UNIVERSITY
OF OSLO

MASTER'S THESIS AUTUMN 2023

PROVING INNATE QUEERNESS:

THE EUROPEAN UNION'S CONFERRAL OF SOGIE ASYLUM SEEKERS

Halvor Hansen Løvlie

Political Science (master's 2 years)
120 credits
Word count: 27915

Department of Political Science
Faculty of Social Sciences

ABSTRACT

This thesis critically examines the Common European Asylum System's (CEAS) treatment of sexual orientation, gender identity, and/or gender expression (SOGIE) in asylum claims. Aligned with international refugee law, the CEAS, despite positive improvements, relies on a long established, essentialist logic requiring proof of particular social group membership. The ensuing credibility assessment, focused on proving innate LGBTQIA+ identity, has faced extensive criticism for, amongst other things, its heteronormativity and stereotyping. This paper argues that, upon closer inspection, the prior literature has pointed to mere contingent flaws of the regime. It then applies tools from political theory to highlight two intrinsic flaws, which, in turn, points to a more fundamental reimagining of the assessment strategy. These intrinsic flaws are the lack of internal epistemic value of an assessment of inherently indemonstrable properties, and the way in which the current iteration of the EUCA holds a priority of fairness that undermines what ought to be considered fundamental respect. In doing so, the paper highlights a fairness dilemma, and attempts to rectify a conflict of values that ought to be complimentary. Advocating for a well-functioning asylum system, the paper identifies intrinsic flaws in the EU credibility assessment, calling for a recalibration of values toward a risk-focused approach. This recalibration, recognizing intrinsic flaws, envisions a more respectful and effective CEAS, in line with refugee protection principles and international human rights.

ACKNOWLEDGEMENTS

I would like to extend my gratitude to all those whose support and insights have contributed to the completion of this paper.

A special acknowledgement goes out to my excellent supervisor Hallvard Hodne Sandven, for his expertise, support, and the vital discussions we have had throughout this endeavour. His guidance has been crucial for the quality of this project, and for that I am truly grateful.

Thank you to all my professors, both from the University of Oslo and my time at PSIA Sciences Po Paris, who has been an excellent source of inspiration and wisdom. Your guidance and encouragement have been instrumental in shaping the trajectory of my research. Similarly, I am indebted to the extended scholarly community, which have served as illuminating guides in navigating the complex terrain of political theory and global mobility, and for providing me with a language to understand and present matters dear to my heart.

To my fellow students and friends, thank you for thoughtful discussion and sharing in the litres of coffee consumed during frequent, but important breaks. Being able to test out ideas, and providing me with reasons to formulate my points in a more clear manner has helped immensely. Your perspectives and thoughts have undoubtably enriched my thesis. Without you, the solitary nature of my academic work would have been a very dull affair.

Lastly, I take full responsibility for any and all shortcomings and mistakes that may be present in this final, concluding iteration of my paper.

Halvor Løvlie,

November 2023, Oslo, Norway

TABLE OF CONTENTS

PRELUDE

In an age where the fundamental rights of marginalized communities are gaining international attention, the challenges faced by SOGIE (Sexual Orientation, Gender Identity and/or Expression) asylum seekers offer a stark reminder of a persisting culture of disbelief. Prominent world leaders, like former UK home secretary Suella Braverman have proposed controversial measures, reforming the UN Refugee Convention, removing the right to apply for asylum based on LGBTQIA+ persecution (Levin, 2023). Such proposals, reminiscent of policies and regulation proposed under the Trump administration (Homeland Security Department & Executive Office for Immigration Review, 2020), underscore a broader global trend of disbelief of asylum seekers. These officials echo a worrying dissident sentiment, and portray a deep cultural resistance, halting and reversing progress in an asylum regime that is already viewed as flawed. Their stance is indicative of a global pushback against progress, muddying and causing the discourse of basic human rights for queer individuals to not only stagnate, but be actively pushed back. In these turbulent waters, the European Union, on paper, appear as a safer haven for SOGIE asylum seekers, causing what I consider to be a moral obligation and responsibility concerning this growing group.

In spite of the fact that the European Union, in many ways, stands as a beacon of progress on the protection of LGBTQIA+ rights, the treatment of SOGIE asylum seekers cast a bleak shadow. In what I consider to be an attempt at providing a fair, foolproof assessment of deservedness, the EU have in many ways unintentionally compromised what ought to be considered fundamental respect and dignity. This shadow becomes particularly ominous when considering the global trends of conservatism, nationalism and anti-wokeness, especially when it comes to migration policy. The EU credibility assessment, its strategy to assess legitimacy of asylum claims, falls short on so many levels, and is widely criticised by scholars and activists. Findings shed light on essentialist and banal criteria, showcasing the EU's lack of understanding of the intersectionality of being a SOGIE migrant. What I will argue to be intrinsically flawed attempts at conferring innately indemonstrable traits permeate what ought to be a refuge for queer people worldwide. Scholars and activists rightly argue about the pressing issues surrounding the EU's treatment of SOGIE individuals. As we delve deeper, it becomes evident that we ought to question, critique and potentially reimagine the regime, so that it upholds principles of respect, dignity, and fairness for all.

PROVING INNATE QUEERNESS:

THE EUROPEAN UNION'S CONFERRAL OF SOGIE ASYLUM SEEKERS

1. INTRODUCTION

The Common European Asylum System (CEAS) considers, and interprets sexual orientation, gender identity and/or gender expression (SOGIE) as potential components of a "particular social group" (PSG), forming grounds for a well-founded fear of persecution (Council of European Union 2004; 2011). This is in line with the current international refugee regime, which widely considers such an interpretation of the 1951 Geneva Convention Relation to the Status of Refugees to be an accepted principle of international refugee law (International Commission of Jurists (ICJ), 2016, p. 1). This new regime, albeit considered a positive improvement, still adheres with the long established, rigid, essentialist logic of "proving" membership to a PSG (Koçak, 2022, p. 1). In order to authenticate, and correctly assess the membership of a SOGIE PSG, and their genuine well-founded fear of persecution, EU member states require the asylum seeker to prove their innate, and irreversible LGBTQIA+ identity, through deeply personal, and scrutinizing credibility assessments (Danisi et al. 2021: Held, 2022). This has led to the EU Credibility Assessment (EUCA) falling under heavy critique from migration and queer literature for its heteronormativity, eurocentrism, and stereotyped ideas about SOGIE migrants (ibid). I argue that this approach is not only morally wrong, but fundamentally broken in its approach.

Asylum claims in Europe, based on, and grounded in the applicants well-founded fear of persecution due to their sexual orientation, gender identity, or gender expression has increased, and is expected to continue to rise moving forward (ICJ, 2016; as cited in European Union Agency for Asylum (EUAA), 2022, p. 3). This is happening at the same time as a culture of disbelief covers European politics and discourse, making it potentially more difficult for SOGIE applicants to have their applications heard, and accepted in the near future (Danisi et al., 2021, chapter 4; Levin, 2023). The legal framework governing EU member state's credibility assessment is limited, and the Common European Asylum System (CEAS) is widely considered to be flawed, and ill fit for the task of assessing LGBTQIA+ identity (Danisi et al., 2021). EU member states, due to their position as some of the few states that recognize SOGIE status, and their capacity to take care of SOGIE migrants, ought to be considered to have a moral obligation to have a well-functioning asylum system, capable and willing to protect those arriving at their

borders (Vitikainen, 2020; Stemplowska, 2016). Liberal democracies are uniquely placed to facilitate LGBTQIA+ asylum seekers, and the EU and most of its member states are obliged to fulfil this purpose. There are 65 countries worldwide that criminalise same sex relations, 12 of which hold capital punishment jurisdiction in instances of same sex, consensual and private acts as of writing this paper (Human Dignity Trust, 2023). 14 countries explicitly criminalise gender identity and/or expression (ibid.), with many more actively persecuting and arresting trans people and non-cis identities on the basis of adjacent legislation or a lack of legal gender recognition (ILGA, 2019, as cited in EUAA, 2022, p. 3).

After an influx of refugees to the EU, during what was later infamously labelled the European migration crisis (Parekh, 2020, p. 1-24), an increased emphasis on securitization and migration scepticism discourse surrounding asylum seekers spread across the continent. During this time, little effort was put in place, and emphasis put on the protection and facilitation of SOGIE asylum seekers (Alessi et al., 2020, p. 15; Held, 2022, p. 1). While the number of SOGIE asylum claims in Europe is unknown, it seems likely that they represent a significant number of applications each year across the EU (Andrade et al., 2020, p. 1). The number has likely increased due to jurisdiction and social stigma relating to sexuality and gender in many of the countries from which migrants have fled from in the past decades (Carroll & Ramón Mendos, 2017).

Literature concerning the flawed assessment of SOGIE asylum claims have primarily been focused on what can be considered contingent flaws within the EU credibility assessment. On inspection, it is unclear whether this critique is successful at the level of principle and not just at the level of enforcement. The contributions of this paper show that the regime lacks justification at the level of principle: it is fundamentally, and not just superficially, unjust. The EUCA flaws can be divided into two different categories, (1) its *contingent* issues, solvable without fundamentally changing the assessment strategy and (2) *intrinsic* flaws, concerning fundamental issues with assessment itself. While the results of both contingent and intrinsic flaws in the assessment of SOGIE migrants might occasionally overlap, the grounds for these flaws differ. In fact, the general conclusions drawn, especially in migration scholarship is that a mere improvement of guidelines, tackling contingent issues, is the primary tool in remedying the unfair treatment of queer migrants. (Dustin & Ferreira, 2021). Some, if not all of these contingent issues could, given enough resources, oversight, and funding, be fixed. A defender of the EUCA could agree with most, if not all of the literature concerning the EUCA's unfair treatment of SOGIE applicants, and *still* be in favour of the underlying components and general

idea of the assessment. The EU could respond to this literature by stating that they will improve measures, funding, and education to ensure a fairer treatment of SOGIE migrants, without changing the EUCA. Improving these contingent flaws would be wonderful, but would not solve the intrinsic flaws with the system, which I argue to be the most vital to mend.

My research question is twofold. **(1)** Are there intrinsic flaws with the EU credibility assessment of SOGIE asylum seekers, *and* **(2)** in what ways, if any, could this regime be improved in light of these potential intrinsic issues?

The thesis will be structured as follows. I will start off with a thorough explanation of the term refugee, and asylum seeker, providing a necessary backdrop for the rest of the thesis. In this section, I will look at the EU credibility assessment, and the jurisdiction that guides decision makers in their assessment of SOGIE applicants. I will cover that despite the existence of directives and tools, provided by both the EU and human rights organizations, there is no comprehensive or explicit understanding of how EUCA should be executed. I then consider SOGIE asylum seekers, and the specific contingent challenges the decision maker, the SOGIE applicant, and the system, i.e., the EU, faces in the assessment of SOGIE claims of asylum. After covering what I consider to be the primary contingent flaws with the EUCA, I move on to what I argue to be intrinsic flaws with the regime. While doing so, I establish a reasonable defence and justification for what we ought to consider intrinsic flaws within the EUCA, namely a system based on luck egalitarian virtues, inspired by a lexical priority of fairness.

This brings us into our main normative discussion, the respect versus fairness dilemma. I further argue that in order to uncover victims of bad brute luck, which is an objective of luck egalitarianism, one has to confer inherently social categories. It seems apparent that there is a lack of intrinsic critique of the regime, and this paper intends to help fill that gap, by looking at the assessment of SOGIE migrants as a conferral of social categories, an inherently social process that attempts to track and simplify the world around us. This critique is deeper and more fundamental. Being aware of, and trying to mend the aforementioned failures of assessment, can fail to capture the intrinsic nature of these flaws – it is not possible to adequately and fairly assess SOGIE identity. In any attempt of credibility assessment, or *conferral* (Ásta, 2018), the authority needs to be aware that such a system is not fit for the purpose of granting someone refugee status, a measure that in some instances quite literally is a matter of life and death. I will provide evidence to the flaws intrinsic to the EUCA, which as a bare minimum should be flaws the CEAS should be aware of in its measures to improve the system, and ideally provide

evidence to re-evaluate or fundamentally change the EUCA. In approaching the EU credibility assessment in this manner, I highlight a fairness dilemma, referring to a value conflict, as a result of relational equality (Anderson, 1999; Wolff, 1998) that has led to a priority of fairness that undermines respect. An implication of what we can consider to be the EU's attempt at answering to, and accommodating fears of immigration, a rigid system has been built to keep the wrong people out, as opposed to let the right people in. Finally, in light of both contingent and intrinsic flaws, we discuss and attempt to achieve a necessary balance, a recalibration of sorts, of the values of fairness and respect, which ought to be considered not just a theoretical ideal but an urgent necessity for a humane and just asylum system.

2. METHODOLOGY

1.1. PURPOSE AND SCOPE OF THE PAPER

The aim of this paper is to assess the EU Common European Asylum System, particularly the EU Credibility Assessment. This paper will provide additional arguments that the EUCA has to undergo fundamental changes, shed light on intrinsic and contingent flaws and implications of the current system, and discuss the necessity to better balance egalitarian values in the assessment, and argue for a recalibration. In doing so, we are exclusively analysing the EUCA of people applying for asylum based on their sexual orientation and/or gender identity and/or expression. This particularly vulnerable group sheds light on flaws within the credibility assessment, and conferral of inherently indemonstrable properties.

The CEAS has long been subject to harsh critique (Danisi et al. 2021; Dustin & Held, 2018; Dustin & Ferreira, 2021). As mentioned in the introduction, upon closer examination, it's not clear whether the critique provided in prior literature and scholarship is intrinsically, and fundamentally valid, rather than just a critique of the application of EUCA, i.e., contingent. This distinction between what we ought to consider contingent and intrinsic is what separates our critique from the vast majority of literature on SOGIE asylum seekers. I believe this paper will contribute to the scholarship by applying novel normative theory and arguments to what has grown to become overwhelming critique of EUCA, providing a more fundamental, intrinsic critique to supplement ongoing discussions at the EU level and in academia, regarding policy, and the protection of SOGIE migrants.

While the primary objective of this paper is to provide explicitly normative arguments relating to the issue of state and supranational organizations assessment in the event of queer asylum seekers, we will also look at the EU and their expressed interest. In other words, given what the EU themselves are saying (X), they ought to do Y. When X is expressed and Y is not done, the critique of its absence is not only that they are doing something morally objectionable, but goes against their core values, and what they explicitly stand for, thereby exposing the EU's engagement in self-contradiction. This paper only focuses on the credibility assessment related to the EU asylum procedure. It does not cover credibility assessments in accelerated processes, appeals, follow-up applications, or procedures related to revoking, terminating, or refusing extension of international protection or national protection statuses[1] (nor does it apply to irregular protection schemes, like the temporary protection status of Ukrainian refugees).

1.2. RESEARCH METHODOLOGY

The research methodology used in this paper is twofold. Our primary methodological approach is an epistemic value test, as presented by Elizabeth Anderson (1995). This test concerns the basis of why an inquiry is conducted, and a belief held true. Epistemology can be understood as the study of knowledge, the things we hold true, why we hold these things true, and whether our knowledge is the results of cognitive success, or failure (Neta & Setup, 2020). Our epistemic test primarily concerns why we hold certain things true, or as true. Holding as true concerns situations where there is no ground to hold something true but acting "as if" serves a purpose other than acting in accordance with suspected truth (Ullmann-Margalit, et al., 2017).

Our epistemic test distinguishes between internal and external epistemic value.[2] The value refers to the reasons as to why something is held (as) true, as well as the objective, or goal of holding that belief (as) true (Ullmann-Margalit et al., 2017, p. 94-97). Differentiating between value-infused beliefs and "pure" academic ones is particularly relevant in feminist epistemology, and crucial in order to garner whether they should be considered to inhabit "[our] prestigious club of our corpus of beliefs" (Ullmann-Margalit, et al., 2017, p. 101). Internal

[1] This paper does also not cover the reception, and accommodation of SOGIE migrants who have been granted asylum and refugee status. For more information I would recommend Danisi et al. 2021, Alessi et al. 2020, Brown, 2014, and Held, 2022 for more information about the experiences of LGBTQIA+ people after they have been granted refugee status in the EU.

[2] Not to be confused with *internalist* (BonJour 1985, Conee and Feldman 2001 and others, as cited in Neta & Setup, 2020) and *externalist* (Conee and Feldman 2001, Greco in Greco and Feldman 2005 and others as cited in Neta & Setup, 2020) *epistemic justification*, which refers to what may justify cognitive successes that still fall short of knowledge.

epistemology revolves around the principles of truth and justification. The core values intrinsic to this approach prioritize the pursuit of theories and beliefs that are accurate, fruitful, clarifying,[3] consistent theories and beliefs that are broad in scope (Kuhn, 1977, p. 357). The overarching objective is to achieve unbiased knowledge, devoid of influences from contextual elements such as political or moral biases. The concern is that these external and contextual values shroud and interfere in our quest of genuine truths, and thus lead us further from the best position for getting reliable beliefs about the matter in question (Stroud, 2002, p. 25). Internal epistemic value will be in this text regarded as evidence for holding something true. Conversely, external epistemic values delve into how science's contextual parameters, like political or moral stances, steer and inform the inquiry or belief (Anderson, 1995, p. 28). Suspected "noise", that interferes with reality, hold value by serving a political or moral goal. In our case, the EU could theoretically be argued to have politically biased grounds to hold something *as* true, therefore prioritizing potential external epistemic values over internal ones.

I will not argue for a dichotomous model of epistemic evidence. I, in line with Anderson (1995, p. 52) believe in a cooperative model of epistemic value, and the judgement of the grounds for holding something (as) true. Regardless of the internal epistemic value, a normative consideration of suspected external epistemic value is necessary. This necessity is argued to be stronger if the internal epistemic value is low. In order to argue for, or against a normative judgement of the EU asylum regime, and its processing of people applying for asylum based on their sexual orientation, and/or gender identity, and/or expression, we will use reflective equilibrium. Reflective equilibrium is the most common and influential methodological approach in political theory, and refers to the attempt at examining and making our moral judgement on a specific issue be in accordance with our beliefs in similar cases and our moral judgements as a whole (Norman, 2020). For the purposes of this paper, we will provide a moral account of assessment of SOGIE identity, which will provide us with moral grounds to judge EUCA in a similar light. The normative judgement of an action or process will come after the epistemic value judgment, which means that reflective equilibrium and epistemic value work in tandem in this paper.

[3] I use the word "clarifying", as opposed to the word "simplistic", as this could confuse the reader. Kuhn (1973, p. 357) puts it this way "(…) it should be simple, bringing order to phenomena that in its absence would be individually isolated and, as a set, confused". I believe clarifying is a better choice, as an internal epistemic test ought to consider the clarifying ability of the credibility assessment, and not how simple it makes it.

1.3. EXISTING LITERATURE

There is an ever-growing, quite extensive body of literature concerning SOGIE asylum in Europe. The topic is interdisciplinary, and has garnered increased attention in both queer academia and migration studies in recent years (Dustin and Ferreira, 2021, p. 316). It seems apparent that the processing, assessment, and facilitation of SOGIE migrants in Europe highlights the flaws with CEAS and EUCA quite well. Still, the majority of research and literature covering the assessment of SOGIE claims conclude and operate within the contingent realm. While these contributions are vital for improving the EUCA of SOGIE asylum seekers, they often fail to analyse what I believe to be intrinsic flaws with the assessment. This research paper intends to help fill that research gap, contributing to a significantly smaller scholarship, and apply pressure on what I consider to be untapped weak points in the CEAS. What follows is a brief explanation of a selected few notable articles and research projects that outline and exemplify existing literature concerning SOGIE asylum in the European Union.

