Abstract: In its 2008 “Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity,” the UNHCR noted that, though a “growing number” of asylum claims is made by persecuted LGBT individuals, there is a paucity of international regulations protecting queer asylum seekers. At the supranational level, EU member states are nominally bound by several common legal documents1 and European Court of Justice rulings.2 This body of law constitutes the CEAS, though its application by Member States is far from even; many national courts have legal precedents that either supercede3 or, as is more commonly the case, fall below EU/international asylum regulations. The lack of judicial harmony regarding LGBT asylum cases is further complicated by the uid nature of sexual identity itself: Should asylum be granted to applicants from countries in which there is legal persecution, or does informal, but widespread social persecution qualify an individual for asylum status? How valid are EU member states’ list of “safe countries” when it comes to LGBT individuals? As sexuality is an innate identifier, can the EU enforce the ‘discretion clause,’4 or have viable mechanisms to determine the authenticity of an LGBT asylum application? By critiquing the current EU legal framework for LGBT refugees and exploring the gap between European and national legal precedent for queer asylum seekers, this paper will seek to identify and address the key policy challenges inhibiting a truly ‘common’ European asylum system for sexuality minorities.

The last thing she could remember were the words: “After everything we're going to do to you, you're going to be a real woman, and you're never going to act like this again.” One night on her way home from football practise in the quiet Johannesburg suburb of Springs, South Africa, Mvuleni Fana was surrounded by four men, all of whom she recognized. They raped and beat her until she was unconscious and near death.1 This tableau of violence is one of many such instances of ‘corrective rape,’ which, in turn, is one of the many egregious harms facing lesbian, gay, bisexual, and transsexual (LGBT) people around the world. Yet for all that the body of laws regulating asylum and refugee claims has been refined in its protections of the world’s vulnerable, the issue of sexual orientation has, until recently, been absent from international law. Were Mvuleni Fana to apply for asylum to the European Union (EU) today, her path to asylum status is far from assured.

In its 2008 “Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity,” the UNHCR notes that, though a “growing number” of asylum claims is made by persecuted LGBT individuals, there is a paucity of international regulations protecting queer asylum seekers.² The 1951 Convention Relating to the Status of Refugees, which forms the keystone of international law relating to asylum claims, specifies its criteria only with regards to persecution due to race, religion, nationality, social group, or political opinion.

European courts, however, at both the national and European Union (EU) level have done much in the half century since to clarify asylum rules regarding LGBT claimants, though its uneven and vague application is still the subject of much legal and academic debate. Since the landmark 1981 ruling by the Dutch Raad vaan State categorized sexual orientation as valid grounds by which to claim discrimination in a court of law, Europe has issued a number of legal protections for LGBT asylum seekers, videlicet the 2004 EU Qualification Directive (Council Directive 2004/82/EC) and the 2011 addition of “gender identity” in its ‘recast’ Qualification Directive, among other legal instruments.³ This body of law constitutes the Common European Asylum System (CEAS), though its application by Member States is far from even; many national courts have legal precedents that either supercede⁴ or, as is more commonly the case, fall below EU/international asylum regulations.

The lack of judicial harmony regarding LGBT asylum cases is further complicated by the fluid nature of sexual identity itself: should asylum be granted to applicants from

³ Videlicet Article 1-A of the 1951 Convention relating to the status of refugees, Article 9 of the 2004 (recast 2011) EU Qualification Directive, the 2005 Asylum Procedures Directive, the 2003 (recast 2016) Reception Conditions Directive, and the Dublin “rules.” Some articles in the European Charter of Fundamental Rights may also apply to queer asylum case rulings. ECJ rulings include: E.g. The 2013 Joined Cases C-199 to C-201/12, Minister voor Immigratie en Asiel v. X (C-199/12) and Y (C-200/12) and Z v. Minister voor Immigratie en Asiel (C-201/12).
⁴ As is the case with the Hoge Raad der Nederlanden and the U.K. Supreme Court in 1981 and 2010 respectively.
countries in which there is *legal* persecution, or does informal, but widespread *social* persecution qualify an individual for asylum status? How valid are EU member states’ list of “safe countries” when it comes to LGBT individuals? As sexuality is an innate identifier, can the EU enforce the ‘discretion clause,’\(^5\) or have viable mechanisms to determine the authenticity of an LGBT asylum application? By critiquing the current EU legal framework for LGBT refugees and exploring the gap in current EU law regulating queer asylum seekers, this paper will seek to identify and address the key policy challenges inhibiting a truly ‘common’ European asylum system for sexual minorities.

