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Addressing Heteronormativity: The Not-So-Lost Requirement of Discretion in (Austrian) Asylum Law

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ABSTRACT

In refugee matters concerning sexual orientation, 'discretion' reasoning is as commonplace as it is unlawful. In its 2013 ruling in *X, Y, and Z*, the Court of Justice of the European Union (CJEU) declared that it was unreasonable to expect that asylum seekers should conceal their sexual orientation by being 'discreet' in order to avoid persecution, and that such a requirement in domestic refugee status determination procedures would be incompatible with European Union (EU) law. However, this did not put an end to the matter. Discretion reasoning still forms part of the process to determine refugee status in many EU countries. This article examines the persistence of discretion reasoning, using Austria as an example. It argues that, whilst the CJEU definitively banned such reasoning, the court failed to give any indication as to how decision makers should proceed from this point. *X, Y, and Z* has thus created a legal vacuum, and there is a risk that normative sociocultural concepts like heteronormativity will be applied in such cases. Indeed, despite the CJEU ruling, it is still common in many societies to expect that LGBTIQ people be discreet. As such, decision makers may find themselves imposing a discretion requirement, even if unconsciously. The main aim of the article is to assess the resulting persistence of discretion reasoning through the lens of heteronormativity, and to provide practical suggestions for assessing refugee status in a way that ensures discretion is no longer required.

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1. INTRODUCTION

Sexual orientation and gender identity (SOGI) are now accepted as grounds for persecution in refugee law.[1] The European Union (EU) Qualification Directive mentions sexuality and gender-based persecution,[2] while the United Nations High Commissioner for Refugees (UNHCR) has created specific Guidelines on International Protection on the subject.[3] Together, these constitute the relevant legal framework for considering SOGI protection claims in the Common European Asylum System.

In practice, however, LGBTIQ claimants[4] still face substantial difficulties in the refugee status determination process.[5] One of these difficulties is caused by the ongoing application of the so-called 'discretion' requirement.[6] This term refers to the notion

1 In this article, 'SOGI' refers to genders and sexualities beyond the heteronormative spectrum, which can also be summarized by the LGBTIQ (lesbian, gay, bisexual, transgender, intersex, and queer) acronym.

2 Art 10(1)(d) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (Qualification Directive).

3 UNHCR, 'Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/12/09 (23 October 2012).

4 See n 1.

5 See Nuno Ferreira and Carmelo Danisi, 'Queering International Refugee Law' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021); Arzu Güler, Maryna Shevtsova, and Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective* (Springer 2020); Tawseef Khan, 'Sexual Orientation and Refugee Law: How Do Legal Sanctions Criminalizing Homosexuality Engage the Definition of Persecution?' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019); Jenni Millbank, 'Sexual Orientation and Gender Identity in Refugee Claims' in Costello, Foster, and McAdam (eds) (n 5).

6 In the relevant literature, the concept of 'discretion' is partly rejected as a euphemistic use of language. Instead, the term 'concealment' is preferred (cf eg Thomas Spijkerboer, 'Sexual Identity, Normativity and Asylum' in Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013)). Similarly, Lord Hope noted in the ruling of the United Kingdom (UK) Supreme Court, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31: 'I would prefer not to use the word "discretion", as this euphemistic expression does not tell the whole truth' (recital 22). Conversely, the term 'discretion' can clarify the legal–political and historical context of this line of case law. It was not developed with a view to restricting refugee protection in the area of SOGI. Rather, the approach stems from an understanding of homosexuality as a naturally 'private matter', which formed the starting point for regarding homosexuality as a form of personal expression that must be afforded human rights protection (cf Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 The International Journal of Human Rights 391). The term 'discretion requirement' is used in this article to refer to this historical context.

that asylum seekers are supposed to hide their SOGI in their country of origin – by being 'discreet' – in order to avoid persecution. According to this approach, refugee status is granted only to those who are no longer able to hide their SOGI, because, for example, they have been outed online. In 2013, the Court of Justice of the European Union (CJEU) banned discretion reasoning. The court ruled in *X, Y, and Z* that an 'applicant for asylum cannot [reasonably] be expected to conceal his homosexuality in his country of origin in order to avoid persecution'.[7] Jenni Millbank has referred to the 'yawning divide' between law on the books and what happens in practice in SOGI-related cases,[8] concluding that '[n]owhere is the divide between refugee law and refugee practice more clearly manifested than in the invidious and enduring operation of so-called "discretion" reasoning'.[9]

This ongoing application of discretion reasoning is, as a matter of course, a legal problem. At the same time, such a disconnect between law on the books and law in action also raises socio-legal questions and cannot be fully captured by a mere doctrinal approach. Against this background, this article applies 'a queer theoretical lens'[10] and examines how heteronormativity shapes discretion reasoning. In doing so, it not only aims to provide a further compelling argument for the endeavour of 'queering' refugee law,[11] but, at a practical level, it also seeks to establish a heuristic perspective on discretion reasoning in a way that avoids finger-pointing and provides a helpful basis for future training on SOGI for decision makers involved in LGBTIQ cases.[12] As a term, 'heteronormativity' refers to a binary understanding of gender. Here, cis masculinity and cis femininity are positioned in a hierarchical and heterosexual order, in which *other* SOGI represent a deviation.[13] While heteronormativity is subject to ongoing (legal) negotiations, it continues to shape everyday assumptions and ideas about what is considered 'normal'.[14]

7 Joined Cases C-199/12 – C-201/12 *X, Y, and Z v Minister voor Immigratie en Asiel* [2013] ECLI:EU:C:2013:720, recital 71. The term 'reasonably' is taken directly from the ruling.

8 Millbank (n 5) 764.

9 ibid.

10 Ferriera and Danisi (n 5) 81. The focus is thus placed on the persistence of discretion reasoning as a legal problem. Janna Wessels, in a similar approach, concluded that discretion reasoning is inherent in the refugee concept and will therefore remain a problem. Janna Wessels, *The Concealment Controversy: Sexual Orientation, Discretion Reasoning and the Scope of Refugee Protection* (Cambridge University Press 2021). This article, however, uses a queer lens and approaches discretion reasoning as a SOGI-specific problem.

11 Sean Rehaag and Hilary Evans Cameron, 'Experimenting with Credibility in Refugee Adjudication: Gaydar' (2020) 9 Canadian Journal of Human Rights 34. See also Ferreira and Danisi (n 5). For a concept of refugee protection against heteronormativity, see also Petra Sussner, 'Mit Recht gegen die Verhältnisse: Asylrechtlicher Schutz vor Heteronormativität' [With Law against the System: Asylum Law Protection against Heteronormativity] (2020) 14 Zeitschrift für Menschenrechte [Journal for Human Rights] 61.

12 cf Nicole La Violette, 'Overcoming Problems with Sexual Minority Refugee Claims: Is LGBT Cultural Competency Training the Solution?' in Spijkerboer (ed) (n 6).

13 cf Judith Butler, *Gender Trouble and the Subversion of Identity* (Routledge 1990).

14 See eg Paul Johnson, 'Heteronormativity and the European Court of Human Rights' (2012) 23 Law and Critique 43.

This article seeks to examine how heteronormative patterns shape the assessment of SOGI and 'discretion'. Where does the line fall between establishing facts and requiring discretion? Which strategies could be helpful in avoiding the pitfalls of discretion reasoning? The article is divided into three main parts. Part 2 provides a brief overview of the gradual ban on discretion reasoning in Europe and discusses basic reasons for its persistence through the lens of heteronormativity. It employs heteronormativity as a tool to grasp the structure and the impact of heterosexual gender binary and to reveal relevant connections between legal reasoning and sociocultural normality. Based on this, part 3 examines the ongoing application of discretion reasoning, focusing on Austria as an example. To that end, it presents a review of case law issued by the Constitutional Court, the Supreme Administrative Court, and the Federal Administrative Court of Appeal between 2014 and 2020. The conclusion (part 4) brings together the findings of parts 2 and 3 and offers practical recommendations on how the pitfalls of the discretion requirement could be avoided.

