The “true” homosexual Refugee

- An Archaeology of the Becoming and Governing of Refugees through scientific-legal Categories of Sexuality in German Legal Decision-making.

Lisa Schmitz

Lund University
Sociology of Law Department

Master Thesis (RÄSM02)
Autumn 2015

Supervisor: Håkan Hydén

Examinator: Ida Nafstad

Abstract

Advancements in the application of international refugee laws, European Union and national asylum legislations has increased the protection for refugees and asylum seekers from sexual minorities. With point of departure in the German administrative court's credibility assessment dealing with asylum/refugee appeal cases relating to sexual orientation, the aim of this study is to explore the epistemological relation between the sexual psychology and legal decision-making. The overall objective of this study is posed through the problem of 'how does knowledge derived from the sexual psychological science become constituent in the German credibility assessment dealing with asylum/refugee appeal cases relating to sexual orientation and what mechanisms are present when governing refugees from sexual minorities?'.

By using a discourse analysis as methods for the empirical court verdicts and Michel Foucault's archaeology as analytical grip, this study seeks to investigate what kind of knowledge counts as relevant criteria and preconditions for the interpretation of the law ''membership of a particular social group'. In addition, it will be explored by what kinds of techniques and mechanisms law and legal decision-making become modes to objectify that categorise individuals and thereby achieve its 'truth effects'. Finally, this study seeks to examine how this knowledge is constituted in the governing of refugees from sexual minorities.

This study shows that the sexual psychological science constitutes itself as a natural and necessary epistemological dimension in the German credibility assessment, determining and affecting the categories, criteria and sexual stereotypes that occur in connection to the law 'membership of a particular social group'. The proposed liberal rights for asylum seekers and refugees denote hence a regulated freedom.

Keywords: Germany, credibility assessment, sexual orientation, membership of a particular social group, discourse analysis, Michel Foucault, archaeology, sexual psychology, stereotypes.

Table of Contents

1. INTRODUCTION

> *"The essential point is that sex was not only a matter of sensation and pleasure, of law and taboo, but also of truth and falsehood [...] in short, that sex was constituted as a problem of truth*."
>
> (Foucault 1978)

Every year, thousands of lesbian, gay, bisexual, transsexual, transgender and intersex (LGBTTI) refugees apply for international protection in the European Union (EU) seeking to escape discrimination, sexual assault, ill-treatment, and killings by state- and non-state actors (Jansen & Spijkerboer 2011). Freedom, including sexual freedoms, provided by human rights has become the democratic ideological foundation of the "Western" states. Sexual freedom revolves around the idea of self-definition and equal rights for all regardless of a human being's sexual orientation or sexual identity. Although being comparatively new in legal decision-making, the right to obtain asylum relating to sexual orientation[1] earlier has been stipulated by different national laws under the legal category of political asylum. Since 2004, the EU has streamlined the right to asylum or refugee status relating to sexual orientation and established the causal link to the legal category of 'membership of a particular social group' (Council Directive 2004/83; Council Directive 2011/95/EU). At first glance this seems like a progressive and a major opportunity for the many asylum seekers and refugees from sexual minorities applying for protection and that seek to escape sexual oppressions and violence.

Taking point of departure in the German Administrative Courts and their legal practices on this area, the right to obtain (political) asylum relating to sexual orientation has been substantiated through a landmark decision from the Federal Administrative Court in 1988. With reference to German administrative court decisions, literature has shown that refugees and asylum seekers from sexual minorities on a regular basis are required to prove their sexual orientations instead of the liberal idea of self-definition (Markard 2013; Dolk &

[1] Sexual orientation' refers to "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender" (Yogyakarta Principles 2007; 6n1).

Schwantner 2007; Referat für gleichgeschlechtliche Lebensweisen 1994). The credibility assessment is thereby mostly undertaken through the verification of sexual psychologists and psychiatrists. These were before mandatory, but the German government stresses that these practices now are outdated (BT-Drucks. 17/8357: 5).

However, what does it mean to prove your sexual orientation? By what means would that be possible? And do there exist sexual orientations, apart from those that are criminalised in Germany, that are not credible for the categorisation 'membership of a particular social group'? These epistemological challenges point towards the aspect that certain underlying knowledges and truths must reduce the complex and fluctuating notion of 'sexuality' into a "singular epistemological category" (Senthorun 2010). Hence, the notion of sexual freedom in German legal decision-making would appear as regulated freedom with possible consequences for human rights and legal certainty.

1.1 Aim of Study and Research Question

With empirical point of departure in (un)published court verdicts addressing asylum/refugee appeal cases relating to sexual orientation, this thesis aims to make a diagnosis of the practices of the German administrative courts and the knowledge dimension in legal decision-making. Thereby, I seek to examine how sexual psychological scientific lines of reasoning become embedded into juridical lines of decision-making, as well as to explore how these knowledges are constituted and reproduced through certain techniques and mechanisms in legal decision-making. Especially the aspect of what kinds of knowledge and relationships are presented as normal, natural and necessary becomes an important relation to explore, since these increase the acceptance of certain (discriminatory) practices and decrease the possibility for critically engaging and addressing them due to its perceived normalcy (Taylor 2009). My main empirical material consists of selected statements within the German administrative courts' (un)published verdicts on asylum/refugee appeal cases relating to sexual orientation during the period 2004 – 2015, as well as a landmark decision from 1988 ruled by the German Federal Administrative Court [*Bundesverwaltungsgericht*].

This decision has binding effects on political and legal institutions. Further, I will use different parliament [*Bundesrat*] inquiries.

In order to examine the knowledge dimension stemming from the relationship between the German judiciary and the sexual psychological science in asylum/refugee appeal cases relating to sexual orientation, my analytical framework will be based on a discourse analysis entailing an archaeology inspired by Michel Foucault. Following Foucault's analytical inquiry, which overall takes departure in poststructuralism, I will investigate the practices for the production of (scientific) truths and knowledge within German legal decision-making that deal with cases relating to sexual orientation under the law 'membership of a particular social group'. Hereunder, I will analyse by what kinds of techniques and mechanisms law and legal decision-making achieve its 'truth effects' and how this knowledge is constituted in the governing of refugees from sexual minorities. This study is therefore not concerned with the outcome of the verdicts, as more factors play into the possibility to obtain asylum or refugee status. Instead, I will focus solely on the credibility assessment which revolves around the plaintiff's need to prove the own sexual orientation, instead of the liberal approach of self-definition.

Based on the aims of this study, I formulate my research question as followed:

How does knowledge derived from the sexual psychological science become constituent in the German credibility assessment dealing with asylum/refugee appeal cases relating to *sexual orientation and what mechanisms are present when governing refugees from sexual minorities?*

In order to provide an answer to my research question, I will make use of three working questions that will guide my analysis. The scientific school of the epistemological stance which I have chosen as the basis for my study, has inspired me to formulate my further working questions as a discourse analysis identifies and discuss the following underlying questions: "What is valid knowledge at a certain place and time? How does this knowledge arise and how is it passed on? What functions does it have for constituting subjects? What consequences does it have for the shaping of society?" (Wodak & Meyer 2011: 23/33).

Hence, I have designed these working questions so that I can integrate the what kinds of knowledge influences the credibility assessment in cases of sexual orientation and how this knowledge is operationalised so as to have an impact on the sexual minority plaintiff as well as German jurisprudence.

Working question 1:	What kind of knowledge counts as relevant criteria and precondition when interpreting the law on 'membership of a particular social group' as part of the credibility assessment in German legal decision-making?
Working question 2:	What kind of modes of objectification as techniques are present as part of the credibility assessment in German legal decision-making and how do these operate?
Working question 3:	Which mechanisms are present in German legal decision-making when dealing with asylum/refugee appeals cases relating to sexual orientation and how do these operate?

1.2 Overview of the Thesis

This first **Chapter 1** presents an introduction, the aim and research question of this study, as well as a literature review of the scholarly contributions, methodological shortcomings and the relevance of this study to the discipline of/state of the arts of sociology of law. **Chapter 2** outlines my methodological and theoretical framework entailing an exposition of my analytical concepts and tools applied, as well as reflections concerning methods of knowledge and data generations, as well as ethical considerations. **Chapter 3** constitutes the core of this study as this entails my analysis, which brings into play my empirical court verdicts in conjunction with my analytical framework. This chapter will be divided into several sub-chapters: Firstly, focusing on the reciprocal relation between the sexual psychological science and German legal decision-making, followed by an in-depth analysis of my empirical material where I trace the scientific episteme, discursive events and

knowledges derived from expert opinions in legal decision-making that deal with asylum/ refugee appeal cases relating to sexual orientation, as well an analysis of techniques and mechanisms in legal decision-making to govern individuals. In **Chapter 4**, I will conclude this study by summarising and providing an answer to my research question, as well as relating my findings to previous and future research.

1.3 Literature Review: Bridging the Gaps between previous socio-legal Research and its Relevance for the Sociology of Law

In the following, I will outline the different scholarly publications and reports from international, regional and German scholars and non-governmental organizations (NGOs) that have contributed to the discussion on the credibility assessment and sexual orientation in asylum/refugee cases. Most specifically, I will focus on the credibility assessment in refugee and asylum appeal cases relating to sexual orientation in German administrative courts when interpreting the law 'membership of a particular social group' as part of the German Asylum Act (1992). As this law is equally stipulated in EU law and international refugee law, the challenges occurring in other countries are to some extend similar to Germany. Although some of the scholars approach this topic from a socio-legal perspective, I have not found any relevant literature from the sociology of law focusing on the German practices of the administrative courts overall, or sexual orientation in particular. Hence, in the first subchapter, I will only focus on research from scholars and legal practitioners from the former mentioned profession that have investigated the empirical dimension of the legal challenges presented and through which I have gained the inspiration for addressing this topic from a sociology of law perspective. As a way to provide an overview of general approaches on the knowledge dimension in legal decision-making within the sociology of law, I will spend the second sub-chapter discussing these overall theoretical findings. On that note I want to mention, that much of the literature also includes and covers the challenges that refugees and asylum seekers from gender minorities, such as transsexual and transgender people, face. Due to the scope of my study, I will however solely focus on asylum/refugee claims relating to sexual orientation.

1.1.1 Socio-legal Contributions and Shortcomings

The first part of my review will establish an overview of the thematic contributions and shortcomings in the EU and German scholarly literature on my chosen topic, followed by a brief outline of the three most reoccurring challenges in international research on asylum/ refugee application based on sexual orientation. Finally, I will point towards potential gaps in socio-legal research emphasising the relevance for my analytical endeavour. As a way to structure this first part of my review and to display some potential empirical-theoretical gaps that exist for Germany on this topic in general, I will emphasise briefly the key socio-legal practices and challenges connected to the asylum/refugee recognition procedures relating to the 'proving of sexual orientation' in international scholarly debates.

1.1.1.1 Three reoccurring Key socio-legal Issues

After reviewing several scholarly publications focusing on cases of sexual orientation in asylum/refugee status determination practices and the corresponding credibility assessment, it became evident that a) most literature focuses on countries such as the USA, Canada, and Australia (see e.g. Senthorun 2011; LaViolette 2014; Berg & Millbank 2009; Birdsong 2007) and b) most English literature for EU member states on this topic exists on the United Kingdom (see e.g. Buxton 2012; Gray & McDowall 2013; Berg & Millbank 2013; Cowen et al. 2011).

Considering as a starting point, Tim Cowen et al.'s (2011) overview of three key legal issues reoccurring in the British refugee status determination system (Cowen et al. 2011: 62), which originally are taken from Nicole LaViolette's research on Lesbian, Gay, Transgender, Transsexual and Intersex (LGBTTI) asylum claims in Canada conducted since 1991 (LaViolette 2009). In light of this, Cowen et al. and LaViolette emphasise that the following three aspects are reoccurring challenges in the credibility assessment

1) "The recognition of sexual orientation (…) as valid eligibility criteria for claiming

asylum";

2) "The need to prove the claimants' sexual orientation";
3) "The need to prove that the claimant's fear of being persecuted in their country of origin because of their sexual orientation (…) is well-founded" (Cowen et al. 2011:62).

In this thesis, I will however make the second challenge my focus, namely "*[t]*he need to prove the claimants' sexual orientation". Although criteria two and three together make up what legal positivists define as 'causal link', the following research on Germany indicate that the "need to prove the claimants' sexual orientation" seems a relevant obstacle that refugees and asylum seekers from sexual minority face in Germany. Hence, I will continue this review with a direct focus on the challenges of proving the sexual orientation connected to the credibility assessment.

1.1.1.2 From Discretion to Disbelief: Sexual Orientation and the Credibility Assessment

While many EU member states, including Germany, for many years have practiced the so-called 'discretion requirement' – this entails that authorities and judges advise the claimants to hide their sexual orientation in the country of origin in order to escape persecution – Jenni Millbank (2009a; 2009b), Louis Middelkoop (2013) and Jana Weßel (2013) for example discuss that some countries have shifted over to doubting whether the claimants in fact are LGB persons with 'innate' or 'identity-forming' characteristics that are associated with the law on 'membership of a particular social group'. While there does not exist much socio-legal research concerning this topic, it becomes observable that some judges interpret this through the requirement of a stable and fixed sexuality and sexual identity (see e.g. Hojem 2009; Jansen & Spijkerboer 2011; Markard 2013; Budd 2009).

Ending these practices, the Court of Justice of the European Union's (CJEU) ruled in 2013 that individuals who are persecuted cannot be expected to conceal their sexual orientation in the country of origin in order to avoid persecution (CJEU 2013). With the binding character of such rulings, the German government has set forward the withdrawal from such practices

(Markard 2013:82). However, as Nora Markard, as well as Klaudia Dolk & Andreas Schwantner (2007) and Leila Mourad (2010), discuss in their research, this resulted equally in a shift from 'discretion' to 'disbelief', which international researchers already have deliberated upon (see e.g. Millbank 2009; Middelkoop 2013; and Wessel 2013).

With reference to German administrative court verdicts, Markard (2013), Dolk & Schwank (2007), and the Referat für gleichgeschlechtliche Lebensweisen (1994) argue that refugees from sexual minority on a regular basis are required to prove their sexual orientations. The credibility assessment is thereby mostly undertaken through the verification of sexual psychologists and psychiatrists, which either is provided voluntarily or requested by the Administrative Courts (Markard 2013; Dolk & Schwantner 2007; Referat für gleichgeschlechtliche Lebensweisen 1994). The German judges seems to be divided on these practices, however empirical research shows that the credibility assessment is often connected to the provision of a sexual psychological/psychiatric expert opinions – either required or provided on a "voluntary" basis in order to enhance the chances within the credibility assessment (Kalkmann 2011; Jansen & Spijkerboer 2011; Markard 2013; Dolk & Schwantner 2007; Mourad 2010; Referat für gleichgeschlechtliche Lebensweisen 1994).

The research for Germany conducted by Sabine Jansen & Thomas Spijkerboer (2011), McPherson et al. 2014, and Markard (2013) outline that the credibility assessment often is accompanied by prejudices and stereotypes that judges hold about sexual minorities. This runs counter to the widely held legal positivist assumptions that the practices of the judiciary and the resulting verdicts are neutral and objective. Jansen & Spijkerboer, Markard and McPherson et al., stress that decision-makers and judges measure the claimants' narratives with stereotyped notions of perceived characteristics and behaviour (see e.g. Markard 2013: 83/84; McPherson et al. 2014: 179/180). An approach that has been ruled by the CJEU on the 7 November 2013 judgment in joined cases C-199, C-200, and C-201 as not being in correspondence with EU and international human rights and refugee law. These practices become especially difficult for a broad range of individuals, such as lesbians, bisexuals and individuals who have been in former/present heterosexual relationships, those who have children, or just those persons who do not fit into these 'Westernised' stereotypes. This is

argued to be due to many authorities and judges understand a person's sexuality as fixed and stable part of the identity (see e.g. Rehaag 2009; Cowen 2010; Spijkerboer 2013; Markard 2013; Mourad 2010; Budd 2013; McPherson et al. 2014).

Finally, Markard outlines that German authorities interpret the law on 'membership of a particular social group' only in terms of an "irreversible" (homo)sexual orientation. A stance that legally has been manifested and binding through a landmark decision from 1988 (Markard 2013: 83). This terminology also excludes the former mentioned individuals, whose "sexual orientation" or "sexual identity" is not fixed or stable. Despite the existence of very few socio-legal researchers in Germany deliberating on/touching upon the above-mentioned aspects and empirical examples, the research on this specific topic remains very scarce and covers my chosen dimensions only very briefly.

1.1.1.3 Potential Gaps in socio-legal Contributions

This overview of international, EU and German scholarly and expert debates provided, sought to shed light on themes and legal topics connected to the asylum and refugee status determination processes, its recognition practices and credibility assessment for asylum seekers and refugees from sexual minorities. Hereunder, I have focused on highlighting some of the reoccurring issues that refugees and asylum seekers from sexual minorities face in their application procedures.

