressions of authentic individual experiences, but as categories produced by dominant discourse co-opting individuals and their everyday experiences, then one thing becomes easier to understand, and another becomes less easy to understand.

If we think of sexual identities in this way, then it becomes more obvious that minority sexual identities can easily be represented as subdominant, boxed and unstable. The identities which we are seduced into assuming are not neutral but tilted. The central category is presented as unproblematic, neutral and given; this is the person who desires persons of the other sex and who identifies with the male or female gender role which has been assigned to him or her. Other categories are presented as different. Which category one belongs to is thought of as being fundamental to one's personality. The mere fact that a distinction is made between different categories implies that the difference must be delineated; whether one belongs to one category or the other makes a difference for who you are. Obviously, the border between such important categories must be delineated as sharply as possible. Therefore, the *boxed* nature of sexual identities is not coincidental, but central to the sexual subject. The identity which most people are seduced into assuming (straight and cisgender) is represented as not only that of the majority, but also as normal. If one grows up to be straight, you are not expected to have stories about how, from a very young age you felt something special, subsequently figured out what that could be about and how you came out to yourself and others. You do not need to explain yourself. In this way, the sexual identity of

people who are straight and cisgender is experienced as normal, as the standard, as the fall back option when there is nothing special. Even when this difference is formulated in neutral terms, as I have tried to do just now, it is inescapable that a normative undertone slips in. The fact that minority sexualities need to explain themselves conceives them as problematic, as *subdominant*. Furthermore, the problematic 'nature' of minority sexualities indicates that it may be hard to identify oneself or others. When is the fall back option applicable? Is a person who has sex with persons of the same sex in a separated environment (a prison or a boarding school) *really* lesbian, gay or bisexual? Can a person who only has sex with one person of the other sex be lesbian, gay or bisexual? Is a person who cross-dresses but does not want gender correcting surgery transgender? Majority sexual identity is under pressure both to include many people because it is the default option, but also to exclude people who would undermine the stable and self-evident 'nature' of straight and cisgender sexual identity. This makes minority sexual identities *unstable*.

In this way, the subdominant, boxed and unstable nature of minority sexual identities are not a coincidence; they come with the notion of sexual identity as it functions in modern western societies. Whenever one speaks the language of sexual identity, the problematic aspects are lurking below the surface. And as we can see, they pop up frequently.

However, Foucault's approach to sexuality makes it harder to understand why many of us experience ourselves as LGBT – or as straight or cisgender, for that matter. Foucault refused to identify himself as gay in public. In his line of thinking, doing so would be to voluntarily assume the terms of one's own oppression.³⁰ On the other hand, whether or not one assumes an LGBT identity, it is imposed on people to quite some extent anyway. By not self-identifying as LGBT, you may deny something that you find important for yourself. Or having sex with people of the same sex without acknowledging you are lesbian, gay or bisexual may make you liable to blackmail. Or sexual identity may be imposed on you through violence against LGBT people. As the struggles for LGBT rights show, assuming LGBT identities may be instrumental in making the world a safer place by creating communities in which LGBT people can feel safe, by decriminalising homosexuality, introducing equal treatment legislation, and by many other effects of identity politics.

I think it is not fruitful to want to choose between either denying the categories in which sexuality is thought, or to assume sexual identity and use it as the basis of sexual politics. In actual practice, LGBT people have done one at one time, the other at other times, and a bit of both most of the time. What I want to point out here is that, if we want to advocate the right to asylum for people who fear persecution on account of their sexual or gender desires or acts, we have no other option but to use LGBT as an identity category and as a basis for human rights claims. But it should come as no surprise that, in doing so, we get on board the homo- and transphobic implications of sexual

identity for free. How to deal with these implications should become a fuller and more conscious part of the LGBT rights based strategies we use in asylum law.

10.3.2 *Sedgwick's closet*

The argument in this sub-paragraph is that Sedgwick's focus on tensions makes it possible to see that sexual identity does have inherent homo- and transphobic tendencies (Foucault), but that by being incoherent it also creates spaces for contestation, etc.