Finally, terminological clarification is necessary. This article uses the term 'SOGI' to refer to both sexual orientation and gender identity. This is in line with UNHCR guidance and EU asylum law. Also, the concept of 'heteronormativity' is based on the interrelation of the gender 'binary' and heterosexuality. At the same time, it is pointed out that the CJEU has so far dealt exclusively with expectations of discretion in the area of sexual orientation. No cases relating to gender identity were found in the review of Austrian case law. Nevertheless, discretion reasoning is likely to become an issue with regard to gender identity in the future. For now, there is not enough case law on gender identity as such, as decision makers (still) tend to frame queer cases as sexual orientation cases.[15] However, with increasing sensitivity in this area, more case law on gender identity can be expected in the future.[16] Especially with regard to the question whether transgender and intersex people can be required to take steps to appear outwardly as straight and/or cisgender in order to 'pass',[17] discretion reasoning could become an issue. In this respect, the analysis in this article is based on the assumption that the ban on discretion reasoning applies equally to the area of gender identity, especially given that the CJEU has ruled discretion reasoning as generally unlawful because it lacks a legal basis. There is no systematic reason to differentiate between sexual orientation and gender identity. Both constitute highly personal areas of life protected within the jurisdiction of the European Court of Human Rights (ECtHR).[18] The CJEU has recently

[15] Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group' in Spijkerboer (ed) (n 6).

[16] cf Jaz Dawson, 'Past and Present: From Misunderstanding Sexuality to Misunderstanding Gender Identity in Australian Refugee Claims' (2019) 65 Australian Journal of Politics and History 600.

[17] In this article, 'passing as' refers to being perceived as cisgender and/or heterosexual.

[18] cf Frédéric Edel, *Case Law of the European Court of Human Rights relating to Discrimination on Grounds of Sexual Orientation or Gender Identity* (Council of Europe 2015) <https://book.coe.int/en/human-rights-and-democracy/6472-case-law-of-the-european-court-of-human-rights-relating-to-discrimination-on-grounds-of-sexual-orientation-or-gender-identity.html> accessed 18 March 2022; Dana-Sophia Valentiner, 'Sexualität in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte: ein Menschenrecht auf sexuelle Autonomie?' [Sexuality in Judgments of the European Court of Human Rights: A Human Right to Sexual Autonomy?] in Katrin Kappler and Vinzent Vogt (eds), *Gender im Völkerrecht: Konfliktlagen und Errungenschaften* [Gender in International Law: Situations of Conflict and Achievements] (Nomos 2019).

referred to SOGI as a common human right.[19] Article 10(1)(d) of the Qualification Directive also mentions SOGI as a reason for persecution equivalent to membership of a particular social group.[20] Consequently, there is no reason that discretion reasoning should be considered unlawful in relation to sexual identity but not in relation to gender identity. Thus, reference to SOGI in this article should be understood against this background and in light of the expectation that the issue of discretion reasoning is likely to arise in relation to gender identity cases as well.

2. A HISTORY OF HETERONORMATIVITY AND DISCRETION REASONING

In 2013, the CJEU banned discretion reasoning in *X, Y, and Z* because it was considered to lack a legal basis. According to James Hathaway and Jason Pobjoy, the discretion requirement amounts to a '*sui generis* imposition of a "duty to be discreet"'.[21] Yet the idea of discretion persists. As Thomas Spijkerboer aptly describes: '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'.[22]

When critically assessed through the lens of heteronormativity, a fundamental problem with the *X, Y, and Z* ruling becomes apparent. The court explicitly told national courts and authorities what *not to do*. However, the ruling fell short by not giving enough indication as to what *to do*. The undesirable consequence of this only becomes fully apparent when it is considered that, before it was banned, discretion reasoning was a very common – 'normal' – way to assess LGBTIQ cases. Consequently, its abolition can create a vacuum for decision makers and thus a situation in which normative sociocultural concepts like heteronormativity are likely to be manifested in stereotypical notions and assumptions. On the one hand, stereotypes can help to navigate everyday life, and that, most certainly, includes refugee status determination.[23] On the other hand, stereotypes negatively affect the assessment of individual cases. Moreover, heteronormative stereotypes enhance the subordination and exclusion of LGBTIQ people.[24] When it comes to protecting LGBTIQ applicants, this dynamic proves

19 Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* [2018] ECLI:EU:C:2018:36.

20 Qualification Directive (n 2).

21 James C Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 New York University Journal of International Law and Politics 315, 326.

22 Spijkerboer (n 6) 220.

23 Jane Herlihy, Kate Gleeson, and Stuart Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22 International Journal of Refugee Law, 351; Carolina Kobelinsky, 'The "Inner Belief" of French Asylum Judges' in Nick Gill and Anthony Good (eds), *Asylum Determination in Europe: Ethnographic Perspectives* (Palgrave Macmillan 2019).

24 For a more detailed analysis, see Peter Wagenknecht, 'Was Ist Heteronormativität? Zu Geschichte und Gehalt des Begriffs' [What Is Heteronormativity? On the History and Content of a Concept] in Jutta Hartmann and others (eds), *Heteronormativität: Empirische Studien zu Geschlecht, Sexualität und Macht* [Heteronormativity: Empirical Studies on Gender, Sexuality and Power] (Springer 2007) 17; also Nora Markard, 'Queerness zwischen Diskretion und

especially inadequate and can, among other things, lead to an unlawful requirement of discretion.[25] For this reason, it is essential to unravel and address the underlying issue of heteronormativity itself. Otherwise, new forms of discretion reasoning will fill the legal vacuum left by the abolition of the discretion requirement. This article aims to make visible, and also to challenge, ongoing practices of discretion reasoning by offering perspectives beyond a heteronormative gaze. Before this approach is illustrated by a detailed analysis of Austrian case law (part 3), the connection between heteronormativity and discretion reasoning is examined more closely. The following sections consider how discretion reasoning is embedded in the history of human rights, and then examine the gradual abolition of discretion reasoning in refugee matters, focusing on the legal vacuum now faced by decision makers.

2.1 The (legal) connection between heteronormativity and discretion reasoning

Numerous authors have shown how Western stereotypes are particularly problematic for credibility assessment. The 'discreet homosexual' represents this type of stereotype, and discretion reasoning is a way of expressing it.[26] Moreover, discretion reasoning is also rooted in a heteronormative public–private divide that locates SOGI in a (legally protected) private sphere. The undesirable consequence of this might be that expectations and assumptions about discretion – even an unlawful requirement of discretion – not only feel normal, but somehow also feel right. Millbank's foundational scholarship provides essential insights into this area. Raising the question of how discretion reasoning could become part of legal reasoning in the first place, she argues:

> The idea of discretion reflects broader social norms concerning the 'proper place' of lesbian and gay sexuality, as something to be hidden and reluctantly tolerated, a purely private sexual behaviour rather than an important and integral aspect of identity, or as an apparent relationship status. The discretion approach explicitly posited the principle that human rights protection available

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Cocktails: Anerkennungskämpfe und Kollektivitätsfallen im Migrationsrecht' [Queerness between Discretion and Cocktails: Fights for Recognition and Pitfalls of Collectivity in Migration Law] in Gabriele Jähnert, Karin Aleksander, and Marianne Kriszio (eds), *Kollektivität nach der Subjektkritik: Geschlechtertheoretische Positionierungen* [Collectivity after Critique of the Subject: Gendertheoretical Positioning] (Lehmanns 2013) 84.

[25] See also Joined Cases C-148/13 – C-150/13 *A, B, C v Staatssecretaris van Veiligheid en Justitie* [2014] ECLI:EU:C:2014:2406, in which the CJEU ruled that decision makers may not exclusively rely on stereotypical notions about LGBTIQ experiences.