A big scholarly emphasis has been put on showcasing and examining the harms happening to SOGIE asylum seekers in the EUCA, particularly the unfair, and asymmetric treatment across member states, and the contingent harms related to an essentialist, eurocentric understanding of what it means to be, and the way sexual orientation, gender identity and gender expression is understood. Jansen & Spijkerboer (2011) criticize the CEAS and EUCA for the inconsistency and inadequacy of treatment across member states, highlighting below standard, stereotyped assessment, and in some cases human rights breaches in the processing of SOGIE applicants. Similarly, Dustin and Held (2018) illuminate the narrow and essentialist interpretations and understandings held by decision makers in the assessment of SOGIE identity in Germany and the UK, leading to inconsistent and unfair treatment across the two states. Dustin and Ferreira (2021) address the unfair outcomes of SOGIE asylum applications, advocating for an approach based on risk of persecution based on "SOGI[E]-specific Country of Origin Information", and thorough education of decision-makers, as opposed to focusing on whether or not the applicant is a member of the SOGIE-minority. Alessi et al. (2020), Held, (2022), Zisakou (2021), Koçak (2022) as well as many other academic contributions have similarly provided valuable insight into what I consider to be contingent issues of the EU assessment of LGBTQIA+ asylum seekers. On the ethics of migration, I primarily base my view of the field of migration and asylum on Serena Parekh (2020), emphasising the importance of a ensuring a minimum amount of human dignity while seeking refuge (ibid. p. 23), as well as Annamari Vitikainen (2020) and

Zofia Stemplowska (2016), and their argument for specific vulnerability of LGBTQIA+ migrants, and the case for the moral obligation and prioritization of SOGIE refugees.[4]

I have also consulted organizational reports to get a better understanding of recent developments, policy recommendations, and in-depth knowledge and understanding of the subject matter. These reports are also a source of written assessments of asylum seekers and judge statements, and therefore provide quotes and empirical evidence relevant to this paper. These reports are conducted by large research groups, with funding and direct access to national asylum authorities, government officials, judges, lawyers, and other stakeholders. Official guidelines and handbooks created to assist asylum officers have also been considered, and read to provide additional insight into the process of assessment of asylum seekers. In doing so, I bring together interdisciplinary contributions that prove invaluable in our attempt at critiquing both the contingent and intrinsic properties of the EUCA. Due to the fact that I have not conducted interviews myself, or have the capacity to conduct large scale research on the assessment of SOGIE asylum seekers, this literature provides necessary empirical evidence for both contingent, and what can be argued to be intrinsic flaws with EUCA.

1.4. Presuppositions, Clarifications and Limitations

The terms LGBTQIA+, *queer*[5] and SOGIE (minority) identity will be used interchangeably in this paper. These terms are operationalized to refer to people who identify as non-cis and/or non-hetero, which is why I believe these terms can be used to provide sentence variety. It is worth noting that the EU primarily uses the term LGBTI (De Groot, 2022; European Union Agency for Fundamental Rights, 2017), omitting the Q (Queer) and A (Asexual), as well as the plus symbol (referencing the existence of more identities within the concept). I have also opted to use the term SOGIE (Sexual Orientation, Gender Identity and Expression) as opposed to SOGI (Sexual Orientation and Gender Identity) as the explicit reference to expression is vital for the assessment of LGBTQIA+ asylum seekers. SOGI has in my experience been the most commonly used term by the EU to refer to asylum seekers claiming asylum based on a well-founded fear of persecution due to being a member of the LGBTQIA+ community. I have chosen to use the term SOGIE, as opposed to SOGIESC in this paper. SOGIESC notably adds

[4] Vitikainen (2020, p. 65) puts it this way: "(…) by prioritizing' I (Vitikainen) mean a process by which a state gives priority to refugees with LGBT status over non-LGBT refugees when choosing to admit only one, but not both refugees (…)". Read more about this in chapter 5.1.

[5] Queer has traditionally been a negative term, but has by a lot of people been reclaimed, and is now widely considered inclusive of diverse sexual orientation, gender identity and expression minorities. It serves as an umbrella term for people with minority SOGIE identities, and in some ways capture the intersectionality of LGBTQIA+ identities very well. I believe, and hope my use of the term is justified.

Sex Characteristics, referring to chromosomal, hormonal, and other biological aspects relating to differentiating between male and female. While the UNHCR and others have recognized and interpreted the ability to apply for asylum due to a well-founded fear of persecution due to their gender (UNHCR, 2016, p. 1), protecting particularly the needs of women and girls, this is not the group this paper focuses on, as they are not processed and assessed the same way SOGIE minority people are in the asylum procedure. I have therefore chosen not to use this more "inclusive" term, but rather the most accurate one for the purposes of this paper. All other terminology has been used in line with the Qualification Directive and other EU reports and bodies related to the field of migration, as well as terminology used by the UNHCR, with some notable exceptions.

I have, for the purposes of this paper grouped together all people applying for asylum based on SOGIE identity, into one homogeneous cluster despite undeniable differences and understandings within the cluster, in terms of treatment and acceptance in the different EU member states, the experiences they have endured in their country of origin, as well as values and sense of community and belonging under the wide *queer* umbrella. Still, this simplification ought to be considered advantageous for the purposes of this paper, due to the scope of my study. One might also argue that it is politically advantageous for members of the group itself. Even if they have differing experiences, one might think that they suffer oppression from similar sources (patriarchal gender expectations, heteronormativity etc.) and that they therefore are natural political allies. Lastly, it is seen as advantageous as it simplifies an already complex regulatory process, but not to the extent that it undermines or diminishes the actual findings of the paper. A more in-depth analysis on more specific identities and expressions within the cluster could be interesting, but would likely not result in a different conclusion, as the one in this paper is relevant to all attempts at assessment, and conferral of inherently indemonstrable properties. I will take all of this into account, and treat this issue with the upmost care and understanding throughout the paper, where treading carefully is both in the interest of internal epistemic value (Anderson, 1995) and for the vulnerable group.

It is also important to acknowledge that in the vast majority of SOGIE asylum literature, sexual orientation dominates over gender identity and expression. While the approaches often conclude and discuss aspects and approaches that are presented in a way that it is applicable to the whole cluster, I believe it is worth emphasising, at least in part, gender identity and expressions, and use these as examples, remedying scholarship weaknesses. We will therefore provide brief explorations into the assessment of the different gender identities and expressions

present in the cluster, in particular gender non-conformity and transgender asylum claims, in addition to sexual orientation.

3. Establishing Terms, Theories and Frameworks

3.1. What Constitutes a Refugee?

> A refugee is a person outside their country and unable, or unwilling to return due to a well-founded fear of persecution due to their race, nationality, religion, political opinion, or membership of a particular social group (United Nations, 1951, Art. 1).

This definition came in the aftermath of the second world war as states came to terms with the difficult task it was to protect the human rights of Jews, and other targeted groups when these people had lost their citizenship. Upholding basic human rights was difficult when there was no state to confront about the fact that their citizens were not treated right. A consensus arose (among the parties present) that all states have the moral obligation to aid individuals who do not have any other state protecting their rights, or may in fact be persecuted by the state obligated to aid them. This Refugee Convention, as well as The United Nations High Commissioner for Refugees were created in an attempt at putting this established moral responsibility into practice through international law (Parekh, 2020, p. 21).

In order to qualify as a refugee, one has to meet all requirements set out by the Refugee Convention. In other words, they have to be outside their country of origin, and state their claim based on one of the five categories laid out in the convention: A well-founded fear of persecution due to their race, nationality, religion, political opinion, or membership of a particular social group. This means that any other reasonable explanation as to why you might have fled, be it famine, war, or climate change, is traditionally not considered to be covered by the convention, making it harder to claim refugee status. There is great debate about whether the definition as defined in the Refugee convention is too narrow. While it leaves room for interpretation, and inclusion of groups not originally intended to be included, it does not explicitly protect the rights of everyone. Discussion, both in political philosophy and in human rights practice argue both for the broadening of the definition of a refugee (Shacknove, 1985, p. 274-284), and against any expansion, expressing reservations due to a concern of weakening the convention, as well as arguing that it would not necessarily always benefit the newly "incorporated refugees" (Ionesco, 2019; in Apap and du Perron de Revel, 2021, p. 4).

The convention traditionally covers people persecuted by their own state, but in recent years alternative non-state sources have been accepted as persecuting actors. Failed states, that allow for alternative sources of persecution, are states that for whatever reason does not have monopoly of force and violence, and therefore not able to sufficiently take care of and protect its own citizens (Parekh, 2020, p. 33). Traditionally the state has to be the persecuting actor, in other words Jews being massacred by the Nazis or Tutsis fleeing the Hutu regime in Rwanda. More recently, however, this new interpretation, has gained traction, leading to some countries accepting private actors as the persecuting actor in asylum applications (Cheng, 2011, p. 50-51). The EU considers non-state actors (as well as the State, and/or parties or organizations controlling the state or a substantial part of the territory of the State) as actors of persecution (Article 6 of Directive 2011/95/EU).

Refugees claim status after they have fled their country of origin, upon arrival or once they have arrived in another state. The state they arrive in is often a neighbouring country, referred to as a host country, and it is here the majority of refugees register with the UNHCR, beginning their processing, and eventual resettlement in a country willing to host them. More than 108 million, in other words 1 in 74 of the world population is forcibly displaced (UNHCR, 2022). Approximately only one percent of these are resettled from a refugee camp every year (Fitzgerald, 2019), exacerbating the fact that once one becomes a refugee, you remain one for an average of 17 years (UNHCR, 2020, p. 2). The majority of displaced persons are emigrants waiting for resettlement and refugee status. These people are in some ways more vulnerable than refugees, as they do not have the same legal status, and therefore do not qualify for the same protections.

3.2. What Constitutes an Asylum Seeker?

Asylum seekers are displaced persons who have not yet been recognized as a refugee, or have not yet legally been granted refugee status through the aforementioned UNCHCR process (Parekh, 2020, p. 33). While the majority of refugees apply for refugee status through the UNHCR, asylum seekers have opted to go directly to the country they wish to seek refuge in, in the hopes that the destination country will grant them refugee status upon arrival. It is then the destination country's obligation to hear out the asylum claimant, and either grant or deny asylum based on their interpreted definition of a refugee. Asylum seekers are not considered refugees until they have been granted asylum (ibid.). Asylum seekers who have had their asylum claim rejected are deported.

It is a human right to seek asylum (United Nations General Assembly, 1948, Article 14). In fact, this makes asylum seekers recipients of some of the strongest rights in international law. Asylum seekers have a human right to have their refugee claim heard by the state they arrive in, and cannot under any circumstances be sent back to their country of origin unless the state they have arrived in explicitly determine that the claimant does not have a well-founded fear of persecution, known as the non-refoulement principle (Parekh, 2020, p. 33). While asylum seekers enter states without authorization, referred to as *irregular entry*, this should not in any way negatively affect the assessment of their refugee claim (United Nations, 1951, Art. 31), despite continuous and in fact growing framing of asylum seekers as illegal immigrants (Guskin, 2013; Illegal Migration Act, 2023).

3.3. Credibility Assessment

Credibility, whether the applicant's statement and evidence ought to be accepted and believed by the authority in question, is a heavily contested and complex area of refugee law (UNHCR, 2013, p. 13). The EU credibility assessment (EUCA) plays a crucial role in the determination of refugee status, and international protection. This task is considered by some decision makers to be the most time consuming and difficult part of their work (ibid. p. 28). While there are instances of the credibility assessment being fairly straightforward, credibility is almost always a difficult task, especially in SOGIE status instances.

The EU credibility assessment is a multi-pronged approach, a tool to establish all facts that can be applied to the determination of asylum status. This evidence can be both oral and documentary, in other words including both statements of the applicant during asylum interview(s) and statements provided by family, witnesses or experts, as well as written, graphic, digital, or visual material (UNHCR, 2013, p. 27). Our primary interest for this paper is the interview of the applicant, as well as statements provided in writing, audio, and visual recordings. Therefore, the term "credibility assessment", while encompassing more than just the statements of the applicant, which is the primary, but not exclusive source of evidence, refers to the statements made by the applicant themselves ahead of, and during their interview, and the determining authorities', the decision makers', final decision. All asylum seekers must undergo a personal interview, provided they are legally capable (Regulation 604/2013 (Dublin III Regulation), (4.1.) (c)).

The primary tools, and guidance for EU decision makers are found in Directive 2013/32/EU *of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)* (Formerly 2005/85/EC), and Directive 2011/95/EU [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)*. In addition to these directives the UNHCR provides decision makers with *The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (2019), and their *Note on Burden and Standard of Proof* (1998).

Despite the existence of these directives and tools there is no comprehensive or explicit understanding of how the credibility assessment should be executed. There is no step-by-step instruction to guide decision-makers through the process of assessing the applicant's credibility from the EU. It is therefore far from a universally accepted way to process asylum applications across EU member states. In fact, Article 4 of Directive 2013/32/EU explicitly states that it is the duty of the Member state to be responsible for the assessment of the application. However, there are basic principles laid out in Directive 2011/95/EU and 2013/32/EU that every EU state has to follow, as well as an increasing amount of legal precedent and court cases clarifying the legality of assessment measures. What follows is a brief understanding of some of the relevant principles guiding EU member states' discretion when it comes to assessing asylum applications, and especially relevant features of the CEAS. More specific legal precedent and principles regarding applicants applying for asylum based on SOGIE identity will be covered later in the paper.

Both EU directives state that the member states must respect the fundamental rights, and ensures full respect for human dignity (UNHCR, 2013, p. 34). This entails that the member states cannot, in the attempt to assess refugee status, violate the human rights laid out in both international human rights law (Directive 2013/32/EU (45)), and the Charter of Fundamental Rights of the European Union (Directive 2011/95/EU (16)). Article 4 (2011/95/EU) states that the member state, and their decision-maker, the authority that assesses credibility must assess each application on an individual basis, and what kind of information the decision-maker should take into consideration when assessing the application. These include, but are not limited to, an understanding of the laws and regulations of the country of origin (Article 4(3a), Directive 2011/95/EU) and the background of the applicant (Article 4 (3c), Directive 2011/95/EU), such as their gender, religion, sexual orientation, group affiliation and so on. Article 4 (5) (ibid.)

states that even when claims cannot be properly substantiated, these claims should not need confirmation if certain conditions are met.[6]

Directive 2013/32/EU Article 8 (2(a)), and 10 (3(a)) ensures objectivity and impartiality regarding the examination and decisions of asylum applicants. These requirements are applied throughout the processing of the asylum seekers, and are reflected in national legislation (UNHCR, 2013, p. 37). This aspect is emphasised in the UNHCR Handbook (2019, para. 202), requiring the decision maker to have no prejudice, scepticism or refusal mindset when assessing each and every asylum seeker. The principle of the benefit of the doubt must always be recognised (ibid. para. 196; para. 203), due to the fact that a refugee is in a lot of cases unable to provide evidence, and prove every aspect of their case, thereby necessitating frequent benefit of the doubt. The European Court of Human Rights have acknowledged the need for the principle of *benefit of the doubt* in the EUCA regime (R.C. v. Sweden, no. 41827/07).

With all that in mind, the EU member-state appointed migration officer is left to their own devices when it comes to the actual assessment of the asylum claim (Koçak, 2022, p. 128). Refugee status assessment could be argued to be primarily dependent on two factors, the personal discretions of migration officials, and the behaviour of the applicant. I devote the next few chapters to an overview of the cognitive shortcomings and clearly contingent flaws of the EUCA, that the EU would likely themselves see removed, or have already precluded from an interpretation of their credibility assessment. There are numerous variables that the migration official is looking for, depending on how trained and knowledgeable the official is on these variables, all of which varies greatly from member-state to member-state, and from decision-maker to decision-maker. These issues, which will make up the first chunk of this paper's analysis are what I will refer to as *contingent* to the credibility assessment.

[6] These conditions being (1) [that] the applicant has made a genuine effort to substantiate [their] application; (2) all relevant elements at the applicants disposal have been submitted and a satisfactory explanation has been given regarding any lack of other relevant elements; (3) […] statements are found to be coherent and plausible and do not run counter to available […] information relevant to the applicant's case; (4) the applicant has applied for international protection at the earliest possible time, unless […] [they] can demonstrate good reason for not having done so; and the general credibility of the applicant has been established.

3.4. WHAT CONSTITUTES A SOGIE ASYLUM SEEKER?

Neither a well-founded fear of persecution owing to sexual orientation or gender identity and/or expression is explicitly mentioned in the refugee convention's definition of a refugee (United Nations, 1951, Art. 1). In spite of this, membership of a *particular social group* (referred to as PSG) has increasingly been interpreted as covering LGBTQIA+, or queer identity as a ground for refugee status. This interpretation has been confirmed by the UNHCR (UNHCR 2011; 2012) as well as ratified and acknowledged by both transnational and national legislation (Vitikainen, 2020, p. 66). Most importantly for the purposes of this paper however, the European Union have ratified and confirmed that LGBTQIA+ people ought to be considered members of a PSG (Council of the European Union 2004; 2011), and therefore, in theory, implies that queer asylum seekers can apply and receive refugee status based on a *well-founded fear of persecution owing to their* sexual orientation, and/or gender identity and expression in the EU. Some EU Member states, namely Portugal and Spain, have even explicitly added gender identity as a ground for persecution in national legislation, while other countries, like Austria and (former EU member state) the UK have included it as a persecution ground in policy documents (Jansen & Spijkerboer, 2011, p. 7).

According to EU Directive 2011/95 III, Article 10.1 membership of a particular social group is only considered if two requirements are met. First of all, the members of the group in question have to share innate characteristics, or have a common background that is unchangeable and irreversible, or have a shared belief or characteristic so fundamental to their identity that one cannot force that person to renounce it. If these requirements are met by the applicant, the group that they are claiming to be a PSG has to be perceived as being so different in their country of origin, that the group is considered a "distinct identity" (Directive 2011/95/EU, III, Article 10.1). It is also worth noting that this directive allows for EU member states that have not yet implemented laws protecting the rights of queer identities, such as trans, or non-binary peoples, to disregard these claims. Member states considering certain acts and/or identities criminal, or non-existent according to national law are not to consider applications based on, or of that nature. For instance, Hungary is permitted to not accept claims made based on the applicants' well-founded fear of persecution due to them being transgender, because transgender people are not recognised in certain EU member states, such as Hungary, Bulgaria, Romania, Czech

Republic, and Latvia (Equaldex, 2023a).[7] Only two EU countries, Denmark, and Germany grant legal recognition of non-binary or third gender identities (Equaldex, 2023b).

One might reasonably argue that these inconsistencies points to a narrow understanding of SOGIE asylum-seekers, both in convention, and EU regulation, as well as to the flawed authority of the EU in their attempt at battling asymmetrical and bigoted interpretations of their directives, and provide arguments to unify the approach, by more clearly defining their directives, restricting member state sovereignty and their ability to handle their migrants the way they see fit. The last point might be seen as drastic, considering the EUs expressed ambition to be a union of "self-determining states", where the incorporation in member state regulations and laws is generally constructed permissively. I will later argue that this interpretation is still valid, as we ought to prioritize a liberal understanding of human rights, as opposed to an interest in self-governance that denies these freedoms.