*Extant Literature*

If there is a common theme among the extant literature on asylum law and sexual minorities, it is that there is a prohibitive ‘research gap’ deterring future attempts at legal reform or legislative proposal. The most comprehensive attempt at addressing this gap has been Sabine Jansen and Thomas Spijkerboer’s 2011 *Fleeing Homophobia* project, which was the first academic attempt at examining LGBT asylum cases in the EU. The results of the project have since been expanded and commented on in Spijkerboer 2013 edited collection of essays, *Fleeing homophobia: sexual orientation, gender identity, and asylum*, the current cornerstone text in the field of sexual minority asylum law.\(^6\) The book is a series of ten essays, each examining a different facet of the problem. Sabine Jansen, who was involved in the original 2011 project, introduces the text with an essay detailing the various webs of protection available to LGBT asylum claimants, their deficiencies, and the key areas of debate, namely issues arising from the difficulties of verifying a sexual minority asylum claim.\(^7\) Her

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\(^5\) “Discretion,” in this context, refers to the legal clause that allows European courts to return LGBT applicants to their country of origins following the argument that these individuals may escape persecution were they ‘discreet’ (i.e. closeted) about their sexual identity.


\(^7\) Ibid., 1.
overview approach is complemented by Jenni Millibank’s essay, “Sexual orientation and refugee status determination over the past 20 years,” which as the title suggests, provides an eschatological history of European asylum law.8

On the key issue of ‘discretion’ - the ethics of requiring an LGBT claimant to disclose his or her sexuality - Janna Webels, Hemme Battjes, and Laurie Berg take a respective EU, national, and sociological approach to the problem.9 Spijkerboer himself contributes to the text by discussing ‘credibility’ - the normative assessments made by asylum assessment boards in their decision making - a theme also discussed by Louis Middlekoop.10

Outside of this research group, a few journals offer further insight. Pamela Heller, writing in the Journal of Gay & Lesbian Social Services, expands on the European-centric analysis provided by Spijkerboer et al. in using a global framework to discuss the discriminatory practises in asylum processes.11 Nan Seuffert uses a purely legal analysis to discuss the ‘grey zone’ inhabited by LGBT asylum seekers as they are processed on the boundaries of a state.12 Martin den Heijer takes a similar legal framework within the European context in his analysis of the 2013 Court of Justice of the European Union (CJEU) rulings on Joined Cases C-199 to C-201/12, which constitutes a landmark binding legal precedent in EU asylum law.13 Toni Johnson and Jackie Jones also use close legal readings to elucidate the pressures facing LGBT asylum claimants.14

8 Ibid., 32.
9 Ibid., 55, 82, 121.
10 Ibid., 154.
Disciplines outside of law are also used by commentators in this field. David Murray, for instance, uses a socio-anthropological discussion of queer identity to argue that, because many of the terms bandied around in modern discourses on sexual orientation are Western in origin, this ‘homonationalism’ disadvantages sexual minorities applying for asylum from countries outside the Western cultural sphere.\textsuperscript{15}

Outside of academia, NGOs such as the European branch of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) and the European Parliament’s Intergroup on LGBT rights provide further information on the topic. These actors produce and continually update the latest legal and political developments on LGBT asylum rights, and are themselves accomplished drafters of legal/legislative proposals for reform of the current system.

\textit{Current Laws}

The legal protections accorded to LGBT asylum claimants are limited, at the supranational level in Europe, to three main legal instruments which specifically include sexual minorities in their texts: the Recast Qualification Directive (2011), the Asylum Procedures and Reception Conditions Directive (2013), and the European Court of Justice’s joined judgment in Case C-199/12, C-200/12, C-201/12 X, Y, Z v Minister voor Immigratie en Asiel (2013). In addition to these European regulations, EU law also holds as precedent in the case of asylum law the first subparagraph of Article 1(A)(2) of the Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951 and which entered into force on 22 April 1954. The relevant passages from these legal documents are reproduced as follows:

\begin{itemize}
\item \textbf{Geneva Convention on Refugees 1951}\textsuperscript{16}
\end{itemize}

Article A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

- (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

- Directive 2011/95/EU of the European Parliament and of the Council (the "Recast Qualification Directive")\(^\text{17}\)

  - Preamble (30): “It is equally necessary to introduce a common concept of the persecution ground ‘membership of a particular social group. For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due

consideration in so far as they are related to the applicant’s well-founded fear of persecution.”