[26] cf also Venice Choi, 'Living Discreetly: A Catch 22 in Refugee Status Determinations on the Basis of Sexual Orientation' (2010) 36 Brooklyn Journal of International Law 241; Sabine Jansen, 'Introduction: Fleeing Homophobia, Asylum Claims related to Sexual Orientation and Gender Identity in Europe' in Spijkerboer (ed) (n 6); Giametta Calogera, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System* (Routledge 2017); Spijkerboer (n 6); Barry O'Leary, '"We Cannot Claim Any Particular Knowledge of the Ways of Homosexuals, Still Less of Iranian Homosexuals …": The Particular Problems Facing Those Who Seek Asylum on the Basis of Their Sexual Identity' (2008) 16 Feminist Legal Studies 87.

> to sexual orientation was limited to private consensual sex and did not extend to any other manifestation of sexual identity (which has been variously characterized as 'flaunting', 'displaying' and 'advertising' homosexuality as well as 'inviting' persecution).[27]

Here, a heteronormative scheme is addressed in which heterosexuality serves as an implicit norm, while homosexuality represents a deviation. This binary is largely reproduced through a public–private divide that also constitutes a private sphere of sexual acts that can include legal protection.[28] In this sense, this idea of a private homosexual sphere not only represents a deviation, but also a historical success over State abuses. At the forefront of this struggle were gay activists such as Jeff Dudgeon, whose case before the ECtHR in 1981 resulted in the court declaring the criminalization of homosexual acts to be an unjustifiable violation of article 8 of the European Convention on Human Rights (ECHR),[29] the right to a private and family life.[30] This decision was groundbreaking: homosexuality was a private matter and homosexuals were no longer *outlaws*.[31]

Over time, this recognition of homosexual acts also came to influence the interpretation and application of the Refugee Convention.[32] As early as 1981, the Dutch Raad van State granted refugee protection to a gay man from Iran.[33] In 1988, the German Bundesverwaltungsgericht followed, accepting the claim of a gay man threatened with criminal prosecution in Iran.[34] In Austria, when the Asylum Act 1991 was amended, the legislative materials stated that claims of persecution due to sexual orientation

[27] Millbank (n 6) 393.

[28] For a more detailed analysis, see eg Juan M Amaya-Castro, 'Human Rights and the Critiques of the Public–Private Distinction' (PhD, Vrije Universiteit Amsterdam 2010).

[29] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (European Convention on Human Rights, as amended by Protocols No 11 and No 14) (ECHR).

[30] *Dudgeon v United Kingdom* App No 7525/76 (ECtHR, 22 October 1981). Where this article refers to consensual homosexual acts, this refers to acts exclusively involving adults. The issue of discrimination within youth protection would justify a separate debate. See eg Nikolaus Benke and Elisabeth Holzleithner, 'Zucht durch Recht: Juristische Konstruktionen der Sittlichkeit im Österreichischen Strafrecht' [Discipline through Law: Legal Constructions of Morality in Austrian Criminal Law] (1998) 9 L'Homme: Zeitschrift für feministische Geschichtswissenschaft [L'Homme: Journal of Feminist History] 41.

[31] cf also Paul Johnson, 'An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights' (2010) 10 Human Rights Law Review 67; Nora Markard, 'Private but Equal? Why the Right to Privacy Will Not Bring Full Equality for Same-Sex Couples' in Guenter Frankenberg (ed), *Order from Transfer: Projects and Problems of Comparative Constitutional Studies* (Edward Elgar Publishing 2013).

[32] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[33] Afedling Rechtspraak Raad van State (ARRvS) No A-21113, Rechtspraak Vreemdelingenrecht (1981).

[34] BVerwG 15 March 1988, 9 C 278.86.

and gender may qualify under the particular social group category.[35] In the following decades, North American, European, and Australian courts gradually acknowledged SOGI as falling within the purview of protection grounds; this was reflected at the international level in UNHCR guidelines on gender and sexuality.[36] At the same time, academics began to problematize a practice of rejecting asylum claims based on the expectation that claimants would conceal their sexuality in their country of origin.[37] Here, 'tensions between queering and de-queering asylum law' became apparent:[38] SOGI were successively integrated into refugee law, while, in practice, LGBTIQ claimants were sent back to the metaphorical closet. In this way, privacy took the shape of an ambiguous concept entailing both protection and deviation. In that sense, discretion reasoning can be seen as an expression of the 'limitations of the privacy approach'.[39] By understanding privacy as private practice that can easily be concealed, decision makers in fact undermined the very idea of protection. While this link between privacy and private – discreet – behaviour fits well into a heteronormative notion of deviation, it still lacks a basis in refugee law.

2.2 The ban and the persistence of discretion reasoning

Just a year after Millbank published 'From Discretion to Disbelief', the United Kingdom Supreme Court decided the case *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*.[40] *HJ and HT* was the first major European ruling that (partially) abolished discretion reasoning. It (in)famously stated that British 'male homosexuals are […] free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates'.[41] The court found that '[m]utatis mutandis – and in many cases the adaptations would obviously be great – the same must apply to other societies'.[42] Regardless of the obvious stereotypes, the ruling put an end to discretion reasoning. However, a limitation remained. The UK Supreme Court declared that discretion reasoning was only unlawful if the applicants hid their sexual orientation due to a well-founded fear of persecution in the sense of the Refugee Convention (and not for any other reason).[43] This limitation has been criticized for various reasons.[44]

35 Asylum Act 1991, RV 270 BlgNR 18 GP.

36 See Ferreira and Danisi (n 5) 82–84; Jenni Millbank, 'Sexual Orientation and Refugee Status Determination over the Past 20 Years: Unsteady Progress through Standard Sequences?' in Spijkerboer (ed) (n 6); Millbank (n 5) 762–65; Volker Türk, 'Ensuring Protection to LGBTI Persons of Concern (2013) 25 International Journal of Refugee Law 120.

37 See n 26.

38 Ferreira and Danisi (n 5) 81.

39 ibid.

40 *HJ and HT* (n 6).

41 ibid para 78.

42 ibid.

43 See also Millbank (n 5) 768–71.

44 See in particular Janna Wessels, '*HJ (Iran) and HT (Cameroon)*: Reflections on a New Test for Sexuality-Based Asylum Claims in Britain' (2012) 24 International Journal of Refugee Law 815. Wessels rightfully points out that the boundary established in *HJ and HT* can rarely be drawn as cleanly in real-life circumstances.

To draw a line between legitimate and illegitimate discretion reasoning, the court drew upon the applicant's individual motives for hiding their sexuality. Again, from a legal perspective, this is not evident. If an applicant chooses to hide their SOGI and live in the metaphorical closet in the country of origin, this usually reduces their risk of being persecuted within the meaning of the Refugee Convention. Thus, a chosen closet is an important empirical aspect when it comes to assessing a well-founded fear of being persecuted. The well-founded fear test does not, however, provide a basis for (implicitly) requiring discretion regardless of an individual's motivation for staying in the closet. Article 1A(2) of the Refugee Convention does not leave room to differentiate between motivations for reducing this risk. Ultimately, *HJ and HT* was a huge step forward, but its differentiation between relevant and irrelevant closets lacked a legal basis (much like the discretion requirement itself).

From a historical perspective, the *HJ and HT* ruling was released at a time when, across Europe, LGBTIQ people were increasingly claiming public space.[45] Gradually, they were also starting to mobilize anti-discrimination law to challenge heteronormative hierarchies between heterosexuality and homosexuality.[46] In numerous cases, the ECtHR had meanwhile applied article 14 in conjunction with article 8 of the ECHR to find unequal treatment: only compelling reasons could now provide a justification of discrimination on the basis of sexual orientation.[47] Most recent developments have occurred in the areas of family law or civil status.[48] In short, the heteronormative order has become – and still is – subject to legal negotiations. This process involves a shift from a mere privacy approach to an approach that acknowledges discriminatory power relations. Against this background, discretion reasoning has become less obvious and also less justifiable. *HJ and HT* was a major step in this process, yet it was a step taken tentatively. Despite colourful stereotypes, the idea that homosexuals were entitled to take part fully in society and express their ways of living and loving in the same way as heterosexuals, seemed to be – and partly still seems to be (see part 3) – quite new and unfamiliar.