In *Epistemology of the Closet* (1990), Eve Kosofsky Sedgwick has argued that homosexuality identity is shaped by two tensions. First, the tension between the minoritising and the universalising perspectives. The minoritising perspective relies on the notion that homosexuals are a small, distinct and relatively fixed community (Sedgwick 1990/2008: 85) – such as the idea relied on by early gay rights activists that homosexuality is inborn and therefore no fault of one's own. This minoritising perspective that homosexuals are a particular group of persons who can be identified. A consequence of this may be that special policies are formulated to protect this minority, such as anti-discrimination laws, or that a discourse on the human rights of sexual minorities is formulated. Because in this perspective people *are* homosexual, they can be LGBT regardless of their acts. On the other hand, the universalising perspective presumes that sexual desire is unpredictable even in persons with stable identities. Same sex influences and desires are crucial to heterosexual identities and vice versa (Sedgwick 1990/2008: 85). In this perspective, desire – including homosocial and homosexual desire – are everywhere. Both mainstream institutions such as the law and LGBT activists rely on both perspectives. In some settings, it made sense to represent homosexuality as innate – if people cannot help it, they should not be punished (relying on a version of the minoritising view). But in other contexts, broader coalitions could be built by emphasising sexual autonomy, regardless of sexual preference. The difference between same sex and opposite sex sexual acts is downplayed, and the commonalities are emphasised – a version of the universalising perspective. The second tension Sedgwick analyses is that between the idea that homosexuality is gender inversion, being about the borderline between the genders (a gay man has a female identity trapped in a male body, and vice versa; LGBTs are a group because they live at the borders of gender), and homosexuality as gender separatism, as being about the solidarity of women with women and of men with men (Sedgwick 1990/2008: 87–88). This tension may play out in the external signifiers of lesbian, gay and bisexual people (butch women and effeminate men versus the hyper-masculine gay clone look and lesbian separatism) as well as in politics, as became particularly clear in feminism (the tension between lesbians as part of the women's movement *versus* as part of the LGBT movement).

Sedgwick has pointed out that lesbians and gays are under a simultaneous obligation to inform their surroundings of their sexual preference and to be discreet about it. She points to US case law holding that coming out is not protected by the right to free speech because sexuality is not a matter of public concern; but at the same time, case law then still held that homosexual acts could be criminalised because they were a matter of public concern. Similarly, while a first instance court found the dismissal of a gay science teacher legitimate because he had drawn undue attention to his sexuality, the appeals court in the same case found the dismissal acceptable because he had failed to notify his employer that he had been a member of a gay students association (Sedgwick 1990/2008: 69–70). This system of double binds (be open about your sexuality at the right moment; conceal your sexuality when it is appropriate to do so), which is part of the larger system of tensions (minoritising/universalising, gender inversion/gender separatism), ensures that lesbians, gays and bisexuals are always doing *something* wrong. They mention the sexuality when they should not, and they remain silent about it while they should speak up. Their sexuality can be labelled as private when they rely on rights in the public sphere (free speech), or it can be considered as public when they rely on privacy rights.

Like Foucault, Sedgwick's analysis makes it easier to understand how sexual orientation can be such an unstable category. It makes it understandable why credibility assessment even within one country can rely on a large array of contradictory presumptions. It also enables us to rethink legal strategies. Sedgwick states that the strategy to protect LGBT rights as privacy rights is an extension of, and a testimony to the power of, the image of the closet (Sedgwick 1990/2008: 71). As a consequence, privacy is a problematic notion because it may perpetuate the closet. On the other hand (something not pointed out by Sedgwick, but in her line of thought), emphasising the public nature of sexual identity is consistent with the notion that sexual behaviour is of public concern – which makes it conceivable to criminalise it. The practice of decision makers and policy makers in asylum law, as well as the strategies used by advocates who come up against them, are full of the tensions and ambiguities that come with the notion of sexual identity. Victories are never secure – but neither is the status quo.