○ Article 10 (”Reasons for persecution”) - Member States shall take the following elements into account when assessing the reasons for persecution:

- (d) a group shall be considered to form a particular social group where in particular:
  - (Subparagraph) Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.

○ CJEU Judgment in the Joined Cases C-199 to C-201/12, Minister voor Immigratie en Asiel v. X (C-199/12) and Y (C-200/12) and Z v. Minister voor Immigratie en Asiel (C-201/12), Judgment of the Court (Fourth Chamber) of 7 November 2013

1. Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be

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18 Judgment of the Court (Fourth Chamber), 7 November 2013. Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel. Requests for a preliminary ruling from the Raad van State (Netherlands) ECLI:EU:C:2013:720.
interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.

2. Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.

3. Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope.\(^{19}\) When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.

- **CJEU Judgment in the Joined Cases C-148/13 to C-150/13, of 7 November 2014**\(^{20}\)

  1. Article 4(3)(c) of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless

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\(^{19}\) This is a legal bulwark against sexual activities that may be same-sex in nature, such as paedophilia, incest, or rape, but are prohibited by the laws of EU member states.

persons as refugees or as persons who otherwise need international protection and the content of the protection granted and Article 13(3)(a) of Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status, must be interpreted as precluding, in the context of the assessment by the competent national authorities, acting under the supervision of the courts, of the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation, the statements of that applicant and the documentary and other evidence submitted in support of his application being subject to an assessment by those authorities, founded on questions based only on stereotyped notions concerning homosexuals.

2. Article 4 of Directive 2004/83, read in the light of Article 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in the context of that assessment, the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum.

3. Article 4 of Directive 2004/83, read in the light of Article 1 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to ‘tests’ with a view to establishing his homosexuality or, yet, the production by him of films of such acts.

4. Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, in the context of that assessment, the
competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution.\textsuperscript{21}

These texts review the thin precedents and legal protections currently available to LGBT asylum seekers. The Geneva Convention on Refugees is notable for its failure to include in its criteria for what constitutes refugee status any mention of sexual minority persecution. The CJEU and the European Commission (EC) have since worked in recent years to update the UN instrument, with the Recast Qualification Directive in 2011 recognizing sexual orientation and gender identity as valid grounds for asylum; the recast directive places “sexual orientation” and “gender related aspects” under the pre-existing protection for persecuted ‘social groups.’

The two CJEU rulings reproduced here form the key legal precedents governing current LGBT asylum claimant procedures. In the 2013 case, “X,Y, and Z,” the court clarified its position on what constitutes LGBT persecution: discriminatory laws themselves are not enough to trigger valid asylum grounds; only if the specific individual has been “actually” prosecuted under these laws can said individual be eligible for asylum protection. The 2013 ruling is also notable for its definite ruling on the subject of credibility and discretion, concepts that will be discussed further in the following section; the court ruled that LGBT asylum claimants cannot be returned to their country of origin with the expectation

\textsuperscript{21} These CJEU rulings have national precedents, most notably in the Netherlands and the UK. Since 2007, the Dutch policy guidelines explicitly state that ‘homosexual people are not expected to hide their sexual orientation upon return in the country of origin’ (Aliens Circular (Netherlands) C2/2.10.2). However, the Dutch Immigration and Naturalisation Service (IND), supported by the highest Administrative Court, the Council of State, often neglects this policy in practise. In 2010, with the landmark judgment of the Supreme Court in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department (HJ/HT), the United Kingdom rejected the discretion requirement; it scrapped its ‘reasonable tolerability’ test, which previously had allowed the ‘discretion argument’ in LGBT cases. This precedent was echoed in 2011 and 2012 by Sweden, Finland, and Norway, as expressed through the Rättschefens rättsliga (2011), Korkein Hallinto-Oikeus (13 January 2012), and Norges Høyesterett ( Dom 29 March 2012).
that they “exercise reserve in the expression of his sexual orientation” - in other words, they cannot be forced to conceal their sexual identity should they choose not to.