As pointed out, there exist some socio-legal scholars and experts emphasising the challenges occurring for asylum seekers and refugees from sexual minorities, but overall there exist very little actual research on this topic for Germany (see e.g. Markard 2013; Dolk & Schwantner 2007; Referat für gleichgeschlechtliche Lebensweisen 1994; and Mourad 2010). In particular, there exist no literature taking a sociology of law stance towards this topic. Consequently, the aspect of sexual psychological science being involved in the credibility assessment becomes especially interesting to investigate in light of my theoretical and methodological framework chosen.

1.3.2 Relevance for the Sociology of Law Discipline

As the former presented literature review has shown, my chosen topic has not covered the (sexual psychological) knowledge dimension in legal decision-making. It is here where I will direct my focus to the shortcomings that exist on this topic, as well as outline general aspects relevant to the knowledge dimension within the sociology of law as discipline, establishing thereby the relevance of my study.

The sociology of law has since Max Weber and Emilé Durkheim raised important questions concerning the reciprocal relationship between law and society. So has Pierré Bourdieu amongst others with his analysis of how different kinds of (legal) knowledge constitute different kinds of resources (Deflem 2008), while other more contemporary sociology of law researchers such as Matthias Beier (2014), Håkan Hydén and Måns Svensson (2008) have focused on the normative dimension of law. Although conventional legal jurisprudence acknowledge that the autonomy of law cannot always be claimed, there exist still positivist discourses in legal studies that consider legal knowledge in verdicts as somewhat objective and neutral (for a critical enquiry of this topic see e.g. Bladini 2013).

While theoretical stances and perspectives are as manifold like each of the respective disciplines and sub-disciplines, the relevance of applying a Foucauldian perspective within the sociology of law can be found in the "comparatively little" focus that exist on the knowledge/discursive dimension within legal decision-making overall. For example, such an approach seeks to examine the practices, means and mechanisms "by which law achieves its 'truth effects'" and how this knowledge is constituted in legal decision-making or in relation to law (Valverde cited in Nelken 2006b: 572). To name a few scholars, Maria Valverde (2010; 2003; Valverde & Rose 1998), David Nelken (2006a; 2006b), Nikolas Rose (1998), Alan Hunt & Gary Wickham (1994), as well as Ben Golder & Peter Fitzpatrick (2009), have been working extensively with a Foucauldian stance in the field of sociology of law, critical legal studies and other branches of socio-legal studies. Nonetheless, as Valverde argues, most sociology of law and socio-legal scholarships have been conducting research on "the reproduction and contestation of various forms of power relation" (Valverde

2003: 1). An example of such very interesting, but somewhat different approach can be outlined through Cynthia Hardy's and Golder's respective examination of the power dynamics in refugee determination systems, which also points to the construction of identity and knowledge in this process (Hardy 2003; Golder 2013). The latter also includes a focus on how rights within this system can be understood in a Foucauldian sense entailing liberal freedoms and "mechanisms of inscription" (Golder 2013).

The domain of legal scientific knowledge has gained more and more attention in recent years. However, as my previous literature review has shown, there exist comparatively little to no research within the sociology of law that examines: how scientific lines of reasoning get embedded into juridical lines of decision-making in this particular field; or studies that examine the reciprocal relationship between (German) administrative courts and the sexual psychology as expert knowledge in asylum/refugee appeals cases dealing with sexual orientation. In extension to the theoretical and methodological shortcomings that exist overall concerning this topic and in relation to my geographical scope, there are especially theoretical and methodological shortcomings concerning my chosen field focusing on court verdicts.

Due to strategic reasons, I have chosen to focus only on the archaeological side of the constitutions and reproduction of sexual psychological scientific knowledge and truths within legal decision-making. I see this as an important analytical approach for the sociology of law, since it reveals, amongst others, how the human sciences have developed certain norms of validity and objectivity creating the illusion that there exist a truth that can be discovered. Further, Nelken points out that courts often use different kinds of knowledge depending on the conclusion they wish to arrive at and that this in general requires us more insight into "legal procedures, functions and discursive forms of communication" (Nelken 2006a: 601). In addition, Nelken emphasises that "*[w]*hat counts as legal knowledge, or knowledge for law, is something that changes over time. And this mainly happens outside the courtroom" (Ibid.: 602). My study will therefore examine how certain specific discursive events enable certain discourses on sexuality in asylum/refugee appeal cases to be perceived as natural and absolute truths. The justification of exploring such a topic within the sociology

of law can be outlined, amongst others, in the importance investigating how such expert legal opinions can be perceived as neutral, natural and necessary in legal decision-making. This sets the stage for an interesting discussion on how the interconnection of sex and truth can establish what appears to be accepted and 'natural' in society and creating the basis "upon which individual sexualities and subjectivities" can be based, is for example outlined by Taylor (2009). Furthermore, this is important for understanding how the categorisation and classification of objects by means of (sexual psychological) science and medicine can make certain forms of modern governance possible (Valverde 2003: 3).

Being situated in the field of sociology of law, I hope to contribute to this debate with a new analytical focus, while also providing some new evidence in the form of verdicts from the German administrative courts in the period between 2004 and 2015.

2. METHODOLOGY AND THEORETICAL FRAMEWORK

This chapter will outline my methodological, methodical and theoretical framework. The foundation of this study is thus to be found in my methodological considerations, which reflect both my theoretical, methodical and empirical choices. In the following, I will start by presenting the scientific stance and departure of this thesis, leading to a brief theoretical overview of Foucault's discourse analysis and archaeological approach, as well as an exposition of his analytical terms relevant to this study. Subsequently, I will put forward my methods for the generation of my empirical material and my methodical reflections concerning the generation and selection of my empirical material, as well as ethical considerations.

2.1 The Thesis' Scientific Departure

I will here shortly depict the social scientific stance of this study, which outlines: a) how I will construct other theorists' perceptions as objects of my own epistemological reflections; b) how I am constructing socio-legal knowledge about the juridical practice when dealing

with asylum cases relating to sexual orientation in Germany. The analytical framework will be based on a discourse analysis entailing an archaeological method inspired by Foucault[2]. The approach belongs under the social constructionist paradigm – more specifically being part of the poststructuralism school of thought. Discourse analysis and archaeology are both of technical (methodical) and analytical character. In this first sub-chapter, I will emphasise how these different modes of analyses will affect my own epistemological reflections, since my epistemological departure has to be created in a way so that the emerging of sociality can be observed.

At the heart of Foucault's historical philosophical inquiries, he sought to present a critique of the perceived naturality of liberal humanism, the humanities and the social science, which since the period of enlightenment constructed the idea that there exists a human nature (a subject) in need of liberation and emancipation (Foucault 1972). In addition, he showed how this epistemologically sustained idea was a normalising measure and embedded in the ontologies of the people through scientific expertise and thereby sustained socio-historical constructs of power and domination (Foucault 1977).

Hence, as a sociology of law researcher within social constructionism, (legal) "knowledge is not just a reflection of reality", but instead the underlying truths in law and legal decision-making are constructed and "different regimes of knowledge determine what is true and false" (Jørgensen & Phillips 2002: 13). While knowledge in social constructionism is perceived as being the result of socio-cultural and socio-historical processes, the is no possibility to objective or neutral external reality (Constantino 2008). In addition, the post-structuralist school of thought, or more precisely applying a Foucauldian "method" of discourse analysis, I am thereby not attempting any objectivity (Esmark et al. 2005). This implies that I, as a researcher, am not situated outside the discourses that I am analysing. Rather I will accept my own intersubjective realities that will be inherent in my reflections and research. By applying a certain methodology, methods and theoretical framework, I will

[2] This aspect will be explained thoroughly in the following chapter.

construct the objects of my enquiry in a certain way so that my own position under this perspective will come to light through the use of certain analytical terms.

By employing discourse analysis, I equally reject objectivism's scientific requirements and understanding of the reliability and validity of my study, since they are positivist and realist assumptions concerning the possibility to achieve truth (Ibid.). In line with Foucault's analytical approach, the human sciences developed certain norms of validity and objectivity and creates thereby the illusion that there exist a truth that can be discovered (Gutting 1989: xi). Instead, the validity of a "discourses analysis can be determined by focusing on *coherence*" where my analytical claims seek to display the discursive formations (Jørgensen & Phillips 2002: 125). This can be supported by Foucault's approach holding that discourse analysis seeks to identify a pattern within reoccurring statements at a certain time and place (Foucault 1972). An aspect that becomes relevant for my approach.

Law, legal categories and court verdicts that are connected to the judicial practices concerning the credibility assessment of asylum/refugee appeal cases relating to sexual orientation entail cultural understandings that are the historical outcomes of specific kinds of scientific knowledge and truths, as well as government practices. In addition, not only are my own reflections affected by certain epistemologies, but by using socio-legal categories such as 'refugees', 'sexual minorities' and 'sexual orientation', I am also contributing to the (re)production of perceived normalities and discourses around these topics. For example, when I in the latter use "sexual orientation", I might also reproduce the commonly held binary distinction between 'heterosexuality' and 'homosexuality'. The terminology of 'sexual orientation' includes all kinds of sexual orientations, such as bisexuality, transsexuality, transgender and many more. My analysis does not include the latter two orientations, but touches briefly upon bisexuality as being a marginalised sexual orientation in legal decision-making. Hence, I equally to some extent reproduce the common sense binary scope.

The analytical concepts and terms applied in this thesis will take their point of departure in Foucault's discourse analysis in conjunction with his archaeological approach. These will be outlined and described in the following sub-chapter.

2.2 Foucault's Discourse Analysis and archaeological Approach

Foucault understood discourses as references to a historically and culturally regulated system of statements, which are not unified but dispersive, and are:

> "(…) made up of a limited number of statements for which a group of conditions of existence can be defined. Discourse in this sense is not an ideal, timeless form […] it is, from beginning to end, historical – a fragment of history […] posing its own limits, its divisions, its transformations, the specific modes of its temporality" (Foucault 1972:72).

According to Foucault, in all periods of history, there exist various differing and competing discourses in the form of discursive formations that produce different kinds of knowledge and truths. Discourses therefore can be perceived as dispersive, differing and contingent, but despite this there exist a certain coherence or repetitiveness in the statements that are produced within a specific domain (Linstead 2010:13). Hence, only the dominant discourses remain visible, while the non-dominant discourses are not being reproduced. These dominant discourses determine in a given historical epoch what is being accepted as meaningful and true (Foucault 1972). The function of a discourse can thus be understood as the ability to communicate, as well as to classify, divide, evaluate and calculate. Thereby discourses create meanings/truths that explain, represent, precondition, legitimise practices and produce the human subject as a semantic artefact (Foucault 1972; Teubner 1989). Discursive formations are governed by rules beyond grammar and are defined by a particular historical 'a priory' and 'episteme' that underlies and informs governing practices. Knowledge for Foucault, hence is no longer homogenous, since different empirical sciences entail different and competing forms of knowledge that contain different modes of objectification and subjectification (Oksala 2005: 28).

In order to identify the discourses and discursive formations that enable certain practices, Foucault re-developed the analytical tool coined 'archaeology', which has its roots in French tradition of history and philosophy of science (Gutting 1989). In addition, Foucault's approach to archaeology is grounded in historical practice instead of philosophical theory (Ibid.:xi). It is an analytical grip that seeks to describe (the emergence of) an archive, which is a system of statements – both in terms of events or structures – that encompass discourses and orders (Ibid.). Archaeology helps to shed light on the processes that have led to a given historical 'a priori' that underlies a given culture (Foucault 1972:126-131). More precisely, Gutting describes Foucault's archaeology as "a technique for revealing how discipline has developed norms of validity and objectivity" (Gutting 1989: xi). The analysis of epistemes is crucial in archaeology, since an episteme entails the discursive regularities of the sciences, denoting an epistemological field that gives rise to and legitimises certain practices (Foucault 1972:191-192). Finally, certain kinds of knowledges and truths enable the emerging of the social (norms) and constitution of subjects.

At a later stage and as an extension to his archaeological approach, Foucault developed his genealogical stance, inspired by Nietzsche, where he focused on the relation between power and knowledge. Hereunder, there is not so much a focus on the modes of objectifications that divide individuals into objects of governance, but genealogy as analytical dimension focuses on the study of subjectification, "the way a human being turns him- or herself into a subject" (Foucault 1982:208-226; Brion & Harcourt 2014:284). For Foucault, power is productive and thereby provides the conditions for the social. Both analytical dimensions are highly applicable to the field which I am to examine, but due strategic choices I will attune to the archaeology as analytical grip to my discourse analysis. In the subsequent chapter, I will however also outline Foucault's analytical notion of power and its related technologies in order to emphasise the importance of the knowledge dimension in legal decision-making as it has effects on the formation and governing of subjects. Finally, this thesis does not aim at drawing precise lines between Foucault's archaeological and genealogical approach, in 'practice' these are much interwoven, but for analytical and strategic reasons, I will emphasise the archaeological side in discourse analysis. I have

chosen to use an archaeology as analytical tool, since it corresponds to the former mentioned gaps in the sociology of law. Particular to my topic, an archaeology allows for the excavating of the governing episteme and the discursive regularities in German jurisprudence dealing with cases of sexual orientation. This epistemological fields occurring at a certain time and place in German legal decision-making gives rise to and legitimises certain dominant discourses, classifications, truths and practices in the credibility assessment upon judgment about the plaintiffs' orientations are made.

2.3 Power, Knowledge, Truth and Norms

Foucault opposes the approach of a general theory of power, but sees power as originating from multiple and differing locations. According to his "conceptualisation", power unfolds itself in a serious of discursive clusters of relationships, which assembles the "operation of the political technologies throughout the social body" (Foucault 1982:185). Hence, power is more to be understood as analytics of power upon which certain technologies, techniques and mechanisms are working and through which one can identify how various discourse operate (Ibid.). Contrary to ontological or normative perspectives on power, Foucault addresses the functioning of power: "What I have been trying to look at *(...)* is the ''how'' of power. Studying the ''how of power,'' or in other words trying to understand its mechanisms" (Foucault cited in Golder 2012:24). In order to understand power, it is suggested by Foucault, that we must focus on the microphysics of power that are day to day operations as well as political and juridical technologies in which these practices are formed (Foucault 1982). Further, Foucault wants us to understand that although power can at times resume a sovereign top-down character, it mostly takes on productive forces that work in multiple directions and is reliant upon a regulated freedom (Ibid.: 790).

Foucault identified different technologies or kinds of power (sovereign, disciplinary, bio-politics and governmentality) throughout the 'history' of humanity and despite them comprising different eras, they overlap and can occur simultaneously in different areas in modernity. What Foucault perceives as the technology of power in modern society is

discipline. It can further be read that the disciplining of individuals, and thus the population, has nothing to do with the hypothesis of repressive power. This also changes the means by which law operates – an aspect that will be developed further in the forthcoming chapter. Modern disciplinary technologies constitute their objects of control through examination, measurements and categories and simultaneously exercise power upon and through the soul of human beings; that is the individual subjectivity (Oksala 2010). This is what Foucault refers to when he talks about the mode of power being productive by creating techniques and mechanisms that are disciplining as well as normalising subjects.

As knowledge is such a significant component in the relationship of technologies of power – which has as its effect the objectification and subjectification of the individual – the ways in which knowledge is constituted is important to Foucault (Oksala 2005; Dean 2003). In line with Foucault's analytics, I will therefore extract by means of my archaeology as analytical tool the scientific episteme and scientific categories underlying the court verdicts in question, which might inform legal decision-making. According to Foucault, the scientific knowledge about the population – and about the individual – is a construction of truth (Foucault 1970).

Contrary to liberal humanism, which since the period of enlightenment constructed the idea that there exists a human nature (a subject) in need of liberation and emancipation, Foucault explains the notion of subjectivity was firstly invented and became a field of intervention in the eighteenth century through the human sciences (Foucault 1970:308). Hence, the scientifically constructed truth imposes itself on the games of power; on the totalising and individualising techniques, as well as normalising mechanism. The latter denotes different means that foster an illusionary "normal state of being" in contrast to what is perceived in society as abnormal (Foucault 2000: 59). It is the notion of truth and its relation to subjectivity that concerns Foucault the most; his main objective of study is to show "*(...)* how the subject constituted itself, in one specific form or another, as a mad or a healthy subject, as a delinquent or non-delinquent subject, through certain practices that were also games of truth, practices of power *(...)*" (Foucault 1994:290). He therefore continues by noting that he had to pose "*(...)* the problem of knowledge and power *(...) [as]* an instrument

that makes it possible to analyse the problem of the relationship between subject and truth" (Ibid.). Although, my forthcoming analysis will not focus on this subjective side, the aspect of scientific constructed truths and the categories from which individuals can be classified and objectified poses an important part of this study and make possible the internalisation of (scientific) norms. After all, for Foucault, power and knowledge are intrinsically related:

> "We should admit rather that power produces knowledge *(...)* that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations. (Foucault 1977:27-28).