In 2012, Hathaway and Pobjoy expressed concern that banning discretion reasoning could exaggerate the reach of refugee law.[49] While ultimately agreeing with the decision in *HJ and HT*, they nevertheless argued that the motive for concealing one's sexuality

[45] See eg *Baczkowski v Poland* App No 1543/06 (ECtHR, 3 May2007). Based on this case, cf *Alekseyev v Russia* App Nos 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010).

[46] For a more detailed analysis, see eg Claudia Lohrenscheidt and others, 'Sexuelle Selbstbestimmungsrechte: Zur Entwicklung menschenrechtlicher Normen für Lesben, Schwule, Transexuelle und Intersexuelle' [Rights of Sexual Self-Determination: On the Development of Human Rights Norms for Lesbians, Gays, Transsexuals and Intersexuals] in Claudia Lohrenscheidt (ed), *Sexuelle Selbstbestimmung als Menschenrecht* [Sexual Self-Determination as a Human Right] (Nomos 2009).

[47] cf Johnson (n 14) 47–48.

[48] cf also Marla Brettschneider, Susan Burgess, and Christine Keating, *LGBTQ Politics: A Critical Reader* (New York University Press 2017).

[49] Hathaway and Pobjoy (n 21). See also Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44 New York University Journal of International Law and Politics 497.

was irrelevant. Instead, they focused on the expression of SOGI. Not every action associated with homosexuality, however vague and/or stereotypical (such as attending a Kylie Minogue concert), should be protected by refugee law. Accordingly, they suggested drawing on a certain link between act and identity: only risky activities that were 'intrinsic to the protected identity' should be sufficient to affirm refugee status.[50] Millbank responded by stressing that 'the trivial nature of the act itself is irrelevant to determining the question of nexus' under the Refugee Convention.[51] She rightly pointed out that an applicant's individual expression of SOGI is not a benchmark for identifying the causal link between the risk of being persecuted and the ground for being persecuted (the nexus clause). Moreover, how SOGI are individually expressed or unwillingly disclosed cannot be objectively defined through a global standard. Depending on the sociocultural background, even minor gestures or seemingly trivial acts – such as attending a concert, wearing a particular hairstyle, or following certain people on social media – can trigger persecution. Substantially, however, Hathaway and Pobjoy rejected the idea of discretion reasoning. Hence, in addition to the focus on the individual expression of SOGI, they proposed the closet itself as a form of persecution: 'given the traumatic effects that normally follow from self-repression (anxiety, paranoia, dissociation, or worse) there is an alternative and solid basis, grounded in the traditional link between persecution and risk to core norms of human rights law, to affirm refugee status'.[52] While this approach is certainly helpful in assessing SOGI cases, Hathaway and Pobjoy did not offer any evidence for the stated regularity of psychological suffering that may constitute a real risk of serious harm. Accordingly, such an approach might avoid discretion reasoning in some cases. In others, however, discretion could still be required, without a solid basis being provided by the Refugee Convention.

2.3 How should decision makers proceed after *X, Y, and Z*?

In 2013, the CJEU ruled in *X, Y, and Z* that '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'.[53] It was clear that sending applicants back to the closet amounted to a violation of EU law. However, the CJEU provided no guidance as to *how* decision makers should now evaluate SOGI claims. This gap presented a challenge for everyday asylum practice. Indeed, both the tentative steps towards a ban on discretion reasoning, and the ongoing application of discretion requirements (see part 3), indicated that giving up something as widely accepted and seemingly natural as

[50] Hathaway and Pobjoy (n 21) 389.

[51] Millbank (n 49) 511–12. Beyond the fundamental principles of the Refugee Convention, it should be added that the persecution of fans of a certain musical genre can also be traced back to an (imputed) religious or political conviction.

[52] Hathaway and Pobjoy (n 21) 388. The same proposal was also put forward in *HJ and HT* and was – rightfully – rejected. The argument concerned Anne Frank's hiding place in Amsterdam. Lord Rodger rejected the argument as 'absurd and unreal. It is plain that it remains the threat to Jews of the concentration camp and the gas chamber which constitutes the persecution' (not Anne Frank's hiding place). *HJ and HT* (n 6) para 107.

[53] *X, Y, and Z* (n 7) recital 76.

the idea of discretion cannot happen overnight. Discretion reasoning is embedded in a heteronormative order and understanding of normality. To protect LGBTIQ applicants' rights to take part fully in society and express their ways of living and loving, in the same way that heterosexual cis people do, means unlearning this normality. Unlike other areas of law or legal problems, the ban on discretion reasoning has the advantage that discretion reasoning lacks a solid basis.[54] For instance, a political activist facing persecution is not expected to hide their political flyers.[55] Political activists want to be recognized as part of society – as do queer people and LGBTIQ activists. In this sense, refugee law also supports the process of unlearning its heteronormativity. If discretion reasoning lacks a legal basis in refugee law, it must be possible to assess refugee status without requiring discretion.

This article seeks to establish and support the first steps towards a refugee status determination process that does not entail any discretion requirement. Against the background of the legal vacuum created by *X, Y, and Z*, and with regard to underlying heteronormative structures, two key questions can be identified. First, if it is unlawful to implicitly expect – and thus normatively require – discretion, does the abolition of discretion reasoning amount to an individual's right to express SOGI openly – and if so, to what extent? At the same time, regardless of rights, it is important to note that there is no duty to be out and proud. This leads to the second question: how, then, should claims be assessed where applicants insist on living in the closet? Before addressing these questions in detail in part 4, part 3 illustrates the implicit – normative – expectations of discretion displayed in Austrian case law. The findings here will ultimately help to address both the legal vacuum and the role heteronormativity has played – and still plays – in filling it.

3. THE PERSISTENCE OF DISCRETION REASONING: A REVIEW OF AUSTRIAN CASE LAW

To illustrate what discretion reasoning looks like after *X, Y, and Z*, this part turns to the example of Austria. It offers a case review that includes 50 rulings of the Federal Administrative Court (Bundesverwaltungsgericht, BVwG), the Supreme Administrative Court (Verwaltungsgerichtshof, VwGH), and the Constitutional Court (Verfassungsgerichtshof, VfGH) between 2014 and 2020.[56] In Austria, asylum applicants whose claims are rejected at first instance by the Federal Office for Migration and

[54] For the abolition of the German practice of differentiating between a religious *forum externum* and *internum* and using this to restrict refugee protection to the private area, see Joined Cases C-71/11 and C- 99/11 *Bundesrepublik Deutschland v Y and Z* [2012] ECLI:EU:C:2012:518.

[55] For the link between the image of the political activist and the origins of today's refugee law, see Efrat Arbel, Catherine Dauvergne, and Jenni Millbank, 'Introduction: Gender in Refugee Law – From the Margins to the Centre' in Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Taylor & Francis 2014).

[56] The search was carried out using a keyword search in the federal legal information system <https://www.ris.bka.gv.at>, using the keywords: bisexu*, gender, gender identity, homosexu*, intersex*, lesbian, gay, sexuality, sexual orientation, transgender*, 'transsex*'. At the level of the highest courts, all relevant case law was included in the analysis. Rulings of the Federal Administrative Court closely related to the relevant Supreme Court case law were especially considered.