The 2014 case, “A,B, and C,” expands on the precedent set the previous year in clarifying issues of credibility, procedure, and late disclosure in LGBT asylum cases. This case deals with credibility by ruling that authorities cannot use “detailed question as to the sexual practices of an applicant for asylum” in the decision-making process: they are prohibited from using methods of interrogation at odds with the European Charter of Fundamental Rights - the court bars the conduct of “tests” or of requiring the applicant to produce film evidence of his sexual acts. This judgment is also notable for its recommendation that an applicant’s credibility cannot be questioned were the applicant to have failed to disclose his/her sexual orientation on “the first occasion he was given to set out the ground of persecution.” This problem of ‘late disclosure,’ will be further discussed in the next section.

Aside from these laws, the EU has issued several non-binding recommendations, most notably in resolutions and paragraphs issued by the Council of Europe (CoE). The 2010 ‘Recommendation of the Committee of Ministers on LGBT Rights,’ for instance, marks significant symbolic progress in the development of further legal protections for LGBT asylum claimants, though it is non-legally binding and has no substantive effect.

Problems

Although the legal instruments described above have clarified many uncertainties regarding procedural aspects of LGBT asylum claims, little has been done to improve matters ‘on the ground.’ It is one thing to state in the abstract, as the CJEU does, that applicants cannot be expected to be discreet about their sexual orientations; but there is no communis opinio on certain key questions - how far are we willing to extend protection to ‘private’ spheres of conduct?
Although the CJEU ruling in the Joined Cases C-199 to C-201/12 (2013) definitively banned the ‘discretion’ argument, problems with application continue to persist. This ruling replaced asylum laws which, at the time the *Fleeing Homophobia* project was carried out (2010-2011), had discretion requirements in seventeen EU member states - LGBT applicants were told that hiding their sexualities would alleviate the persecution they faced in their own societies. In banning this logic, the CJEU has only blocked the surface problem; it has not solved the innate philosophical dilemma at the heart of the question of LGBT asylum claims.

As O’Dwyer asks, is it persecution of self-identified status or of the sexual act that warrants asylum? LaViolette forms the question another way by questioning whether asylum should be contingent on perception; *id est*, since ‘discretion’ hinges on public perception of identity, should asylum be extended to non-LGBT individuals who face risk due to the perception of their sexual proclivities? Similarly, it should be asked whether one can ‘rank’ the severity discrimination faced by LGBT asylum seekers; is a bisexual man, being at least partly in line with what is approved by society, less likely to be harmed than a gay or lesbian individual? On these questions the court is silent.

Perhaps because of these ambiguities, the number of LGBT asylum seekers who are rejected has grown significantly in recent years. In her article, “From discretion to disbelief,” Jenni Millibank describes an ironic trend: credibility seems to be a particularly problematic issue in EU states that have become more sensitive to LGBT cases. Millibank suggests that this is because, once discretion reasoning has been rejected, the grounds by which authorities can reject asylum shift from one of discretion - where they argue that simply hiding one’s sexuality is enough to survive in the country of origin - to arguments based on the credibility

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of the applicant - where they argue that the asylum seeker is inauthentic in his or her claims.  

Under the aegis of ‘credibility’ falls some of the key issues troubling queer asylum procedures. As discussed previously, there is an unresolved gap between ‘perceived’ and ‘actual’ queer identity. The law is unclear as to which deserves asylum. However, a different aspect of this in the asylum decision process is the narratives that play into how the interviewer perceives the applicant: Middlekoop, Millibank, and many other scholars note how an asylum decision may be influenced by preconceived stereotypes and cultural narratives. The appearance, demeanor, and body language of the applicant is often taken into consideration when evaluating asylum claims - malleable concepts tied to the interviewer’s bias that have little place in a court of truth. However, if an interviewer is barred from using sexual films and other ‘tests’ deemed inhumane by the CJEU, how exactly can a queer asylum applicant be assessed? Most often, the procedure is simply to ask leading questions about the LGBT applicant’s life and, in doing so, analyze whether their stories align with the interviewer’s own prejudiced notions of what constitutes queer identity and a queer lifestyle.