4. CHALLENGES AND THE PRESUMED REASONS FOR HARM IN THE EUCA

There have been considerable attempts at uncovering the shortcomings in the credibility of asylum seekers arriving in EU, in particular both the applicants' individual and contextual circumstances, as well as the factors that affect the decision-maker. This research has been conducted by both academic researchers (Dustin & Ferreira, 2021; Jansen & Spijkerboer, 2011; Dustin & Held, 2018; Zisakou, 2021) as well as directly funded by and/or published by the European Union (UNHCR, 2013; European Union Agency for Asylum, 2023). There is therefore extensive literature on the "cognitive" imperfections and flaws of EUCA. The arguments presented in these papers are vital to our critique, but what differentiates this paper from the aforementioned is the way these arguments are used in our normative evaluation of EUCA, as well as our attempt at looking at intrinsic flaws. Our critique is deeper: it is not just that there are cognitive imperfections in humans, and contingent flaws with the system - it is that it is not possible to adequately and fairly allocate SOGIE status, and any attempt at such highlights a priority of fairness that undermines respect.

Nevertheless, it is important to provide the reader with an explanation of the harms happening to SOGIE applicants, and why these harms take place, referring broadly to both the applicant and decision-makers' individual and contextual circumstances. Most decisions are made under

[7] Bosnia and Herzegovina, Czech Republic, Georgia, Kosovo, Latvia, Moldova, Montenegro, North Macedonia, and Romania have recognized the right to change your legal gender, but requires surgery, otherwise it is considered illegal. Changing your legal gender is considered illegal no matter what in Bulgaria and Hungary.

conditions of uncertainty, but these uncertainties are especially apparent, and illuminated in the case of SOGIE identity EUCA. We begin by taking a look at the applicants' and the decision-makers' imperfections before an explanation of the harms happening to SOGIE people in the EUCA as a result of these flaws. In this section there will be more emphasis on insensitive questioning, illegal tests, and less emphasis on generalized and stereotyped views, as this is covered more in depth after our critique and explanation of the conferralist framework (Chapter 7.2.1.). That being said, stereotyped, eurocentric, essentialist views of LGBTQIA+ inhabits the grey area between the contingent and the intrinsic, as they at least to an extent could be fixed, without the whole system having to change. The reason why this is covered later is because I find them to be a clear and direct result of what I consider to be intrinsic flaws, and is therefore better suited to that section, yet it is important to remember that stereotypes are contingent, and covered extensively in prior literature.

4.1. The Applicant

SOGIE applicants are required to provide all relevant facts and documentation, past and present to substantiate their asylum application, and the way in which they cooperate with the decision-maker and state authorities plays a huge role in their assessment for refugee status. In SOGIE cases, a lot of emphasis is put on the background of the applicant, and their experience of inhabiting their PSG back in their country of origin. Due to the traumatic nature of a lot of these experiences and memories, many people struggle with retrieving these moments, and recalling them with the accuracy required in EUCA (Conway, M, and Holmes, E. 2008, as cited in UNHCR, 2013, p. 55) which can have damaging effects on the assessment of their claim. SOGIE asylum seekers often display symptoms of avoidance and disassociation, both deliberate and non-deliberate due to the traumatic nature of the memory (ibid. p. 62). This, coupled with the fact that they might have other reasons[8] as to why they may have a hard time disclosing traumatic events in general may explain why they at times might be vague in their recollection, omit relevant information, or flat out refuse to answer questions by the decision-maker. Because of this, inconsistencies with regard to the applicants retelling of the story, and material facts do not necessarily undermine the credibility according to leading human rights experts, tribunals, and committees (ibid. p. 65).

Due to traumatic experiences and a fundamental fear and lack of trust concerning state

[8] An in depth review of the limits and variations of human memory can be found in Chapter 3.2.1. in UNHCR Beyond Proof: Credibility Assessment in EU Asylum Systems (2013, P. 57-65)

authorities in their country of origin, SOGIE claimants may have a difficult time trusting vis-à-vis any authority, and may find it hard to disclose personal information and relevant facts (UNHCR, 2019, para. 198, Herlihy & Turner, 2009, p. 174, as cited in UNHCR, 2013, p. 65). SOGIE applicants may also fear that disclosing and documenting their sexual orientation, gender identity and/or gender expression may negatively impact relations with, or cause reprisals from their communities and families (UNCHR, 2012, para. 63). Stigma and shame play a huge role in the applicant's assessment, and the way in which they may choose to disclose information to authorities. Applicants from non-tolerant, anti-queer countries and communities more often have particular difficulties coming to terms with their SOGIE identity, making it even more difficult to provide evidence and prove their identity (ibid.), often not disclosed on initial assessment (UNHCR, 2013, p. 71). It could be considered unfair to expect SOGIE applicants to confidently and properly answer questions about their identity, if that identity is something they have had to hide in their country of origin (Jansen and Spijkerboer 2011, p. 36). The shame and stigma in SOGIE asylum seekers will prove important in the analysis and discussion of intrinsic flaws later in this paper, but for now it is important to note that these particular difficulties are acknowledged by international and national jurisprudence, as well as in judicial and national policy guidance (UNHCR, 2013, p. 73).

4.2. DECISION-MAKER

Just as the applicant, the decision-maker, the given authority that assesses the asylum seeker, is influenced by a lot of factors in relation to the way they act, assess, and decide whether to grant or deny refugee status. In this section specifically, I will be looking at the flaws, both human and institutional, that are primarily tied to the decision-maker alone, i.e., their own individual and contextual circumstances, their state of mind, their level of stress and the repetitive nature of their task. As a general rule, the decision maker cannot have a refusal mind set, or assess credibility prior to facts being presented (UNHCR, 2013, p. 77). This is especially important due to the fact that many people tasked with assessing asylum seekers happen to be working in political, institutional, and societal environments that emphasise preventing irregular immigration, and the importance of making sure that no one abuses, and submit false claims to the immigration system (ibid. p. 78), emphasised by the EU (Council of the European Union, 2010, p. 32). This has led to some decision makers expressing the view that their primary task is to keep the gates closed, as opposed to providing protection and upholding human rights, as well as the sentiment that the majority of asylum seekers are economic migrants, undeserving

of protection (UNHCR, 2013, p. 78). Some NGOs and asylum claimants have even argued that decision-makers are given quotas for acceptance and refusal, distorting evidence, and asking easily misunderstood questions in order to deny refugee status (Danisi et al., 2021, p. 322-323). As an example, German decision-makers undermined a SOGIE applicant's credibility due to the fact that they had not participated in "CSD" (Christopher Street Day), referring to the German Pride parade. The applicant was unfamiliar with "CSD", answering that they had never attended such an event, which was later used against them, even though they had attended pride events before (ibid. p. 312).

Even in instances where this is not the case, issues related to the repetitive nature of assessment, increased stress and emotional detachment are common amongst decision makers. This could lead to the decision maker not assessing each applicant individually, as stated as a requirement in Article 4 (2011/95/EU), due to the intentional or unintentional grouping of asylum seekers into predetermined categories and having prejudgement of their assessment based on their category (Herlihy & Turne, 2009, p. 191). The trauma experienced by the applicant can mentally scar and affect the decision-maker, which can compromise their impartiality, but also lead to emotional detachment, disbelief, and cynicism (UNHCR, 2013, p. 80). These issues may impact the decision-maker's ability to properly assess the applicant in a fair manner. All of these issues, as well as the ones that soon follow, is severely exacerbated by the fact that the EUCA is severely underfunded, lacking necessary resources, and logistics, as well as a lack of sufficient education (Danisi et al., 2021, p. 324).

4.3. THE EUCA HARM

What follows is an overview of some of the flaws I believe to be present in the assessment of SOGIE asylum seekers, primarily focusing on the ones that are mostly, if not completely contingent, meaning that in an idealised world, with enough resources and oversight, could be improved immensely. One of the contingent issues related to EUCA of SOGIE applicants is the lack of proper information, sufficient communication, and the funding of legal counsel. It is too often the case that SOGIE people fleeing their country of origin in part due to their identity are unaware of the fact that they can apply for asylum based on their SOGIE status (Andrade et al., 2020, p. 31). During the asylum procedure, one survey showed that only 54% of applicants had a legal advisor or representative, in some EU member states legal aid is not even available during the initial claim to asylum, and in some cases do not allow lawyers to be present during the interview (Danisi et al., 2021, p. 192-193). Even when legal advice and representation is

present, the quality is not always adequate (ibid. p. 194). Communication between the lawyer or legal counsel (who is not always present, or even allowed) and the applicant is another concern. Breaking down barriers takes time, especially in cases where the applicant has prior difficulties trusting authority (Herlihy & Turner, 2009, p. 174, as cited in UNHCR, 2013, p. 65), or a hard time expressing and openly discussing their sexual orientation, gender identity and/or gender expression (UNCHR, 2012, para. 63; Jansen and Spijkerboer 2011, p. 36).

4.3.1. Interpretation and Trust

In some cases, the communication between the parties requires an interpreter, which while a necessary component, can prove detrimental or damaging to the applicant's assessment. The access to an interpreter is granted through Article 12(1) (b) and Article 15 (Directive 2013/32/EU), referring to access to an interpreter both for the submitting of the case, as well as the interview and assessment. There are primarily two issues with interpreters in SOGIE claims, one concerning language, both what we can consider to be translation related, and what is considered to be SOGIE specific interpretations, and one concerning the unwillingness to help, and trust between the applicant and their interpreter. It is also worth noting that in spite of the legal recognition and requirement to have interpreters present, this is according to one survey not the reality for more than a quarter of applicants (27% did not have an interpreter[9]) (Danisi et al., 2021, p. 241), with less than half of the recipients being happy with the service (ibid.).

The training and selection process of interpreters is really important in EUCA. The ability to accurately translate the applicants' story in a professional and accurate manner is crucial in instances where the applicant does not speak the same language as the decision maker. It is therefore worrying that a lot of interpreters are not qualified, and are not required by the state to pass examinations or tests before representing the applicants, with no quality control (The Asylum Information Database, 2018, p. 25, Danisi et al., 2021, p. 240-247). There are instances where there is no one available who can translate a certain language, leaving the applicant without an interpreter (ibid., p. 242), poor translations in court (Hesse, 2019, as cited in ibid.), inability to understand accents and languages to a satisfactory level (Andrade et al., 2020, p. 21), and even instances where the interpreter has stopped the interview themselves due to the

[9] It is possible that they did not request one, which could make this particular figure a little misleading. However, the question that remains in those cases is whether they were informed about their right to have one present: if they were not informed about their rights, then they can hardly have been said to consent to not have an interpreter present. This question is highly relevant, as the information provided to the applicant about several key aspects of EUCA have not always been communicated well (Danisi et al., 2021, Chapter 6.2.).

fact that they are unable to speak English adequately (Danisi et al., 2021, p. 244). Interpreters have repeatedly been shown to not be fit to represent SOGIE asylum seekers, due to the fact that they themselves find it difficult to understand, accept and translate their stories (Andrade et al., 2020, p. 21). Previous research has shown that particularly when intimate, subcultural, i.e., queer terms are used, the interpreter has a more difficult time doing their job (Hübner, 2016, p. 250, as cited in Danisi et al., 2021, p. 244). There have been examples of interpreters representing gay asylum seekers who were not familiar with the term homosexual/gay in neither English, nor Arabic (ibid.). The interpreter can also in some cases be considered homophobic, or believe SOGIE identities are sinful (Andrade et al., 2020, p. 21). Both an inability to properly communicate and translate the asylum seekers' story, as well as prejudice amongst interpreters has increasingly been raised in literature (ibid.), which is crucial, as the interpreter's role is immensely important, especially in the case of SOGIE applicants.

4.3.2. Medical Examination and Psychological tests

In several EU member states[10] both psychological and medical tests have been performed on SOGIE applicants in order to establish, or provide further proof as to whether they are legitimate members of their PSG or not (Jansen & Spijkerboer, 2011, p. 50). This is despite the fact that neither variations of sexual orientations, nor gender identities and expressions should be considered medical or psychological conditions. The Council of Europe's High Commissioner for Human Rights has acknowledged this, and considers those kinds of classifications as obstacles of the full enjoyment of human rights (2009, p. 6). As I will argue, SOGIE identity ought to be considered a self-identification, and not something that can be proven by medical tests and interviews.

Compulsory medical and psychological interventions are considered violations of the right to privacy, according to The European Court of Human Rights (Appl. 8278/78, Article 8), and examinations, unless strictly proportionate and necessary, equally fall in under the right to privacy (The European Court of Human Rights, 31534/96). I would argue that in the case of SOGIE applicants, whether or not the applicant themselves request medical tests, and whether or not the applicant is granted the ability to give consent, it still ought to be considered wrong. This is because (1) SOGIE identities are not valid medical or psychological categories, and are not illuminated through testing, and (2) the pressure to undergo these tests due to a legitimate

[10] Notably Austria, Bulgaria, Czechia, Germany, Hungary, Poland, Romania, and Slovakia (Jansen & Spijkerboer, 2011, p. 49)

fear of not getting assessed correctly, either willingly or coercively, is high due to the possibility of being sent back to the country that persecutes them.

In spite of this, both Hungary and Bulgaria have had state-requested medical tests, and Germany, Austria, Romania, and Poland have accepted requests to be medically evaluated in the EUCA (Jansen & Spijkerboer, 2011). For instance, both Rorschach test and Szondi psychological tests have reportedly been conducted in Hungary and Bulgaria (ibid., p. 50) in order to ascertain the sexual orientation of SOGIE applicants. These tests have been conducted in most cases, except for when the applicant is a gay man, or a trans woman conducting and expressing themselves in traditionally feminine ways (ibid.). Gender identity, particularly in cases where the applicant has gone through medical operations (Austrian Federal Asylum Review Board, 2004, as cited in ibid. p. 51), have been supported by medical documents, and used as evidence of SOGIE identity. In the Netherlands, a medical evaluation concluding with "serious gender identity disorder" was used as evidence to support an asylum application (Dutch Regional Court, 2009, as cited in ibid. p. 52).

Deeply personal, and intrusive sexual tests have been requested and performed by EU member-states in the attempt at discerning SOGIE status. Phallometry (for men, and less commonly used vaginal photoplethysmography for women (Jansen & Spijkerboer, 2011, p. 52)), a test measuring blood flow to and arousal of genitals in response to presentation of both homosexual and heterosexual sexual stimuli, i.e., pornography (Bickle et al., 2021) have infamously been used to establish, or disregard homosexuality in SOGIE asylum seekers by EU member states (Jansen & Spijkerboer, 2011, p. 52).[11] The test is more commonly, although equally controversial, applied to sex offenders and in relation to paedophilia (Purcell et al., 2015). Although the test was only part of the examination, it carried weight in the final assessment of applicants, and was officially stopped in the EU for the purposes of detecting SOGIE identities in 2009. Phallometry arguably violates Article 3 and 8 in the European Convention on Human rights (Jansen & Spijkerboer, 2011, p. 52), and serves as an example of the length's authorities are willing to go in order to establish SOGIE status, and detect illegitimate claims.

Similarly, detailed explicit sexual questions are a prevalent practice amongst EU decision-makers (Jansen & Spijkerboer, 2011, p. 55). These range from asking about number of sex partners, detailed recollection of sexual encounters, whether the applicant is more passive or

[11] Particularly in the Czech Republic and Slovakia (Jansen & Spijkerboer, 2011, p. 52)

active during sex, requests to log onto gay social networks to analyse their activity on the platforms, questions about whether they (the applicant) thought they had psychological problems and had consulted a doctor about their supposed "illness" (sexual orientation) and whether their homosexual activity was paid for, i.e., sex work. Instances where SOGIE applicants have provided video evidence of their sexual activity in order to prove their SOGIE status have been accepted by decision makers in the past (Advocate General Sharpston, 2014, para. 66 & 91). Pornographic documentation was for instance increasingly used as shortcut documentation for sexual orientation claims in male applicants in the UK (Lewis, 2014, p. 963). EU member states accepting video evidence of sexual acts "proving" SOGIE identity, is considered degrading, and has since been considered precluded from a reasonable understanding of the EUCA by authorities, and in violation of Article 3 and 7 of the Charter of Fundamental Rights of the European Union (ibid; Judgement of the Court, 2014, para. 73). Medical and psychological evidence has largely been less prevalent in recent years, due to the Court of Justice of the European Union precluding these from the list of substantiative evidence, as it undermines the dignity and privacy of the applicants (Danisi et al., 2021, p. 291).

5. Our Puzzle – Respect Versus Fairness Vol. 1

Are these tests, and the essentialist understanding of SOGIE applications a necessary evil? Would the system be just if it simply had more resources, and if the contingent flaws, would be solved? How far should EU authority go, what measures and means are decision-makers allowed to, and required to do, in the attempt at providing a "fair" asylum regime, where only "genuine" applications are accepted, and no one is able to abuse the system?

5.1. Intersectionality, and the Prioritization of SOGIE Applicants

It is a presupposition that vulnerability ought to play a part in the assessment and eventual processing of queer asylum seekers. As mentioned in the introduction, I believe we ought to consider SOGIE asylum seekers a particularly vulnerable group, and that (most) EU member states have a moral obligation to admit and prioritize[12] people applying for asylum based on their SOGIE status. There are two reasons as to why I believe this is the case. The first being the intersectionality of SOGIE asylum seekers (Jenkins, 2019; Danisi et al., 2021), and the second being the EUs position as a potential safe haven, compared to other states, who might

[12] See footnote 4.

not have legislation, or societies able or willing to protect the rights of SOGIE migrants (Vitikainen, 2020). For the purposes of my argument, I will argue that the EU has a moral obligation to admit SOGIE applicants (ibid.; Stemplowska, 2016).

Intersectionality refers to the idea that different dimensions of oppression are not additive, meaning that they do not simply stack on top of each other, but rather interact in complex ways with each other, creating new dimensions of oppression all together (Jenkins, 2019, p. 264). As the concept stems from Black feminist thought (Combahee River Collective, 1986; Crenshaw 1989, 1991, as cited in ibid.) the term is often attributed to, and exemplified as black women, and the differential treatment and oppression they experience as opposed to white women. This "compounded vulnerability" (Timmer, 2013, as cited in Danisi et al., 2021, p. 63) applies to SOGIE claimants as well. The compounded vulnerability refers to the higher risk of human rights violations, discrimination, and oppression owing to the intersectional properties SOGIE asylum seekers have (their sexual orientation, gender identity, gender expression, race, religion, disabilities, cultural background and crucially their refugeeness), especially in the context of EU reception and facilitation of SOGIE asylum seekers, and their credibility assessment (in particular the asylum interview). The intersectional aspects of SOGIE asylum seekers are both non-additive and non-separable. Stating that oppression is non-additive relates to the idea that we cannot understand the oppression of a SOGIE applicant, for instance a transsexual asylum seeker, simply by adding together general claims about transgender-based oppression, oppression relating to them being an asylum seeker, and oppression owing to the fact that they came from their country of origin, but rather a unique intersectional dimension of oppression.

The non-separable aspect of intersectionality relates to the fact that oppression cannot be neatly separated to explain why something has happened. In other words, a qualification of the sufficient level of vulnerability of a trans woman is not because of her being "trans", or her being an "asylum seeker", or her being "black" etc., but rather the culmination of all aspects, leading to the conclusion that they are to be considered vulnerable. Similarly, these intersectional aspects, such as the cultural and family background, their race, religion, nationality and so on, combined with their SOGIE identity, ought to be a priority when teaching and training decision makers, and a primary focus for trained decision makers when assessing SOGIE asylum seekers. In some cases, one could argue that qualifying SOGIE asylum seekers as particularly vulnerable could lower the threshold for degrading and discriminatory evidence-seeking, and treatment in the hopes of recognising refugee status (Brandl and Czech, 2015, as cited in Danisi et al., 2021, p. 63). At the very least, one can expect qualifying SOGIE asylum

seekers as particularly vulnerable due to, in part, their intersectional oppression gives incentive to EU decision makers to prioritize an accurate processing of this particular group.