Asylum (Bundesamt für Fremdenwesen und Asyl) may file an appeal before the Federal Administrative Court, which reviews on the merits of the case. After that, applicants have the opportunity to appeal to the Supreme Administrative Court and the Constitutional Court. Appeals to the Supreme Administrative Court are limited to fundamental legal questions. Complaints to the Constitutional Court may be lodged in cases involving a possible violation of constitutional rights. If the Supreme Administrative Court or the Constitutional Court overturns a decision of the Federal Administrative Court, the case is usually referred back to the lower courts, which must then continue proceedings. In 2019, the Constitutional Court overturned 8 per cent of such matters,[57] whilst the Federal Administrative Court overturned 16 per cent of contested decisions.[58]

In accordance with the CJEU's ruling in *X, Y, and Z*, the Constitutional Court in 2014 emphasized that a discretion requirement for SOGI-based protection claims violates EU law.[59] More generally, the Supreme Administrative Court has ruled that 'the culpability of the asylum seeker in the emergence of persecutory risk is not the subject' of examination in an asylum case,[60] stating that the purpose of refugee law is 'to grant (international) protection to people who are persecuted on political, religious or ethnic grounds or because they belong to a particular social group in their country of origin. It does not matter … whether or to what extent an asylum seeker is "to blame" for the persecution.'[61]

However, discretion reasoning remains a persistent element of lower court jurisprudence, despite these superior court rulings. In fact, the case review reveals a thin line between expecting (in an empirical sense) and requiring (normatively) discretion. Only a handful of rulings go so far as to explicitly and directly require secrecy or restraint. More often, discretion is implicitly expected. In such cases, discretion reasoning is harder to identify; in many decisions, it is likely that it is applied unconsciously. To provide a more systematic insight, the following section examines cases involving (1) direct and (2) indirect discretion reasoning. 'Direct' discretion reasoning refers to cases where the discretion requirement is applied expressly or implicitly, but always as a standalone technique rather than within the application of other techniques of legal reasoning. In contrast, 'indirect' discretion reasoning describes situations where an expectation of discretion is conveyed through other legal arguments or techniques, such as, for example, the internal flight alternative (IFA).

3.1 Direct discretion reasoning

As noted above, the Constitutional Court's first key ruling on discretion reasoning was issued in September 2014 (*VfGH Nigeria I*).[62] The complaint was filed by a Nigerian

[57] Bericht des Verfassungsgerichtshof über seine Tätigkeit im Jahr 2019 [Report of the Constitutional Court on Its Practice in the Year 2019] 17 <https://www.vfgh.gv.at/downloads/taetigkeitsberichte/VfGH_Taetigkeitsbericht_2019.pdf> accessed 18 March 2022.

[58] ibid 19.

[59] VfGH 18 September 2014, E910/2014 (*Nigeria I*).

[60] Christian Filzwieser and Isabella Taucher, *Asyl- und Fremdenrecht* [Asylum and Migration Law] (NWV 2016) § 3 AsylG, E 84.

[61] VwGH 6 July 2011, 2008/19/0994.

[62] *VfGH Nigeria I* (n 59).

citizen, who claimed a threat of persecution due to homosexuality. His claim had been found credible by the Federal Administrative Court, but was rejected by the lower court, partly because persecution had occurred '(only) when [the complainant] committed sexual acts in a way that was (at least indirectly) accessible to the public'.[63] The lower court had quite directly required discretion by ruling public expressions of homosexuality to be irrelevant in the determination of refugee status. The Constitutional Court overruled this decision, explicitly referring to *X, Y, and Z*:

> In this context, we should refer to the ruling of the Court of Justice of the European Union dated 7 November 2013, C-199/12 to C-201/12, on interpreting Directive 2004/83/EC. In this judgment, the court stated that the competent authorities, when examining an application for refugee status, cannot expect an asylum seeker to keep his homosexuality secret in his country of origin or to exercise restraint in pursuing his sexual orientation in order to avoid the risk of persecution.[64]

When the case was referred back to the lower court to continue the proceedings, refugee status was granted.[65] This blunt line of discretion reasoning is not unique. The requirement that the homosexual acts be 'committed in a manner (at least indirectly) accessible to the public' can be found verbatim in at least one other ruling of the Federal Administrative Court.[66] At the same time, it cannot be said that direct discretion reasoning represents a consistent line of case law in the lower courts. The lower court applied the *X, Y, and Z* ruling before, and after, the Constitutional Court ruling in *VfGH Nigeria I*.[67] These cases also concerned Nigeria as the country of origin. Subsequent lower court judgments issued in 2017 explicitly referred to the unlawfulness of discretion reasoning. For example, with regard to Cameroon:

> In light of the country reports, it cannot be ruled out with significant probability that the complainant would have to expect state repression in the future on account of her homosexuality, especially since permanent[68] suppression of her sexual needs and interests cannot be expected from her pro futuro either, and in accordance with the decision of the European Court of Justice of 7 November 2013, C-199/12 to C-201/12, such secrecy may not be enforced.[69]

63 ibid recital 2.4.

64 ibid.

65 BVwG 13 April 2014, W105 1419666-1.

66 BVwG 18 August 2014, W105 1436950-1. Another judgment included this precise wording in relation to an IFA. See section 3.2.3 below.

67 BVwG 29 August 2014, W125 1437636-1; BVwG 4 November 2014, W125 1409093.

68 If the requirement of permanence were to become a legal prerequisite in the future, it would, in turn, have to be critically questioned.

69 BVwG 30 November 2017, I403 2169097-1. In this sense, see also BVwG 9 June 2017, W159 2112334-1; BVwG 25 October 2017, W159 2145561-1; BVwG 9 November 2017, W237 1419272-1.

3.1.1 (Heteronormative) Moral codes

This first key ruling of the Constitutional Court in *Nigeria I* was followed by three major rulings that all concerned Iraq as the country of origin (*VfGH Iraq I–III*).[70] The *Iraq II* and *Iraq III* rulings concerned the same case. In all the cases, the main question was whether countries in which a generally strict moral or religious code is enforced by law are to be considered 'safe' for homosexuals.[71] The Constitutional Court repeatedly rejected this approach. Ultimately, in *Iraq III*, the court also declared discretion reasoning to be in breach of the constitutional prohibition on discrimination.[72]

The claimants in *Iraq I–III* were two gay men from Iraq. Both stated that they had to hide their homosexuality in Iraq. The lower Federal Administrative Court had also identified corresponding risks, such as attacks and a hostile climate towards the LGBTIQ community. In *Iraq I*, the Federal Administrative Court had denied asylum because the complainant stated that he had led a 'self-determined and happy life' before he had to flee.[73] In *Iraq II*, the Federal Administrative Court had held that the complainant had not been forced to conduct himself with a level of discretion that went beyond the rules of conduct generally observed in a traditional Muslim society.[74] Both judgments ultimately required the applicants to conceal their homosexuality and were overturned by the Constitutional Court for this reason (*Iraq I–II*).

The files, however, were not yet closed. In *Iraq II*, the Constitutional Court explicitly stressed that further assessment was required as to whether the applicant would be exposed to persecution if he expressed his homosexuality openly in Iraq. The lower court did not follow these instructions. Instead, in its second ruling, the Federal Administrative Court (again) reasoned that if homosexuals were deemed entitled to publicly express their sexuality in traditional Islamic societies, they would be granted more rights than heterosexuals in those societies and would thus be privileged in comparison. Upon further appeal, this justification resulted in the Constitutional Court ruling in *Iraq III*:

> These statements by the Federal Administrative Court discriminate against the complainant as a homosexual person. … If the Court of Justice of the European Union and accordingly the Constitutional Court rule that 'persons with homosexual orientation should not be expected to keep their homosexuality secret in their country of origin or exercise restraint in living their sexual orientation … in

[70] VfGH 21 June 2017, E 3074/2016 (*Iraq I*); VfGH 11 June 2019, E 291/2019 (*Iraq II*); VfGH 25 February 2020, E 4470/2019 (*Iraq III*).

[71] In contrast, see BVwG 23 July 2019, G312 2206191-1.

[72] Art 1 para 1 of the Federal Constitutional Act on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, BGBl I 390/1973.

[73] BVwG 13 October 2016, L 502 2017219-1.