Personal narratives are an undoubtedly more humane approach to assessing queer asylum claims, but they can themselves be misleading; even in the most desperate circumstances, claimants often lie, or misrepresent facts in a way that may lead the interviewer to conclude that their claim is illegitimate. These may be caused by several factors, including internalized homophobia on the part of the claimant - the byproduct of years of societal repression - a lack of knowledge of Western queer norms. Psychological

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studies conducted on queer asylum seekers also emphasize the role in which trauma, shame, and depression may affect the applicant’s memory and ability to present himself in front of the review board. This may result in a key issue in LGBT asylum claims: ‘late disclosure’ - *id est* revealing one’s queer status only after the initial asylum application has been rejected. Although this move is often seen by reviewers as a last bid attempt at gaining asylum, late disclosure may be caused by the psychological conditions noted above and thus cannot continue to be used as an excuse to reject what may be legitimate queer asylum cases.

Outside of these subjective narratives, the question of ‘perceived’ versus ‘actual’ queer identity may also be interpreted as constituting the difference between ‘forced homosexuality’ - for instance, same-sex prostitution forced upon the applicant by dire economic circumstance - and ‘self-identified homosexuality.’ Similarly, the term ‘LGBT’ may vary across the world in its definition. In many cases, as researched by Middlekoop’s work, queer applicants struggle to define as fundamental concepts as ‘gay’ or ‘queer’ in relation to themselves, thus resulting in a negative application result. The language difficulties that arise from usual asylum interviews are magnified in the many nuances and subjectivities present in queer asylum procedure.

The current laws governing current procedure, though a step forward from its previous incarnation, is still insufficient to address these problems. Article 15(3) of the recast Asylum Procedure Directive states simply that: “Member States shall: (a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application including the applicant’s cultural origin, gender,

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sexual orientation, gender identity or vulnerability; (b) wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests (...) (c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. (...) Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests.”

These law demonstrate a clearer approach than its first iteration, though when confronted with the vagaries and unclear patches of reasoning described in this section, this asylum procedure contributes little of substance to the issues that still surround LGBT asylum claims.

Compounding these legal problems are extra-judiciary factors such as the lack of COIs (Country of Origin Information). Article 4(3) of the Qualification Directive establishes the necessity for all asylum applications to take into consideration “all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied.”

The current Procedures Directive bolsters this regulation by ruling that “Member States shall ensure that precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants.”

In the case of LGBT asylum cases, there is little to no updated information available on queer issues in the many global areas where persecution of queer individuals is a de facto if not de jure reality. South Africa, for instance, has tolerant queer laws on paper, as the only African state to legalize same-sex marriage. Stories like Mvuleni Fana’s however is common in South Africa, where the norm and the law constitute the difference between life and death, and asylum and continued persecution.

31 Directive 2013/32/EU L 180/60.
As part of the 2015 European Agenda on Migration, the EC has proposed a common EU list of safe countries of origin, comprising Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey, in accordance with the Copenhagen Criteria, the Asylum Procedures Directive 2013/32/EU and the principle of non-refoulement. Accelerated procedures may be initiated were a queer applicant to come from these countries, though the reality for queer individuals living in any of these ‘safe countries’ may be markedly different from their heterosexual counterparts to the point where it may warrant asylum. However, as in the case of South Africa and others, these ‘safe countries’ are not properly researched for their treatment of their LGBT citizens, thus constituting a major barrier in the protection of queer asylum seekers who have legitimate claim.

Insufficient COI data impacts an important aspect of the asylum decision making process: the internal flight alternative argument (also known as the internal protection alternative or internal relocation alternative), which allows the return of asylum seekers if persecution is present only in a part of the country. To use South Africa again as an example, the asylum review board may decide that Mvuleni Fana, as a South African citizen, is ineligible for EU asylum as she may escape persecution by moving out of her neighbourhood. The ‘internal flight alternative’ argument implies a dichotomy between states which afford protection to affected citizens and those who do not, though in most cases the distinction is rarely clear-cut: a state may have tolerant laws, but its executors - the police, the judiciary - may be as prejudiced as the asylum seeker’s persecutors. Updated and

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comprehensive COI data is necessary to ensure proper and just asylum procedures in all cases, especially for sexual minorities on which little data has yet been collected.