I would also argue that the EU represents a group of nations that have a particular moral obligation to accept SOGIE asylum seekers. While all asylum claimants who have grounds, and sufficient evidence and reasons to be granted asylum always should be granted asylum, and therefore a particular obligation seems odd, if not morally objectionable, obligation in this regard refers to the case where an EU member state using its localized power, only admits and accepts a certain amount of asylum seekers, could be argued to have an obligation to prioritize the processing of applicants applying based on SOGIE. This obligation is also argued to be due to the EU having a duty to take up the slack when other states are not doing their part (Stemplowska, 2016, p. 604). No one should be denied because they are not a SOGIE minority, and no-one should be granted simply because they are a SOGIE minority. The granting and refusal of asylum seekers should only be based on whether their claim, whether that be a claim based on political persecution, or persecution based on SOGIE PSG, etc., is valid and sufficient for refugee status according to the decision maker. I take it that EU member states, particularly member states that have legislation protecting LGBTQIA+ peoples, and culture and communities that accommodates LGBTQIA+ people, have on some level a moral responsibility to take particular care for SOGIE applications. This is because western liberal democracies are positioned well to protect LGBTQIA+ people within their borders (Vitikainen, 2020, p. 76). While not all EU member states ought to be considered liberal democracies, they are still, due to a transnational obligation to incorporate EU legislation into their national laws, as well as increased external pressure to follow EU norms and social improvements, better positioned than other states.

I believe the compounded vulnerability and moral obligation could be argued to potentially allow the EU to justify their "at all costs" approach to assess legitimate SOGIE applicants. This is what I believe the EU is attempting to do with the EUCA, and their attempt could be argued to be in line with luck egalitarianism. This process of distinguishing fake from genuine could be argued to only be possible through *conferral*. Conferralist, or conferralism as used in this paper refers to the process of assigning social categories upon an individual based on the assumption that they inhabit characteristics and properties that are expected by the conferrer to be present in most, if not all people belonging to that particular social category (Asta, 2018; Jenkins, 2019). The conferrer can be represented by an individual, or a system, and the results of their conferral, or assignment of social category, will impact the lives of the conferred. As I

will explain more thoroughly below, this paper presupposes that this mechanism is present in all people, and in all social settings, and that this mechanism both explains the process of EUCA, could serve as a possible justification of the regime, as well as providing us with the first intrinsic flaw.

5.2. LUCK EGALITARIANISM – THE EXTREME CONFERRALIST

Egalitarian theories presuppose that, when some individuals are worse off than others, then this inequality could on some level be intrinsically wrong (Arneson, 2000, p. 340). In other words, (1) where there is inequality of resources, welfare, or capabilities, depending on the egalitarian theory in question, then (2) a redistribution of resources ought to be favoured or needed to rectify that inequality. The person, or persons in the disadvantaged position may, if they qualify based on a set of *requirements* put forth in the egalitarian theory, deserve compensation, state intervention, priority, or some other form of redistributive justice. These predetermined requirements are often meant to single out genuine victims of inequality, in order to not accidentally redistribute to individuals in seemingly disadvantaged positions that for one reason or another are less deserving of intervention.

Ronald Dworkin (1981, cited in Arneson, 2018, p. 1) drew the distinction between victims of option luck and victims of brute luck, as a way to split genuine victims of inequality from those who are not, in his theory that was later coined as luck egalitarianism (LE) by Elizabeth Anderson (Wolff, 2010, p. 336). One can be a victim, or recipient of both, but the need or desire to redistribute the resources is dependent on the nature of the luck. Option luck refers to good or bad fortune as a result of deliberate and/or calculated risks. The gains or losses as a result of option luck is yours to keep, meaning that there is no redistribution in, or not in, your favour. Consider a farmer that decides to grow delicate flowers, that once harvested are lucrative and expensive, that may or may not blossom during harvest season. The farmer has taken a risk, as they could have chosen to grow more reliable, although cheaper crops. If the flowers blossom, the farmer is rich, if they do not, the farmer is poor, as the farmers around them continues to live adequate lives with their reliable crops. The undeniable inequality between our farmer, and the other farmers is clear, but does not require intervention or redistribution. This is also the case if the farmer becomes a billionaire, as the surrounding farms barely scrape by. This is because the inequality is a result of option luck, as one could argue that every farmer had the chance to do the same, but aware of the potential risk, decided against it.

Brute luck, on the other hand, is defined as "a matter of how risks fall out that are not in that sense deliberate gambles" (Dworkin, 2000, p. 73). People afflicted with brute luck are, according to luck egalitarianism, not to blame for their fortune, or misfortune, and deserve compensation and a redistribution of resources, in order to mend the "unfair" inequality. Victims of bad brute luck, in other words people negatively affected by brute luck or individuals in a disadvantaged position, are people born with handicap(s), or for instance people born in slums with a bad childhood they cannot reasonably be held accountable for, which later might affect their position in society and their finances. Luck egalitarians also consider people born lacking natural talent, in other words people with low market value to be affected by bad brute luck (Anderson, 1999, p. 304), individuals "unlucky" in the beauty and personality department (Van Parijs, 1997, p. 68), or in some interpretations traits that make satisfying an individual's subjective welfare harder, such as having an expensive taste or a natural disposition to depression (Arneson, 1990; Cohen, 1989, p. 930-931). I extend this line of reasoning to cover SOGIE asylum seekers.

In short, Elizabeth Anderson puts it this way: "(1) it is morally bad if some are badly off through no fault or choice of their own, (2) it is morally bad if some are worse off than others through no fault or choice of their own, and (3) social justice requires us to eliminate, so far as is possible, the moral bad described in (1) and (2)" (Arneson, 2000, p. 340). Jonathan Wolff (1998, p. 110) distinguishes the two types of luck as the following: "[s]omeone who is rich as a result of a series of risk-taking-risks available to, but declined by, others-could rightfully keep the fruits of this activity. Someone rich through the fortuitous possession of a rare skill would be subject to high taxation". It is therefore essential in luck egalitarian theory to uncover genuine victims of bad brute luck. I would even argue that this quest ought to be seen as the defining attribute of that branch of distributive justice philosophy. If one cannot find, or even distinguish victims of bad brute luck, and victims of option luck, or neither, one cannot, and should not, attempt to redistribute, based on those parameters.

I would therefore propose the following. Luck egalitarians have to be extreme conferralists. They have to be able to and attempt to accurately confer, or correctly assign people as victims of bad brute luck, as this is the only way they are able to redistribute resources, and eliminate, within the realm of possibilities, morally bad inequality. This paper operates with the notion that luck egalitarianism could be argued to hold a lexical priority of fairness in the case of assessment. The distributing authority is obligated, in accordance with their lexical priority of fairness, to be intrusive in order to know the causes of a persons' either disadvantaged or

advantageous position (ibid. p. 110) so that they are able to prioritize and discern deservedness based on perceived presence and level of bad brute luck, and in turn attempt to correct and intervene in the moral bad.

Lexical priority of fairness provides a rigorous understanding of what is to be considered morally good or bad. This rigorous, straightforward nature is what makes it popular (Wolff, 1998, p. 118), as it allows us to have an easier time justifying decisions, as the hypothetical question of "is this in line with what we consider to be fair" is the end all, be all question. A lexical priority of fairness dominates and ignores hypothetical and potential lack of respect for the individual, but does so because it believes that fairness, above all else, dichotomously, is the moral good. Despite the fact that this paper argues that lexical priority of fairness and luck egalitarianism could offer a defence of the EUCA, most egalitarians are not inspired by a single, lexical priority of any value, but rather believe in, and act in accordance with a combination of several values, for instance the value of respect. The term lexical priority is therefore case-specific, and does not attempt to rationalise and justify all activity by the EU, or someone or something following luck egalitarian virtues.

I would argue that at least in its bare construction and intention, the EU credibility assessment is a system built with a lexical priority of fairness. While the EU asylum system might have, and have expressed other interests, such as efficiency, harmonization, and increased cooperation, satisfying member states' ability and willingness to resettle migrants as well as securitization (Directorate-General for Migration and Home Affairs, 2023; Huysmans, 2000), fairness seems to hold lexical priority in the EUCA specifically. In our context, lexical priority of fairness means that fairness should come first in our considerations before any other value in principle. Maintaining the integrity of the CEAS and EUCA, ensuring that the system is not taken advantage of, jeopardizing its fairness for those who genuinely need protection. The EU has a strict, and as we have established often times problematic way to assess asylum claimants. A lexical prioritization of fairness, as interpreted here, could in principle legitimize these intrusive and rigorous means of assessment. While some people might feel inclined to argue that this is done purely due to anti-immigration and anti-woke sentiments, I would consider it to be (or at least could be defended as) a perfect example of the lexical prioritization of distinguishing genuine victims of bad brute luck, a lexical priority of fairness in line with luck egalitarian virtues, even if we will later argue against it.

5.2.1. The Conferralist Framework

When attempting to determine the gender or sexuality of an individual due to concerns of gender and sexuality-based persecution and harm, there exists only one strategy that I would regard as *viable*. No matter how technologically advanced or educated migration officers, and decision-makers become, an attempted objective "scientific" strategy remains inherently flawed. I would even argue that the more we rely on scientific methods, the less accurate our approach becomes. To simplify this for the sake of our discussion: Scientific determinations of gender, such as examining genitals, reviewing health records, or referencing assigned sex at birth, often miss individuals who are perceived and treated as women and consequently face discrimination, harassment, or assault based on their perceived womanhood.

If we try to pinpoint someone's gender or sexuality using scientific methods, including anatomical tests and, for instance, phallometry, we don't necessarily arrive at the most accurate conclusions. This is because the violence or harassment stemming from perceptions about gender or sexuality isn't grounded in scientific analysis, but rather an immediate conferral. In this context, we are not interested in what people «really, scientifically» are. Instead, we are interested in the kinds of harms they are exposed to and thus which legal protections they should have to protect them from those harms. To clarify: when a government entity, a mob, or even just one individual decides to discriminate or mistreat someone based on their perception that the person is, for instance, gay, this conclusion isn't derived from scientific scrutiny. Instead, it is influenced by social cues, gut instincts, and learned behaviours—a process of conferral, in the interest of ascertaining SOGIE identity. Therefore, the government body responsible for the assessment of credibility based on these social factors, have to resort to a social conferral as well. In analysing and scrutinizing this process, we are better equipped at understanding the first intrinsic flaws of EUCA, conferral. Upon closer inspection, this instinctive method is also riddled with flaws.

This paper operates with a tweaked and elaborated upon "conferralist framework", coined by the Icelandic mononymous philosopher Ásta in her book *Categories We Live By* (2018), to better understand the goals, means and measures of such efforts, and stands as a landmark contribution in contemporary ontology and social metaphysics (Jenkins, 2019, p. 261). Her work establishes an understanding of social categories, as well as the framework these social categories inhabit, are created, and maintained. This individualistic framework is elaborated on by Aaron Griffith (2019) to also include structural explanations for social categories, which

becomes particularly useful if we wish or intend to change the way in which these categories are maintained. Claims of social construction, be it the concepts of race, gender, class, or our reality as a whole is quite common in feminist philosophical literature, as well as in day-to-day conversation and political rhetoric. In spite of this, there is no universally accepted account for it, as scholars and philosophers argue about what gets constructed, who constructs, the nature of the construction and the extent of social construction (Griffith, 2018, p. 393). The *active* dimension is in my view the primary dimension in the categorisation of the individual. In other words, whether manual or automatic, whether done by a human, or *artificial intelligence,*[13] the defining dimension is the *action,* the process of assigning social category. While the grounds and factors leading to the categorization is undoubtedly equally important, the term *conferral* is used as opposed to *metaphysical grounding*, or *grounding* (ibid.), (which are common terms to describe a similar process), as conferral describes the action (as well as the resulting category). The conferralist framework also puts emphasis on why these categories matter, with its focus on enablement and constraints. I find the increased emphasis on enablements and constraints (Jenkins, 2019, p. 261) persuasive, and these additions are therefore included in the framework and schema this paper operates with, and uses to explain the rationale and thought process of EUCA.

The conferralist framework establishes the idea of a *conferred property*. These are properties, given to us by other individuals or through societal structures, that establishes social properties that in turn sets boundaries, status, and privilege. These conferred properties—like being identified as a woman, transgender, or a lesbian—are ascribed to us by those who hold a certain degree of authority or significance in various settings, whether it's a coworker at a company gathering or an official at an immigration office (Griffith, 2019, p. 251-252). This conferral is based on assumed underlying characteristics believed to exist in the person being conferred. While the social categorizations stemming from this framework offer a way to understand and simplify our interactions with the world and its inhabitants, they aren't without flaws. As Ásta (2018; Griffith, 2019) highlights in her work—and as echoed by other researchers like Danisi et al. (2021), Dustin & Held (2018), and Dustin & Ferreira (2021)—this general process of conferring and categorizing is intricate, often imprecise, and can perpetuate sexist, homophobic,

[13] Personally, I am in favour of strict AI governance by all stakeholders, governmental, civil society etc. I am worried about the damage AI poses for democracies, misinformation, the labour market, and our social lives moving forward. AI, as it stands, is inherently biased (Minssen, et al., 2021), and would not solve the intrinsic flaws I will later cover. Still, I believe it is a reasonable assumption that in the coming decades, migration governance and border control will increasingly utilize AI, necessitating its mention.

transphobic, and other forms of discriminatory behaviour, both at societal and individual levels.

The following is the conferralist framework, the schema, as Ásta presents it in her original book.[14] We will fill this schema out later, as well as modifying it to better suit the purposes of this paper, as well as to include the amendments by Griffith (2019) and Jenkins (2019).

> **Conferred property**: (CP) Belonging to a social category. What property is conferred?
> **Who**: Subject, group, or institution with standing or authority (Conferrer)
> **What**: The perception of the conferrer that the conferred has one, or several of the base properties (BP).
> **When**: in a particular context, under which conditions the conferral takes place
> **Base property**: (BP) the property the conferrer(s) are attempting to consciously, or unconsciously track in the conferred. These properties serve as the base for the conferral. The individual being conferred does not need to have the properties; they just need to be taken to have them. All properties do not have to be believed to be present for the conferral to happen.

5.3. Modified Conferralist Framework

To start off, Ásta's framework's intended use is primarily between people, and created in order to understand the processes that happen in day to day discrimination and behavioural changes based on the conferred social categories of yourself and the people around you, as well as heavily rooted in the view that our world is best explained by the actions and attitudes of individuals (Griffith, 2019, p. 251). While it certainly allows for conferral based on "citing power structures" and non-individualistic explanations for conferral (Ásta, 2018, p.21, p. 128), Griffith (2019) argues that our social world is not explained simply through individual action and attitudes, but a combination of that and social structures. Haslanger (2012; 2016 as cited in Griffith, 2019, p. 257) describes social structures as the (somewhat) intersubjective patters of perception, thought and behaviour that are often manifested in our physical world. A contemporary example would be gendered toilets, but advertisements, education, media, and the way our cities are built are all manifestations of social structures. This emphasis on the

[14] Conferred properties come, according to Ásta, in two general kinds, communal and institutional. These kinds refer to whether the conferrer has deontic (institutional) or non-deontic (communal) standing. This schema takes both into account. Queer asylum seekers inhabit a grey area between the two, being a social category, conferred by someone with deontic standing, but where the BPs are entirely social. An example of a pure institutional conferral is the PN of "President of the United States", where the base properties are simply "holding the majority of electoral college votes" (Jenkins, 2019, p. 262)

structures, as opposed to flimsy and more fluid social patterns, explains why they are so rigid, and widely seen as acceptable. The inclusion of social structures could allow us to better understand how eurocentrism plays a role in the EUCA, as well as removing the burden on the decision-makers, by emphasising the role their environment plays in their assessment.

Intersectionality ought to be a priority for the decision-makers, and are therefore a necessity in the model, if we wish to view EUCA in the best possible light. It is also relevant to expand the conferralist framework with these inclusions due to the fact that it could allow us to discuss assessment, as it relates to the intersectionality of EUCA. We will therefore operate with a schema that looks like this:

> **Property name:** (PN) The complete name of the "social category", allowing for an intersectional approach. i.e., a *disabled black lesbian woman*. (Jenkins, 2019, p. 263)
> **Status:** The constraints and enablements that constitute the social status that is the conferred PN (ibid.)
> **Who**: Subject, group, or institution with standing or authority (Conferrer)
> **What**: The perception of the conferrer that the conferred has one, or several of the base properties (BP).
> **When**: in a particular context, under which conditions the conferral takes place
> **Base property**: (BP) the property the conferrer(s) are attempting to consciously, or unconsciously track in the conferred. These properties serve as the base for the conferral. The individual being conferred does not need to have the properties; they just need to be taken to have them. All properties do not have to be believed to be present for the conferral to happen.

This would allow for intersectionality. Stating the full property name in the schema to begin with removes the potential pitfall of multiplying or adding together the single-moniker names, such as "women", "black" etc. as opposed to looking at their complex interactions, that have consequences for the enablements and constraints. The social world is messy, and this messiness ought to be reflected in a somewhat messy model (Jenkins, 2019, p. 270.).

SOGIE asylum seekers are considered people in disadvantaged positions, and victims of bad brute luck. Their bad brute luck is intersectional. We can visualise an assigned SOGIE asylum claimant in the conferralist framework as the following:

Property name: (PN) LGBTQIA+ Person with a well-founded fear of persecution due to their membership of a particular social group, their PSG being their SOGIE identity.
Status: The constraints and enablements. In the case of SOGIE asylum seekers, the right to international protection and asylum status.
Who: Decision-maker appointed by the EU member state, acting on behalf of CEAS
What: The perception of the conferrer that the conferred has one, or several of the base properties (BP), leading to the assignment of the PN, and the granting of, or denial of *Status.*
When: During the European Union Credibility Assessment, i.e., during the interview, or in the immediate aftermath
Base property: (BP)[15] These base properties vary greatly between the primary identities, i.e., Lesbian, Gay, Bisexual, Transgender etc. Examples of base properties potentially associated with being queer could traditionally be seen as bodily presentation and aesthetic, social behaviour and demeanour, sexual engagement, cultural tastes, knowledge of queer culture and other stereotypes (problematized in chapter 6.1.). The individual being conferred does not need to have the properties; they just need to be taken to have them. All properties do not have to be believed to be present for the conferral to happen.

Although not explicitly stated in any document, this is what I believe happens, or one reconstruction of how the EUCA happens with luck egalitarian lexical priority of fairness during EUCA. In the case for migrants claiming asylum due to a well-founded fear of persecution due to their membership of a SOGIE PSG, I would argue that conferral, as a concept, could be seen by authorities as an efficient way to assess these social categories. SOGIE identity, especially accounts of a well-founded fear of persecution as a result of said identity operates in an inherently social dimension, that is not scientifically or visually picked up on in audio, visual, or written statements, and therefore could be considered to require a similarly inherently social framework to catch the base properties we are looking for, if the primary goal is to discern real and fake applicants in line with a lexical priority of fairness.

[15] There are simply too many base properties that could in theory be viable for the assessment of LGBTQIA+ identity. This is a non-exhaustive set of examples.