[74] cf BVwG 31 October 2018, L502 2017219-1. Concerning moral sanctions and refugee status, see VwGH 21 September 2001, 99/20/0409 (extramarital relations), as well as case law regarding the so-called Western orientations. cf Ines Roessl, '"Westliche Orientierung" im Asylrecht: Probleme der österreichischen VwGH-Rechtsprechung' ['Western Orientation' in Asylum Law: Problems of the Austrian VwGH Jurisdiction] (2019) 74 Zeitschrift für öffentliches Recht [Austrian Journal of Public Law] 349; Sussner (n 11).

> order to avoid the risk of persecution' …, this means that it must be possible for people with same-sex orientation … to be open about their sexual orientation in public and to admit to homosexual relationships without a resulting risk of persecution. Thus, the prohibition on discrimination at issue here is intended to ensure that people with same-sex orientation, are treated equally to heterosexual people, especially in societies in which heterosexual relationships are seen as the social norm.[75]

With this ruling, the Constitutional Court cemented two important clarifications. First, the Constitutional Court identified a breach of the prohibition on discrimination on the facts and thereby provided further clarification of the scope of an individual's right not to have to conceal or hide their sexuality in their country of origin. Secondly, the court explicitly referred to heterosexuality as a societal norm. In doing so, it extended the argument beyond an individual's right to identify and act in a certain way, and explicitly rejected the idea that countries in which a strict moral or religious code is enforced by law can provide a safe space for homosexuals. In this sense, *Iraq III* represents a shift away from privacy reasoning towards an acknowledgment of discriminatory power relations. In addition, the court clearly identified that there may be a systemic problem in heteronormative societies, such that restrictions on being out and proud will violate the prohibition on discrimination. Relevant discrimination could occur in countries where, for example, homosexuals are unable to talk about their same-sex partner or to start a family with this partner in the same way as heterosexuals, for fear of being persecuted. In this context, the possibility of being out and proud does not necessarily constitute things like holding hands in the street or (other) public displays of affection. In other words, after *Iraq III*, requiring discretion not only violates EU asylum law, but discriminates against homosexual applicants, in breach of the Austrian Constitution.

Meanwhile, both the Constitutional Court and the Supreme Administrative Court have stressed that requiring discretion is unlawful, referring to *X, Y, and Z* for this purpose.[76] In addition, both courts work with the expectation of an open expression of sexuality and reject (empirical) assumptions about individual discretion or restraint. Moreover, the Constitutional Court has not only rejected discretion reasoning, but has also seized this opportunity to develop its case law on discrimination and to provide some clarity on how to proceed after *X, Y, and Z*. Such clarification is especially required where, as the next section will show, discretion reasoning takes place more subtly and in instances where sociocultural and legal normality are intertwined.

3.2 Indirect discretion reasoning

Case law issued by the Federal Administrative Court contains rulings where discretion expectations are more often conveyed through other legal arguments or technicalities than through blunt discretion reasoning. These are more difficult to recognize. Such rulings are categorized below into four prevalent forms: the truth hypothesis, the mathematical approach, the IFA, and sexual binary.

[75] *Iraq III* (n 70) recital 3.2.

[76] VwGH 20 September 2018, Ra 2018/20/0043 (*VwGH Cameroon*).

3.2.1 The truth hypothesis and expectations of discretion

The so-called truth hypothesis is a common form of supportive reasoning and is applied by Austrian courts when asylum claims are deemed not credible.[77] Essentially, it involves the following considerations: (1) that, due to a lack of credibility, the submitted facts are regarded as irrelevant to the decision and the application must therefore be dismissed; or (2) alternatively, the application is rejected even if the claim is considered credible, as the submitted facts would not fulfil the requirements for the grant of refugee status. Thus, although the truth hypothesis reasoning is not necessarily linked to discretion reasoning, it seems to foster the discretion requirement and thus represents a form of indirect discretion reasoning.

The main reason for this link between the truth hypothesis and discretion reasoning appears to lie in the way truth hypotheses are applied in practice. In such cases, establishing which facts are deemed relevant for the decision is no longer based on the actual outcome of the asylum procedure.[78] Three problems can result from this. First, failure to comply with legal reasoning requirements burdens the quality of the body of case law. Secondly, in individual cases, abbreviated truth hypotheses are no longer recognized as viable alternative reasoning,[79] which undermines its intended function of supporting the decision. And finally – and this is pivotal here – abbreviated truth hypotheses prove to be sensitive to error with regard to the discretion requirement. This is illustrated, for example, by the tacit assumption that applicants will behave discreetly in their country of origin. In other words, decision makers are likely to expect discretion when applying truth hypotheses. Consequently, due to the lack of specific evidence, they usually end up unlawfully requiring it.

In 2014, the Supreme Administrative Court issued a key ruling on the truth hypothesis (*VwGH Truth Hypothesis*).[80] In this ruling, the court set minimum standards for applying this type of legal reasoning. According to the standards, truth hypotheses must be evidence-based, although under certain circumstances the reasoning may be shorter. Substantive arguments must, however, be made in each individual case. Hence, expecting discretion without very specific evidence almost inevitably leads to unlawfully requiring discretion. This is illustrated by a Federal Administrative Court ruling in the case of a Gambian national, who claimed that he believed himself to be homosexual and that he had had a sexual relationship with a man in exchange for payment.[81] He had fled his country of origin due to the police initiating investigations against him, since homosexual acts are illegal and can be prosecuted in the Gambia. The Federal Administrative Court rejected the claim as not credible. The court also ruled that the applicant would – if he were homosexually inclined – not act on his homosexuality, since he had not done so in his country of origin. Subsequently, the claimant filed a complaint and the Supreme Administrative Court overruled this judgment that alternatively relied on discretion reasoning.

[77] cf VwGH 21 October 2014, Ro 2014/03/0079; also VwGH 28 January 2014, Ra 2014/03/0038.

[78] cf VwGH 16 December 2014, Ra 2014/11/0095.

[79] ibid.

[80] VwGH 12 November 2014, Ra 2014/20/0069.

[81] VwGH 23 February 2016, Ra 2015/20/0161.

Ultimately, the truth hypothesis in itself is not a problem. The case law of the Supreme Administrative Court emphasizes that, if applied correctly, it is not linked to discretion reasoning. However, given its supportive function – and its succinctness, which makes it attractive in practice – applying the truth hypothesis requires particular sensitivity towards everyday perception and stereotypes, including the heteronormative idea of discretion. Furthermore, the truth hypothesis raises the question whether, and under what circumstances, it might be legitimate to expect discretion (without requiring it). The highest courts have so far not addressed the question (as formulated in part 2) as to how the law might deal with the fact that, while there is a right to express SOGI openly, there is certainly no obligation to do so. This will be examined further in part 4.

3.2.2 Mathematical discretion reasoning

In contrast to the truth hypothesis, assessing the risk of persecution from a mathematical point of view (the mathematical approach) in itself contradicts the Supreme Administrative Court case law. Where it is applied despite this, discretion reasoning also tends to appear more frequently. The mathematical approach essentially involves assessing the risk of persecution with precise mathematical measures, such as calculating a percentage risk. In Austria, the Supreme Administrative Court rejects such reasoning, as it does not adequately consider individual circumstances.[82] With regard to SOGI cases, it is important to note that the CJEU, in *X, Y, and Z*, apart from the ban on discretion reasoning, also ruled that the criminalization of homosexual acts can only be regarded as persecution within the meaning of article 9 of the Qualification Directive if custodial sentences are actually imposed. Thus, conviction statistics tend to play a significant role in such cases, which in turn can lead to a kind of mathematical discretion reasoning. This problem particularly affects applicants from countries with high population densities. One such State is Nigeria, as can be observed in *VfGH Nigeria I*.[83] In this case, the Constitutional Court not only overruled discretion reasoning, but it also stated that low numbers of convictions in the past did not justify the conclusion that there was an insufficient risk of persecution in the future (for an individual claimant). This illustrates how the ban on discretion reasoning challenges both sociocultural and legal normality. Nigeria is a very large country and claims are often rejected on the basis that there is an IFA, as well as a low rate of actual convictions. To avoid discretion reasoning, it may be necessary to assess such cases more carefully and, consequently, such arguments are met with increasing scepticism. For example, in a similar case to *VfGH Nigeria I*, the decision to grant refugee status was justified in the following way:

> Although it should be noted that the cited view of the Constitutional Court, that the importance of the size issue (only few convictions or assaults per year vis-à-vis approximately 4.5 to 15 million homosexuals in Nigeria!) for the establishment of 'significant probability' of a risk of persecution has been 'grossly misjudged', is not substantiated in more detail, it was against the background of the above-described legal opinion of the Constitutional Court in conjunction with the fact that the

[82] cf eg VwGH 2006/20/0771, dated 19 December 2007.