Information is an important deficit factor in the struggle to standardize queer asylum procedure. ORAM (the Organization for Refuge, Asylum, and Migration) puts the figure of successful queer asylum cases at 2,500 per annum.\(^{36}\) In the EU, only Belgium systematically collects and publishes data on the number of LGBT asylum cases on an official basis; the Norwegian Directorate of Immigration does not release official data. From what we know from these two countries, LGBT asylum cases constitute anywhere from 0.22\% (the Norwegian figure) to 4.4\% (the Belgian figure) of all asylum cases processed.\(^ {37}\) If these numbers are applied to the total EU figure of asylum applications (435,000 in 2013), then the number of LGBT asylum cases processed in the EU would number around 1,000-20,000 depending on which set of statistics are used.\(^ {38}\) Only 30\% of any asylum application is processed and if this variable holds in queer asylum cases, only a couple hundred asylum seekers are granted protection; the rest either become illegal migrants or are sent home to face possible execution.\(^ {39}\)

These statistics are so variable as to be practically unusable. The opacity of the data renders queer asylum seekers invisible, a step short of non-existence in the eyes of important state and civil society actors working to improve European migration.

Prescriptions

\(^ {38}\) Organization for Refuge, Asylum & Migration, Opening Doors (ORAM), A Global Survey of NGO Attitudes Towards LGBTI Refugees and Asylum Seekers (ORAM, June 2012).  
\(^ {39}\) Ibid.
Leaving aside the variegated national transposition of EU laws, the discussion of which is out of the purview of this essay, there are three main paths forward in the battle for better asylum regulations concerning LGBT claimants: we can improve and expand on the laws we have, propose new legislation, or enforce ‘good practises’ at the local level. The European Commission proposed a number of reforms to the CEAS in 2016, which include a new Qualification Regulation, the Recast Reception Conditions Directive, a new Asylum Procedures Regulation, a new Regulation on the EU Agency for Asylum, a Recast Dublin Regulation (also known as Dublin IV), and a new Regulation establishing a Union Resettlement Framework. These laws are currently still being processed and have not yet been approved by the EU apparatus, and thus can still viably constitute a site of reformative change for laws governing queer asylum cases.

Actors such as ILGA Europe have remarked on the outdated use of the term ‘homosexuality’ - a vague and incomprehensive word that refers only to a specific facet of the queer community at risk. As such, ILGA Europe has proposed a legal lexicon more closely resembling the “Identity, Gender Expression and Sex Characteristics” Maltese parliamentary act of April 1, 2015. Instead of using ambiguous identifiers, ILGA proposes that the EU use such words such as gender expression (instead of ‘gender identity’) - referring to an individual’s expression of cultural norms of masculinity and femininity, which protects transsexual people as well as other queer asylum seekers - and sex characteristics - which protects intersex people - into the legal terminology of future asylum regulations. The UNHCR’s LGBT Guidelines, which are addressed at governments, lawyers, and the judiciary, are also a useful reference for future legislation on the subject, as well as the

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41 The Maltese parliamentary document is often heralded as among the most queer-friendly and progressive in the extent of its protections for the LGBT community in the world.
European Asylum Support Office’s (EASO) Training Module on Gender, Gender Identity and Sexual Orientation. In line with these recommendations, the main laws regulating EU asylum may thus be amended:

- **Qualification Directive:**

  - **Article 10 (Reasons for Persecution):** “The following elements shall be taken into account when assessing the reasons for persecution: […] depending on the circumstances in the country of origin, the concept might **shall** include a group based on a common characteristic of sexual orientation (a term which cannot be understood to include acts considered to be criminal in accordance with national law of the Member States); gender related aspects, including gender identity, **gender expression and sex characteristics**, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.”

  - **Recital 29:** “In accordance with relevant case law of the Court of Justice of the European Union, when assessing applications for international protection, the competent authorities of the Member States should use methods for the assessment of the applicant's credibility in a manner that respects the individual's rights as guaranteed by the Charter, in particular the right to human dignity and the respect for private and family life. Specifically as regards homosexuality **sexual orientation and gender identity**, the individual assessment of the applicant's credibility should not be based on stereotyped notions concerning homosexuals and **sexual orientation and gender identity**, the applicant should not be submitted to detailed questioning or tests as to his or her sexual practices, and the competent national authorities cannot find that the statements of the applicant for asylum lack credibility merely
because the applicant did not rely on their sexual orientation, gender identity, gender expression or sex characteristics on the first occasion given to set out the ground for persecution.”