Having established this reciprocal relation, it becomes even more important to bear this perspective in mind when generating new research within the sociology of law. Thus, law and legal decision-making in certain situations need to rely on knowledge from other profession for its truth effects, while other professions rely on law for extending its epistemological certitude and authority to impact social cohesion (Golder & Fitzpatrick 2009: 63). An aspect that will be central for my upcoming analysis where I will investigate the reciprocal relationship between the sexual psychological science and German administrative courts dealing with the credibility assessment for asylum/refugee appeal cases relating to sexual orientation.

Finally, the concept of norms has taken up a crucial role as mechanism to disperses and normalise certain knowledges and a means to govern individuals. In a Foucauldian perspective, a norm is not a stigma, as Goffman (1963) defined it; instead norms, can be understood as a comparative measure or standard that arises from social practices and is articulated through the human science. Norms thereby "aim to distribute individuals on a continuum from normal to abnormal" (Golder & Fitzpatrick 2009: 43n43). Foucault has outlined several times in his intellectual *oeuvre* that power is productive; hence

> "*(...)* the norm brings with it a principle of both qualification and correction. The norm's function is not to exclude and reject. Rather, it is always linked to a positive technique of intervention and transformation, to a sort of normative project" (Foucault 2003: 50).

Norms are therefore no rules or principles that are explicitly codified and are thereby not articulated through legal institutions in general (Ibid.). In contrast to the law, stereotypes/norms do not distinguish between what is legal or illegal, but they are formative of an individual's subjectivity through establishing a sense of being "normal" (Ibid) and seek to "qualify, measure, appraise, and hierarchize" (Foucault 1978: 144). To my knowledge, Foucault has not focused on stereotypes as an analytical term; instead, I will argue that stereotypes can be understood in a similar vein as Foucault's analytical term of 'norms' and will therefore also be applied as such in my analysis.

2.4 Expert Knowledge in legal Decision-Making and the Penal System

As the modes of punishment from the 16th Century on onwards gradually changed from corporal punishment to a punishment of the 'soul' (a practice already intensified by Christianity), the emergence of the human sciences, such as psychiatry and later psychology, rendered the 'soul' into an object of study and a field for technical intervention (Foucault 2003)[3]. Hence, knowledge about the individual as well as the distribution of knowledge becomes of importance in the exercise of disciplinary power. This implies a transformation from ways of knowing into ways of being; that is, how scientific epistemologies about the population become ingrained in the ontology of this very same population (Foucault 1977:203).

This change in power, equally, had an impact on legal decision-making, which on one hand enabled the separation of the population (dividing technique) into legal categories such as legal, illegal, normal/abnormal, sane/mad, etc., but on the other hand also could judgement

[3] Foucault's own empirical analysis focused on the relationship between the birth of the clinic, the birth of the prison and penal institutions, that together created the dangerous individual.

upon those individuals who had committed a crime against society and was dangerous to the social body but which somehow fell outside the legal categories (Golder & Fitzpatrick 2009; Foucault 2014). Although law still could operate as a technology of domination (totalising), legal decision-making equally could become a mode of objectification that supported medical and psychiatric interventions, which in the nineteenth century became routine in penal practices (Foucault 1977; 2014). On the contrary, the psychiatric knowledge could equally support a given verdict, which gave the psychiatric science the power to make judgement that were supported by a judge who ruled that the dangerous individual was insane in the moment of crime (Foucault 2003). Further, Punishment was not prison, but the asylum which was often under the complete rule of the psychiatrist. According to Foucault, through the emergence of expert psychiatric opinions in legal decision-making and legitimised through the scientific "standards" of knowledge production, it was possible to extend the punitive power to something that was originally not a breach of law. Thereby, it became "possible to transfer the point of application of punishment from the offense defined by the law to criminality evaluated from a psychologico-moral point of view" (Davidson 2003: xxiii). Foucault describes this mode of objectification as:

> "*(...)* a technique, a form of power *[that]* applies itself to immediate everyday life which categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognize and which others have to in recognize him" (Foucault 1982:212).

Especially the aspect of stating and finding out the truth about individuals became the point of intersection where the judicial institutions of the court and the scientific knowledge of experts merged and developed towards new techniques and mechanisms. In addition, by establishing a reciprocal and dynamic relationship, it was possible that "statements *(...) [could be]* formulated having the status of true discourses with considerable judicial effects" (Foucault 2003:11):

Further, a shift occurred "from legal punishment, to a realm of objects of a knowledge, a technique of transformation, a whole set of rational and concerted coercions" that could

transform and discipline individuals within a normative framework (Foucault 2003:18). As Foucault outlines in his *Abnormal Lectures at the Collège de France 1974-1975*, expert psychiatric/psychological opinions in legal decision-making situates itself at the nexus point "between the social norms and rules and medical analysis of abnormalities" and which through written expert opinions or witness statements in courts becomes the science and technique of abnormal individuals/abnormal conduct (Ibid.:162-163). Or put differently, psychiatry/psychology now underpins two different areas of expertise, namely the medical science focusing on the disorder of nature (the norm vs. the pathological and morbid) and the judiciary concentrating on the disorder of law (the norms vs. irregularity and disorder) (Foucault 2003: 162-163). Thereby, psychiatry/psychology aims to distribute individuals on a continuum from normal to abnormal" (Foucault 2003: 162-163; Golder & Fitzpatrick 2009: 43n43).

The psychiatry delivered to law and criminal justice a whole new range of symptomatological field of knowledge through all kinds of disorders, deviances and abnormal behaviours and identities always in contrast to the (moral/ethical) norm. By relying on the knowledge provided by the human science – made calculable through its scientific standards, examination reports, tables, cases and statistics – law/legal decision-making is able to operate on a general horizon of truth (Foucault 2003:1977). On the contrary to the advantages provided by the psychiatry to law/legal decision-making, Golder & Fitzpatrick argue in their book *Foucault's Law* (2009) that "*(...)* disciplinary power's knowledge is ultimately lacking in its epistemological reach and its extravagant claims to encompass a totality" (p: 63). Hence, Golder and Fitzpatrick stress in line with Foucault that it is law and legal decision-making that can serve as a transcendent reference point for disciplinary power's normative project in modernity, which through law's authority can connect the knowledge of the individual to the totality of society (Ibid.:62-67). Finally, in their relationship with each other, and sometimes perceived from the outside as contrary to each other, both law/legal decision-making and the disciplinary power (psychiatry/psychology) engage in a reciprocal relationship by constituting each other as natural and necessary.

While each of the respective powers can operate within their 'original' fields of expertise, i.e. law can operate as a mode of objectification dividing individuals into objects of governance and expert opinions can both be objectifying through scientific classifications and subjectifying through individual examinations, in legal decision-making both powers can converge. Thereby, knowledge can more easily become dispersed, it can regulate and normalise what becomes 'natural' behaviour and commons sense knowledge for the individual and society outside the legal scope. This is an important feature for my own analytical approach since I will investigate what is represented by the German administrative courts as a true and credible sexual orientation under the law 'membership of a particular social group'; which sexual orientations are normalised and pathologised; what specific evidence is used and what is left out.

2.5 Sexuality, Law and Norms

In Foucault's analysis, the discourse on sexuality has been rooted in the Christian penance of the Middle Ages to present day alleged discourses on 'self-emancipation'; a pivotal point of departure for the production of knowledge and truths, as well as the governing of individuals in modernity.

Foucault describes in 'Scientia Sexualis' of his book *The History of Sexuality, Volume I*, how the Christian ritual of confession came to function within the "norms of scientific regularity" that produce and establish an ordered system of knowledge and truths, as well as an economy of pleasure in the nineteenth century (Foucault 1978). Contrary to widely held Victorian perception of 'sexuality' being something that was repressed, despite the legal dimension of this, Foucault argues that there occurred a proliferation and multiplication of ways to speak about sex and sexuality. Thereby the obscure 'nature' of sexuality "compels the individuals to articulate their sexual peculiarity – no matter how extreme" (Foucault 1978:61). While the ritual of penance in the beginning did not involve obligatory confession, this changed substantially in the seventeenth and eighteen centuries where individuals were obliged to confess absolutely everything without retention. This obligation to confess remained an

important technique in scientific practices, which in return also was a substantial element in the production of knowledge within penal practice.

Further, this transformation into a scientific discourse also changed the form of confession from something that the subject wished to hide (from a moral Christian point of view) to something that was hidden from the individual, as it resembled the most inner secret of the self or the personal identity structure (Foucault1978:65). This could only be deciphered, interpreted and verified through a psychiatric (and later psychologist) examination. As a result, sexuality and the knowledge derived from scientific examinations created new pathological processes and different kinds of sexual deviances and abnormalities that required therapeutic or normalising interventions by psychiatrists/psychologists, always in relation to a so called norm and 'normal sexual development' (Ibid.:68-69). This accompanied equally a psychiatric shift in around 1870, a time that defined sexual abnormalities or deviances as "immoral acts, a temporary deviation of the norm" and from 1880/1890 to "an innate morbid condition" (Oosterhuis 2012:133; Foucault 1978:168).

According to Foucault, in the beginning there appeared only some cases of sexual abnormal individuals in scientific reviews, however soon after this became the leading etiological principle which defined almost all kinds of abnormality (Foucault 2003: 168). Along these lines, by pathologising certain sexual behaviours and identities, there occurred a normalisation of the requirement to speak about different kinds of sexual attractions and desires. As described briefly in the foregoing part, psychiatry as important source of knowledge in legal decision-making became the science of and correctional technique for abnormal individuals and abnormal conduct, which explained crimes and other social deviances through a discourse of morbid sexuality.

These changes described above similarly occurred in Germany during the end of the 19th century and it was through the work of notable German sexologist, such as Krafft-Ebing[4],

[4] According to Oosterhuis, Krafft-Ebing as a German sexologist can be seen as the founder of the modern concept of sexuality (Oosterhuis 2012). Krafft-Ebing wrote his scientific books *Psychopathia Sexualies* as manual for doctors and lawyers.

Moll[5], Westphal[6] and Hirschfeld. These figures have not only bee prominent experts in German legal decision-making, but Foucault equally saw how their knowledges and truths impacted modern discourses of sexuality (Foucault 1978; Oosterhuis 2012: 134). By applying a Foucaultian stance to the works of Krafft-Ebing and Moll, Oosterhuis and Domaier argue that these German sexologists offered new labels and categories of sexual abnormalities, and thereby enabled that new and different 'perversions' could be diagnosed, categorised and discussed (Oosterhuis 2012; Domaier 2007). In addition, these sexual scientists also introduced and dispersed the terminology of 'contrary sexual feelings' (inversions) or 'homosexuality' (versus heterosexuality) to the legal professions and the wider public (Ibid.). In line with Foucault, Oosterhuis stresses that their scientific approach defined homosexuality or 'psychosexual hermaphroditism' (bisexuality) as "morbid-like (krankhafte) modifications of the normal sexual drive", but simultaneously they also contributed to an initial normalisation of different forms of sexualities (Oosterhuis 2012:146; Foucault 1978; Foucault 2003). Having this in mind, this makes the analysis of the relationship between the German administrative courts and German sexual psychology in my current cases a relevant aspect to explore. For many years to come, the knowledge derived from sexual psychologists, either through sexual scientists as court witnesses or written expert opinions, remained through the work of Krafft-Ebing, Moll and Westphal an objective mean to access and obtain reliable evidence and truths during legal decision-making (Oosterhuis 2012).

Finally, through the convergence between scientific expertise and law/legal decision-making there occurred not only new labels and categories of sexual dispositions, identities and abnormalities, but the problem of sexuality appeared more and more as a 'natural' phenomena in German legal decision-making (Oosterhuis 2012). The transformation of sex into discourse became the fundamental issue in society around which objectifying and

[5] Albert Moll, equally a German sexologist, wrote books such as *Die Conträre Sexualempfindung: Mit Benutzung amtlichen Materials* (1891) and *Handbuch der Sexualwissenschaften mit besonderer Berücksichtigung der kulturgeschichtlichen Beziehungen* (1911).
[6] See for example Westphal's book (1870). Die contrare Sexualempfindung, Symptome eines neuropathischen (psychopathischen) Zustand," Archiv für Psychiatrie und Nervenkrankheiten.

subjectifying techniques and mechanisms were organised (Foucault 2014: 258). According to Oksala, Foucault thereby shows "how our belief in a true sexual nature is a disciplinary mode of knowledge that makes us objects of control as well as subjects of sexuality[7]" (Oksala 2010: 4). Finally, in order to obtain knowledge about a person's sexuality, sexual scientific expertise (also in legal decision-making) became "synonymous with having access to truth" (Taylor 2009: 57).

Although, I will refrain from focusing on the actual narratives provided by the refuges/asylum seekers, this aspect will be an interesting perspective to explore. Also, the it becomes interesting to see why sexual psychologist still act as experts in decision-making that deal with other areas than the penal code.

2.6 Methods of Data Generation

The following section is divided into the collection and selection of my empirical material in order to outline the choices made and challenges met acquiring my empirical materials. In addition, I will briefly reflect upon ethical considerations.

2.6.1 Generation of Empirical Material

I started the process of generating my empirical material by looking at the empiria that my literature reviewed had included. Although this only makes up a small portion of cases applicable, this offered an idea of what kind of statements were occurring in the court verdicts that described the legal category of 'particular social group'. Hence, I searched for further verdicts from the same Administrative Courts that I originally was directed towards. Most databases enabled the search via key words and by typing the wording such as "homosexuality" and "bisexuality" into some of the different German Administrative

[7] For Foucault, the discourse on sexuality equally had impact on ethics as practice, which implies the ways through which individuals constitute themselves as moral subject their own action (Oksala 2010: 160). Due to my archaeological framework chosen, I will thus not focus on this dimension.

Courts' databases, only very few court verdicts came to my attention[8]. Although this might be a general challenge when doing research on court verdicts s and case laws overall, the aspect that there existed very few cases dealing with asylum/refugee appeal cases relating to sexual orientation nevertheless struck me. Due to the scope of this study and the aspect that there exist approximately 52 Federal Administrative Courts in Germany, I selected therefore those verdicts that suited my topic and I will use them as exemplifying cases. These seek "*(...)* to capture the circumstances and conditions of an everyday or commonplace situation" (Bryman 2008:56). However, by rejecting the positivist and realist assumption of an objective and or external world that can be shown through research. Hence, although my selected court cases might display a commonplace legal situation, they are still an outcome of "historically and culturally situated social process" (Constantino 2008).

Through the communication with the Administrative Court Berlin, I was offered the possibility to acquire access to some unpublished court files covering my topic. Here through, I was able to review 10 unpublished asylum cases that appealed their asylum/refugee cases relating to sexual orientation. As earlier mentioned, a discourse analysis does not necessarily require a representative amount of documents; instead, the focus is on the regularity of the statements that underlie certain discourses. Consequently, I had to delimit myself to a tangible size of empirical material. When crosschecking the database of the Administrative Court Berlin with the court files that I was given, it became evident that only few were published online and thereby not accessible for the wider public[9].

While conducting this process some interesting thoughts occurred to me which I briefly will deliberate on. Upon questioning the Federal Administrative Court Berlin, they emphasised that only the most important or significant cases were published online. This was done in order to minimise the amount of "repetitive cases online" and although, the oral proceedings are open for the public, only very few information is being dispersed about when and where oral proceedings take place. With a verdict by the Federal Administrative Court from 1997,

[8] Due to the scope of this study and the empirical data at hand, I am not including asylum/refugee appeal cases based on gender identity.
[9] For extended information, please see the chapter on 'ethical consideration'.

it was ruled that all verdicts from the various German courts should be made publicly available, since the publication of court verdicts is a public affair (BVerwG 1997, 6 C 3.96). Although these were not published on their own homepage, it is possible to obtain these verdicts through external operators that require a payed membership. Yet, the limited amount of court decisions available presents to me an important argument for why the study of court verdicts is of importance for the sociology of law and other social sciences. In addition, this gap in information concerning this topic available, indicates that some knowledge stemming from the German judiciary and the immigration authorities was not intended to be public. Consequently, this is an aspect that could pave the way for further research on my topic and the general judicial practices when dealing with different kinds of refugee and asylum seekers.

2.6.2 Selection of Empirical Material

In order to identify the discursive practices and to trace the underlying scientific episteme, political rational, categories for sexuality applicable, and narratives of truths within the German legal decision-making dealing with asylum/refugee appeal cases based on sexual orientation, I will make use of qualitative research tools. The primary empirical sources that I based my analysis on can be consolidated as follows:

- (Un)published court decisions/verdicts [*Beschlüsse/Urteile*] by selected German courts (Administrative Courts and Federal Administrative Court)[10];
- The German Asylum Act 1992, EU Council Directive 2004/83, and EU Council Directive 2011/95/EU;
- Documents *[Bundestagsdrucksache]* from the German Parliament *[Bundesrat]*[11].