[83] See section 3.1 above.

> alleged sexual orientation of the complainant cannot be conclusively challenged, that the decision had to be made in accordance with the ruling.[84]

Especially with regard to the 'enforcement-centred' approach taken in *X, Y, and Z*,[85] decision makers now need to be sensitive to mathematical discretion reasoning.[86] The issues involved in mathematical approaches show how indirect discretion reasoning tends to intersect with legal normality, and how the breach of heteronormative normality can be linked to a breach of legal normality, such as the assumption that applicants have an IFA in Nigeria. In the case of mathematical discretion reasoning, both branches of reasoning are unlawful. Moreover, they can also reinforce one another. Mathematical approaches also prove to be susceptible to error by presupposing discretion as normality. The conclusion that applicants will not face a relevant risk of persecution presupposes – at least *prima facie* – that they will not draw the attention of State bodies or their personal environment to their SOGI. Discretion is not only expected, but is also unlawfully required.

To provide more nuanced reasoning, it needs to be appreciated that expressions of SOGI vary greatly at an individual level and, depending on the circumstances in the country of origin, can give rise to manifold risks of persecution. Regardless of their ban in Austria, mathematical approaches do not provide an adequate tool by which to assess individual risk. For example, a kiss between two women can be both an expression of affection and/or an act of activism (a kiss-in); it can lead to imprisonment in one State, whilst being tolerated or even welcome in another. If same-sex relationships are no longer prosecuted in a State, this does not mean that transsexual, intersexual, or queer persons are not still at risk. A lesbian applicant may face a completely different level of risk in her relationship with a cisgender partner than with a transgender partner. Even more fundamentally, decision makers will have to recognize that no closet is forever. There is always a risk of being outed and this is not only true for LGB people. For intersex people, for example, every need for medical treatment can entail the risk of being outed. In the case of a chosen closet, these risks must be assessed at an individual level. As Millbank puts it: 'there is no such thing as a complete and lifelong closet'.[87] Furthermore, as Hathaway and Pobjoy argue, the closet itself can constitute a form of persecution.[88]

3.2.3 Internal flight alternative and expectations of discretion

The IFA appears to be a melting pot for indirect discretion reasoning. It is a means developed by States to reject asylum claims (compare section 11 of the Austrian Asylum Act[89] and article 8 of the Qualification Directive), mainly building on the idea that refugee protection is subsidiary to protection by the State of origin. Accordingly, the

[84] BVwG 7 November 2014, W144 1401744-1. Referencing the VfGH ruling in this sense, see also eg BVwG 4 November 2016, W1251409093-1.

[85] Khan (n 5) 313.

[86] See also BVwG 2 December 2018, W195 219727-1 and conversely BVwG 29 October 2018, L516 2140298-1; BVwG 26 July 2019 W195 2215123-1; BVwG 26 July 2019 W195 2214413-1.

[87] Millbank (n 49) 506.

[88] See section 2.2 above.

[89] Federal Act Concerning the Granting of Asylum (Asylum Act 2005) Federal Law Gazette I 2017/84.

obligation to grant refugee status is triggered only where asylum seekers would not be able to live a life free from persecution in another part of their country of origin.[90] In rulings of the Federal Administrative Court, the IFA appears especially relevant in large countries with a high population density and no centralized system of population registration. In such cases, the IFA assessment is frequently based on the assumption that no one knows about the sexuality of an applicant in the relevant part of the country:

> Even if one believes his claim ..., one can assume that there is an internal relocation alternative. Since there is no functioning registration system in Nigeria, one can assume that his persecutors will not be able to locate him in another part of the country. Moreover, no one will endanger him because of his sexual orientation, since nothing is known in another part of Nigeria about the events with the foster father [that caused the flight].[91]

More or less openly, this reasoning (the truth hypothesis) assumes that the applicant will no longer act on their homosexuality. A similar case was based on the finding that in Nigeria, 'in the event of discreet behaviour, a safe life for homosexuals is possible in the large cities, such as Lagos and Abuja'.[92] Other decisions assume that 'rural communities [are] more tolerant of same-sex relationships and that a homosexual who would have problems in the city could move to rural areas'.[93] In other cases, a nationwide IFA is presumed, without further specification.[94] Legally, the IFA must fulfil the same protection standards as a refugee's place of origin (article 8 of the Qualification Directive). Consequently, expecting discretion with regard to an IFA can easily lead to unlawfully requiring discretion. In a relatively high number of cases, the argument for the existence of an IFA is connected to discretion reasoning. Here, it is important to increase awareness of this connection among decision makers.

At the same time, it must be emphasized that the line of Federal Administrative Court case law on this issue is not completely consistent. In other words, while the sociocultural normality of discretion and the legal normality of an IFA in Nigeria may indeed reinforce one another, a significant number of Nigerian SOGI claims are not rejected with reference to an IFA.[95] Other rulings have deliberately taken *X, Y, and Z* as their starting point

[90] See eg Jessica Schultz, 'The Internal Protection Alternative and Its Relation to Refugee Status' in Juss (ed) (n 5); Bríd Ní Ghráinne, 'The International Protection Alternative' in Costello, Foster, and McAdam (eds) (n 5).

[91] BVwG 11 December 2017, I411 2117193-1.

[92] BVwG 22 September 2014, I406 1319338-2; BVwG 3 June 2014, W105 1437848-1; BVwG 12 February 2014, W129 1400220-1.

[93] See eg BVwG 13 February 2018, I416 2176873-1; BVwG 30 April 2018, I416 2181300-1.

[94] See eg BVwG 10 January 2018, I411 2173792-1; BVwG 13 January 2018, I416 2174519-1; BVwG 22 January 2018, I414 2182838-1.

[95] See eg BVwG 22 January 2018, I403 2116531-1; BVwG 6 February 2018, I415 2173551; BVwG 9 March 2018, I412 2171240-1; BVwG 28 May 2018, I407 2196057-1; BVwG 27 July 2018, I411 2172404-1; BVwG 24 August 2018, I414 2186273-1; BVwG 3 September 2018, I408 2202623-1; BVwG 27 September 2018, I420 2185495-1; BVwG 18 October 2018, I411 2171439-1; BVwG 21 October 2018, I415 2158906-1.

and have proceeded on the assumption that the applicants express their SOGI openly.[96] Another possibility is to assess individual risk in relation to the IFA. A 2017 judgment took this approach, but the reasoning ended by unlawfully requiring discretion:

> It also follows from the complainant's submissions that the persecutory acts by third parties – which he claims befell him – (only) occurred when he engaged in sexual activities in a way that was (at least indirectly) accessible to the public. He … was able to have a relationship with his then boyfriend … for two years without anyone noticing. According to his own statements, [the] complainant [is] not open about his homosexuality in Austria either …, but [keeps] his alleged relationship with a Hungarian citizen (partially) secret from his friends in Austria. … The fact that the complainant is wanted by Kenyan federal authorities was not substantiated in the proceedings, which is why no nationwide persecution due to his homosexuality can be assumed. … Kenya has no central population register and no compulsory registration. Nairobi is a city of about 6.5 million inhabitants, in which a life in anonymity is possible in principle.[97]

The court's reasoning was based on the personal circumstances of the complainant, and apparently considered the risks that could arise in another part of the country were his homosexuality to become known. In the process, however, the court imposed two requirements of discretion. First, the court used the precise wording rejected by the Supreme Court in *VfGH Nigeria I*.[98] Secondly, the fact that the complainant hid his relationship with a man from parts of his social environment does not justify the conclusion – nor the requirement – that he would comprehensively hide his sexual orientation in the future.