6. Internal and External Epistemic Value of Conferral

Any conferral of social categories, regardless of implications or consequences, presuppose the normative judgement that some base properties are inherently more appropriate for one social category as opposed to another. A conferralist system governs what is considered accepted or encouraged behaviour, constraining, and limiting flexibility, autonomy, and creativity which ought to be seen as innate human qualities. These innate qualities hold internal epistemic value, and ought to be seen as knowledge held true (Ullmann-Margalit, et al., 2017). The basis of conferral, denying these innate freedoms ought to be scrutinized. Our hypothesis is that conferral, as argued to be a primary tool of the EUCA holds external epistemic value, with little to no internal epistemic value, leaving us with a vital normative judgement of the external epistemic value (chapter 7). This chapter (6) will concern the internal epistemic value of conferral, applied, and analysed in the context of EUCA in the following chapters. With that in mind, we move over to what I consider to be the pitfalls of EUCA, and an objection against the conferral of SOGIE identity in this institutional context, due to it being conceptually, and therefore intrinsically flawed. As a result of attempting to correctly identify a queer identity, decision makers resort to asking stereotyped questions, due to the perceived to be reasonable assumption that individuals claiming to be queer inhabit some of the base properties seen as commonplace in the queer community, or their specific, or intersectional category within the LGBTQIA+ cluster. While this attempt manifests itself in different ways based on the specific case, or the country assessing the asylum seeker, the grounds for this attempt is still, I will argue, intrinsically flawed for a few reasons. These problems with the process of conferring SOGIE identity give rise to normative issues with the EU's system, to which I will return in chapter 7. Here, I will focus on fundamental problems with conferral as a method of assessment.

6.1. Stereotypes in Assessment of SOGIE Applicants

"When it comes to sexual orientation, I think there is still an expectation of performance. Of performing certain stereotypes" (Jules, staff member at ILGA-Europe, as cited in Danisi et al., 2021, p. 303)

Eurocentric, essentialist, heteronormative, stereotyped views, and understandings of SOGIE is one of the primary concerns, and issues plaguing the EUCA (European Union Agency for Fundamental Rights, 2017: Danisi et al. 2021: Dustin & Held, 2018: Jansen & Spijkerboer, 2011). The use of inappropriate, and culturally contingent stereotypes is widely documented in the EU credibility assessment, and directly and heavily impact the assessment, interview, and final decision to either grant or deny asylum (Danisi et al., 2021, p. 304). These notions will in this paper refer directly to perceived to be present base properties, as presented in the conferralist framework schema. Failure to be considered to inhabit all, or most of these base properties may, and often does, lead to the denial of credibility, and asylum in the EU (ibid.). At the same time, exhibiting too many of these base properties, "suspiciously" neatly fitting inside the predetermined stereotyped SOGIE person, may be seen as a sign of a fake or exaggerated application, which could also lead to the applicant being denied asylum (Ferreira, 2023, p. 312).

Attempts to track *perceived to be necessary base properties of LGBTQIA+ people* (referred to as just base properties moving forward) are well documented, and ought to be considered one of the primary tools, albeit controversial, the decision maker have at their disposal. The base properties are for the purposes of this paper divided into two groups: The first group referring to visual and behavioural assessments, and the second group referring to expectations of lived experiences and knowledge of their SOGIE category. A handful of particularly useful examples are provided in each group, as an exhaustive list of all documented types of attempts of tracking base properties would not be fruitful. These attempts are considered intrinsic flaws, as they are directly related to the conferralist framework, operating with the goal of ascertaining, and expecting the demonstration and presence of base properties in SOGIE applicants, properties that ought to be considered indemonstrable. We will look at examples that are arguably contingent, however, I want the reader to understand that they represent the intrinsic flaw of conferral, that will, due to their intrinsic nature, never truly be resolved. This means that even when precluded from interpretations of EUCA, such as medical examinations and certain

methods of assessment mentioned below, these contingent examples are bound to reappear until the fundamental issues of conferral of indemonstrable properties are resolved.

6.1.1. Aesthetic and Behavioural Base Property Assertions

Decision makers have been documented to be influenced by a visual impression, and the appearance of the applicant during the credibility assessment (Millbank, 2009, p. 7; Selim et al., 2022, p. 1016; Jansen & Spijkerboer, 2011, p. 48). Gay applicants have been rejected because they as gay men were not effeminate (Morgan, 2006, as cited in Selim et al., 2022, p. 1016), or as lesbian women were not butch, or masculine enough as lesbians (Jansen & Spijkerboer, 2011, p. 48). If a male applicant, applying for asylum based on their homosexuality enters the interview wearing "hot pants, and gives answers in a feminine manner" (Hertoghts & Shinkel, 2018, p. 711) or "dresses in a feminine way, (…) [wearing] make-up" (Jansen & Spijkerboer, 2011, p. 61), these stereotypes often work in the applicant's favour. The intersectionality between sex, gender, sexuality, and background is crucial in the assessment of SOGIE applicants.

As an example, lesbian women applying for asylum based on their SOGIE status may struggle with their assessment due to the stereotypes about SOGIE applicants is primarily related to heteronormative stereotypes of gay men (Lewis 2014, p. 966). Due to the use of "pornographic" evidence used in relation to assessment of sexual orientation by some gay applicants, lesbian women felt pressured to prove their sexuality in more explicit ways, as the presentation of cards, gifts and pictures of kissing were deemed unreliable as evidence (ibid. p. 963-964).[16] This was seen as both humiliating and embarrassing by the SOGIE applicants (BBC Today, 2013). Trans people have equally been denied and accepted refugee status due to their appearance, or rather their conformity to what the given authority deems to be the expected look of a trans person (Danisi et al., 2021, p. 305). Trans women who look effeminate may have a less difficult assessment, notably with less intrusive testing, due to the way they look and behave (Jansen & Spijkerboer, 2011, p. 50). It goes without saying that trans identity cannot be visually perceived.

These patterns of assessment highlight the EUCAs rigid essentialist conferral of asylum seekers, that systematically deny the variety of expressions and appearances of SOGIE peoples, in turn providing unreliable, inaccurate, and not fruitful assessment of refugee status. It is

[16] This is of course not to say that gay men are in any way more promiscuous or sexual than any other sexual orientation, but rather point to expectations and treatment that does not differentiate between individuals. I believe gay men feel the same pressure, and stigmatization.

obvious that there is no appearance that is universal for all LGBTQIA+ people, or subsections within the cluster, and I feel inclined to believe that most decision makers and authorities feel the same way. This is not *just* a result of decision makers' heteronormative eurocentric view of SOGIE people, but rather a direct result of the impossible task they have been given. Given the fact that SOGIE identity is a self-identified category, any external attempt at tracking base properties is bound to be unreliable.

The applicant's behaviour has similarly been used to assess the credibility of their SOGIE claim (Hanna, 2005; Hertoghts & Shinkel, 2018; Jansen & Spijkerboer, 2011; Selim et al, 2022). Mannerisms associated with "queerness" improve the applicants' chances of being granted asylum based on their SOGIE claim (Danisi et al., 2021, p. 189). On the other side of the spectrum, not expressing these behavioural base properties, and acting in a manner that decision makers deem commonplace in SOGIE applicants, could lead to the application being denied (ibid.). The way one assesses behaviour varies, as an example, some officials have referred to their 'gaydar', the colloquial word for the "ability" to instinctually determine whether someone is gay or not, when assessing SOGIE asylum seekers, and rejected applications from gay men who did not appear on their gaydar, due to presenting too masculine and heterosexual (Selim et al, 2022, p. 1016). There is no uniform way a genuine LGBTQIA+ person behaves.

What these examples illustrate is the decision-makers' conferral based on base properties in action. Stereotyped ideas of expected appearance and behaviour of people based on what can be considered heteronormative and eurocentric ideas of sexuality and expression, explicitly deny variety and freedom within these social categories. As stated before, being able to represent a variety of expressions within all social categories ought to be seen as innately human, and cannot be denied (Anderson, 1995, p. 50). These examples not only highlight (1) the bias in the CEAS, perpetuating narrow views on SOGIE identity (Rehaag, 2008, p. 21), but also (2) directly restrict autonomy, flexibility, and creativity. The restriction (2) ought to be seen as intrinsic to a system built on conferral.

In response to the authorities' incessant search of certain base properties, some applicants have been encouraged to try to exhibit, strengthen, or fake the presence of these base properties in order to increase their chances at being accepted and granted refugee status (Danisi et al., 2021, p. 189). These attempts, as kind-hearted as they might be, does not necessarily help the applicant, reduces their agency while at the same time continuing the stereotyped view of the decision makers, as opposed to trying to educate and change their views. It is also insensitive

to the applicant, who might not have a cultural background that would make it natural for them to inhabit a eurocentric, heteronormative SOGIE identity. As one SOGIE applicant, applying for asylum in Germany put it in response to making his appearance more "gay" in preparation for the EUCA: "You cannot make someone who has been one year in Germany [look] like some-one who has grown [up] seeing gay, or someone who has grown [up] with gays in a gay lifestyle. You cannot change in one year, no no no no" (as cited in Danisi et al., 2021, p. 310).

6.1.2. Experience and Knowledge Base Property Assertions

While there is no denying that the appearance and behaviour of the applicant does play a role in the assessment of SOGIE asylum seekers in the EU, this interpretation, although prevalent, is widely considered to be unacceptable, and certain aspects covered in the section above have been deemed precluded from a reasonable understanding and interpretation of the EU credibility assessment (Judgement of the Court, 2014). A far more common approach is relying on expected to be present base properties related to the experiences of being part of the LGBTQIA+ community, and knowledge of "shared" culture and struggles SOGIE people face and are knowledgeable about (Jansen and Spijkerboer, 2011, p. 57-62). For the purposes of my argument, primarily knowledge of "queer" culture and what has been referred to as "Coming out" stereotype will be used as examples. Although widely considered less intrusive than the aforementioned flaws, these examples still perpetuate stereotypes, provide inaccurate and wrong assessment of SOGIE applicants, and most importantly for us, represents the same intrinsic flaw of conferral, and highlights a lack of internal epistemic value.

Knowledge and familiarity with queer culture has been, and remain, a prevalent criteria in assessing SOGIE applicants. It operates on the assumption that SOGIE applicants are well acquainted with considered to be queer culture as well as safe spaces and social hubs for LGBTQIA+ people in their country of origin (European Union Agency for Fundamental Rights, 2017, p. 2). Authorities have for instance noted that SOGIE applicants should know of Oscar Wilde (Connely, 2014, p. 9, as cited in Koçak, 2020, p. 30), an Irish author writing his pieces at the end of the 19th century in order to be considered sufficiently queer. If the applicant is not familiar with, or unable to recall the names of queer bars in their countries of origin, it can, and has been used as evidence against the applicant's credibility (Lewis, 2013, p. 179). In France, the Netherlands, and the UK (who at time of reported incident was an EU member state) reports unfamiliarity with LGBTQIA+ books and magazines being used against the claim of SOGIE status (Jansen and Spijkerboer, 2011, p. 57). Past actions in a manner that is deemed uncommon

in SOGIE peoples in Europe by the given authorities, such as not trying to avoid servicing in the army due to the applicant being gay, has been used as contradictory evidence to their claim (Jansen & Spijkerboer, 2011, p. 61). It should not be seen as fair by the authorities to expect SOGIE applicants who have had to hide their identities to be able to answer all these questions in a manner to be expected by eurocentric and western standards (Court of Justice of the European Union, 2015, para. 72), not to mention the fact that queer people are different, and simply do not attend the same places, or consume the same culture, similar to how heterosexual and cis people do not all act the same.

The coming out stereotype refers to the fact that SOGIE applicants are assumed to have found out, and dealt with their sexual orientation, gender identity and/or gender expression in a particular way, in line with what is perceived as the way European SOGIE identities often come out (Jansen & Spijkerboer, 2011, p. 62). Examples of eurocentric ideas of the "coming out" experience is shame and negative feelings associated with their sexuality, an internal struggle that later turn into self-acceptance (Jansen, 2018, p. 55-57; Selim et al., 2022, p. 10), and an understanding of SOGIE identity as "something you are", with emphasis on romance and feelings, as opposed to describing sexual activity (Jansen, 2018, p. 74). The latter goes against what many SOGIE migrants regard, for instance, homosexuality as, which can cause confusion during the assessment, as well as a denied refugee status (Grønningsæter, 2017, p. 10; Jansen, 2018, p. 74). This claim of "coming out emphasis" is substantiated with the DSSH model (Difference, Stigma, Shame and Harm model) being a training tool for decision makers in their assessment of applicants (European Union Agency for Asylum, 2022, p. 2).[17]

These stereotypes largely come from a view that, just like heterosexuality is seen as stable and unchanging, other sexual orientations should be the same. Decision makers, therefore, try to determine if an applicant's sexual orientation or gender identity is fixed and unchanging (Jansen & Spijkerboer, 2011, p. 62). As we'll explore later on, this perspective can disadvantage those with fluid orientations like bisexuality, making it harder for them to get asylum based on their SOGIE status (Danisi et al., 2021, p. 266). Gender identity and expression, like trans people, are also seen as challenging this heteronormative view, as it can be seen as breaking the stability of these categories. Mere same-sex sexual and romantic activity is not enough, authorities

[17] This model is by and large considered to be a positive addition and asset to EUCA, and has been endorsed and used in fieldwork training by the UNHCR, the International Association for Refugee Law Judges and EASO European Union Agency for Asylum (European Union Agency for Asylum, 2022, p.2). We ought to consider its contribution, although it does not tackle the intrinsic flaws with EUCA, to be primarily positive, as it in many ways replace more harmful and explicit assessment criteria.

require the applicant to have experienced queer experiences in ways that match their own understanding of what's "typical" for SOGIE identities, in order to be conferred to be irreversibly part of their SOGIE minority (ibid.).

These base property assessments highlight the lack of understanding of the intersectionality of SOGIE asylum seeker's identity. When it comes to SOGIE asylum seekers (like all people), their experiences and ways of expressing themselves is not just shaped by their sexuality, gender identity and expression, but rather a multifaceted, interconnected web of religion, race, age, nationality, and class. A lesbian woman from a traditionally collectivist society's recollection and experience of coming out might not resonate with EU decision makers understanding of the "coming out" narrative, deeply embedded in western LGBTQIA+ culture. Instead, their navigation of their identities might be more subtle, focusing on communal harmony, which will impact their experiences. They might also face persecution based on their refusal to conform to traditional gender roles. A trans man of colour might face compounded discrimination not just because of their gender identity and/or expression, but also their race, and likely their political beliefs and affiliations. Their familiarity with queer media and LGBTQIA+ symbols might therefore be entirely different. The fact that he may also not be familiar with LGBTQIA+ popular media, or symbols, such as pride flags and queer icons, overlooks local LGBTQIA+ symbols and expressions. Similarly, awareness and familiarity with symbols and media should not be misconstrued to be evidence to suggest someone being part of a SOGIE minority. One cannot assess the credibility of a SOGIE claim due to a perceived lacking, or presence of base properties. It does not matter whether those base properties ought to be seen as valid, or if they are based in heteronormative and eurocentric ideals and stereotypes. The search in and of itself is the intrinsic issue.

6.1.3. Hidden and Fluid Base Properties

Base properties associated with "good" brute luck can very easily appear in SOGIE applicants, making the conferral even more difficult. These fluid base properties are for instance likely to be expressed, or believed to be present by authorities in trans, gender-fluid, bi- and pansexual applicants.[18] They could be argued to inherently possess base properties that could lead the decision maker, the conferrer, to assess their SOGIE claim as false, due to their more fluid or ambiguous properties. Base properties that fool the authorities can of course be found in anyone, regardless of their SOGIE status, and the intersectionality of their identity. However, it is particularly important for these migrants, as it leads to their cases being less likely to be accepted and granted refugee status (Dustin & Held, 2018, p. 10-13). Assessment of SOGIE asylum seekers who have had heterosexual relationships and/or experiences in the past is particularly difficult, and have led to denial of refugee status, and long legal battles to have their claim understood (Dugan, 2015; Dustin & Held, 2018, p. 10-13; Duffy, 2016). These difficulties are exacerbated due to the fact that some people have had to hide their identities in the past, or because they have less rigid understandings of sexuality, may have had heterosexual relationships that have led to children (ibid.).

Hidden base properties are related to the fact that SOGIE applicants, as former members of often traditional societies where being openly queer is met with social repercussions and persecution, have a very valid reason for not expressing themselves in a very "open" and "queer" manner (Danisi et al., 2021, p. 310). Not only does the way people dress or express themselves reflect their individuality, and their background, but may also reflect the fact that they have had to hide their identities in the past (Jansen and Spijkerboer, 2011, p. 36). In SOGIE asylum applications gay men have a far higher success rate than lesbian women, and bisexual people. This is in part due to the fact that many of the base properties decision makers are looking for in SOGIE applicants relate to gay men, leaving other SOGIE identities that do not conform to these stereotypes *invisible* (Lewis, 2014, p. 966).

All the aforementioned stereotypes of SOGIE minorities in the EUCA have in some instances led some organizations and associations involved with preparing the applicants for their

[18] There are very few, if any instances of pansexual and gender fluid applications in the literature I have consulted. Still, I believe that it is likely that some applicants might fit within these categories, and that the fact that they did not apply based on these SOGIE categories might be because they are inherently more fluid, making the assessment more difficult, or the fact that the applicants might not be aware of these terms. It is also mentioned because, in the case of the applicants appearing, my points would prove valid for their situation.

interviews to encourage the applicants to attempt to fit the stereotype the decision makers are looking for, in the hopes that this could increase their chances of being granted refugee status (Danisi et al., 2021, p. 189). Bisexual applicants have for instance been suggested to avoid stating their bisexuality, and rather claim to be gay (Rehaag, 2009, as cited in ibid.). Although it may increase the chances of getting approved, it goes without saying that this undermines the agency of the applicants, and reproduces and encourages stereotypes rather than attempting to challenge them. It should not be a requirement or recommendation to hide or fake base properties in the EUCA, pointing to a fundamental problem of conferral, the need to believe that certain base properties are present in order to be assigned a social category. At the same time, fitting too neatly into the stereotypes have caused concerns of applicants being fake (Ferreira, 2023, p. 311). This could lead to not only people with fluid or hidden base properties to be denied due to the system at times requiring them to fake their identities, but also SOGIE applicants who happen to fit into the stereotype of what the decision maker is looking for. Applicants from certain countries, due to the frequency of, believed to be fake cases, have led to the belief by decision makers that all claims from those countries are fabricated (ibid. p. 312).

6.1.4. Internal epistemic Value of SOGIE Assessment

In order to establish the internal epistemic value of an assessment of SOGIE asylum seekers' SOGIE identity, we ought to look at whether this conferralist credibility assessment provide us with accurate, fruitful, clarifying results that are broad in scope (Kuhn, 1977, p. 357). In evaluating the internal epistemic value of EUCA, we will be better equipped to evaluate the external epistemic value. I would argue that if we conclude with a low internal epistemic value, the normative judgement of the external value is made more important.

The accuracy of conferral, one of the central values of internal epistemic value (Kuhn, 1977, p. 330-339, as cited in Andersson, 1995, p. 29) seems flawed. Our findings have shown that the base properties that refer to, and represent physical traits, preferences, behaviours, experiences, and knowledge are fundamentally inconsistent and inaccurate. While these examples show us what can be interpreted as contingent flaws, they represent attempts by the authorities to assess, and uncover base properties. A better understanding of the fluidity and variability of SOGIE expression would by no means remove the underlying, intrinsic flaw of conferral, namely the necessity of finding and establishing base properties. A more varied, more representative, and exhaustive list of base properties, that take into account intersectionality, would create a better system, but would not remove our intrinsic flaws. I would argue that due to how the current

regime works, a bisexual woman, who presents and expresses themselves in a stereotypically heteronormative manner, perhaps with children and previous straight relationships, has a hard, if not impossible time being assessed correctly, even in an idealised world. These inaccuracies are crucially not a result of a lack of funding and resources, inadequate education, and knowledge of SOGIE experiences and country of origin information, nor are they related to neither the applicant nor the decision-makers personal and contextual circumstances, but rather an intrinsic flaw of any system that bases its assessment on a conferral.