While the court verdicts that I will be reviewing will cover the time period between 2004 – 2015, the landmark decision from the Federal Administrative Court's [*Bundesverwaltungsgericht*] is from 1988 (hereafter referred to as 1988-Decision). A full list

[10] For a compilation off all verdicts, please see the list of verdicts under bibliography.
[11] For a compilation off all parliament documents used, please see the list under bibliography.

of the court verdicts that form the empirical basis for this study is outlined in the bibliography. The reason for including the 1988-Decision in my archaeological approach can be found in the aspect that many of my empirical court decisions referred to the 1988-Decision, since it is binding for administrative courts and political institutions. Although this seems like a long period for comparatively few verdicts, I was due to the former mentioned challenges not able to generate additional empirical material. Yet as outlined earlier, the repetitiveness of statements found in my empirical material denotes that these are sufficient for a discourse analysis. In addition, the enforcement of the Council Directive 2004/83/EU and its amended version Council Directive 2011/95/EU equally shows that the biggest amount of empirical data is from the last 3-4 years where the Council Directives have been fully enforced.

These various empirical materials in conjunction with my analytical and methodical tools will hence provide an answer to my overall research questions.

2.6.3 Ethical Considerations

In this chapter, I will briefly reflect upon my own ethical behaviour concerning my selection of court verdicts as my main empirical material[12].

Ethical requirements to inform the affected parties or receiving their consent can be traced back to one of the guiding principles in line with the Swedish Research Council, which covers the aspect of "*[d]*o not conduct your research in a way that could harm other people (e.g. subjects)" (Gustavsson, Hermrén & Petersson 2005). While some of my selected court verdicts are available online, hence obtaining consents or the like is not applicable. The second part of my court verdicts were obtained through contact with one of the judges from the Berlin Administrative Courts. As earlier outlined, not all cases are published online, but in general all verdicts from the various courts are official affairs and hence upon request, and albeit with obstacles, these are available to the public. In order to protect the integrity of

[12] The other part of my empirical material is made up of laws and parliament inquiries which are publicly available and hence there exists no risk in this study that could compromise the 'do no harm' principle.

those verdicts that were not officially anonymised, their integrity is still protected in this study, as I refrain from referring to any names or the like. Finally, with regards to knowledge derived from expert opinions, these are not discussed on any personal level or with citations as references in this study. The overall existence of such documents as background knowledge for legal decision-making is the only aspect that is discussed.

Finally, by reflecting briefly on the other guidelines proposed by the Swedish Research Council regarding "to tell the truth about your research", "openly report your methods and results", affiliations with "commercial interests and ties", plagiarism, fairness of other research and conducting research in an "orderly manner by maintaining documentation and retaining data" (Ibid.), I consider these as an important ethical base for this study. Lastly, although my methodological and theoretical stance rejects realist or positivist approaches to "truth", my research is line with what the Swedish Research Council expresses as "demand*[s]* for integrity" expressing a critical stance towards my own generated data and about what my "data will demonstrate" (Ibid.: 16).

3. ANALYSIS

In this chapter, I will analyse the relationship between the sexual psychology and German legal decision-making that deal with the credibility assessment of refugee/asylum appeal cases relating to sexual orientation. Hereunder, I will explore by what kinds of knowledges, techniques and mechanisms law and legal decision-making achieve its 'truth effects' and how this knowledge is constituted in the governing of refugees from sexual minorities. In the first part of my analysis, I will investigate how knowledge stemming from the sexual psychology counts as relevant criteria and precondition for interpreting the law 'membership of a particular social group'. Hereunder, I will focus especially on the discourse of an 'irreversible (homo)sexual orientation' that have been the guiding reference point in contemporary appeal cases as well as in specific moments in German jurisprudence. The second part of my analysis, will focus on expert opinions and law as techniques/modes that objectify and thereby create specific criteria and categories as part of the credibility

assessment. Finally, the third part will examine how normalising mechanisms in legal decision-making operate and I will reflect upon the potential effects that the discourse of an 'irreversible homosexual disposition' has on jurisprudence.

3.1 The German Administrative Courts and Sexual Psychological Knowledge of the 'Particular social Group'

Taking point of departure in three different sets of empiria: my selected court verdicts dealing with asylum/refugee appeal cases relating to sexual orientation, the landmark decision by the Federal Administrative Court from 1988, as well as two different parliament *[Bundesrat]* documents from the 5th and 6th legislature period, I will do an archaeology of the local discursive formations, the political rational and the governing episteme, i.e. an accumulation of underlying scientific truths, that legitimises certain techniques for the governing of sexual minority refugees in contemporary German legal decision-making. In addition, I will provide an answer to my first working question: 'What kind of knowledge counts as relevant criteria and precondition when interpreting the law on 'membership of a particular social group' as part of the credibility assessment in German legal decision-making?'.

3.1.1 Credibility and the Discourse of an irreversible homosexual Orientation

Although German legislation has changed from criminalisation of homosexuality to acknowledging rights for sexual minorities, including the right to asylum/refugee status, that rely on the liberal notion of self-identification, literature has yet pointed towards the notion of 'sexual orientation' in German legal decision-making still being determined and verified by sexual psychological experts (Markard 2013; Dolk & Schwantner 2007; Referat für gleichgeschlechtliche Lebensweisen 1994; BT-Drucks. 17/8228). In the following, I will therefore investigate to what extend the credibility assessment and the corresponding court verdicts entail direct or indirect traces of the sexual psychological science affecting German legal decision-making.

Firstly, I will however take point of departure in the legal framework of the German Asylum Act 1992 (see also Council Directives[13], Article 10) in which I can observe a contradiction between two significant paragraphs that encompass the legal requirement 'membership of a particular social group'. On one hand § 3b, Abstract 1 No. 4 stipulates that a "membership" with a "particular social group" is connected to "innate characteristic", "a common background that cannot be changed", "a characteristic or belief that is so fundamental to identity or conscience" or "a distinct identity" (German Asylum Act 1992). On the other hand, § 3b, abstract 2 outlines that "it is immaterial whether the applicant actually possesses the "*(...)* social *(...)* characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution" (German Asylum Act 1992). The legal framework does, as such, not define how judgement can be reached. As with all laws, interpretation relies on carefully weighing different indicators and evidences to reach conclusion. According to UNHCR, self-definition should be taken as an indicator of the individual's sexual orientation and decision-making should rely on the person's testimony alone (UNHCR 2008: 16). Yet as I will show in the following, when interpreting the Act in practice, the perceived causality between "innate characteristic", "common background" or characteristic fundamental to identity" weighs more than the paragraph on "immateriality"[14].

When being granted the possibility for an oral proceeding[15], the main source of evidence for the deciding judge in the credibility assessment of the plaintiff's sexual orientation are the statements made from the applicants evolving around their personal narrative and persecution story. As a decision from the Federal Administrative Court outlines: "Credibility is defined by conclusive facts and truthful descriptions of a real event that is empirically

[13] Until the Council Directive 2004/83/EU was enforced in 2004, asylum and refugee claimants from sexual minorities were not understood as part of a 'particular social group' in German asylum cases; instead, homosexuality was counted as relevant asylum-related characteristics. Currently its amended version 'Council Directive 2011/95/EU' is in force.

[14] For more information, see literature review.

[15] In connection with the enforcement of the first Dublin Regulation in 1997, the laws on 'safe third country' and 'safe country of origin' provide the legal instrument for implementing the Dublin Regulations and are enshrined in the German Basic Law, i.e. Germany's Constitutions. Applications now are rejected as 'manifestly unfounded' [*offensichtlich unbegründet*], which changes also the judicial procedures extensively, minimising the possibility for oral proceedings.

defined through concreteness, a high level of details and presentiveness" (BVerwG, 26.10.1989, 9 B 405.89). In addition, it remains fundamental that the narrative of the plaintiff is described in a way to presents itself as lived experience.

Crosschecking this approach with my empirical material, I can observe that most court verdicts focused on the proving of whether the plaintiff indeed held the outlined characteristics and identity traits, instead of leaving this to self-definition of the plaintiff. This argument can be substantiated through the crystallising of a pattern that revolves around certain statements connected to the words 'innate', 'irreversible', 'fateful' [*schicksalhaft*], 'determined', 'disposition', 'substance', 'identity'. In addition, most of the material focused on homosexuality as the only indicator for being associated with 'membership of a particular social group'. A verdict from the Administrative Court Ansbach from 2008 can serve as an example of the similarity of reoccurring statements in connection with the law on 'membership of a particular social group':

> "Based on the claim of the plaintiff and his way of life it clearly can be established that there does not exist an irreversible fateful and immutable homosexual predisposition in him" (VG Ansbach 2008).[16]

Instead of focusing on self-definition, I can observe through these kinds of statements that judges repeatedly question whether the plaintiff's "substance/disposition" and identity "really" was 'homosexual'. Further, "generic" statements concerning the sexual orientation were disqualified for not being sufficient, credible or conclusive for being categorised under the law on 'membership of a particular social group'. However, it was not only when judges disqualified the plaintiffs' narratives concerning their sexual orientation as "innate characteristic" that the statement of "irreversible" occurred, but these occurred equally when judges identified the plaintiff as being "irreversible homosexual":

> "The court is in favour of the applicant on the assumption that an irreversible homosexual predisposition exists in her. According to the verdict of the Federal

[16] See Appendix A, No. 1 for original German quotation.

> Administrative Court, punishment of an irreversible, fateful homosexuality generally constitutes political persecution as laid down in Art. 16, paragraph 1 GG *(...)*" (VG Bayreuth 2012).[17]

Bridging therefore the aspect of sexual orientation being something that is innate and fundamental part of a human dispositions (psyche/identity) with the requirement that the sexual orientation should be an integral part of one's life history, or at least something that denotes a high degree of lived experience, it is here where the relationship between the sexual psychology as a episteme and knowledge dimension in legal decision-making emerges. When reviewing my empiria, it became evident that the statements concerning an irreversible fateful homosexual orientation were reoccurring. Relating this terminology to current scientific stances of (sexual) psychology, these hold that a person's sexuality is a fundamental feature/characteristic of a person's psychological dispositions and identity structure (Müller Götzman 2009). While the law defines sexual orientation as "innate", most of my reviewed empirical court verdicts mentioned "irreversibility". The terminology of "irreversible homosexual disposition" are also actively used by the sexual psychologist as part of the expert opinions that were connected to the files of the reviewed administrative court of Berlin[18]. While in earlier years it was mandatory for asylum seekers and refugees from sexual minorities to provide (sexual) expert opinions, these are no longer required officially by the German authorities (BT-Drucks. 17/8357: 5; Rath 2014). However, if these are provided, expert opinions will be considered in the final judgement.

To Foucault, the human sciences, e.g. psychiatry and psychology, made 'sexuality' and 'sex' the fundamental part in a person's identity. The act of obtaining knowledge about the plaintiff's sexual orientation becomes therefore synonymous with gaining access to this truth (Taylor 2009: 57). Hence, as a mean to obtain this knowledge and truth about the "innate characteristic(s)" and "characteristic(s) fundamental to identity", and thereby overall question of whether the plaintiff belongs to the legal category of a 'particular social group',

[17] See Appendix A, No. 2 for original German quotation.
[18] In addition, this argumentation will be developed further in the upcoming sub-chapter.

sexual psychology remains crucial evidence in German asylum/refugee appeal cases. By being able to examine and interpret the most inner secret of the plaintiff's narrative, disciplinary power with the help of the sexual psychology is able to make hierarchical observations and normalising judgements, as well as establishes categories, criteria and preconditions that are connected to the interpretation of laws. Consequently, I can argue that the cases in question rely on sexual expert opinions to complement the "subjective" narrative with a perceived "objective" verification in order to substantiate what narratives are true and live experience or which ones are unsubstantiated and false.

3.1.2 Irreversibility as scientific-political Rationale and legal Manifestation

In the subsequent part, I will investigate the discursive events that gave rise to such particular knowledge, and how these scientific lines of reasoning firstly have become embedded into German legal decision-making. The aim of the following is therefore to trace back these specific types of truths and knowledges within two different sets of materials, namely in a landmark decision from the Federal Administrative Court [*Bundesverwaltungsgericht*] from 1988 and German parliament [*Bundesrat*] documents from the 5th and 6th legislature period.

3.1.2.1 The 1988 landmark Decision

In many of the (un)published court decision I have observed that key references are being made to the 1988-Decision. These references mostly occurred in conjunction with statements concerning a plaintiff's "irreversible", "fateful" and "inescapable" ["*unentrinnbar*"] homosexual disposition. In addition, when reviewing the court files from the Administrative Court Berlin, and due to the binding character of the 1988-Decision, I also observe that the Federal Office for Migration and Refugees [*Bundesamt für Migration und Flüchtlinge*] (hereafter referred to as BAMF) equally refers to the 1988-Decision.

In the 1980's, homosexuality was counted as relevant asylum-related characteristics granting political asylum under certain preconditions. This possibility was for the first time legally manifested in this 1988 landmark decision. With reference to and under explicit citation of

the "special treatment" of homosexuals in German concentration camps in the Third Reich, the 1988-Decision enabled homosexual refugees/asylum seekers to obtain political asylum. Due to its binding character, decisions from the Federal Administrative Courts act in a law-like manner but still require interpretation (BVerwG 1988). Despite this progressive approach, this ruling occurred at a time where §175 of the German Penal Code still was in charge, criminalizing certain kinds of male homosexual activities between the age of 18-21. In this landmark decision from 1988, the Federal Administrative Court concluded and loosely translated as:

> "This is not a matter of mere tendency *[bloße Neigung]*, which is the plaintiff can more or less refrain from, but that there exist an irreversible, unescapable and fateful homosexual disposition, which determines the plaintiff's emotional life and sexual behaviour since the 15. or 16. year of age" (BVerwG 1988).[19]

This decision clearly defines the possibilities for who can obtain political asylum and which criteria need to be fulfilled. As the quote outlines, it is not sufficient that a person's homosexuality is only a mere tendency [*bloße Neigung*] but instead it understands a person's sexual orientation as a stable part of identity and behaviour, which even has been determined since adolescents (Ibid). Further, the decision stated that the plaintiff's narrative was conclusive, since it covered the knowledge provided by sexual-scientific and psychoanalytical expert opinions as part of the oral proceeding in the Federal Administrative Court (Ibid). Hence, it can be argued in line with the 1988-Decision that a statement of appeal is conclusive and a person's sexual orientation is perceived as credible, if it covers sexual scientific knowledge and is verified by a sexual psychologist as expert. Further, by rejecting the former held positivistic-sexual scientific "*(...)* thesis of a free determinability of sexual drive direction"[20] or rather the former held moral idea that homosexuality can be the product of socialisation or seduction (BVerwG 1988), I argue that the landmark decision can be understood as an important discursive event in German legal decision-making that

[19] See Appendix A, No. 3 for original German quotation.
[20] See Appendix A, No. 4 for original German quotation.

manifested the sexual psychological science as guiding episteme in legal decision-makings. Consequently, the discourse of an 'irreversible fateful homosexual disposition' was thereby manifested in relation to asylum-relevant characteristics.

The inclusion of, amongst others, sexual psychologists as expert knowledge in legal decision-making hands to the judiciary a certain power of truth, since it is perceived as an "objective" science that defines and preconditions specific characteristics, categories and identity traits, which decision-makers can use to interpret the plaintiff's narrative and the German asylum law. Examples of such criteria and categories can be highlighted through the scientific assumption that 'there exist a certain time in life where a person's (homo)sexual orientation has become fixed' after which this (homo)sexual orientation then is understood as "irreversible, fateful and inescapably" and not a mere tendency. On the contrary, this 1988-Decision hands over to the sexual psychology a 'unitary field of objects', which secures the need for expert examinations and opinions. Scientific knowledge counts as objective and reliable evidence contrary to the subjective narrative that the plaintiff is providing. Operating on a continuum between "normal" and the "abnormal", sexual psychology seeks to classify, categorise, as well as to normalise the object of governance. This can especially be emphasised due to the statement of "fateful" as this could be interpreted as being something that denotes an abnormal state, which however cannot be changed. As the statements of irreversibility were reoccurring in contemporary cases, I argue that the discourse of an "irreversible homosexual disposition" is dominant as it determines in a given historical epoch in German legal decision-making what is being accepted as meaningful and true and thereby legitimises certain legal practices.

3.1.2.2 Parliament Documents from the 5th and 6th legislative Period

The following part will continue to trace back further discursive events that point towards the discourse of 'irreversible homosexual disposition' derived from the human sciences, i.e. (sexual) psychology, which can be understood as the guiding episteme in legal decision-making. Thereby, I would like to emphasise how this scientific lines of reasoning firstly have

become embedded into political rationalities, where after this scientific-political rational of an irreversible (homo)sexual orientation has become manifested in legal decision-making. In the 1988-Decision, the Federal Administrative Court refers to two document [*Bundestagsdrucksache*] by the German parliament [*Bundesrat*][21] from the 5th and 6th legislative period (BT-Drucks. 5/4094; BT-Drucks. 6/3521). Within these two parliament documents, the penal code §175 (criminalisation of male homosexual activities between the age of 18 and 21) is discussed, amongst other laws.