3.2.4 Sexual binary and discretion

If judgments are based on a binary concept of sexuality that contrasts homosexuality and heterosexuality, they are the expression of a heteronormative pattern of thought. This can promote discretion reasoning. For example, bisexual applicants are capable of experiencing heterosexual desire, so is it reasonable to expect them not to act on their homosexual side, or at least to require them to do so discreetly? This kind of approach is rare in the Federal Administrative Court case law. In 2017, however, there was a ruling to this effect. The court pointed out that the applicant did not show any 'deeply rooted homosexuality' because, among other things, he had begun a relationship with a woman at the age of 17.[99] The wording used discloses a narrative of discretion reasoning. As early as 2011, the *Fleeing Homophobia* report pointed out that Austrian case law follows a logic of discretion when it comes to bisexuality.[100] Specifically, the

[96] BVwG 4 November 2014, W125 1409093; BVwG 4 November 2014, W125 1409093; BVwG 11 April 2016, W159 1433816-1.

[97] BVwG 12 September 2017, W103 2153628-1.

[98] See section 3.1 above.

[99] BVwG 17 November 2017, L525 2147152-1.

[100] Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims related to Sexual Orientation and Gender Identity in Europe* (Vrije Universiteit Amsterdam 2011) 41.

report mentions the following ruling of the Asylum Court (a precursor institution to the Federal Administrative Court):

> Overall, the complainant left an impression of unreliability at the oral hearing, although it was not doubted that he has had homosexual experiences. Nevertheless, one cannot assume an exclusive and so deeply rooted homosexual inclination that it is impossible for the complainant to enter into other, heterosexual, relationships and thus avoid the risk of persecution in Iran that would be relevant with regard to asylum.[101]

Both the 2017 ruling and the quoted Asylum Court ruling required a deeply rooted homosexuality. They thus strongly referenced heterosexuality as the norm (heteronormativity). As in the cases of direct discretion reasoning, this binary approach is rare and does not represent a significant line of case law.

4. CONCLUSION

This article aimed to contribute to the endeavour of 'queering' refugee law by examining the persistence of discretion reasoning in the area of SOGI, with reference to Austrian case law as an example. The findings can be summarized as follows: (1) The CJEU ruling in *X, Y, and Z* declared the application of discretion reasoning unlawful. Yet, it did not provide any indication of how the courts were to proceed without it. (2) Without clarity on how to proceed without discretion reasoning, there is a significant risk that State authorities and courts will revert to the concept of heteronormativity – including the idea of discretion – to fill the legal vacuum left by *X, Y, and Z*. Heteronormativity continues to shape our everyday understanding of what is normal and reasonable and can consequently influence the assessment of refugee status. (3) Sociocultural normality and legal normality tend to reinforce each other in everyday judicial practice. Judicial routine, in particular, carries the risk that normality is expected with regard to both the facts and the legal aspects of the case. This is particularly evident in cases where discretion is required in relation to an IFA in Nigeria. Furthermore, it is interesting to note that no case of discretion reasoning could be identified at the level of the highest courts. This might be because the highest courts do not have as high a caseload to manage and primarily focus on the legality of the lower court rulings that have been appealed.

Moreover, the findings in Austrian case law show that rulings that rely strongly on heteronormativity are rare. The case of *VfGH Iraq III* provides an example of such reasoning. Essentially, the lower Federal Administrative Court had deemed homosexuals safe in countries in which a strict moral or religious code is enforced by law, because people generally do not show affection in public. The Constitutional Court rejected this idea, moving beyond an understanding of sexuality in terms of act and identity, and ultimately identifying the problem as relating to perceptions of normality in heteronormative societies. Moreover, the court used the opportunity to develop its case law on discrimination by

[101] AsylGH 14 July 2009, E2 405.216-1/2009.

ruling that, in addition to violating EU asylum law, such discrimination against homosexual claimants constitutes a violation of the Austrian Constitution. In this case, the fact that a ruling based on blunt discretion reasoning was appealed to the higher courts ultimately led to more clarity on how to proceed after *X, Y, and Z* and also to a shift from privacy reasoning to an acknowledgment of discriminatory power relations. However, in most cases, discretion reasoning occurs more subtly or indirectly. Within the meaning of this article, such indirect discretion reasoning refers to cases in which the requirement of discretion is conveyed through other legal arguments or techniques, such as the IFA. In these cases, sociocultural and legal normality intersect, causing the line between the expectation of discretion in an empirical sense and the imposition of an unlawful (normative) requirement of discretion to become particularly thin. It becomes more difficult to identify that the judgment is based on unlawful discretion reasoning. For this reason, indirect discretion reasoning is perhaps more likely to be accepted without appeal, meaning that the judgments become final without their legality being reviewed by the higher courts.

So, what can be done in response to the persistence of discretion reasoning? First, it is important to note that refugee law itself can provide answers. If discretion reasoning lacks a legal basis in refugee law, it must be possible to assess refugee status without requiring discretion. Yet, to overcome the enduring practice of discretion reasoning effectively, it is clearly not enough to focus on legal technicalities. Against this background, this article approached the legal vacuum created by *X, Y, and Z* through the lens of the heteronormative societies in which it is filled. As a result, two key questions can be asked. (1) If it is unlawful to implicitly expect – and thus normatively require – discretion, does the abolition of discretion reasoning amount to an individual's right to express SOGI openly, and if so, to what extent? (2) Furthermore, if refugee law protects the open expression of SOGI, does this not automatically amount to an obligation to be out and proud? How, then, should cases be handled where applicants insist on living in the closet (a chosen closet)? The findings of the case review show that heteronormativity cannot be unlearned overnight. More importantly, they suggest that judicial routine is a key factor in discretion reasoning. To adjust routines, models of refugee status assessment involving the following questions could provide a useful tool to help decision makers ask themselves the right questions when assessing the claim of an LGBTIQ applicant:

- If applicants were to fully realize their SOGI in their country of origin, how would it be expressed?
- What risk of persecution would this expression entail in the country of origin?
- If applicants explicitly wish to (partially) hide their SOGI from the outside world, in the event of a return to their country of origin:
  - Would the applicants still express this wish if there were no threat of persecution in the country of origin?
  - Is there a significant risk of discovery? If so, is there a significant risk of persecution in the event of discovery?
  - Does the desire for secrecy or the perceived need for restraint itself amount to persecution?

These questions do not build on the idea that applicants are explicitly entitled to express their SOGI openly (question 1). They do, however, take the Austrian case law on discrimination as their starting point and expect an open expression of SOGI until expressly told otherwise. In the case of a chosen closet, both the risk of being discovered and the question whether the closet itself constitutes persecution[102] are addressed (question 2). Of course, this model can provide only a first step to establish refugee status determination without requirements of discretion. Future research will probably explore the further dynamics of discretion reasoning and effect more detailed solutions. However, the findings of this article suggest that we do not face an unsolvable dilemma. Bearing in mind Wessels' understanding that controversies around discretion reasoning are embedded in the refugee concept, it might indeed be observed that the ban on discretion reasoning in the area of SOGI may in future lead to a broader change in the understanding of refugee law. One area in which additional research may be indicated is that of patriarchal clothing norms. With regard to discretion reasoning itself, the objective is clear and pressing: discretion reasoning was declared unequivocally unlawful and thus ways must be found to overcome it. In the end, it is indeed that simple.

[102] See Hathaway and Pobjoy in section 2.2 above.