Our findings also suggest implications regarding the internal epistemic values of the ability to clarify, and whether the results are broad in scope. The EU credibility assessment does not by any means make the discernment of SOGIE identities any less difficult, as it in many ways repeats the same patterns that we use in day to day conferral of people. The conferralist framework is after all both a structural and individual system of social categorization (Ásta, 2018). If anything, it provides us with examples of what we should not do in order to clarify sexuality, gender identity, and gender expression, as several of the attempts have been ruled as violations of human rights (Jansen & Spijkerboer, 2011, p. 52; Judgement of the Court, 2014, para. 73). The fruitfulness of the EUCA is also questionable, given the examples provided throughout this paper. Fruitful here does not refer to the external epistemic value of being useful in the sense that it can be argued to be a flawed, yet at large cost effective way of administering border control and flow of immigration, but rather whether it achieves its goal. Considering we are assessing the internal epistemic fruitfulness of the assessment of the sexual orientation, gender identity and gender expression of SOGIE asylum seekers, the end goal cannot be argued to be anything but ascertaining these properties. In light of an internal epistemic value worthy of critique, the external epistemic value assessment becomes ever more important. In order to uncover the external epistemic value, an understanding of the assumed expressed interest of the EU is in order.

6.2. The EUs Expressed Interest

When examining the EU's expressed interest when it comes to assessing SOGIE asylum seekers, there are a few considerations to keep in mind. The EU does not operate as one brain, and has several different branches, be it member states, or EU organs, that might have differing or directly competing views of immigration, and SOGIE status, and might express this dissidence through numerous channels (European Parliament, 2023; Jacque, 2023, Zisakou, 2021, p. 2). For instance, securitization, which is widely considered to be one of the primary

interests of the EU, is heavily emphasised by the European Border and Coast Guard Agency, also known as Frontex (Léonard, 2010), but less prevalent in documents by the European Union Agency for Asylum and in research funded by the European Research Council (European Union Agency for Asylum, 2022; UNHCR, 2013). I believe we ought to consider two interests of the EU. First (1), the fact that it recognizes its role, and the need to offer international protection to individuals persecuted due to their SOGIE (Directive 2011/95/EU), as well as the need of discretion, sensitivity, and *respect* in the assessment of this often times particularly vulnerable group, and second (2), its need and expressed interest in border management, securitization, and what I argue to be a lexical priority of fairness.

The EU, and by extension its member states recognise and acknowledge the need to offer international protection to individuals persecuted based on SOGIE status (2011/95/EU), and are aware of the difficulties relating to the assessment of SOGIE applicants. EU guidelines, legislation and judicial precedent emphasize that the assessment should not be invasive or detailed, and not based on bias and stereotypes (Jansen & Spijkerboer, 2011, p. 52; Judgement of the Court, 2014, para. 73, Advocate General Sharpston, 2014, para. 66 & 91; UNHCR, 2013), which point to an expressed interest of respect and dignity. The EU also has an expressed interest in security, and the protection and control of their borders (Jubany, 2017, p. 40). This, broadly speaking, is widely considered to be the primary interest of the CEAS (ibid., p. 53). Anti-immigration rhetoric (Zisakou, 2017, p. 2), securitization policies (Jubany, 2017, p. 51-53) and a culture of disbelief exemplify this expressed interest. This perhaps overtly cautious system provides the EU with reasons to scrutinize asylum seekers, and legitimizes, in their mind, intrusive measures in line with a priority of fairness. Concerns about fairness, transnational crime, terrorism, and already struggling social services to the pressures of maintaining social cohesion in member states are exemplified through securitization measures like externalisation of EU asylum systems to countries with questionable human rights records (Klepp, 2010, p. 8), militarisation of its borders and the Mediterranean (Jubany, 2017, p. 52), and the use of surveillance technologies and biometric data collection (Council Regulation (EC) No 2725/2000; Kaurin, 2019). This fairness relates more so to providing a system that attempts to refuse entry to fake applications, and a fairness related to protecting member states and EU citizens, as opposed to a priority of fairness that would provide the benefit of the doubt..

Another, related interpretation of fairness as expressed by the EU is that it, in a way, could be argued to be fair to the SOGIE asylum seekers, making sure that fake applicants do not "jump the queue". Without a rigorous screening process aimed at both identifying and deterring

fraudulent applicants, there is a potential for a significant influx of unregulated individuals with fabricated claims attempting to exploit the system through SOGIE-based applications. Failing to do so could be argued to compromise the fairness of the system for genuinely vulnerable SOGIE individuals. Still, however, I argue that EUCA, and the interest of fairness, is primarily concerned with the integrity of the asylum system itself, rather than a concern for the asylum seeker, who may, due to a flawed regime, not pass despite being genuine. Such an argument would only really be fruitful *if, and only if*, the system was capable of discerning real from fake, not merely have it in their interest. I would argue that while the expressed interest of the EU is dichotomous, the primary interest of the EU, is argued to be security and, crucially, fairness. While concerns for refugee rights might have been a primary concern when the convention was formulated, I would argue that protecting the interests of member states from concerns and consequences associated with immigration, as well as providing a "fair", scrutinizing assessment of applicants, has become the primary goal for the European Union's strategy of immigration.

6.2.1. External Epistemic Value of SOGIE Assessment

We have established that the conferral of SOGIE applicants apply limitations to what we consider to be innate and undeniable properties of people. This, along with the empirical evidence of intrinsic flaws as a result of conferral, leads us to the conclusion that there is a lack of internal epistemic value of the assessment process of SOGIE identity in the EU credibility assessment. Yet, the EUCA is a system held to be true, and stands as the primary strategy for denying and accepting SOGIE asylum seekers into the EU. The lack of internal epistemic value necessitates a normative judgement of the external epistemic value, i.e., the political and moral reasons for EUCA. I will now account for what I believe to be a reasonable understanding of this external epistemic value, seen from the perspective of a defender of the credibility assessment, in light of what is to be considered the interest of the EU.

The external epistemic value of "fairness" in EUCA can be understood as the expressed interest above, security and making sure the CEAS is not abused. The external epistemic value of the strict, scrutinizing assessment of SOGIE applicants can be seen as an answer to, and a consequence of, broadly speaking, a culture of disbelief. The conferral maintains and defends a system that keeps vague, ambiguous, and in the eyes of sceptics' potential fake and fraudulent asylum seekers out of the EU. Lastly, the lexical priority of fairness, or external epistemic values derived from a priority of fairness, could also be argued to uphold, and continue

heteronormativity and eurocentrism. As a consequence of the current assessment strategy implemented in the EUCA, as well as an outcome of unclear, unsupervised guidelines of assessment, stereotypes are reinforced by all actors, including both the applicant and decision maker.

Some might also argue, in short, the external epistemic value of assessing SOGIE identity, is establishing their particularly compounded vulnerable position and precarious situation, and the fact that they are persecuted due to their identities, put them in a similar position to other PSGs, granting them the right to asylum. The fact that it is virtually impossible to assess sexual orientation, gender identity and gender expression, does not change the fact that SOGIE asylum seekers, because of the persecution of their indemonstrable social categories, have the right to international protection. It could be argued, and likely is argued by the EU and defenders of EUCA, to be an external epistemic value of assessing SOGIE identities in order to give credibility to their asylum application. Its moral and political value outweighs the lack of internal epistemic value. Despite the appearance of external value, I will argue that the EUCA lacks such value. In spite of this claim of external value, I believe the external epistemic value of fairness is more fitting for understanding the SOGIE EUCA, or at the very least could be argued to necessarily work in tandem. Having the vulnerability of SOGIE asylum seekers *alone* as an external epistemic value would not create the current system we have today, a priority of fairness would.

7. Normative Objections: Respect Versus Fairness Vol. 2

With the established understanding of the low internal epistemic value of the EU credibility assessment, we ought to look at the normative objections to the external epistemic value believed to be argued by the EU, and defenders of the current CEAS. What follows are normative objections to a lexical priority of fairness, or at the very least normative objections to policies and interests argued to be inspired by, and defended in the name of, a priority of fairness. These arguments will also provide a critique which is not contingent on the belief that the aforementioned "intrinsic" flaws, are in fact intrinsic, or ought to be considered and attempted to be mended without changing the fundamental system that upholds them, i.e., necessary evils. Given the fact that the EU credibility assessment could be considered a luck egalitarian tool, or a tool used to identify victims of bad brute luck in line with luck egalitarianism, it only seems reasonable that we consider what I believe to be the strongest arguments against luck egalitarian attempts at doing such. These unfortunate implications, and

objections to luck egalitarianism highlight the lack of respect, which is considered our general puzzle, or fairness dilemma.

This fairness dilemma will be highlighted through implications of attempted conferral of bad brute luck, both when the victim, or suspected victim of bad brute luck themselves provide evidence to suggest bad brute luck, and when authorities attempt to confer based on assumed to be present base properties. The first implication is based on Anderson (1999), arguing for the inherent paternalism, stigmatization, and disrespectful nature of luck egalitarianism, particularly in relation to the search for instances of bad brute luck, i.e., conferral of base properties. The second, and what I consider to be the primary normative argument against the fairness priority is the *shameful revelation* argument. Wolff (1998; 2010) presents us with a diagnosis of luck egalitarian standards of fairness that he believes undermines relational respect amongst people, resulting in the required shameful revelation.

7.1. ANDERSSON PITY AND ENVY ARGUMENT

Let us begin with Elizabeth Anderson's (1999) critique of luck egalitarianism (LE), particularly the system's inherent tendencies towards paternalism, stigmatization, and crucially for the purposes of this paper, its lack of respect. According to Anderson, the respect of all parties in a luck egalitarian society is lacking, "it fails the most fundamental tests any egalitarian theory must meet" (1999, p. 307). Luck egalitarianism fails to respect and dignify victims of bad brute luck, those excluded from aid, as well as people in the advantageous position, required to compensate for their good brute luck. The condescending, disrespectful attitudes (ibid.) are identified as pity towards victims of bad brute luck, and envy towards the more fortunate. It is important to note that Anderson argues for a different equality system, *democratic equality*, ensuring equal access to participate in society, lifting everyone's *capabilities* up, so that everyone can function as equal citizens, as opposed to levelling down and compensating bad brute luck. I will not go into further detail of democratic equality; we are merely using her diagnosis of LE for this paper.

Luck egalitarianism is inherently comparative[19], where emphasis is on compensating the *less fortunate*, and not the unfortunate (Anderson, 1999, p. 303-307). It centres around comparing individuals to others to determine whether they are at a disadvantage due to bad brute luck or not. This, according to Anderson, induces pity towards the less fortunate, i.e., victims of bad brute luck. She differentiates between pity and compassion, and argues that LE is rooted in the former. When you pity someone, you regard them as inferior to you. Compassion is empathy, and does not hinge upon someone being inferior. A victim of bad brute luck receives compensation by the given authority out of pity, due to their disadvantaged position compared to others, in the hopes of creating equality. This distribution of benefit and aid reinforces this sense of inferiority. Victims of bad brute luck are reduced to subjects of pity, best exemplified in her famous letters by the fictional State Equality Board (ibid., p. 305). An excerpt: "To the stupid and untalented: Unfortunately, other people don't value what little you have to offer in the system of production. Your talents are too meagre to command much market value. Because of the misfortune that you were born so poorly endowed with talents, we productive ones will make it up to you: we'll let you share in the bounty of what we have produced with our vastly superior and highly valued abilities.". Similarly, luck egalitarianism's focus on compensating bad brute luck relies on making a comparison in the other direction. Those identified as unlucky are continually compared to, and considered disadvantaged compared to the lucky ones, which can cause feelings of resentment and *envy* (1999, p. 307). This envy guides policy, and results in the redistribution of recourses. Anderson suggests that such a system reduces societal responsibility to compensations for envy, rather than fostering cohesion, mutual respect, and equal access to participate in society. Neither envy nor pity put us in a position of moral obligation to distribute resources and compensate to the less fortunate.

Applying Andersons critique of luck egalitarianism in the context of asylum politics is interesting. Taking into account that we ought to consider asylum seekers as victims of bad brute luck, Anderson's criticism can help us understand some of the pitfalls in approaching asylum through the LE lens. The inherent comparison in LE can unintentionally create a hierarchy of suffering, where the applicants' stories are measured and compared to consider which one is more deserving. We have seen examples of heart wrenching personal stories being

[19] Again, to reiterate, I believe we ought to consider SOGIE people born in countries where they may be stigmatized and persecuted due to their SOGIE status are to be considered victims of bad brute luck in a luck egalitarian system. The fact that they are victims of bad brute luck would also necessitate authorities to compensate by granting asylum status to these people. However, Anderson's (1999) argument sets us up for a critique of LE on its inherent lack of respect. It is therefore included, despite seemingly arguing against compensation of bad brute luck as a whole.

admitted, and consequently raising the bar and creating hierarchies of suffering, making it harder for less vivid stories to be granted asylum (UNHCR, 2013, p. 40). This could lead to a homogenization of accepted SOGIE experiences, and perhaps reinforce stereotypes. *Pitying* asylum seekers, might also reinforce the perception of asylum seekers as helpless, robbing them of their agency and reinforcing paternalistic attitudes. The LE lens of asylum might also reinforce an age old anti-LGBTQIA+ idea, that these identities are more akin to choices or lifestyles, as opposed to intrinsic identities. This could lead to the (undeniably wrong) assumption that SOGIE applicants are victims of bad option luck. This flawed claim is wrongly substantiated and exacerbated by the culture of disbelief, and fake applications. The pity and envy argument may not be central to our critique of the EUCA; however, it provides us with an impression that the redistributive grounds in luck egalitarian systems, which we argue the EUCA is, might not be respectful, but rather an "ends justify the means" kind of system, and importantly, provide us with an important backdrop for our shameful revelation (Wolff, 1998; 2010), and the fairness critique, our *value conflict*.

What then of the true victims of bad brute luck that do not benefit from compensation, i.e., refugee status and asylum in the EU? Anderson does not answer this directly, but I will refer to her impression of the lack of respect towards those who are not compensated for their bad brute luck like this. A central part of luck egalitarianism that I will not cover in detail is the idea of insurance, and the many reasons why someone might not choose to pay this imaginative insurance. Let us consider, for instance, a rare disease scenario. In this case, risk-averse individuals might be compensated as they are more likely to invest in the hypothetical insurance, while their risk-tolerant counterparts may not receive compensation, resulting in both facing the same stroke of bad luck but ending up in unequal positions due to differential insurance participation (Anderson, 1999, p. 302-307). This does not generally apply for denied asylum seekers, as they are not denied compensation due to not hypothetically buying insurance, but because the evidence they presented in order to receive compensation was not considered good enough. In other words, they were victims of the same disrespectful, brutal, pitiful, and envious system, but were not compensated for their participation, not due to risk aversion, but due to the decision makers not assessing them correctly. If the person denied compensation were in fact a legitimate victim of bad brute luck, this could be argued to be an even worse fate than those who at the end of the day are compensated for their perceived bad brute luck.

7.2. SHAMEFUL REVELATION

Jonathan Wolff (1998) presents what I consider to be the strongest, most hard hitting argument against luck egalitarianism, namely the shameful revelation implication. This implication is, similarly to the aforementioned Anderson (1999) critique, a criticism of the lack of respect in LE. Part of what I believe makes his argument so good is the way he diagnoses LE as going too far in its attempt to answering criticism from libertarianism, leading to a prioritization, or lexical priority of fairness that undermines trust, and relational respect (Wolff, 2010, p. 336). As he puts it, LE has in some ways bent over backwards to accommodate the basic thought that exact equality in all cases can, and will be unfair (Wolff, 1998, p. 97). This accommodation is what has led to the incessant need, the intrinsic requirement to be absolutely aware of the distribution of, and the genuine victims of bad brute luck in order to eliminate or cure immoral inequality. In short, the concept of a "shameful revelation" describes a situation where inequality forces victims of bad brute luck to reveal, and prove why they are in a disadvantaged position, personal, potentially deeply shameful information that they would prefer to keep private. Wolff imagines a scenario to explain the shameful revelation, and we will later provide a more apt example, relating to SOGIE asylum seekers as victims of bad brute luck.

In his scenario (Wolff, 1998, p. 114) we imagine an unemployed individual, in a world with low unemployment and no shortage of jobs. There is objectively no lack of opportunities to get resources, and yet, despite trying, the unemployed is not able to achieve the otherwise simple task of entering the labour market. The barrier of entry is not an objective one, but a subjective one. Our individual has a lack of talent or ability, similar to the example provided by the fictional State Equality Board (Anderson, 1999, p. 305). This lack of talent or ability is for the purposes of this example a consequence of bad brute luck, i.e., they may be severely cognitively impaired, to the point of being incredibly unattractive as a potential worker. In LE, bad brute luck needs to be equalised, requiring as this is a subjective barrier, the victim of bad brute luck to not only reveal, but to actively convince the benefactor, i.e., the state, as well as themselves that they are severely lacking in talent and ability, a comparative failure, and worthless in the workforce. If, and only if the victim of bad brute luck manages to convince the benefactor of their bad brute luck, they may receive compensation, out of pity from those more fortunate (Wolff, 1998, p. 109; Anderson, 1999, p. 307). One could imagine a reverse State Equality Board (ibid., p. 305), where the applicant themselves have to write down a letter, describing their severe cognitive impairment and personal failures (their experience of bad brute luck) in

such explicit personal detail, in the hopes that it is convincing enough for the authorities to send compensation back.

I wish to once again reiterate that while SOGIE asylum seekers are considered victims of bad brute luck, due to them being in disadvantaged positions as a result of factors beyond their control (i.e., their SOGIE status interacting *intersectionally* with, for instance, the country they were born in), this does not mean that their sexual orientation, gender identity and gender expression is in any way, shape or form considered bad brute luck. Their bad brute luck is contingent on societal factors around them, being a SOGIE minority person in a country that stigmatizes and persecutes SOGIE minority persons, is considered bad brute luck. Compensation, state intervention, the redistribution of equality is not removing LGBTQIA+ identity, but rather changing the societal factors, i.e., welcoming them into a safer environment, i.e., granting them asylum in the EU. Wolff argues that a lexical priority of fairness in LE undermines the important component of egalitarianism, namely respect, which is particularly exemplified with the shameful revelation (Wolff, 1998). One can draw a similar conclusion of EUCA, which similarly, due to external concerns of fairness, have bent over backwards to accommodate, undermining the respect for asylum applicants, and forcing them through a shameful revelation.

The conferral of SOGIE asylum seekers during the EU credibility assessment can be argued to include, and depend on shameful revelations, in line with Wolff (1998; 2010). This is the result of an innate lack of trust in LE (Wolff, 1998, p. 108-109). To start off, a lot of asylum seekers arriving in Europe and claim asylum based on their SOGIE status, come from countries where their identities, and SOGIE expression is persecuted and taboo. In their country of origin, they may be ostracized or worse by their communities for revealing their SOGIE identities (Carroll & Ramón Mendos, 2017). Evidence suggests that living under conservative, non-tolerant, anti-LGBTQIA+ authorities, communities, and family settings, and having to hide your identity for years will likely impact your ability to come to terms with, and unashamedly discuss your SOGIE (Jansen and Spijkerboer, 2011, p. 36; UNCHR, 2012, para. 63). Due to the dependence on shameful revelations, the applicant will need to prove and talk about their queerness, and how innate it is to their identities. Some individuals, especially when living under the above circumstances, may not just lack the vocabulary to prove their SOGIE, but may be shameful and tremendously uncomfortable doing so.