In the parliament document from the 5th legislature period, it was stated that those men who practice same same-sex relationships, show an irreversible disposition [*Prägung*] (BT-Drucks. 5/4094). Further, it was stated that "(…) also what applies in this regard, the manifestations of same-sex exercise should not emanate any advertising effects on normal sentient human beings"[22] (BT-Drucks. 5/4094). By this statement, a distinction between „normal" heterosexual persons and „abnormal" homosexual persons whose sexuality has been criminalised through §175 of the German Penal Code becomes evident. In addition and more interestingly, this statement equally shows a paradigm shift towards the earlier outlined stance that homosexuality is "irreversible" or as contemporarily expressed "innate" and as such lays political ground for the decriminalisation of same-sex relationships amongst men.

Another component can be outlined through the document from the 6th legislative period, which discusses the age of homosexual consent between young men (BT-Drucks. 6/3521). In this, it is emphasised that according the then state of the art, it is scientifically acknowledged that the sexual orientation of a young man is fully determined by the end of adolescences (BT-Drucks. 6/3521: 30):

> "According to this expert opinion *[Gutachten]*, a very large proportion of the male youths have encountered (hetero)sexual experiences when they reach the age of eighteen, which act immunizing against homosexual influences. Also the psychological

[21] The German representative bodies is comprised of a bicameral institution, namely the Bundestag and Bundesrat, which pass legislation and also elect its de facto head of state.
[22] See Appendix A, No. 5 for original German quotation.

> maturity at the age of eighteen has been developed to the extent that they largely are able to act independent and self-responsible" (BT-Drucks. 6/3521: 30).[23]

This statement shows that sexual scientists, psychologists and pedagogues validate that a young man's sexual drive cannot be reversed by the end of 18, it even "acts immunizing", making therefore a reshaping *[Umprägung]* to homosexuality no longer possible (BT-Drucks. 6/3521: 30). Further, the discussion amongst German politicians regarding the penal code §175 outlines a shift away from an earlier positivist sexual scientific stance holding that homosexuality is a matter of behaviour, "seduction" or choice, towards a sexual psychology describing homosexuality as a matter of disposition and identity with innate and irreversible characteristics (BT-Drucks. 6/3521; BVerwG 1988). In addition, laying the scientific basis for the assumption that a person's sexual orientation is developed fully by the end of adolescent, this scientific knowledge has potential objectifying consequences for those individuals who do not "hold" a fixed and stable sexual orientation by that age. Hence, it is here that we find the connection to the discourse of an 'irreversible homosexuality' and the effects of sexual psychology as episteme for both the political rational and judiciary. Thus, the analysis of epistemes are crucial in an archaeology, since an episteme entails the discursive regularities of the sciences, denoting an epistemological field that gives rise to and legitimises certain practices.

3.1.3 Sexual psychological Expert Opinions and the Verification of an 'irreversible' Homosexuality

I will now investigate and categorise what kind of roles expert opinions as valid knowledge play in contemporary asylum cases relating to sexual orientation.

Besides observing in my empiria a direct reference to scientific examinations, i.e. as expert opinions *[Gutachten]* or expert witness statements referred to in the court verdicts, I also found expert opinions as separate documents within the case files of the Berlin

[23] See Appendix A, No. 6 for original German quotation.

Administrative Court Berlin that were not referred to in the final verdicts. These will not be examined here, but it is however important to outline that these are substantial part of court cases dealing with sexual orientation and asylum/refugee status. Examining the direct statements outlined in the courts' verdicts, another from 2008 by the Administrative Court Wiesbaden entailed a written expert opinion, which was used as supporting evidence for the classification of a plaintiff's alleged irreversible homosexuality:

> "The claimant explained in his interview at the Federal Office that he first had homosexual contacts during his military service. (…) The court does not doubt these statements, particularly as the claimant made identical statements when questioned by the clinical centre of the university of (…) and the sexological-psychological expert opinion concludes that the claimant has an irreversible homosexual disposition" (VG Wiesbaden 2008)[24].

Here, the aspect of plausibility does not only occur through repetition of the narrative, but through the detailed examination by the sexological-psychological expert who diagnoses and categorises the plaintiff's homosexuality as being irreversible. By actively classifying the plaintiff and proposing categories of sexual identity traits and behaviour, the plaintiff is turned into an object. Modes of objectification in conjunction with modes of subjectification function in "Western" societies to turn human beings into subjects. This reciprocal relation between law/legal decision-making and the sexual psychology together enable the governing plaintiffs through certain techniques and knowledges.

Until recent years, the BAMF officially required expert opinions when dealing with asylum cases relating to sexual orientation. According to a parliament enquiry from 2012, the German government states that the BAMF no longer requires an expert opinion from asylum seekers that apply on grounds of their sexual orientation (BT-Drucks. 17/8357). The practices of the Administrative Courts it is not known exactly, but currently, most plaintiffs provide expert opinions or expert witness statements "voluntarily" and use them as supporting evidence for the existence of their sexual orientation. Although not being

[24] See Appendix A, No. 7 for original German quotation.

mandatory, when these are submitted, these will equally be taken into consideration in the judgements of the German authorities (Schmidt 2013).

In my empiria, it is observable that judges rely on expert opinions as part of the credibility assessment, which acts as guiding knowledge for interpreting the law on 'membership of a particular social group'. As the following statement shows, non-provision of such expert opinion might decrease the changes in the assessment:

> "Insofar as presented in the statement of claim that the expert opinion *[Gutachten]* discovered the existence of an irreversible homosexuality in the claimant, this is incomprehensible. Because obviously, such an expert opinion is not yet created *[and]* such *[was]* neither submitted to the court (…)" (VG Berlin 2009).[25]

Court verdicts are always used by different legal actors and hence an argumentation like this can have potential effects for future cases as it establishes some sort of causality between the existence of a person's sexual orientation and the need for expert opinions to verify this claims. Although expert opinions no longer officially are required, this citation shows that the former practices have made expert opinions part of jurisprudence as these knowledges count as highly important truths in the German credibility assessment. Consequently, psychological expert examination of the plaintiff's sexual orientation not only feed decision-makers with knowledge, categories, characteristics and truths that counts as relevant for the law 'membership of a particular social group', but also becomes a necessary technique to objectify and normalise the discourse of an "irreversible homosexual disposition" in German jurisprudence. Hence, as I will show later, this ultimately will have governing effects for refugees/asylum seekers from sexual minorities who seek protection in Germany.

Having already earlier outlined through the 1988-Decision and the parliament documents the state of the art of sexual scientific knowledge and their understandings of how a (homo)sexual disposition should develop, I observed that much of the credibility assessment circulates around whether the claimant truly holds a (homo)sexual orientation. Many sexual

[25] See Appendix A, No. 8 for original German quotation.

minority refugee claimants also underline this in their narrative the relation to the knowledge about being "different" than the others by a certain age. A verdict by the Administrative Court Ansbach from 2008 entailed a statement concerning this connection between "irreversibility" and "adolescence" and was also related to the claimant's bisexuality:

> "The plaintiff lacks, according to the chamber, an identity-forming disposition *[Identitätsprägung]* in this sense, because due to his own assertion his homosexuality was by the end of his adolescence, a point in time where according to current state of knowledge *[Wissenschaftsstand]* a fateful determination of homosexuality exists, not more than a mere tendency besides his lived heterosexuality" (VG Ansbach 2008).[26]

In German legal decision-making, it seems therefore that the criteria of a credible sexual orientation are understood in close connection to a certain time span when this orientation has become "visible" or "manifested" in the plaintiff. Also in this citation the perceived causality between '(homo)sexuality' and 'identity' is being outlined as a criterion for credibility. Another verdict from the Administrative Court Düsseldorf from 2012, emphasises that "irreversibility" should according to current understandings not be the main concern, but on the contrary it still outlines the incredibility of the claimant's sexual orientation by reference to the claimant's age: „Even the story of how the plaintiffs*['s] [homosexuality]* came about, that he in the year of 2002 with more than 40 years discovered his same-sex orientation, does not convince. "(VG Düsseldorf 2012).[27]

With these statement in mind, I argue therefore that the sexual psychology as well as German jurisprudence understands adolescents and sexuality as being fully developed and becomes static by a certain age, as well as makes sexual orientation a fundamental part of a person's identity. However, as these are by no means universal "concepts", it seems that this "knowledge" derived from "Western" scientist clashes with those experiences that asylum seekers and refugee from non-Western areas have. The idea of a fixed and static sexual orientation, or in general what "Western" people might understand as such, becomes even

[26] See Appendix A, No. 9 for original German quotation.
[27] See Appendix A, No. 10 for original German quotation.

more differentiated for those individuals who were forced to hide their sexual orientation in the country of origin. Further, this is an indicator for how the sexual psychology has come to play a major influence on law and legal jurisprudence. By creating the idea of what a normal sexual development should supposed to be like, it simultaneously pathologies those traits and criteria connected to sexual orientation that are not understood as "irreversible" or are contrary to these truths (e.g. about age and stability) and assumptions that reproduce the knowledges that sexual orientation with these characteristics is a normal and universal phenomenon.

3.1.4 Summary first Part

As this chapter has shown, there exist a reciprocal relationship between the law/judiciary and the disciplinary power on this topic, since their relationship has been manifested through the discussion of the §175, the 1988-Decision and is reproduced in current court verdicts through expert opinions. The discourse of an 'irreversible (homo)sexual disposition' can be traced throughout the empirical material and is further reproduced by expert opinions that continue to categorise the plaintiffs as holding an "irreversible" and "fateful" homosexual dispositions. So far, the existence of a sexual psychological episteme, i.e. an accumulation of underlying scientific truths, has crystallised through a reoccurring pattern of specific statements within my empirical cases that I was reviewing. Due to the analysis of the more "hidden" references, namely the two documents from the Bundesrat combined with the 1988-Decision, in my empirical cases, these make visible the political rational and scientific truths as episteme that also inform today's German legal decision-making when dealing with asylum/refugee appeal cases relating to sexual orientation. As the concept of 'irreversibility' clearly stems from the sexual psychology, sexual psychologists remain an important source of knowledge for the judiciary that supports the latter in classifying the plaintiff as belonging to the law on 'membership of a particular social group'. Through the knowledge and criteria of 'age by which a sexual orientation fully has developed' and 'overall static perspective of sexuality and identity' provided by the sexual psychological science, German legal decision-makers can value whether the plaintiff's narrative is "credible". Simultaneously, this

knowledge and truths pathologies those traits and criteria connected to sexual orientation that are not understood as "irreversible". The credibility assessment hence relies on a sexual psychological diagnosis (expert opinions) of the plaintiff's sexuality, which verifies the existence and truthfulness of that person's sexual orientation. Operating on a continuum between "normal" and the "abnormal", sexual psychology seeks to classify, categorise, as well as to normalise the object of governance.

3.2 Modes of Objectification and Expert Opinions in German Administrative Courts

Having earlier analysed the governing episteme, I will in the following focus on the German administrative courts techniques that inhibit certain modes of objectification, such as expert opinions and laws, to categorise and define valid and invalid sexual orientations under the law 'membership of a particular social group'. Applied together in legal decision-making, these kinds of modes of objectification enable the former analysed discourse of an 'irreversible (homo)sexual disposition' and sexual psychological episteme to be made 'operable'. In this chapter, I will also provide an answer to my second working questions: 'What kind of modes of objectification as techniques are present in the German legal decision-making when dealing with asylum/refugee appeals cases relating to sexual orientation and how do these operate?'.

3.2.1 Scientific Expert Opinions as Mode of Objectification

While the former part focused more on the epistemic dimension, specially how scientific lines of reasoning became embedded into juridical lines of decision-making, this part will outline the more technical side that operationalise the knowledge and truths outlined earlier. Here I will focus especially on those modes of objectification or totalising techniques (expert opinions and law) that are operating within the credibility assessment. In addition, I will briefly discuss the components 'expert opinion within court files' and 'expert opinions mentioned in court verdicts', which can be seen as an archive that can be of objectifying character.

Scientific expert opinions as a mode acquires objectification through classifications and categorisations, and provides the law on 'membership of a particular social group' to "*(...)* function on a general horizon of truth" (Foucault in Golder & Fitzpatrick 2009: 66). As the credibility assessment seeks to obtain the "truth" in asylum seekers and refugees narratives, it seems that this can only be done by examining and generating knowledge about the plaintiff's lived sexuality. Thus specifications, preconditions and categories that are used as evidence for the interpretation of the legal framework of a 'membership of a particular social group' creates normative parameters of what an innate/irreversible sexual orientation is supposed to be.

However, these normative criteria and aspects are created by the disciplinary power through sexual psychology so that plaintiffs can be objectified and classified in relation to the guiding knowledge that defines sexual orientation as an identity-forming disposition. Thereby, categories and classification seek to qualify, correct and regulate those individuals who have not yet been determined by the discourse of an 'irreversible (homo)sexual disposition'. As a precondition, it establishes the time when a sexual orientation fully has been determined and become "irreversible" and also classifies which sexual orientation is relevant for the credibility.

Even though the individual plaintiff is being examined by the sexual psychologist, and thereby is targeted on her/his subjectivity, the application of categories and concepts are overall not taking into consideration the individual plaintiff's own narratives. To my knowledge, no sexual psychologist/psychiatrist has delivered an expert opinion not verifying the existence of an irreversible homosexual orientation, but all have been verified as being 'irreversible homosexual'. This certain kinds of knowledges and truths and the need of verifying a plaintiff's sexual orientation, can be traced back to the 1988-Decision and the scientific-political rational that discursively manifested the approach of an "*(...)* irreversible disposition of an unescapable fateful" homosexuality (BverwG 1988).

Through framing of the law on 'membership of a particular social group', the sexual psychology gains its 'unitary field of objects', since the legal preconditions define that this

group "*(...)* is perceived as being different by the surrounding society" (German Asylum Act 1992). This can both be observed by differentiating between the "normal" heterosexual and the "abnormal" homosexual individual, since the credibility assessment (in)voluntarily requires pathologisation after which the plaintiff can be diagnosed and classified as "irreversible homosexual". This in return has both objectifying and normalising effects on the individual. The sexual psychology inside the legal system thereby contributes to a normalisation through abnormalisation, an analytical component derived from Foucault (Foucault 2003: xxii).

Expert opinions can either be observed as evidence within the court files or mentioned directly in the court verdicts. Expert opinions, as separate documents within court verdicts, can act as background knowledge to promote "natural" and "unitary" norms/stereotypes and categories about this 'particular social group' within the wider juridical profession. The expert knowledge provided by the sexual psychologist – determining who can be classified as part of the law on 'membership of a particular social group' – enables that certain kinds of truths can become "fixed" in time through its written material. The earlier identified criteria of 'age by which a sexual orientation fully has developed' and 'overall static perspective of sexuality and identity' becomes through the reproduction in new court verdicts the dominant and natural stance to assess whether a sexual orientation is irreversible and hence credible. By establishing parameters and criteria for who can be recognised as part of the 'particular social group' classification, these categorise and concepts become naturalised and thus have objectifying effects on future cases to come. By naturalisation, I understand the way in which the discourse of an 'irreversible homosexual disposition' has become the only credible characteristic that is qualified for the membership of a particular social group. As outlined earlier this can be further substantiated by the aspect that German jurisprudence also today uses this concept in a normal manner, although stemming from a different time, instead of using the terminology of "innate" as the law outlines.

3.2.2 Law and legal Decision-Making as a Mode of Objectification

In this part, I will briefly depict how the law on 'membership of a particular social group' in conjunction with legal decision-making can be understood as a mode objectification creating legal categories from which it is possible to govern. This denotes a process that divides the individual asylum seeker from others, exclusively due to the sexual orientations, and turns the former into an object of governance on the basis of categories. In line with Foucault's analytical approach, it becomes necessary to outline this dimension as law thereby frames sexual scientific knowledges, including its categories and criteria, and proposes these as valid truths to decision-makers and plaintiffs.

Initially, law and legal decision-making can operate through a mode of power that is associated as sovereign, as well as disciplinary (Golder & Fitzpatrick 2009). Both sides are always at work in modern Western societies. When German alien and asylums laws are understood in its sovereign manner, then the single individual does not have any influence in legal decision-making. Overall, the plaintiff is made an object of administrative practices and no weights is given to the individual narratives and circumstances. This goes contrary to what UNHC stresses: "Due to their often complex nature, claims relating to sexual orientation are generally unsuited to accelerated processing or the application of "safe country or origin" concepts" (UNHCR 2012:14). Instead the plaintiff is solely understood through an overall principle of categorisation. In Germany, the laws on 'safe third country' as part of the Dublin Regulations and the law on 'safe country of origin' thereby often exclude the possibility or appealing for an oral process at the administrative courts. From a bureaucratic perspective law needs to be framed in a way that enables the governing of a total population instead of each single individual – It is here, where the productive side of law appears.

When law and legal decision-making on the contrary are more understood from it productive and disciplining side, law is operating as a dividing technique – it divides between normal/abnormal, sane/mad, good/bad etc. – after which it can have normalising effects for the individual and wider society (Golder & Fitzpatrick 2009; Foucault 2014). This especially

occurs when law and legal decision-making works in relation with other powers/professions, such as in my chosen case with the sexual psychological science.