10.4 Contradictions: potential and risks

Contrary to the implicit assumption on which LGBT asylum advocates usually rely, proper application of the law, combined with notions of sexual identity as properly understood, will *not* lead to a stable situation in which LGBT asylum claimants with a well-founded fear of being persecuted will be granted asylum. Sexual identity is a problematic concept full of internal tensions. In addition, as Sarah van Walsum wrote, law is 'not monolithic, but fragmented and fraught with contradictions and logical flaws'. Because law serves conflicting interests, it can facilitate surprising coalitions. In this way,

significant progress can be made. But such victories are not self-evident, because there is nothing inevitable or irreversible about the workings of – in our case – international asylum and refugee law (Van Walsum 2009: 311). My suggestion would be not to pretend that law (as properly applied) and sexual identity (if properly understood) will lead to a stable situation where justice will be done to LGBT asylum seekers. Instead, I propose to focus on the contradictions inherent in law and sexual identity in order to make progress, but also – once victories have been won – in order to keep the gains that have been made, to prepare for reactions, and to think about further progress.³¹

It makes sense to pursue the direction indicated by Rehaag (2008, 2009), who argues for a non-essentialist understanding of sexual identity. Looking back at the developments in the past two decades, we can go one step further than that. It is worthwhile to develop argumentations that do not choose between essentialist and constructivist notions of sexual identity, but which instead make space in refugee law discourse for the fact that people experience their sexualities in different ways. Some of us experience our identity as given, while others experience it as fluid. Likewise, it seems important to me to analyse the ways in which we rely on transphobic and homophobic notions in the very same arguments which we make in order to get LGBT people asylum. Relying on the notion of privacy may feed notions about the closet; emphasising LGBT identity may encourage decision makers to use stereotypes in credibility findings. Sexualities cannot be understood as pre-existing things out there for which we just have to find the right words. Sexualities are made and unmade by people in actions and reactions. Words, including the words of law, are among the actions and reactions that take part in shaping sexualities. Because sexualities are contradictory and contested, what we say about them can hardly be otherwise.

10.5 Notes

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1 See on persecutory intent, Bennett 1999; Ghai 2011–2012: 540–541.

2 Afdeling rechtspraak van de Raad van State [Judicial Division of the Council of State] 13 August 1981, *Rechtspraak Vreemdelingenrecht* 1981 at 5, *Gids Vreemdelingenrecht (oud)* D12-51.

3 Arguments advocating particular social group are central to most early articles, compare Goldberg 1993; Vagelos 1993; Grider 1994; McGoldrick 1994; Park 1995; Ramanathan 1996; McGhee 2001. More generally on particular social group, see Helton 1983; Parish 1992; Fullerton 1993; Godfrey 1994–1995. See for more recent articles focusing on particular social group, Southam 2011; Sternberg 2011.

4 See for example Article 9 of EU Directive 2004/83; this provision has not been changed in Article 9 of EU Directive 2011/95.

5 This issue was included in the *Fleeing Homophobia* project (question 43 of the questionnaire), but was not incorporated into the final report on account of