Love and sex are deeply personal, and to most people shameful, especially when scrutinized by an authority who has the power to deny or give you access to a presumed better life. Detailed questioning concerning the asylum seekers' sexual practices has been deemed precluded from a reasonable interpretation of the EUCA (Court of Justice of the European Union, 2015, para. 72), but less intrusive questions that still result in shameful revelations are still prevalent, and deemed necessary in the current iteration of EUCA. Widely considered to be more acceptable questions, discussing aspects of romance and feelings, as opposed to sex, has not only been seen as eurocentric and paternalistic, leading to confusion during EUCA and denied asylum (Grønningsæter, 2017, p. 10; Jansen, 2018, p. 74; Selim et al., 2022, p. 10). These also ought to be considered deeply personal questions, requiring the applicant to open up about deeply personal matters, that they themselves might not have properly been able to process, let alone not consider it shameful. Similarly, the EU's use of medical and psychological testing in the past, including phallometry, vaginal photoplethysmography (Jansen & Spijkerboer, 2011, p. 50; p. 52), and pornographic evidence (Lewis, 2014, p. 963), underscores the system's reliance on shameful revelations to assess victims of bad brute luck, even if these means are now considered precluded from use in the assessment of asylum seekers. The EUCA is argued to be designed to distinguish between victims of bad brute luck and impostors, in the name of fairness, to accommodate the basic thought and that equality in all cases can, and will be unfair (Wolff, 1998, p. 97). Even without these real life examples, the need to *prove* bad brute luck is to an extent inherently shameful, in and of itself.

7.3. The Value Conflict in the Credibility Assessment

I would argue that the EUCA is diagnosed with a conflict of the competing values of *respect*, and *fairness*, and that we need a dynamic balance of the two. They ought to be seen as complementary, but as we have seen, can pull a system in two opposing directions, and the priority of one, might lead to undermining the other. As outlined earlier, *fairness* within the EUCA operates on multiple planes. From the perspective of member states, it relates to the sharing of responsibility, and retaining member state autonomy. For the EU citizen, fairness is viewed as security, and the continuation and stability of their institutions, where immigration has been argued to pose a threat. Most crucial for the purposes of this paper, however, is fairness as a defender of the current system sees it, in relation to the role the EUCA should play in the granting and denial of asylum. In a fairness perspective, providing a system that does not let illegitimate claims through, denying the ability to abuse the system, is morally good. Through

this lense, the primary objective is to discern legitimate claims, causing, I argue, a prioritization of weeding out illegitimate ones.

I argue that the way value of fairness is prioritized in the current iteration of EUCA, have led to both the contingent and intrinsic flaws outlined throughout the paper. This is why I argue that the current EUCA is built on a lexical priority of fairness. The incessant need to discern illegitimate claims, inadvertently compromise a fundamental level of respect. Would the system be better off if there was a lexical priority of respect? Even one arguing for a liberalisation of the asylum system would see a free-rider issue here. It could also be argued to be self-defeating (Wolff, 1998, p. 120), as similarly to how too much focus on fairness inherently causes a lack of trust amongst people, too little fairness, and no "data collection" or assessment of entitlement to resources or statuses, would lead to a lack of trust between people. Much like Wolff's (ibid.) project of finding a balance between fairness and respect, the EUCA requires recalibration. This is not done by removing fairness, but rather by ensuring that in the pursuit of fairness, the respect of the asylum seeker is not compromised.

At the very least two options are available in answering this value conflict. One can (1) continue to have a system built on conferral of victims of bad brute luck, but strive to make the contingent flaws go away, to the best of our ability, and refine the assessment procedures to be more sensitive, offering applicants better platforms and ways to share their stories, and continuous training and funding for decision makers, so that they are better equipped to understand the nuances of diverse SOGIE experiences, and knowledgeable of country of origin information, or (2) build a new system, not dependant on the conferral of victims of bad brute luck. In practical terms, the first option would continue to assess SOGIE identity, but reimagine the way in which this is done, in light of the fact that these are self-identified social categories, and cannot scientifically or factually be determined by an outsider. This option would continue to attempt to remove the contingent flaws, accepting, to an extent, the intrinsic flaws, due to the conviction that these are necessary in order to avoid the asylum system falling apart and being abused. The second option would entail a total reimagining of the credibility assessment. This is done in light of intrinsic flaws, both the *conferral*, which provides evidence to suggest that there is little internal epistemic value of an assessment of sexual orientation, gender identity and gender expression, and the implications of a priority of *fairness*. The combination of the two suggests, regardless of the accuracy of conferral, an understanding that such an assessment is in violation of a fundamental level of respect and human dignity.

An alternative could be a shift of assessment towards establishing the legitimacy of the well-founded fear of persecution, with a presupposition (of sorts) that an applicant is telling the truth about their self-identified SOGIE status, if according to specialists on SOGIE culture in the country in question regards this SOGIE identity as a distinct PSG in that country. I do however, in line with Wolff (1998, p. 122), broadly speaking, argue that there needs to be a limit in trust, safeguarding against destructive and extensive free riding. The question remains where this limit, or threshold should be. This requires a balancing act of the two preferably compatible, but competing values of fairness and respect, as discussed in Chapter 8.

In assessing asylum claims there exists a delicate balance between two types of errors: false positives, i.e., granting asylum to people who do not qualify, but are considered to qualify in the assessment, and false negatives, i.e., wrongly denying asylum to those who genuinely qualify. In this instance, I believe minimizing the false negative error ought to be prioritized, in the same way capital punishment is considered to carry the inherent risk of executing innocent people, and therefore illegal in the EU (Committee of Ministers, 2020). It ought to be considered worse to deny asylum to an applicant who is, as a result send back to their country of origin, persecuted, or executed due to their SOGIE status, than let an applicant who does not have a genuine SOGIE identity have asylum in the EU. Moving towards a EUCA that is less dependent on catching false cases, accepting a margin of error in terms of false positives, emphasising instead the fundamental right to asylum to all deserving applicants, could help mend this issue, and lower the amount of false negatives. As discussed later, the EUCA, while striving for fairness, must recognize that respect is not a secondary luxury but a fundamental right. Achieving a dynamic balance between these values is not just a theoretical ideal but an urgent necessity for a humane and just asylum system.

7.3.1. PULL-FACTORS

Before discussing balance and recalibration, we need to understand the concern of free riders and pull factors. How do we avoid fake applications, and how do we catch them – and what is the reality of fake claims? Just as luck egalitarianism might worry about compensating individuals for risks they knowingly took, in asylum politics, there might be concerns about creating "pull factors". If a state is seen as too generous, it might be perceived as encouraging more people to seek asylum, or rather attracting people seeking a better life without the right to asylum. By making the EUCA more in line with the virtue of respect, as opposed to fairness, allowing for more false positives, there is a concern that the EU would create a pull factor, and

see an increase in the number of fake applications. This is what we refer to as the opportunity implication, opportunity referring to the idea that those who wish to fake an application spots an opportunity, or a loophole in the system, and intend to exploit it. Despite the fact that I consider it to be a reasonable concern, I would argue that the reality of the opportunity implication is this; it is (1) not as extensive as one might think, and (2) the small amount of people using this system to their benefit are outweighed by the normative value of accepting in as many queer asylum seekers as possible.

There are three reasons why I consider fake SOGIE claims not as extensive as one might fear, even in its current state, where it is theorized as an easier pathway to asylum for those who wish to fake their way into Europe (Danisi et al., 2021, p. 294; Koçak, 2020, p. 16-17). The first being the impracticality of it. SOGIE-based asylum claims involve deeply personal and often painful experiences related to discrimination, violence, or persecution. Faking these experiences can be emotionally and psychologically challenging for an individual. Asylum seekers may need to maintain a fabricated narrative consistently throughout interviews and documentation, which can lead to heightened stress and anxiety for years (UNHCR, 2020, p. 2). These arguments are corroborated, and echoed in interviews by members of the European Parliament who are critical of the discourse surrounding "fake" claims (Ferreira, 2023, p. 325). The migration journey itself is also dangerous and risky, with migrants facing life-threatening challenges, such as dangerous travel conditions, human trafficking, or exploitation. For those who are not genuinely seeking asylum, choosing such a perilous path merely to fake a claim is a significant risk that we ought to consider impractical. This is not to mention the fact that seeking asylum based in SOGIE is not by any means a guaranteed success, even for those who are genuine applicants.

Second of all, I consider it to be a difficult position to uphold for the fake applicant. In cases where they are applying for asylum based on SOGIE status, their community, that they may be a part of, has to be proven to persecute SOGIE identities. The burden of acting as a SOGIE minority, potentially distancing yourself from family, friends, and community, and doing things that are potentially in direct opposition with your inner moral or religious compass is one I consider difficult to uphold. Especially when this fake identity undoubtably will lead to exacerbated discrimination and harassment due to homophobia, transphobia and so on (Held, 2020, p. 9; Alessi et al., 2020). Still, although no official record of the amount of fake applications, there have been reports of suspected incidents involving fake SOGIE applications (Koçak, 2020; Danisi et al., 2021). For instance, there have been reports of asylum seekers

stealing SOGIE applicants' stories and identities in Turkish refugee camps, using it as their own in order to abuse the system (Koçak, 2020, p. 16-17). Not only does this point to the reality that fake SOGIE applicants exist, but perhaps more importantly it adds a new dimension to asylum seekers unwillingness to openly share and express their queerness in places where they ought to be safe. This gives them reasons to further supress their SOGIE identity amongst potential likeminded people and groups, making it harder for them to prove it to authorities at a later stage. Finally, recent data suggests that severe abuse of EUCA is simply not the case (Ferreira, 2023), with no evidence to suggest the extents of abuse theorized and feared by the culture of disbelief (ibid., p. 304-305).

The reality of fake claims is that while they may exist, there exists undoubtably few of them (Ferreira, 2023, p. 325). The majority of applicants are genuine migrants fleeing conflict, persecution, or serious harm in their home countries. Efforts to detect and deter fake claims should not compromise the protection of those who genuinely need asylum. Striking the right balance between preventing abuse and providing refuge to those in need is a complex task that requires a fair and thorough assessment process. The discourse and exaggerations surrounding fake applications might be better understood as a tool for the culture of disbelief, and for those who wants stronger border control and securitization to take centre stage in immigration policy (ibid.), than a genuine concern, with real evidence. This necessitates a balancing act. As stated prior, it ought to be considered morally worse to accept a margin for error in false negatives, as opposed to a margin for error in false positives. Both errors, unless one wishes to fundamentally change the world, and provide radical suggestions, have to be minimized to an extent. The priority of error minimization is what I have been concerned with.

8. THE BALANCING ACT

Our findings suggest moving from concerns of false positives, and the assessment of identity in the quest for fairness, to concerns of false negatives, an assessment of risk, in light of the need for fundamental levels of respect. Doing so is not easy, and the balance of these interests depend on whether one wishes to eliminate, as far as is possible, the intrinsic flaws with the current iteration of the EUCA, or if one is willing to accept these flaws, and would rather focus all attention on eliminating, to the best of our ability, the contingent flaws in the assessment. As the approach the majority of literature have concluded with concerns the latter, we will in this paper emphasise the former. The European Commission has since 2016 proposed amendments to the EUCA, in order to, amongst other things harmonize the member states assessment of asylum seekers. The proposed replacement has not been formally adopted (Orav, 2023), and would, as it stands, not address the intrinsic flaws outlined throughout this paper.

It is important to note that, before we attempt to address what I consider to be some of the major intrinsic flaws with the EU credibility assessment, it is the uncomfortable belief of the author that, although I condemn conferral of SOGIE, especially in instances where the results of said conferral have dramatic real life implications, it is difficult to argue for the removal of all assessment based on conferral. It is here important to note the difference between ideals and practice. Ideally, as stated throughout this paper, any and all conferral of sexual orientation, gender identity and/or expression ought to be considered flawed, in practice however, unless one wants to argue for a total reimagining of the state, and open international borders (Carens, 2013), I believe one has to, if one wishes to respect national sovereignty and other important concerns, consider an assessment of all asylum claims to be necessary. This provides us with what I consider to be a morally improved EU credibility assessment in principle, while still operating within the practical realm. As Wolff (1998, p. 122) puts it, “Distributive justice, [i.e., LE, and EUCA, a strategy argued to be in line with LE], should be limited in its application by other egalitarian [value] concerns”. In doing this, the EU credibility assessment requires a recalibration.

8.1. A RECALIBRATION

I would argue, in light of difficulties concerning conferral of SOGIE, increased emphasis should be put on the experiences of harm and persecution, as opposed to attempts to establish things one cannot establish. It should not be the given authority's responsibility and power to assign SOGIE status based on base properties, no matter how good the authorities are, or how well their gaydars (Selim et al, 2022, p. 1016) work. Their job is to assess the dangers of return, and other pertinent aspects of the application. Attempts at addressing the intrinsic flaws will allow policy makers to better avoid the current, and future contingent flaws in the EUCA, especially those related to, or as a result of conferral of SOGIE. Not only do I believe we have normative theoretical grounds to hold this position, due to the lacking, or non-existent internal epistemic value of SOGIE conferral, but it would also, I believe, reduce the harm experienced by SOGIE applicants in the CEAS. In doing so, I would argue, less harm is done in two (interconnected) ways, (1) it avoids the conferral of social categories, and (2) mitigates the shameful revelation.

The core tenet of seeking asylum is the right to protection from persecution. The essence of the Refugee Convention is not to categorize people, but to safeguard individuals from serious harm. Emphasising the risk of persecution aligns more closely with this human rights principle. In reality, we can consider the application of such a measure to be on a sliding scale. One could for instance argue for an approach where the decision maker tries to establish other grounds than membership of a PSG for claiming asylum, such as political beliefs, to substantiate and help with the assessment of the asylum seeker. This *intersectional* approach would put less emphasis on the membership of the PSG, but rather put the SOGIE in perspective, connecting them with aspects more easily conferred and established (Dustin et al., 2021, p. 459-460). Another way to gradually shift the emphasis away from PSG would be removing the requirement of proving and establishing actual membership, but rather focusing on perceived membership (Ferreira & Venturi, 2018, p. 3). This would still require a conferral, but still addresses the fact that it is not an objective reality assessment. No matter which approach we pursue, it is important to note that it has to be unified approach, headlined and with oversight by the EU, as to avoid unfair treatment across different member states.

Implementing an asylum system primarily centred on the assessment of individual risk rather than membership to a particular social group would necessitate significant structural changes in the EUCA. The application could for instance primarily focus on the nature, immediacy and severity of harm or threats, rather than the identity of the applicant. While personal testimonies

would be crucial, corroborative evidence from NGOs, news, and other documentation on the severity of persecution in the country of origin would establish the risk, rather than the cause of persecution. In the case of threats, the cause of those harms or expected harms would be arbitrary. Some have argued that it is not necessary to establish individual persecution when persecution of SOGIE minority is widespread in the applicants' country of origin (Dustin et al., 2021, p. 459). Such an approach would allow for less visible and expressive SOGIE asylum seekers to be accepted on the same basis as their more expressive counterparts. I believe we ought to consider the mere existence of criminal laws against SOGIE identity, whether enforced or not, to be considered persecutory (Jansen and Spijkerboer, 2011). The fear of persecution would be what the assessment and interview would address, circumventing a deep conferral of SOGIE identity. This EUCA would prioritize a trauma-informed approach, ensuring sensitivity when delving deeper into the circumstances of the perceived threats or harm, and avoid shameful revelations (related to the identity of the applicant). This approach would necessitate proper, trauma sensitive education for the decision makers, and potentially require more collaboration between the asylum regime and experienced psychiatrists, psychologists, and NGOs with case-specific knowledge. Similarly, the current system of interpretation has to fundamentally change, avoiding any and all of the contingent issues mentioned, likely requiring the professionalization of SOGIE specialist interpreters. While these measures will undoubtably require budgets, the EUCA is, without these changes already overdue an overhaul in these areas, moreover, no-one ever claimed that having just institutions would be free of charge.

I mention in this paper that, despite its faults as a basis for an asylum system, conferral is the best, if not the only viable option for assessing SOGIE identity, due to the fact that their vulnerability is tied to how others perceive them to be queer, not to a medical foolproof evaluation. What about straight cis people who present themselves, for a multitude of reasons, in a manner often associated with queer expression? Should they be protected by the same regime? What is their hypothetical claim to asylum in the events of persecution? A straight cis man who has an interest in dressing effeminate, consume queer culture, and express themselves in line with stereotyped notions of *queerness* could be argued to be at a greater risk of persecution than a gay man who, due to their interests and personality, presents themselves in a stereotypically straight manner. An implication of a risk assessment strategy could be the following. With the current regime, conferring SOGIE identity, neither would (hypothetically) be protected, as the straight cis man would showcase symptoms of bad brute luck, likely evidence to suggest that they have a well-founded fear of persecution, but not fulfil the primary

criteria of being a SOGIE minority, and the gay man would fulfil this criteria, but not showcase most, if any of the base properties the decision maker is looking for. A risk assessment strategy would protect either one, or protect them both, depending on a few factors: (1) Whether simply being a member of a SOGIE minority, even when the individual has no (genuine) desire to express themselves in a way that would reveal their identity, is considered a risk of persecution worthy of refugee status, and (2) whether one considers the inability to express and live freely as a SOGIE minority in and of itself is harmful, to the extent of granting any and all individuals that live in areas where SOGIE identities are illegal or persecuted refugee status, and (3) where one draws the line on choice, and the extent of ones SOGIE-reminiscent actions and expressions. Ideally, I believe a risk assessment emphasis should protect both individuals. Membership to a SOGIE PSG, whether obvious or not, in a culture where said PSG is persecuted or illegal, ought to count as grounds for persecution. Similarly, due to proof of consistent persecution owing to an irreversible and genuine desire to express oneself in a manner that resembles, to the given authority, membership to a SOGIE minority, grants them right to protection in line with international human rights principles. Once again, ideally, international protection is granted, not due to a categorization, but due to risk of persecution.

This paper has advocated for a shift away from assessment of SOGIE minority identity, towards an assessment of prioritizes risk of persecution, and briefly discussed the implementation of a risk assessment strategy. While I recognize the difficulties and flaws of a risk focused assessment, I argue that it is not inherently more susceptible to abuse. Adhering to stereotypes of *fear of persecution*, expressing interpretations of fear (of persecution) in line with what the decision maker is looking for, could by some be argued to be more easily exploited than stereotypes of SOGIE minority identity. To that I say, the EU credibility assessment, in its current iteration, remains just as susceptible to exploitation. In spite of not answering to the fairness critique of exploitation and opportunity implications directly, these challenges have neither been exacerbated, nor fixed. This approach has maintained fairness, and allowed for better incorporation of respect. This highlights a more compatible regime, where the one value does not undermine the other.

9. CONCLUSION

In scrutinizing the EUCA concerning the SOGIE asylum claims, it is evident that the current system faces both contingent and intrinsic flaws that demand our attention and reform. In this paper I have presented a novel critique of the European Union credibility assessment, in particular the fundamentally incessant need to demonstrate and prove indemonstrable evidence of bad brute luck. The primary goal of this paper has been to establish the intrinsic flaws of such a system, both by highlighting issues of conferral, assignment of social categories based on believed to be present base properties, and, in turn, an argued lexical priority of fairness, permeating the regime, undermining the important value of respect. While SOGIE applicants ought to be considered victims of bad brute luck, and deserving of compensation, in other words asylum, this cannot, or ought not to be determined based on an inaccurate and unfruitful attempt at establishing *innate queerness*.