The law on 'membership of a particular social group', which is stipulated in § 3b, Abstract 1 No. 4 of the German Asylum Act *[Asylgesetz]* 1992, seeks to divide the "normal" heterosexual refugee or asylum seeker from the other "members" of sexual minorities are perceived as "different" (German Asylum Act 1992). Overall, it can be argued in line with Hardy (2003) that the concept/category of a 'refugee' equally be understood as a mode of objectification, since:

> "*[t]*he refugee subject is a product of the processes of determination that lead to his or her classification as well as the broader discourses that impinge on and overlap with refugee discourse. *(...)* There is, then, no autonomous subject: a refugee only exists insofar as he or she is named and recognized by others" (Hardy 2003:467/477).

Apart from the overall classification of being a "refugee/asylum seeker", the object of my study is in this context categorised in a double-way, becoming the "lesbian/gay" refugee. As already shown, this categorisation requires sexual psychological verification. Consequently, the actions of the dividing practices rely on and are justified "through the mediation of science (or pseudoscience) and the power the social group gives to scientific claims" (Madigan 1992:266-67).

As the law on 'membership of a particular social group' promotes the right to asylum or refugee status due to an individual's sexual orientation, judges hence need the expertise of sexual psychologist to interpret and classify to what extend the claimed sexual orientation is an innate/irreversible characteristic of the plaintiff's identity and substance. Law as such needs to rely on the human sciences in order to "*(...)* function on a general horizon of 'truth'" (Foucault cited in Golder & Fitzpatrick 2009: 66), since scientific categories and criteria appear under the cloak of an "objective" science which examines, diagnoses, categorises, classifies human beings and their behaviour, as well as creates statistics that distribute individuals on a continuum from normal to abnormal. In short, the objectifying mechanisms of the human science, such as sexual psychology, help to make law operational and

justifiable (Golder & Fitzpatrick 2009:84). Thereby, law is always subject to and applied by political powers/interests that enable the governing of society through scientific-legal categories and norms. By legally categorising those people and labelling them as a singular epistemological category, the law 'membership of a particular social group' sets the frame which requires the sexual psychology to act as experts that can reveal these truths. Further it creates the potential for governing those objectified individuals. In addition, by establishing a legal category covering the aspect that this group has a "distinct" identity in the relevant country, it sets the basis for pathologising processes which divides between the "normal" refugee/asylum seeker and the "abnormal" refugee/asylum seeker.

3.2.3 Summary second Part

In this chapter, I have tried to outline what kinds of techniques as modes of objectifications are present in legal decision-making, how these operate and how these become important productive functions in complementing the episteme upon which law relies. By separating analytically, the techniques from the knowledge dimension in legal decision-making, I have been able to show that the totalising techniques are necessary modes of objectification that make sexual psychological knowledge operational. Thus specifications, preconditions and categories that are used as evidence for the interpretation of the legal framework creates normative parameters of what an innate/irreversible sexual orientation is supposed to be. These criteria have been earlier identified as 'age by which a sexual orientation fully has developed' and 'overall static perspective of sexuality and identity'. By reproducing these criteria and truths in new court verdicts, the discourse of an 'irreversible (homo)sexual orientation' becomes dominant and only narrative that is understood as valid and truth. Further, these truths become natural guiding knowledge for the law 'membership of a particular social group'. This legal framework on a particular and coherent group with an innate characteristics and identity traits frames the need for sexual psychologist to act as expertise within this process. Finally, by categorising these individuals as holding a "distinct" identity in the relevant country, it sets the basis for and manifests the pathologising processes which divides between the "normal" refugee/asylum seeker and the "abnormal"

refugee/asylum seeker.

3.3. Mechanisms of Normalisation: Governing sexual Minorities through Stereotypes

In the subsequent part, I will direct my focus towards those normalising mechanisms in the credibility assessment that potentially allow for the governing of sexual minority refugees at a distance. I will exemplify this by focusing on two kinds of sexual stereotypes, namely 'bisexuality' and 'sexual minorities as coherent social group', that I could identify in my empirical material. These stereotypes are similar to those that scholars within my literature review also have identified (see e.g. Markard 2013; Jansen & Spijkerboer 2011; Budd 2009, etc.). In practice, these stereotypes are mostly intertwined, but for analytical reasons, I will outline them as separate aspects. Finally, I will provide an answer to my third working question: 'Which mechanisms are present in German legal decision-making when dealing with asylum/refugee appeals cases relating to sexual orientation and how do these operate?'.

Law operates both through categories that apply to larger groups in society, as well as have an impact on the individual. Law is therefore dependent on other powers/knowledges and mechanisms, such as stereotypes and norms, for its individualising and normalising effects. On the other hand, sexual psychological expert knowledge can assist in the normalising dimension in legal decision-making by making certain kinds of knowledges dominant and make them appear as "natural". This is often done through statistics, but in legal decision-making certain dominant discourses, such as in this case the sexual scientific discourse of an "irreversible homosexual disposition", is being reproduced and manifested through "cases laws" and statutes". When a discourse becomes jurisprudence, it has potential normalising effects on the legal profession and future plaintiff. Thereby, jurisprudence can distribute certain comparative measures or political standards about sexuality and sexual identities apart from being framed as law. In extension, these can regulate what becomes normal behaviour and commons sense knowledge for the individual outside the legal scope. However, although stereotypes and norms originate according to Foucault from the human sciences, these can have developed to the extent that their "origin" no longer certainly can

be verified. As such, the sexual stereotypes in my empiria are on the threshold between scientific knowledge and stereotypes that have a *Lebensraum* [living space/environment]. However, the subsequent stereotypes can be traced back to the dominant.

3.3.1 'Bisexuality'

A commonly held sexual stereotype that became visible in my empiria is the idea that people cannot be homosexual if they had former/present heterosexual relationships/marriages and children:

> "The Federal Agency *[BAMF]* has correctly valued this submission as totally incredible. Against the plausibility of the information speaks that the claimant in the meantime has a heterosexual relationship and intends to marry this woman and an irreversible homosexual disposition does not exist, despite that, the claimant in his interview at the Federal Office has alleged this and has not declared that he is bisexually predispositioned" (VG Berlin2009 (unpubl.)).[28]

As I have outlined earlier, the 1988-Decision is not only binding for German administrative courts, but also in binding for the BAMF. The dominant discourse of an "irreversible (homo)sexual orientation" has therefore also gained political impact in different institutions. Aligning to Valverde's line of thinking, it might not be classification that is problematic as such, but "what is problematic" in the German credibility assessment "are the historical inequalities" that it reproduces (Valverde 2003: 99). Thereby, all those sexualities and sexual expression that are not perceived as fixed and static become excluded from being understood as credible, lowering the changes for asylum/refugee status on these grounds.

> "The plaintiff would, due to his disposition, be able to have a relationship in Algeria with a woman and to live out his sexuality. This assumption is supported by the fact, that the plaintiff already has become a father to a child" (VG Saarland 2015: 11-12).[29]

[28] See Appendix A, No. 12 for original German quotation.
[29] See Appendix A, No. 13 for original German quotation.

It can be argued on the basis of these observations, that bisexuality here is understood as "reversible" and a matter of "choice". Through different court verdicts, this approach has become normalised and hence has become a natural stance in jurisprudence. In addition, it brings with it (post-colonial) effects, as the dominant "Western" perception holds certain standards and criteria for how sexual behaviour and sexual identity should develop and manifest itself. Those who do not fit into these categories or tell any other narrative than expected are thereby excluded. This argument can be extended with reference to a verdict from the Administrative Court of Ansbach stating that:

> "On suspension that the fact, that he obviously also had sexual intercourse with a woman meant that his homosexuality is not explicitly and irreversible, the plaintiff stated that this is correct, but he tends *[neige]* more towards men. When asked if he currently practices homosexual sex, the claimant stated, not here, but most recently in the Netherlands" (VG Ansbach.2008).[30]

Stereotypes thereby can become a shared reference point for legal decision-makers and the wider population, including new potential plaintiffs. Hence, sexual stereotypes may not only sustain ideas about what is normal and abnormal, but also specifically proliferate and cement what is "a "natural" and necessary foundation upon which individual sexualities and subjectivities are based" (Taylor 2009:57). When something becomes normalised and part of jurisprudence, this restricts the plaintiffs' of telling any other narrative than those which fit the discourse of an "irreversible (homo)sexual disposition".

3.3.2 Sexual Minorities as 'a coherent social Group'

The second identified stereotype entails the idea that plaintiffs are understood as a 'coherent social group'[31]: A sexual-subcultural stereotype. This overall stereotype revolves around a cluster of stereotypes concerning "assumed knowledge", public manifestations (e.g. spaces),

[30] See Appendix A, No. 14 for original German quotation.
[31] It is difficult to assess whether these are these stereotypes are the exceptions, but if already found in my small amount of empirical material at hand, it cannot be excluded that there exist more (un)published verdicts entailing similar kinds of statements concerning this stereotypes.

patterns of behaviour and demeanour; which directs judges towards the real "truths" in the plaintiff's narrative. In an unpublished verdict from the Administrative Court Berlin (2014), a judge declares:

> "In the written request for asylum through his legal representative, there exist only the generic reference to the claimant's homosexuality, but no concrete specification to the outing or engagement in gay-lesbian associations" (VG Berlin 2014 (unpubl.)).[32]

In addition to the engagement in gay-lesbian organisation, it is equally assumed that sexual minority refugees share an interest in public manifestation (e.g. spaces) that represent "their" sexuality. While the law on 'a particular social group' promotes the idea that individuals holding a certain sexuality are categorised as 'members' who even hold a "distinct identity", I argue that this perceived causality would never have been postulated about heterosexual people. Thereby, these scientific-legal classifications enable and reiterate hierarchical and marginalising norms and stereotypes.

Finally, stereotypes based on demeanour are difficult to capture, as these are impressions that judges acquire in oral proceedings and are rarely translated into the written verdict. However, what kind of categorisation occurs when these are translated into the final court verdicts, can be shown by the following empirical example:

> "The plaintiff has through her masculine appearance and the lively description of her identity with the resulting problems and dangers in Iran made plausible that she belongs to a *['particular social']* group (…). Her homosexual orientation (…) is fateful *[schicksalhafter]* component of her entire personality (…)" (VG Stuttgart 2006).[33]

This kind of statement is on the edge between Foucault's understanding of disciplinary power's normative evaluations about identity and behaviour and a bio-political discourses focusing on bodily appearances and bodily performances. In order to exemplify the switch from categorising "internal" characteristics to categorisation on bodily features and bodily

[32] See Appendix A, No. 15 for original German quotation.
[33] See Appendix A, No. 16 for original German quotation.

performance, the subsequent older statement outlines what consequences stereotyping can have for legal decision-making and jurisprudence:

> "*(...)* if the sexual disposition does not remain hidden, but – as in the case of the plaintiff – becomes apparent. After the impression that the court has gained, the plaintiff cannot hide his sexual orientation. It *[the sexual orientation]* does not appear in an intrusive presentation *[Aufmachung]* (…), but in his defining body appearance and his body language that he cannot disguise. The court has gained sustainably this impression through the oral proceedings" (VG Düsseldorf 2004).[34]

This approach in legal decision-making might be valued with carefulness, as this excludes a whole range of individuals who do not appear in certain expected ways and in accordance with the outlined sexual stereotypes. Further, this kind of approach has potential effects on how a "homosexual" person should appear, behave and perform their sexuality. Hence, severe potential consequences for such an approach in jurisprudence could be that not only are scientist used for the deciphering and extraction of internal hidden truth, but it can also bring with it physical measurements and classifications. For now, the performative requirements manifested through sexual orientation seems to be still prevailing in the credibility assessment and can contribute as a judge's intuitive knowledge of who belongs to this 'particular social group'. On the other hand, if stereotypes about certain sexual or subcultural expectation can be fulfilled, this increases the chances for being perceived as credible (Markard 2013:83-84). It can therefore not be excluded that plaintiffs govern themselves to the extent that such stereotypes become mechanisms of inscription, either just for the sake of being perceived as credible within the oral proceedings or also in terms of identity formations in the long run.

[34] See Appendix A, No. 17 for original German quotation.

3.3.3 Stereotypes as normalising Mechanisms and potential naturalising Effects of German Jurisprudence

This final chapter will briefly reflect on some additional aspects that are connected to the normalising effects that the discourse "irreversible (homo)sexual disposition" can have for categorisation and legal decision-making. Here, I will focus on two aspects: 'expert opinions and "voluntary involuntariness"' and 'stereotypes and legal certainty'.

The first point that I briefly would like to reflect on expert opinions and "voluntary involuntariness". While analysing my court verdicts, I started to wonder about the question of what effects does it have when scientific expert opinions no longer can be identified directly in court verdicts since they have become jurisprudence? Literature has outlined that it remains very difficult to obtain asylum or refugee status due to one's sexual orientation in Germany. As my empirical cases have shown, credibility is mostly obtained in those cases where plaintiffs with the help of expert opinions as evidence are being diagnosed as "irreversible" homosexual. Sexual stereotypes also find their share in legal judgements. However, while authorities and courts no longer officially request that refugees and asylum seekers from sexual minorities pathologies themselves, current legal practices still include expert opinions in decision-making. It is difficult to assess whether all of the examined court verdicts included 'expert opinions' as background knowledge, not all judges might rely on such evidence as the following statement outlines: "It does not need an expert opinion to come to such an assessment, this assessment can and has to be undertaken by the court in the context of the credibility test of the claimant" (VG München 2004).[35] Nevertheless, at is has been documented throughout the analysis, that the provision of expert opinions increases credibility and enables the categorisation of a "fixed and static" sexual orientation, which is required for the legal classification of the 'membership of a particular social group'. It seems therefore that this "voluntary involuntariness" has become normalised and become a natural part of German jurisprudence.

[35] See Appendix A, No. 11 for original German quotation.

Another point that I would like to outline can be made in relation to stereotypes and legal certainty. Categorisation and stereotypes might as such be unavoidable and are even be seen necessary and productive mechanisms through which new knowledges, perspectives and rights might appear. However, stereotypes in the German credibility assessment exclude a broad number of asylum seekers and refugees from sexual minorities. Firstly, foreigners might not tell the "right" narrative that is understood as credible and in accordance with "Western" scientific standards. Secondly they might neither appear in certain expected stereotypical ways that have been proposed by sexual scientists and decision-makers. When occurring in legal decision-making, this particular set of prevailing sexual stereotypes/norms in conjunction with the discourse of an "irreversible (homo)sexual orientation" are together understood as truths. By reproducing these knowledges and truths through court verdicts, these have naturalising and normalising effects which delimit the boundaries for other sexual orientations, such as bisexuals or those whose sexuality is "static" and "fundamental part of identity". By connecting sexual stereotypes, and certain scientific truths in legal decision-making, this "encourages the acceptance and internalization of sexual norms and thus masks their normalizing character" (Taylor 2009: 57). However, when sexual scientific expert opinions become rejected and instead stereotypes (as common sense) become the governing mechanisms for the credibility assessment. Ultimately, this would have consequences for legal certainty. Consequently, the credibility assessment might no longer be ruled out from the "objective" categories and criteria established by experts, but instead from the basis of common sense objectification of stereotypes that are derived from the single judge. This ultimately would jeopardise legal certainty.

3.3.4 Summary third Part

This last analytical chapter focused on categories established by the sexual psychology and sexual stereotypes as highly functional mechanism within the credibility assessment that have normalising effects on legal decision-making and potentially on jurisprudence. In the process of normalisation sexual psychological expert knowledge can assist in the normalising dimension in legal decision-making by making certain kinds of knowledges

dominant and make them appear as "natural". Expert opinions are no longer mandatory, but I argued that there occurs a "voluntary involuntariness" that has become normalised and become a natural part of German jurisprudence. Through this chapter, I have shown that this discourse is still is inherent and applied in living law without any direct reference to expert opinions.

Considering the aspects of stereotype, these can develop in different direction. I have shown through the two sexual stereotypes "bisexuality" and "sexual minorities as a coherent social group' that the discourse of an "irreversible homosexual disposition" can be related to these stereotypes. Thereby, all those sexualities and sexual expression that are not perceived as fixed and static become excluded from being understood as credible, lowering the changes for credibility. Hence, sexual stereotypes may not only sustain ideas about what is normal and abnormal, but also specifically proliferate and cement what is a "natural" and necessary basis upon which individual sexualities and subjectivities are based. When stereotypes have become jurisprudence, it can distribute certain practices, comparative measures or political standards about sexuality and sexual identities apart from being framed as law. However, thinking further, when there is no longer any need for expert opinions, but judgement might rely on common sense, this would ultimately jeopardise legal certainty.