- the insufficiency of the available data. See the national reports, published at <http://www.rechten.vu.nl/nl/onderzoek/conferenties-en-projecten/onderzoeksproject-fleeing-homophobia/national-questionnaire/index.asp> (accessed 17 December 2012).
- 6 See on discretion, the contributions of Weßels and Battjes to this volume, and Choi 2010; Hanna 2005; Hinger 2010; Johnson 2007; Jansen and Spijkerboer 2011: 33–39; Millbank 2002: 171–174; LaViolette 2010. Compare on discretion in the context of political opinion, Smith 2012; Hanna 2005. For a defence of discretion reasoning, arguing that *HJ and HT* leads to refugee status for any infringement on the rights of LGBTs, see Buxton 2011–2012.
 - 7 Discretion has been rejected by UNHCR, see the UNHCR *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, paras 25–26. UNHCR *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the states of refugees*, 23 October 2012, para. 30–33. Discretion reasoning was rejected by the High Court of Australia in its judgment of 9 December 2003, *Appellant S396/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, S395/2002 and 396/2202; by the New Zealand Refugee Status Appeals Authority in Refugee Appeal no. 74665/03, 7 July 2004; by a US Federal Court in United States Court of Appeal for the Ninth Circuit, 7 March 2005, *Karouni v Gonzales*, 399 F3d 1163; by the Federal Court of Canada in its judgment of 8 October 2008, *Atta Fosu v the Minister of Citizenship and Immigration*, 2008 FC 1135; in the UK Supreme Court's judgment of 7 July 2010, *HJ (Iran and HT (Cameroon)) v Secretary of State for the Home Department* [2010] UKSC 21, [2011] 1 AC 596; in Finland by the Supreme Administrative Court in its judgment of 13 January 2012, KHO:2012:1; in Norway by a Supreme Court judgment of 29 March 2012, reported on <http://www.unhcr.se/en/media/baltic-and-nordic-headlines/2012/april/3-4-april-2012.html> (accessed 17 December 2012); in Poland by the Refuge Board's decision of 25 July 2012, *W.S. (Uganda) v Head of the Office for Foreigners*. In the Netherlands it was abolished in the Aliens Circular, Vreemdelingen-circulaire 2000, C2/2.10.2; in Sweden by circular of 13 January 2011, Jansen and Spijkerboer 2011: 38. See for early literature, Millbank 1995, 2005; Walker 1996; on recent developments, Chelvan 2011; Choi 2010; Millbank 2009; Weßels in this volume.
 - 8 See for European state practice, Jansen and Spijkerboer 2011: 43–44.
 - 9 See Anker and Ardanal 2011–2012 on the ease with which factual prediction and requirement can trade places.
 - 10 On the social visibility approach to particular social group and its consequences for LGBT claimants, see Marouf 2008–2009; Bresnahan 2011. Generally, Soucek 2010. A quite similar approach seems to be at work in the case law of the French Cour Nationale du Droit d'Asile, e.g. CNDA, 7 May 2008, 605398, H; see Jansen and Spijkerboer 2011: 36.
 - 11 The social visibility test would also lead to denial of asylum to victims of domestic violence and gang related violence, Bresnahan 2011: 673–675, as well as to exclusion of family membership and human trafficking from the scope of refugee protection, Marouf 2008–2009: 91–102. One might add – although this is heavy artillery – that secular Jews in Nazi Germany would not be considered as members of a particular social group on account of the invisibility of their group membership.
 - 12 Other authors also have pointed out that asylum claims by lesbians are particularly challenging because the threats they face emanate from family members, more so than for gay men, and similar to other women; LaViolette 2007: 188; compare Millbank 2002: 158–163.
 - 13 UK Supreme Court, 7 July 2010, *HJ (Iran and HT (Cameroon)) v Secretary of State for the Home Department* [2010] UKSC 21, [2011] 1 AC 596.
 - 14 '(S)ome forms of behavior loosely (or stereotypically) associated with homosexuality are not presently protected at law' (Hathaway and Pobjoy 2012: 374), are not 'appropriately deemed to be included within the protected status of sexual orientation' (Hathaway and Pobjoy 2012: 374). They distinguish between a situation in which 'the activity that engenders the risk is intrinsic to one of the five forms of protected status', and a situation in which 'the activity precipitating the risk is no more than marginally connected to one of the forms of protected status' (Hathaway and Pobjoy 2012: 377–378). Hathaway and Pobjoy (2012: 379) refer to precedent holding that Pakistani Ahmadi can be required to curb religious activity – now set aside in CJEU Case C-71/11; and to precedent holding that standing up for law and order in a corrupt system does not fall within the ambit of political opinion, which is a debatable position.
 - 15 See for critical reactions to Hathaway and Pobjoy, Goodman 2012; Tobin 2012; Millbank 2012; Anker and Ardanal 2011–2012.
 - 16 Cases C-199/12, C-200/12, C-201/12.
 - 17 See Jansen and Spijkerboer 2011: 21–26.
 - 18 Compare Anker and Ardanal 2011–2012: 534–539; Jansen and Spijkerboer 2011: 21–26. The Italian Supreme Court recently ruled that criminalisation of homosexual acts constitutes persecution, Corte Suprema di Cassazione, 29 May 2012, 15981/12.
 - 19 Corte Suprema di Cassazione, 29 May 2012, 15981/12.
 - 20 See on trans cases more generally, Benson 2008; Jenkins 2009–2010; Landau 2005; Mohyuddin 2001; Neilson 2005b.
 - 21 I use the term 'cisgender' to refer to people who do identify with the gender which has been assigned to them.
 - 22 But see Jansen and Spijkerboer 2011: 14 on Bulgaria.
 - 23 This double standard, presuming as a factual matter that non-straight relationships are about sexual acts, has an impressive pedigree. It was relied on, for example, from the Inner London Quarter Sessions in the *Handyside* case. The British court found a passage about homosexuality in a book aimed at people between 12 and 18 years of age 'hopelessly damning' because of the 'very real danger that this passage would create in the minds of children a conclusion that that kind of relationship (i.e. a homosexual one, TS) was something permanent'. Quoted in European Court of Human Rights, 7 December 1976, *Handyside v United Kingdom*, Application 5493/72, para 34. The European Court of Human Rights found the judgment of the British court not in violation of the freedom of expression of Article 10 of the European Convention on Human Rights.
 - 24 European Court of Human Rights, 24 February 1983, *Dudgeon v United Kingdom*, Application No. 7525/76; European Court of Human Rights, 26 October 1988, *Norris v Ireland*, Application No. 10581/83; European Court of Human Rights, 22 April 1994, *Modinos v Cyprus*, Application No. 15070/89.
 - 25 On Article 8 of the European Convention on Human Rights in a gay asylum case, European Court of Human Rights, 22 June 2004, *F v United Kingdom*, Application