As we have approached this subject matter through the lense of political theories, we have more fundamentally defined the lack of internal epistemic value of an assessment of SOGIE minority status in the EUCA, and provided a normative discussion and arguments against what is argued to be the expressed external epistemic value of the current assessment strategy. Our normative objections to presumed lexical priority of fairness relates closely to prior implications to luck egalitarianism, primarily implications of envy and pity (Anderson, 1999), and the shameful revelation (Wolff, 1998) which I consider applicable for a critique of credibility assessments of SOGIE. In the pursuit of a humane and just asylum system, a trauma-informed, risk-focused approach, shifting the concern of false positives, towards a concern of false negatives, could provide a way forward. In conclusion, we argue that the attempt to create a fair system has inadvertently resulted in a flawed, stereotype-driven assessment, affecting the very individuals the system seeks to protect. Proposing a recalibration of values, our findings suggest that when assessing SOGIE asylum seekers, we have incentives to move away from an assessment of SOGIE minority status, towards an assessment that prioritizes risk of persecution, a shift of focus to evaluating the genuine danger faced by asylum seekers. Ultimately, recognizing the intrinsic flaws in the current system paves the way for a more respectful and effective CEAS, better aligned with the foundational principles of refugee protection and international human rights.

BIBLIOGRAPHY

Advocate General Sharpston (2014) *Opinion of Advocate General Sharpston delivered on 17 July 2014. A (C-148/13), B (C-149/13) and C (C-150/13) v Staatssecretaris van Veiligheid en Justitie.* EU:C: 2014:2111

Alessi, E.J., Kahn, S., Greenfield, B. et al. (2020). A Qualitative Exploration of the Integration Experiences of LGBTQ Refugees Who Fled from the Middle East, North Africa, and Central and South Asia to Austria and the Netherlands. *Sex Res Soc Policy 17*, 13–26. https://doi.org/10.1007/s13178-018-0364-7

Anderson, E. (1995). Knowledge, Human Interests, and Objectivity in Feminist Epistemology. In: P*hilosophical Topics, 23(2*), 27–58. http://www.jstor.org/stable/43154207

Anderson, E. (1999). What Is the Point of Equality? *Ethics, 109(2),* 287–337. https://doi.org/10.1086/233897

Andrade, V. L., Danisi, C., Dustin, M., Ferreira, N., and Held, N. (2020) Queering Asylum in Europe: A Survey Report. Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – *SOGICA*, University of Sussex.

Arneson, R. (2000). Luck Egalitarianism and Prioritarianism. *Ethics*, *110*(2), 339–349. https://doi.org/10.1086/233272

Arneson, R. (2018) Dworkin and Luck Egalitarianism: A Comparison. In Serena Olsaretti (ed.), *The Oxford Handbook of Distributive Justice, Oxford Handbooks* https://doi.org/10.1093/oxfordhb/9780199645121.013.4

Arneson, R. J. (1990). Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare. *Philosophy & Public Affairs*, *19*(2), 158–194. http://www.jstor.org/stable/2265408

Ásta (2018). Categories We Live By: The Construction of Sex, Gender, Race, and Other Social Categories. *New York, USA: Oxford University Press.*

Avgeri M (2021) Assessing Transgender and Gender Nonconforming Asylum Claims: Towards a Transgender Studies Framework for Particular Social Group and Persecution. *Front. Hum. Dyn. 3:653583*. doi: 10.3389/fhumd.2021.653583

BBC Today (2013) Asylum seeker: 'I had to prove I'm gay'. BBC Radio 4 Today Programme. Broadcast 13 February.

Betts, A. and Collier, P. (2017) Refuge: Rethinking Refugee Policy in a Changing World, *New York: Oxford University Press*

Bhabha, Jacqueline (2018). "Can We Solve the Migration Crisis", *Polity*

Bickle, A., Cameron, C., Hassan, T., Safdar, H., and Khalifa, N. (2021) International overview of phallometric testing for sexual offending behaviour and sexual risk. *BJPsych Int. 2021 Nov; 18(4*): E11. doi: 10.1192/bji.2021.17

Brown, M. (2014). Gender and Sexuality II: There Goes the Gayborhood? *Progress in Human Geography 38 (3):* 457–465. doi:10.1177/030913251348421

Campbell, J. (2013) Language analysis in the United Kingdom's refugee status determination system: Seeing through policy claims about 'expert knowledge.' In: *Ethnic and Racial Studies, 36(4*), pp. 670–690.

Carens, Joseph (2013) The Ethics of Immigration (Oxford University Press).

Carroll, A. and Ramón Mendos, L. (2017) *State-Sponsored Homophobia – A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*. 12th Edition. ILGA – the International Lesbian, Gay, Bisexual, Trans, and Intersex Association

CASE OF MATTER v. SLOVAKIA 31534/96, European Court of Human Rights - Court (Second Section) - Judgment (Merits) -, 05/07/1999

Cheng, Gracye (2011). Gang persecution as grounds for asylum in the USA. *Forced Migration Review 37.* Pages 50-51. https://www.fmreview.org/non-state/Cheng

Cohen, G. A. (1989). On the Currency of Egalitarian Justice. *Ethics*, *99*(4), 906–944. http://www.jstor.org/stable/2381239

Committee of Ministers (1380bis Meeting of the Committee of Ministers, 8 July 2020) (2020). EU Statement on the death penalty. https://www.eeas.europa.eu/eeas/eu-statement-death-penalty_en

Connely, E. (2014) Queer, beyond a Reasonable Doubt: Refugee Experiences of 'Passing'

into ‘Membership of a Particular Social Group,’ *UCL Migration Research Unit Working Papers, 3*

Council of Europe’s High Commissioner for Human Rights, (2009) Issue Paper (2009)2 on Human Rights and Gender Identity, 29 July 2009, available at: https://wcd. coe.int/wcd/ViewDoc.jsp?Ref=CommDH/IssuePaper(2009)2&Language=lanEn glish&Ver=original&Site=CommDH&BackColorInternet=FEC65B&BackColorIntr ante=FEC65B&BackColorLogged=FFC679

Council of the European Union (2010) The Stockholm Programme — An open and secure Europe serving and protecting citizens 2010/C 115/01

Council Regulation (EC) No 2725/2000 (2000) *Council Regulation (EC) No 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention*, 11 December 2000, OJ L 316; 15 December 2000, pp.1-10.

Daniels, N. (2020) "Reflective Equilibrium", *The Stanford Encyclopaedias of Philosophy (Summer 2020 Edition)*, Edward N. Zalta (ed.), URL https://plato.stanford.edu/archives/sum2020/entries/reflective-equilibrium/

Danisi, C., Dustin, M., Ferreira, N. & Held, N. (2021) *Queering Asylum in Europe*. Springer (1) https://doi-org.ezproxy.uio.no/10.1007/978-3-030-69441-8

Decision - X. v. AUSTRIA 8278/78, European Court of Human Rights - Commission (Plenary) - 13/12/1979

Directive 2011/95/EU. *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).* Official Journal of the European Union. L 337/9

Directive 2013/32/EU. *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).* Official Journal of the European Union, L 180/60.

Dustin, M. and Ferreira, N. (2021) Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity, *Refugee Survey Quarterly*, Volume 40, Issue 3, September 2021, Pages 315–347, https://doi.org/10.1093/rsq/hdab005

Dustin, M. and Held, N. (2018). In or out? A Queer Intersectional Approach to "Particular Social Group" Membership and Credibility in SOGI Asylum Claims in Germany and the UK. *Genius 2018* (November): 74–87

Dworkin, R. (2000). Sovereign Virtue: The Theory and Practice of Equality. *Cambridge, MA: Harvard University Press*.

Equaldex (2023a). Right to change legal gender. https://www.equaldex.com/issue/changing-gender

Equaldex (2023b). Legal recognition of non-binary gender. https://www.equaldex.com/issue/non-binary-gender-recognition

European Parliament (2023) Asylum and migration: Parliament confirms key reform mandates. *Press releases.* https://www.europarl.europa.eu/news/en/press-room/20230419IPR80906/asylum-and-migration-parliament-confirms-key-reform-mandates

European Union Agency for Asylum (2022) Expert Panel: Evidence and Credibility Assessment in Sexual Orientation and Gender Identity/Expression (SOGIE) - based claims Wednesday 12 October 2022. https://euaa.europa.eu/sites/default/files/2023-01/2022_10_brochure_sogie_expert_panel_en.pdf

European Union Agency for Asylum (2023) Evidence and credibility assessment in the context of the Common European Asylum System. Judicial analysis, *Judicial Publications, Second edition.* https://euaa.europa.eu/publications/judicial-analysis-evidence-and-credibility-context-common-european-asylum-system

Ferreira, N. (2023), Utterly Unbelievable: The Discourse of 'Fake' SOGI Asylum Claims as a Form of Epistemic Injustice, *International Journal of Refugee Law, Volume 34, Issue 3-4,* Pages 303–326, https://doi.org/10.1093/ijrl/eeac041

Ferreira, N. and Venturi, D. (2018) Testing the Untestable: The CJEU's Decision in Case C-473/16, F V Bandolas És Állampolgársági Hivatal (June 28, 2018). EDAL – *European*

Database of Asylum Law, 28 June 2018, Available at SSRN: https://ssrn.com/abstract=3204321

FitzGerald, D. S. (2019) Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers. New York: *Oxford University Press*

Griffith, A. (2019). Individualistic and Structural Explanations in Ásta's *Categories We Live By*. *Journal of Social Ontology, 5*(2), 251-260. https://doi.org/10.1515/jso-2020-2003

Griffith, A. M. (2017). Social Construction and Grounding. *Philosophy and Phenomenological Research 97 (2):*393-409.

Grønningsæter, A. G. (2017), Establishing a sexual identity: The Norwegian immigration authorities practice in sexuality-based asylum cases, paper for the conference 'Out & Proud? LGBTI asylum in Europe Conference', *COC Netherlands,* Amsterdam, 5-6 October 2017.

Guskin, E. (2013). 'Illegal,' 'undocumented,' 'unauthorized': News media shift language on immigration. *Pew Research Centre,* June 2013. https://www.pewresearch.org/fact-tank/2013/06/17/illegal-undocumented-unauthorized-news-media-shift-language-on-immigration/

Hanna, F. (2005). Punishing masculinity in gay asylum claims. *Yale Law Journal,114(4),* 913–920. https://www.jstor.org/stable/4135797

Held, N. (2022) "As queer refugees, we are out of category, we do not belong to one, or the other": LGBTIQ+ refugees' experiences in "ambivalent" queer spaces. *Ethnic and Racial Studies,* DOI: 10.1080/01419870.2022.2032246

Herlihy, J. and Turner, S. W. (2009) 'The Psychology of Seeking Protection', *International Journal of Refugee Law,* vol. 21, no. 2, 2009,

Hertogh's, M., Schinkel, W. (2018) The state's sexual desires: the performance of sexuality in the Dutch asylum procedure. *Theor Soc 47,* 691–716. https://doi.org/10.1007/s11186-018-9330-x

Homeland Security Department & Executive Office for Immigration Review. (2020, June 15). Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review. *Federal Register*, 85 FR 36264, 36264-36306

Human Dignity Trust (2023), Map of Countries that Criminalise LGBT People. Accessed 11.10.2023 on https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/

Huysmans, J. (2000), The European Union and the Securitization of Migration. *JCMS: Journal of Common Market Studies*, 38: 751-777. https://doi.org/10.1111/1468-5965.00263

Illegal Migration Act 2023 (2023) c. 37. https://www.legislation.gov.uk/ukpga/2023/37

International Commission of Jurists (ICJ) (2016) International Commission of Jurists. (2016). Refugee status claims based on sexual orientation and gender identity – A practitioner's guide 11.

Jacque, P. (2023, April 21) MEPs vote in Favor of EU migration and asylum pact. Le Monde. https://www.lemonde.fr/en/international/article/2023/04/21/meps-vote-in-favor-of-eu-migration-and-asylum-pact_6023721_4.html

Jansen, S. & Spijkerboer, T. (2011). Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe. *Vrije Universiteit Amsterdam*. https://www.refworld.org/docid/4ebba7852.html

Jansen, S. (2018), Pride or Shame: Assessing LGBTI Asylum Applications in the Netherlands Following the XYZ and ABC Judgments, *COC Netherlands*

Jenkins, K. (2019). Conferralism and intersectionality: A response to Ásta's categories we live by. *Journal of Social Ontology*, *5(2*), 261-272. Doi: HTTPs://doi.org/10.1515/jso-2020-2004

Jubany, O. (2017) Screening Asylum in a Culture of Disbelief: Truths, Denials and Sceptical Borders. *Palgrave Macmillan Cham*. https://doi.org/10.1007/978-3-319-40748-7

Judgement of the Court (Grand Chamber) 2 December 2014. *JUDGMENT OF THE COURT (Grand Chamber) In Joined Cases C-148/13 to C-150/13,* EU:C:2014:2406

Kaurin, D. (2019) Data Protection and Digital Agency for Refugees. *World Refugee Council Research Paper No. 12* — May 2019

Klepp, S. 2010. A contested asylum system: The European Union between refugee protection and border control in the Mediterranean Sea. *European Journal of Migration and*

Law 21(12): 1–21

Koçak, M. (2020): Who is “Queerer” and Deserves Resettlement?: Queer Asylum Seekers and Their Deservingness of Refugee Status in Turkey, *Middle East Critique*, DOI: 10.1080/19436149.2020.1704506

Koçak, M. (2022) Deservingness as Transnational Refugee Governance: Queer Asylum Seekers in Turkey (2019-2020*), New Europe College Yearbook Pontica Magna Program 2019-2020*. Pages 121-140.

Kuhn, D., Cheney, R. & Weinstock, M. (2000). The Development of Epistemological Understanding. In: *Cognitive Development. 15(3*), 309-328. DOI: 10.1016/S0885-2014(00)00030-7.

Kuhn, T. (1977) "Objectivity, Value Judgment, and Theory Choice," in his The Essential Tension (Chicago: *University of Chicago Press*, 1977),

Léonard, S. (2010) EU border security and migration into the European Union: FRONTEX and securitisation through practices, *European Security, 19:2*, 231-254, DOI: 10.1080/09662839.2010.526937

Levin, Y. (2023) Keynote Address by UK Home Secretary Suella Braverman: UK-US Security Priorities for the 21st Century. *American Enterprise Institute*. https://www.aei.org/events/keynote-address-by-uk-home-secretary-suella-braverman-uk-us-security-priorities-for-the-21st-century-web/

Lewis, R. (2013) Deportable Subjects: Lesbians and Political Asylum, *Feminist Formations*, 25(2),

Lewis, R. A. (2014). ‘Gay? Prove it’: The politics of queer anti-deportation activism. *Sexualities*, 17(8), 958–975.

Longino, H. E. (1990). Science as Social Knowledge: Values and Objectivity in Scientific Inquiry. *Princeton University Press*

Mariza, A. (2021). Trans*it: Transgender and gender nonconforming asylum claimants’ narratives in Greece. *Sexualities*. 26. 1-15. 10.1177/13634607211013278.

Millbank, J. (2009). 'The ring of truth': A case study of credibility assessment in particular social group refugee determinations. *International Journal of Refugee Law, 21(1*), 1–33. https://doi. org/10.1093/ijrl/een040

Minssen, T., Gerke, S. & Corrales C, M. (2021). Discrimination and racial bias in AI technology: A case study for the WHO.

Orav, A. (2023). Reform of the qualification directive: In "Promoting our European Way of Life". European Parliament; Legislative Train Schedule. Accessed 31.10.2023 at https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-reform-of-the-qualification-directive

Parekh, S. (2020), *No Refuge: Ethics and the Global Refugee Crisis* (New York, 2020; online edn, *Oxford Academic*, 22 Oct. 2020), https://doi.org/10.1093/oso/9780197507995.001.0001

Parijs, P. V. (1997). Real freedom for all: What (if anything) can justify capitalism? *Oxford: Oxford University Press.* https://doi.org/10.1093/0198293577.001.0001 (Original work published 1995).

Purcell, M. S., Chandler, J. A., Fedoroff, J. P. (2015) The Use of Phallometric Evidence in Canadian Criminal Law. *Journal of the American Academy of Psychiatry and the Law Online Jun 2015*, 43 (2) 141-153.

R.C. v. Sweden, no. 41827/07 (Judgment), ECtHR, 9 March 2010, para. 50; N. v. Sweden, no. 23505/09 (Judgment), ECtHR, 20 July 2010, para. 53; F.H. v. Sweden, no. 32621/06 (Judgment), ECtHR, 20 January 2009, para. 95

Regulation 604/2013. *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).* L 180/31

Rehaag, S. (2008). Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada. *McGill Law Journal* 3(53): p. 59–102

Rehaag, S. (2009). Bisexuals need not apply: A comparative appraisal of refugee law and

policy in Canada, the United States, and Australia. *The International Journal of Human Rights, 13(2–3)*, 415–436

Selim, H., Korkman, J., Pirjatanniemi, E. & Antfolk, J. (2023) Asylum claims based on sexual orientation: a review of psycho-legal issues in credibility assessments, *Psychology, Crime & Law, 29:10*, 1001-1030, DOI: 10.1080/1068316X.2022.2044038

Stemplowska, Z. (2016) Doing more than one's fair share. *Critical Review of International Social and Political Philosophy, 19:5*, 591-608, DOI: 10.1080/13698230.2016.1183753

Steup, M. and Neta, R. (2020) "Epistemology", *The Stanford Encyclopedia of Philosophy (Fall 2020 Edition)*, Edward N. Zalta (ed.), URL= https://plato.stanford.edu/archives/fall2020/entries/epistemology/

The Asylum Information Database (AIDA) (2018) Country Report: Germany 2018 Update.

Timmer, A. (2013). A quiet revolution: Vulnerability in the European Court of Human Rights. In M. Freeman (Ed.) *Vulnerability: Reflections on a new ethical foundation for law and politics* (pp. 147–170). *London: Ashgate*

Ullmann-Margalit, E., Margalit, A. & Sunstein, C. R. (2017). Normal Rationality: Decisions and Social Order. *Oxford Scholarship Online*. DOI: 10.1093/oso/9780198802433.001.0001

UN High Commissioner for Refugees (UNHCR), Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report, May 2013, available at: https://www.refworld.org/docid/519b1fb54.html

UNHCR (2014), "Protracted Refugee Situations,", UNHCR/DPC/2014/Doc. 02,

UNHCR (2016). UNHCR's Views on Gender Based Asylum Claims and Defining "Particular Social Group" to Encompass Gender Using international law to support claims from women seeking protection in the U.S. *UNHCR Asylum Lawyers Project.* https://www.unhcr.org/us/media/unhcrs-views-gender-based-asylum-claims

UNHCR (2019), Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4,

UNHCR, (2012) Guidelines for International Protection NO. 9. HCR/GIP/12/09

UNHCR, (2022) "Figures at a Glance.". Data gathered from https://www.unhcr.org/en-us/figures-at-a-glance.html)

United Nations General Assembly. (1948). *Universal Declaration of Human Rights (217 [III] A). U.N. Doc. A/810 at 71.*

United Nations. (1951). *Convention Relating to the Status of Refugees. Treaty Series, 189, 137.*

Vitikainen, A. (2020) LGBT rights and refugees: a case for prioritizing LGBT status in refugee admissions, *Ethics & Global Politics, 13:1,* 64-78, DOI: 10.1080/16544951.2020.1735015

Wolff, J. (1998), Fairness, Respect, and the Egalitarian Ethos. *Philosophy & Public Affairs, 27*: 97-122. https://doi.org/10.1111/j.1088-4963.1998.tb00063.x

Wolff, J. (2010). Fairness, Respect, and the Egalitarian "Ethos" Revisited. *The Journal of Ethics, 14*(3/4), 335–350. http://www.jstor.org/stable/40928983

Zisakou, S. (2021) Credibility Assessment in Asylum Claims Based on Sexual Orientation by the Greek Asylum Service: A Deep-Rooted Culture of Disbelief. *Front. Hum. Dyn* 3:693308. doi: 10.3389/fhumd.2021.693308