4. CONCLUSION

With point of departure in the examination of the credibility assessment in German legal decision-making dealing with asylum/refugee appeal cases relating to sexual orientation, I have shown how sexual psychological scientific lines of reasoning become embedded into juridical lines of decision-making. In this last chapter, I will return to my research question: *How does knowledge derived from the sexual psychological science become constituent in the German credibility assessment dealing with asylum/refugee appeal cases* relating to *sexual orientation and what mechanisms are present when governing refugees from sexual minorities?*

In my analysis of an episteme in the German juridical credibility assessment based on sexual orientation, I have shown how the sexual psychological science constitutes itself as a natural and necessary knowledge dimension that determines the preconditions for the law on 'membership of a particular social group'. These classifications and categorisations enable the governing of refugees and asylum seekers from sexual minorities. In addition, I have outlined how sexual stereotypes, as highly functional mechanisms within legal decision-making, can contribute to laws quest for social regulation and cohesion by gathering individuals under certain societal categories that enable the governing of such groups from a distance.

In part one, I have outlined the sexual psychological categories and criteria, such as 'age by which a sexual orientation fully has developed' and a 'static perspective of sexuality and identity' that through the discourse on an 'irreversible homosexual disposition' informs legal decision-making. Further, I have shown that there exists a reciprocal relationship between the law/legal decision-making and sexual psychology. This relationship in matters of 'sexual orientation' has been manifested through early collaborations of §175 (Penal Code) and the 1988-Decision, but still prevails in current court verdicts through expert opinions that are actively used in living law. In the second part, I have tried to outline what kinds of techniques as modes of objectifications are present in legal decision-making, how these operate and how these become important productive functions in complementing the episteme upon which law relies. In the third part, I focused on those categories established by the sexual psychology and sexual stereotypes in court verdicts as highly functional mechanism within the credibility assessment that have normalising effects on legal decision-making and potentially on jurisprudence and future plaintiffs.

The 1988-Decision has been a crucial discursive event in German legal decision-making opening up a space for the sexual psychology to extend its validity and perceived "objectivity" in the domain of asylum and refugee laws. By introducing the discourse of an 'irreversible (homo)sexual disposition' it has created the preconditions and criteria that are connected to the assumption that sexuality is a "innate" characteristic which has impact on a human's identity structure and psyche. Scrutinised by scientific standards and detailed

examination of the plaintiff, criteria such as 'age by which a sexual orientation fully has developed' and a 'static perspective of sexuality and identity' has shown to be fitting preconditions to extract the truth out of plaintiffs' narratives. For example, puberty and sexual orientation are by no means universal and fixed concepts, but part of a sexual psychological stance constructed in "Western" liberal cultures aiming at the governing of individuals through objectification, classification and examination on a continuum between normal and abnormal.

By filling up the epistemological space required to verify these narratives, the sexual psychology successfully and continuously reproduces the almost thirty-year-old discourse of an 'irreversible homosexual disposition' that still today counts as normalised and naturalised notion when assessing a person's sexual orientation. Further, this kind of knowledge does not only sustain ideas about what is normal and abnormal in terms of sexual orientations suitable for the law 'membership of a particular social group', but also specifically proliferates and cements what is a "natural" and necessary foundation upon which individual sexualities and subjectivities are based" (Taylor 2009: 57). Hence, expert knowledge in the form of expert opinions enable that certain kinds of truths can become "fixed" in time through its written and reproduced material. This might not be valid knowledge for the whole of the German judiciary, however it still has been used for many years and thus might be a "natural" part of jurisprudence.

Although the German government claims that expert opinions no longer are required in the credibility assessment, I argued that there occurs a "voluntary involuntariness" that requires asylum seekers/refugees from sexual minorities to provide this evidence as to increase the possibility for showing that their narratives are true. Thereby this "voluntary involuntariness" has become normalised and become a natural part of German jurisprudence. Potential effects of this jurisprudence therefore can go beyond the mere objectification, but could target plaintiffs on their individuality and the subjective technologies that transform objects into subjects of governance and self-governance. Ultimately, these practices in German legal decision-making encourage the acceptance of the discourse of an "irreversible

homosexual disposition" as being the only credible "truth" within the credibility assessment, and thereby mask the normalisation character of the knowledge and powers behind.

Finally, as the two stereotypes on 'bisexuality' and 'sexual minorities as coherent social group' has shown, I have argued that these have a relation to the discourse of an 'irreversible (homo)sexual disposition'. It seems therefore that all those sexualities and sexual expression that are not perceived as fixed and static become excluded from being understood as credible, lowering the changes in the credibility assessment. By connecting sexual stereotypes, and certain scientific truths in legal decision-making, this encourages the acceptance and internalisation of specific sexual stereotypes and thereby can mask their normalising character. This becomes especially difficult for all those individuals who are not familiar with these kinds of "Western" stereotypes or those who resist the objectification. Despite some reference in court verdicts, it seems that expert knowledge more and more operates as background knowledge. If judges however continuously rely on sexual stereotypes as guiding knowledge, categorisation and classification of objects by means of intuitive knowledge would therefore trigger potential consequences for legal certainty. Instead of being governed through the categories and criteria of the sexual science, this would then enable the governing through common sense and legal certainty would be jeopardised. Hence, legal certainty might rely from a 'legal security point of view' to some extend on knowledges from the sexual psychology, as the human sciences operate from similar "perceived" standards of objectivity and validity. Nonetheless and as a result, the rights of refugee status and asylum relating to sexual orientation might signify freedom from sexual repression, but it simultaneously places individuals within similar oppressive discursive boundaries. The proposed liberal rights for asylum seekers and refugees denote hence a regulated freedom.

4.1 Further Research: Governing Refugees through Rights and Truths

Recalling the findings of my literature review, it became evident that almost no research exists on my specific topic for the German context or research within the sociology of law that focus on how techniques of power and knowledge within legal systems create certain

scientific categories or sexual stereotypes about refugees/asylum seekers from sexual minorities. In this study, I therefore sought to contribute to this debate with a new analytical focus, while also providing some new evidence from the German administrative courts that decided upon asylum/refugee appeal cases based on sexual orientation.

While this archaeological study focused on the epistemic nature in conjunction with modes of objectification and mechanisms of normalization observable in the German credibility assessment, this study could have gained substantially by extending this approach with a genealogy. This would show how refugees/asylum seekers from "non-Western" countries firstly are made objects of governance through the reciprocal relationship between sexual psychology, legal decision-making and jurisprudence. Following Foucault's lines of thought, plaintiffs would be targeted on their individuality by activating subjective technologies that transform objects into subjects of governance and self-governance. Substituting this approach with the dimension of how refugee law and sexual rights discourse are formative of identity, or rather mechanisms of inscriptions as proposed by Golder (2013), it would be interesting to investigate what types of subjects are produced by the classificatory space of irreversible homosexual refugee/asylum seeker versus the discourse of self-determination. Potentially, this could add the dimensions of freedom and resistance that Foucault examined in detail. In Extension, an inclusion of transgender cases would have been interesting to explore, since the same analytical framework and purpose of this study would have been applicable for the discursive scientific-legal preconditions for transgender cases under the 'particular social group' classification. Especially ethnographic observations as methods would be a good complement to the court verdicts or protocols from oral proceedings.

Apart from focusing on rights as mechanisms of inscriptions that generate certain subjectivities, it would equally be fruitful to extend my proposed analytical approach with the focus of truth-telling/avowal/confession in German oral proceedings and oral examination conducted by sexual psychologists. While this might appear as a neutral exercise, the "imperative to narrate one's own experience over and over again" functions as highly effective method of political individualisation (Golder 2013: 12- 13). Hence, while an archaeology including the written expert opinions could bring to light the epistemological

categories that arise in these two different forms, a genealogy in extension could include ethnographic observations of oral proceedings and expert examinations. Both the governing through rights and truths would appear as highly applicable analytical dimension that can be fruitful for the sociology of law and the overall topic.

5. BIBLIOGRAPHY

Baier, Matthias (2014). *Social and Legal Norms*. Ashgate Publishing Limited.

Berg, Laurie and Millbank, Jenni (2009). Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants. In *Journal of Refugee Studies. 22(1)*: 1 – 17.

Berg, Laurie & Millbank, Jennie (2013). Developing a Jurisprudence of Transgender Particular Social Group. In Spijkerboer, Thomas ed. *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum*. Oxon, UK: Taylor & Francis Books. [ONLINE] Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312887 [Accessed 28-12-15].

Bladini, Moa (2013). I objektivitetens sken: en kritisk granskning av objektivitetsideal, objektivitetsanspråk och legitimeringsstrategier i diskurser om dömande i brottmål, Gothenburg: Makadam.

Brion, Fabienne & Harcourt (eds) (2014) The Louvain Lectures in Context. In Foucault, Michel (2014). Wrong-Doing, Truth-telling – The Function of Avowal in Justice. (transl) Sawyer, Stephen W., Chicago, University of Chicago Press.

Bryman, Alan (2008). *Social Research Methods*, 3rd edition, Oxford: Oxford University Press.

Budd, Michael Carl (2009). *Mistakes in Identity: Sexual Orientation and Credibility in the Asylum Process* (M A Thesis, The American University in Cairo) [unpublished] [ONLINE] Available at: http://schools.aucegypt.edu/GAPP/cmrs/Documents/MichaelCarlBudd_Thesis.pdf [Accessed 28-12-15].

Buxton, Richard (2012). A History from Across the Pond. In *44 NYU J Int'l L & Pol 391*: 391-406. [ONLINE] Available at: http://nyujilp.org/print-edition/#44 [Accessed 28-12-15].

Birdsong, Leonard (2007) Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution: The New Ground for Grants of Asylum. In 35:1 William Mitchell Law Review 197. [ONLINE] Available at: http://www.wmitchell.edu/lawreview/volume35/documents/birdsong.pdf.

Constantino, Tracie E. (2008). Constuctivism. In Given, Lisa M. *The Sage Encyclopedia of Qualitative Research Methods*. Thousand Oaks, CA: SAGE Publications.

Cowen, Tim et al. (2011). *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland*. Glasgow: Equality Network, BEMIS and GRAMNe, University of Glasgow. [ONLINE]. Available at: http://www.gla.ac.uk/media/media_195792_en.pdf. [Accessed 28-12-15].

Davidson, Arnold I. (2003). Introduction. In Foucault, Michelle. *Abnormal Lectures at the College de France 1974-1975*. English Series Ed.: Davidson, Arnold I.; Transl. Burchell, Graham. Verso; London.

Dean, Mitchell (2003). Governmentality – Power and Rule in Modern Society, 2nd ed. London: Sage Publication Ldt.

Deflem, Mathieu (2008). *Sociology of law: Visions of a Scholarly Tradition*. Cambridge: Cambridge University Press

Dolk, Klaudia & Schwantner, Andreas (2007). Homosexualität und (Abschiebungs)schutz in Deutschland. In *Amnesty International, Asyl Info 7-8 2007*. [ONLINE] Available at: https://www.lsvd.de/fileadmin/pics/Dokumente/Migration/Abschiebeschutz.pdf [Accessed 28-12-15].

Domeier, Norman (2007). Scandal & Science – The Power of Sexology in the Eulenburg Affair, 1906-1909 [ONLINE] Available at: http://www.hist.ceu.hu/conferences/graceh/abstracts/domeier_norman.pdf [Accessed on 03-01-16]

Esmark, Anders, Lausten, Carsten Bagge & Andersen, Niels Åkerstrøm (2005). Socialkonstruktivistiske analysestrategier - En introduction. In (eds.) Socialkonstruktivistiske analysestrategier. Copenhagen: Samfundsliteratur

Foucault, Michel (1970): The Order of Things – An Archaeology of the Human Sciences. New York, United States of America: Random House, Inc., Second Vintage Books Edition

Foucault, Michel (1972): The Archaeology of Knowledge – and the Discourse on Language, New York: Random House, Inc.

Foucault, Michel (1977): *Discipline and Punish: The Birth of the Prison*. New York:

Random House, Inc., Second Vintage Books Edition

Foucault, Michel (1978): The History of Sexuality: 1, London: Penguin Books

Foucault, Michel (1982): Subject and Power in Dreyfus, In Hubert & Rabinow, Paul eds. *Michel Foucault: Beyond Structuralism and Hermeneutics*: Brighton: Harvester Press Ltd.

Foucault, Michel (1994): *Ethics: essential Works of Foucault 1954-1984* (red.), Rabinow, Paul, London: Penguin Group, Penguin Books

Foucault, Michel (2000). Truth and Juridical Forms, in *Th*e Essential Works of Foucault 1954-1984, *Volume 3*: Power. New York: The New Press.

Foucault, Michel (2003). *Abnormal*: *Lectures* at the Collège de France, 1974-1975. Eds: Valerio Marchetti and Antonella Salomoni, General Editors: Francois Ewald and Alessandro Fontana. London: Verso.
Foucault, Michel (2014). Wrong-Doing, Truth-telling – The Function of Avowal in Justice. (eds) Brion, Fabienne & Harcourt, Bernard E. (transl) Sawyer, Stephen W., Chicago, University of Chicago Press.

Golder, Ben (2012). Foucault, Rights and Freedom. In *Int J Semiot Law (2013) 26*, pp. 5–21.

Golder, Ben & Fitzpatrick, Peter (2009). *Foucault's Law*. Abingdon: Routledge.

Goffmann, Erwin (1963). Stigma. Notes on the management of spoiled identity. Englewood Cliffs, N.J., Prentice-Hall. MLA

Gray, Amanda & Alexandra McDowall (2013). LGBT Refugee Protection in the UK: From Discretion to Belief?, in Marion Couldrey & Maurice Herson, eds. *Sexual Orientation and Gender Identity and the Protection of Forced Migrant*, *42 Forced Migration Review*. [ONLINE] Available at: http://www.refworld.org/pdfid/517eab7f4.pdf [Accessed 28-12-15].

Gustavsson, Bengt, Hermrén, Göran & Petersson, Bo (2005) *Good Research Practice – What is it? Views, Guidelines and Examples*. Stockholm: The Swedish Research Council. [ONLINE] Available at: https://www.vr.se/download/18.6b2f98a910b3e260ae28000469/Good+Research+Practice+20+april.pdf [Accessed on 03-01-16]

Gutting, Gary (1989). *Michel Foucault's Archaeology of scientific Reasoning*. Cambridge University Press.

Hardy, Cynthia. 2003. Refugee determination: Power and resistance in systems of Foucauldian power. In *Administration & Society 35*, pp. 462–488.

Hojem, Petter (2009). *Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia*. Research Paper No 181, UN High Commissioner for Refugees (UNHCR), ISSN 1020-7473. [ONLINE] Available at: http://www.refworld.org/docid/4c2325780.html [Accessed 29-12-2015].

Hunt Alan & Wickham, Gary (1994). *Foucault and Law: Toward a Sociology of Law*. London: Pluto.

Hydén, Håkan & Svensson, Måns (2008). The Concept of norms in Sociology of law. In Hydén & Wickenberg (eds.). *Contributions in Sociology of Law – Remarks from a Swedish Horizon*, Lund: Media-tryck.

Jansen & Spijkerboer (2011). *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation*. [ONLINE] Available at: http://www.refworld.org/docid/4ebba7852.html [Accessed 28-12-2015].

Jørgensen, Marianne & Phillips, Louise (2002) *Discourse Analysis as Theory and Method*. London: Sage Publication Ltd.

Kalkmann, Michael (2011). Questionnaire for Fleeing Homophobia, Seeking Safety in Germany, Best Practices on the (Legal) Position of LGBT Asylum Seekers in the EU Member States. Informationsverbund Asyl und Migration. [ONLINE] Available at: http://www.rechten.vu.nl/en/Images/Germany_questionnaire_tcm248-240406.pdf [Accessed on 03-01-2016].

LaViolette, Nicole (2009). Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process. In *International Journal of Human Rights 13(2/3)*: 437-476.

LaViolette, Nicole (2014). Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada. In *Journal of Research in **Gender** Studies; Vol. 4 Issue 2*, p68-123.

Linstead, Stephen Andrew (2010). Poststructuralism. In Mills, Albert J.; Durepos, Gabrielle & Wieb, Eiden. Encyclopedia of Case Study Research. Thousand Oak: SAGE Publications, Inc.

Madigan, Stephen (1992). The application of Michel Foucault's philosophy in the problem externalizing discourse of Michael White. In Journal of Family Therapy, Vol.14, pp. 265–279, 1992

Markard, Nora (2013). Sexuelle Orientierung als Fluchtgrund – Das Ende der »Diskretion«. In Informationsverbund Asyl und Migration e.V., *Asylmagazin 3/2013*, pp. 74-84. [ONLINE] Available at: http://www.asyl.net/fileadmin/user_upload/beitraege_asylmagazin/Beitraege_AM_2013/AM2013-3beitragmarkard.pdf [Accessed 28-12-2015].

Mc Pherson, Annika, et. al. (2014) *Wanderungen: Migrationen und Transformationen aus geschlechterwissenschaftlichen Perspektiven*. Bielefeld: Transcript.

Middelkoop, Louis (2013). Normativity and Credibility of Sexual Orientation in Asylum Decision Making. In Spijkerboer, Thomas (ed). *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum*. Oxon, UK: Taylor & Francis Books.