- No. 17341/03; compare on Article 9, European Court of Human Rights, 28 February 2006, *Z and T v United Kingdom*, Application No. 27034/05, and on Article 6, European Court of Human Rights, 7 July 1989, *Soering v United Kingdom*, Application No. 14038/88.
- 26 European Court of Human Rights, 7 July 1989, *Soering v United Kingdom*, Application No. 14038/88; European Court of Human Rights, 8 November 2005, *Bader and Kandor v Sweden*, Application No. 13284/04; European Court of Human Rights, 22 June 2006, *D and others v Turkey*, Application No. 24245/02; and in other contexts than asylum, European Court of Human Rights, 18 June 1978, *Ireland v United Kingdom*, Application No. 5310/71; European Court of Human Rights, 11 January 2012, *Gorobot v Moldova*, Application No. 30951/10.
- 27 This distinction is central in the approach of Hathaway and Pobjoy 2012, as well as Verdirame 2012, as pointed out by Millbank 2012.
- 28 By the way, this raises the question as to whether someone can be lesbian, gay or bisexual without having sex with a person of the same gender. Note that this was, and in some circles still is, considered commendable behaviour for lesbian, gay or bisexual people.
- 29 See for an argument about decriminalization of homosexuality in the US because the US granted asylum to gay asylum seekers, Pfitsch 2006; Russ 1998.
- 30 This way of thinking was not unique; one can find it in the writings of Jean Genet and the films of Rainer Fassbinder; see on Fassbinder's Genet film *Querelle*, Spijkerboer 1998.
- 31 Leitner 2004 and O'Dwyer 2008 illustrate the diversity in judicial approaches to LGBT asylum claims.

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