- Asylum Procedures Regulation:
  - Article 12 (Competence of persons conducting interviews and of interpreters):
    - (6) Include ‘gender expression and sex characteristics’ to the list included here.
    - (8) A clause should be inserted here regulating the competency of interpreters and decision-makers in the field of gender identity, sexual orientation, and sex characteristics, including a prohibitory phrase aimed at curbing stereotypical and derogatory assessments of a queer asylum applicant.

These initial recommendations would provide the bare minimum necessary for improving the current asylum laws, short of proposing new and, given the uneven reception of the queer community across member states, contentious legislation. Ironically, given ILGA Europe’s rightful push towards more specific protections, the language recommended here uses terms that are more semantically open, so as to be as elastic as possible in regulating the many currents of sexual/gender identity issues.

To enforce good practice, offices such as the EASO should pay closer scrutiny to the many theories and proposals fielded by theorists on queer asylum cases. Chelvans’ ‘Difference, Stigma, Shame and Harm Model,’ for instance, seeks to overcome stereotyping at asylum interviews by re-focussing credibility assessment from inquiries based on a sexualization of the applicant to one more encompassing of his queer experience: instead of

43 Ibid., 4.
44 Ibid., 10.
questions about the applicant’s sexual behaviour, Chelvan suggests that the applicant should instead be asked about their experiences of isolation and alienation in their country of origin.\textsuperscript{45} The argument here lies in that while applicants from outside the queer cultural norms of the West may not have fluency in the expected tropes of LGBT identifiers, they may speak with more eloquence on their own unique experiences - one which cannot be as easily forged as claiming same-sex activities on paper.

Other commentators regard LGBTQ cultural competency training for asylum officials as paramount. A guidance note issued by the UNHCR in 2008 (paragraph 37) highlights the importance of specialist training for officials involved in interviewing asylum applicants (be they interpreters, the decision-makers, or the interviewers): this training should involve not only appropriate interview techniques but a familiarity with current situation facing sexual minorities abroad - an easier-said-than-done proposal that requires an update to the COI statistics. Cross-cultural and queer-sensitivity training, such as that advocated by LaViolette, will likely do much to alleviate the current culture of stereotypes and ineffective interviews plaguing queer asylum decisions.\textsuperscript{46}

Reforms to the greater asylum system are ambitious and should not be focussed on the issue of sexual minorities, due to the still controversial nature of the issue among member states. However, EU asylum processes would benefit from a more stringent and updated information system - the COI database that feeds much of the lower level decision making on asylum cases. In order to resolve this, there needs to be more connection at the international level with academic/non-governmental organisation and state structures so as to provide a comprehensive and relevant set of statistics. This, in turn, can only be properly calibrated were there to be an EU-wide agreement on information sharing, both of COI statistics, and of

\textsuperscript{45} S. Chelvan, ‘From Sodomy to Safety? The case for defining persecution to include unenforced criminalisation of same-sex conduct’ (Paper delivered at Fleeing Homophobia Conference, Amsterdam, 5 September 2011).

\textsuperscript{46} Nicole LaViolette, ‘Independent human rights documentation and sexual minorities: an ongoing challenge for the Canadian refugee determination process,’ \textit{The International Journal of Human Rights} 13.2 (2009), 440.
member state asylum information. There is a currently a paucity of data that inhibits both state and academic actors from seeing the full picture in a way conducive to formulating proper reforms to the system.

Concluding Remarks

Even though the statistical data is yet unclear, the number of queer asylum cases each year are minute compared to the vast influx of asylum applications that continue to pour into the European Union. Their small size comparative to the greater body of asylum cases however, does not mean queer issues should be seen as marginal or be ignored: it is often by the weakest link that the cohesive strength of a system can be judged. The EU has, since the crisis of 2015, attempted reform of its current asylum system, to limited effect and while all institutional reforms take time to unveil, cases like that of Mvuleni Fana, who, despite proven bodily harm, would make no progress were she to apply for EU asylum, give urgency to the issue. The legal diction of the EU asylum directives and CJEU rulings may be just words, but to many around the world, a change in phrase or terminology could be the difference between life and death and the EU, as such, should make every effort to address the current legal gaps in their asylum system.
References