Millbank, Jenni (2009a). From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom. In *International Journal of Human Rights, 13(2–3)*: 391–414.

Millbank, Jenni (2009b). "The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations, In *International Journal of Refugee Law, 21(1)*: 1–33.

Moll, Albert (1981). *Die Conträre Sexualempfindung: Mit Benutzung amtlichen Materials*.

Moll, Albert (1911). *Handbuch der Sexualwissenschaften mit besonderer Berücksichtigung der kulturgeschichtlichen Beziehungen*.

Mourad, Leila (2010). *Muslimische Frauen mit gleichgeschlechtlicher Orientierung Asylverfahren und Asylpraxis in Deutschland*. (Diplomarbeit Fachhochschule Ludwigshafen am Rhein) [Unpublished] [ONLINE] Available at: https://www.yumpu.com/en/document/view/53378039/diplomarbeit [Accessed 28-12-15].

Müller-Götzman, Christian (2009). *Artifizielle Reproduktion und gleichgeschlechtliche Elternschaft: Eine arztrechtliche Untersuchung zur Zulässigkeit fortpflanzungsmedizinischer Maßnahmen bei gleichgeschlechtlichen Partnerschaften*. Heidelberg: Springer-Verlag

Nelken, David (2006a). Getting at Law's Boundaries. In *Social and Legal Studies, Vol. 15(4)*, pp. 598–604.

Nelken, David (2006b). Law and Knowledge/Law as Knowledge. In *Social & Legal Studies Vol. 15*, pp. 570-73.

Oksala, Johanna (2005). Foucault on Freedom. UK; Cambridge University Press.

Oksala, Johanna (2010). Violence and the Biopolitics of Modernity. In *Foucault Studies,*

No 10, pp. 2343. [ONLINE] Available at: http://rauli.cbs.dk/index.php/foucault-studies/article/view/3122/3290. [Accessed 28-12-15].

Oosterhuis, Harry (2012). Sexual Modernity in the Works of Richard von Krafft-Ebing and Albert Moll. In *Med. Hist.Vol.56(2)*, pp.133–155.

Rath, Christian (2014). Deutschland macht keine Homo-Prüfung. In *TAZ* 03 December 2014. [ONLINE] Available: http://www.taz.de/1/archiv/print-archiv/printressorts/digi-artikel/?ressort=a2&dig=2014%2F12%2F03%2Fa0041&cHash=b8836fe4c941aedf20368f896a8f3455 [Accessed 28-12-15].

Referat für gleichgeschlechtliche Lebensweisen (1994). Homosexualität als Politischer Asylgrund? Dokumente lesbisch- schwuler Emanzipation. In *Senatsverwaltung für Jugend und Familie*, Berlin Oktoberdruck. [ONLINE] Available at: https://www.berlin.de/imperia/md/content/lb_ads/gglw/veroeffentlichungen/doku11_bf2.pdf [Accessed 28-12-15].

Rehaag, Sean (2009). Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia. In *International Journal of Human Rights, Vol. 13, No. 2, p. 415.*

Rose Nikolas & Valverde, Mariana (1998). Governed by law? In Social Legal Studies Vol., pp. 569–79.

Schmidt, Manfred (2013). *Response to an Inquiry by Volker Beck*, Member of the German Parliament from the 04 January 2013. [ONLINE] Available at: https://www.lsvd.de/fileadmin/pics/Dokumente/Recht/BAMF-121227.pdf [Accessed 23-12-15].

Senthorun, Raj (2011). Affective Displacements: Understanding Emotions and Sexualities in Refugee Law. In *Alternative L J 177*.

Senthorun, Raj (2010). Displaced subjectivities: the queer refugee body in law [unpublished]. [ONLINE] Available at: http://www.polsis.uq.edu.au/docs/Challenging-Politics-Papers/Senthorun_Raj_Displaced_Subjectivities.pdf [Accessed on 03-01-2016].

Sigusch, Volkmar (2012). The Sexologist Albert Moll – between Sigmund Freud and Magnus Hirschfeld. In *Medical History, Vol.56(2)*, pp.184–200.

Spijkerboer, Thomas. ed. (2013). *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum*. Oxon, UK: Taylor & Francis Books.

Taylor, Dianna (2009). Normativity and Normalization. In *Foucault Studies, No 7*, pp. 45-63. [ONLINE] Available at: http://rauli.cbs.dk/index.php/foucault-

studies/article/view/2636 [Accessed 23-12-15].

Teubner, Günther (1989) How the Law Thinks: Toward a Constructivist Epistemology of Law. In *Law and Society Review, Vol. 23, No. 5*, pp. 727-757.

UN High Commissioner for Refugees (UNHCR) (2008). Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity (21 November 2008). [ONLINE] Available at: http://www.refworld.org/docid/48abd5660.html [Accessed 23-12-15].

UN High Commissioner for Refugees (UNHCR) (2012). Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (October 23, 2012), HCR/GIP/12/01. [ONLINE] Available at: Refworld http://www.refworld.org/docid/50348afc2.html [Accessed 23-12-15].

Valverde, Mariana (2010). Specters of Foucault in Law and Society Scholarship. In *The Annual Review Law Social Sciences, Vol. 6*. pp. 45–59.

Valverde, Mariana (2003). Law's Dream of a Common Knowledge. Princeton, NJ: Princeton University Press.

Yogyakarta Principles (2007). Principles on the Application of international human rights law in relation to sexual orientation and gender identity. [ONLINE] Available at: http://www.yogyakartaprinciples.org/principles_en.pdf [Accessed 23-12-15].

Westphal, Carl (1870). Die konträre Sexualempfindung, Symptome eines neuropathischen (psychopathischen) Zustand," Archiv für Psychiatrie und Nervenkrankheiten.

Weßels, Janna (2013). Discretion in Sexuality-based Asylum Cases – An Adaptive Phenomenon. In Spijkerboer, Thomas ed. 2013. *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum*. Oxon, UK: Taylor & Francis Books.

Wodak, Ruth & Meyer, Michael (2011). *Methods of Critical Discourse Analysis*. London: Sage Publication Ltd.

List of Court Verdicts

Germany: Bundesverwaltungsgericht (BVerwG), 15.03. 1988, 9 C 278.86

Germany: Bundesverwaltungsgericht (BVerwG), 26.10.1989, 9 B 405.89

Germany: Bundesverwaltungsgericht (BVerwG), 26.02.1997, Az. 6 C 3.96

Germany: Verwaltungsgericht (VG) München 20.01.2004, M 9 K 03.51197

Germany: Verwaltungsgericht (VG) Düsseldorf, 01.09.2004, 5 K 1367/00.A

Germany: Verwaltungsgericht (VG) Stuttgart, 29.06.2006, A 11 K 10841/04

Germany: Verwaltungsgericht (VG) Ansbach, 21.08.2008, AN 18 K 08.30201

Germany: Verwaltungsgericht (VG) Wiesbaden, 24. 09. 2008, 6 K 478/08.WI.A(2)

Germany: Verwaltungsgericht (VG) Berlin, 04.03.2009, 23 L 61.09 A (unpubl.)

Germany: Verwaltungsgericht (VG) Bayreuth 2012, 05.03.2012, B 3 K 11.30113

Germany: Verwaltungsgericht (VG) Düsseldorf, 23.04.2012, 23 K 8414/09.A

Germany: Verwaltungsgericht (VG) Berlin, 27. 05. 2014, 33L195.14.A (unpubl.)

Germany: Verwaltungsgericht (VG) Saarland, 23.01.2015, 5 K 534/13: 11-12

List of legislations

Court of Justice of the European Union (CJEU), 7 November 2013 judgment in joined cases C-199, C-200, and C-201. [ONLINE] Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0199&from=EN [Accessed 03-01-16].

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. *Official Journal of the European Union* L 304/12, 30.9.2004 [ONLINE] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML [Accessed 03-01-16].

Council 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. *Official Journal of the European Union* L 337/9, 20.12.2011, pp. 1-18.

Germany: Basic Law (Grundgesetz) vom 23. Mai 1949 (BGBl. S. 1), zuletzt geändert durch Artikel 1 des Gesetzes vom 23.12.2014 (BGBl. I S. 2438). [ONLINE] Available at: https://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg/245216 [Accessed 03-01-16].

Germany: Asylum Act (AsylVfG) 28 June 1992. [ONLINE] Available at: http://www.gesetze-im-internet.de/bundesrecht/asylvfg_1992/gesamt.pdf [Accessed 03-01-16].

List of Parliament Inquiries

Germany: Bundestagsdrucksache (BT-Drucks.) 5/4094. Erster Schriftlicher Bericht des Sonderausschusses für die Strafrechtsreform. [ONLINE] Available at: http://dipbt.bundestag.de/doc/btd/05/040/0504094.pdf [Accessed 03-01-16].

Germany: Bundestagsdrucksache (BT-Drucks.) 6/3521. Viertes Gesetz zur Reform des Strafrechts (4. StrRG) (Schriftlicher Bericht des Sonderausschusses für die Strafrechtsreform). [ONLINE] Available at: http://dipbt.bundestag.de/doc/btd/06/035/0603521.pdf [Accessed 03-01-16].

Germany: Bundestagsdrucksache (BT-Drucks.) 17/8357: 5 Auf die kleine Anfrage der Abgeordneten Ulla Jelpke, Dr. Barbara Höll, Jan Korte weiterer Abgeordneter und der Fraktion DIE LINKE. Asylrechtlicher Umgang mit homosexuellen Flüchtlingen und der Einschränkung der sexuellen Vielfalt. [ONLINE] Available at: http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Newsletter_Anhaenge/180/BT-Drucksache_1708357.pdf [Accessed 03-01-16].

6. APPENDIX

Original German Quotations:

No. 1 „Auf Grund des Vorbringens des Klägers und seiner Lebensführung sei eindeutig feststellbar, dass bei ihm gerade nicht eine irreversible schicksalhafte und unumkehrbare Festlegung einer homosexuellen Prägung vorliege“ (VG Ansbach, 21.08.2008, AN 18 K 08.30201).

No. 2 „Dabei geht das Gericht zu Gunsten der Klägerin davon aus, dass eine irreversible homosexuelle Veranlagung bei ihr vorliegt. Nach der Rechtsprechung des Bundesverwaltungsgerichts stellt die Bestrafung irreversibler, schicksalhafter Homosexualität grundsätzlich politische Verfolgung im Sinne des Art. 16 Abs. 1 GG dar (…) (VG Bayreuth 2012), 05.03.2012, B 3 K 11.30113).

No. 3 „ (…) daß es sich hierbei nicht um eine bloße Neigung handelt, der nachzugeben mehr oder weniger im Belieben des Klägers stünde, sondern daß in dessen Person im Sinne einer irreversiblen Prägung eine unentrinnbare schicksalhafte Festlegung auf homosexuelles Verhalten gegeben ist, die das Gefühlsleben des Klägers einschließlich seines sexuellen Verhaltens seit seinem 15. oder 16. Lebensjahr bestimmt“ (BVerwG, Urteil vom 15. März 1988 - 9 C 278.86)

No. 4 „(…) These von der freien Bestimmbarkeit der sexuellen Triebrichtung“ (BVerwG, Urteil vom 15. März 1988 - 9 C 278.86)

No. 5 „ *[a]*uch hier gilt, daß von den Erscheinungsformen gleichgeschlechtlicher Betätigung keine werbende Wirkung auf normal empfindende Menschen ausgeht“ (BT-Drucks. 5/4094)

No. 6 „Nach diesem Gutachten verfügt ein sehr großer Teil gerade auch der männlichen Jugendlichen, wenn sie das achtzehnte Lebensjahr erreichen, über (hetero-) sexuelle Erfahrungen, die gegenüber homosexuellen Einflüssen immunisierend wirken. Auch die psychische Reife ist bei Personen ab achtzehn Jahren in der Regel soweit entwickelt, daß diese weitgehend selbständig und eigenverantwortlich zu handeln in der Lage sind“ (BT-Drucks. 6/3521: 30).

No. 7 „Der Kläger hat im Rahmen seiner Anhörung vor dem Bundesamt erklärt, erste homosexuelle Kontakte habe er während seiner Wehrdienstzeit gehabt.

(…) Das Gericht hat keine Zweifel an der Richtigkeit diese Aussagen, zumal der Kläger gegenüber dem Klinikum der ... Universität gleichlautende Angaben machte und das erstellte sexualwissenschaftlich-psychologische Gutachten zu dem Ergebnis kommt, bei dem Kläger liege ein irreversible homosexuelle Veranlagung vor." (VG Wiesbaden, 24. 09. 2008, 6 K 478/08.WI.A(2)).

No. 8 „Soweit in der Klagebegründung (…) vorgetragen wird, in dem eingeholten Gutachten (…) werde festgestellt, dass bei dem Kläger eine irreversible Homosexualität vorliege, ist dies nicht nachzuvollziehen. Denn offensichtlich ist ein solches Gutachten noch nicht erstellt (…) *[und]* ein solches *[wurde]* auch nicht bei Gericht eingereicht (…)"(VG Ansbach, 21.08.2008, AN 18 K 08.30201).

No. 9 „Beim Kläger fehlt es nach Überzeugung der Kammer an einer Identitätsprägung in diesem Sinne, denn seinem eigenen Vorbringen zufolge war seine Homosexualität auch nach Abschluss der Pubertät, dem Zeitpunkt, zudem nach heutigem Wissenschaftsstand spätestens eine schicksalhafte Festlegung auf homosexuelles Verhalten vorliegt, nicht mehr als eine bloße Neigung neben der von ihm auch gelebten Heterosexualität" (VG Ansbach , 21.08.2008, AN 18 K 08.30201).

No. 10 „Schon die Geschichte, wie es bei dem Kläger dazu kam, dass dieser im Jahr 2002 mit über 40 Jahren seine gleichgeschlechtliche sexuelle Orientierung erkannte, überzeugte nicht." (VG Düsseldorf, 23.04.2012 (23 K 8414/09.A).

No. 11 „Für eine solche Wertung bedarf es keines Gutachtens, diese Wertung kann und muss durch das Gericht im Rahmen der Glaubwürdigkeitsprüfung des Klägers durchgeführt werden" (VG München 20.01.2004, M 9 K 03.51197)

No. 12 „Zu Recht hat das Bundesamt dieses Vorbringen als insgesamt unglaubhaft gewertet. Gegen die Glaubhaftigkeit der Angaben spricht bereits, dass der Antragsteller zwischenzeitlich eine heterosexuelle Beziehung unterhält und beabsichtigt, die Ehe mit dieser Frau einzugehen, und irreversibel homosexuelle Neigung jedenfalls nicht bestehen, obwohl der Antragsteller dies in seiner Anhörung beim Bundesamt behauptet und nicht erklärt hat, er sei bisexuell veranlagt." (VG Berlin, 04.03.2009, 23 L 61.09 A (unpubl.)).

No. 13 „Der Kläger wäre nämlich auch aufgrund seiner Veranlagung in der Lage, auch mit einer Frau in Algerien eine Partnerschaft zu führen und seine Sexualität auszuleben. Diese Annahme wird dadurch gestützt, dass der Kläger in Deutschland bereits Vater eines Kindes geworden ist." (VG

Saarland, 23.01.2015, 5 K 534/13: 11-12)

No. 14 „Auf Vorhalt, dass die Tatsache, dass er offensichtlich auch mit einer Frau Geschlechtsverkehr gehabt habe, bedeute, dass seine Homosexualität nicht eindeutig und irreversibel sei, gab der Kläger an, dies sei zutreffend, aber er neige mehr zu Männern. Befragt, ob er derzeit homosexuellen Sex praktiziere, gab der Kläger an, hier nicht, zuletzt in Holland." (VG Ansbach, 21.08.2008, 18 K 08.30201).

No. 15 „So findet sich in der schriftlichen Asylantragstellung durch seine Verfahrensbevollmächtigte lediglich der pauschale Hinweis auf die Homosexualität des Antragstellers, aber keinerlei konkrete Angaben beispielsweise zum Outing oder zum Engagement in schwul-lesbischen Vereinigungen" (VG Berlin, 27. 05. 2014, 33L195.14.A (unpubl.)).

No. 16 „Die Klägerin hat durch ihre maskuline Erscheinung und die lebendige Schilderung ihrer Identität mit den daraus folgenden Problemen und Gefahren im Iran glaubhaft gemacht, dass sie zu einer *[‚particular social']* Gruppe gehört (…). Ihre homosexuelle Ausrichtung (…) ist schicksalhafter Bestandteil ihrer Gesamtpersönlichkeit (…)" (VG Stuttgart, 29.06.2006, A 11 K 10841/04).

No. 17 „(…) wenn die sexuelle Veranlagung nicht verborgen bleibt, sondern – wie im Falle des Klägers – offenbar wird. Nach dem Eindruck, den das Gericht gewonnen hat, kann der Kläger seine sexuelle Orientierung nämlich nicht verbergen. Sie kommt nicht etwa in aufdringlicher Aufmachung (…) zum Ausdruck, sondern in seiner ihn prägenden körperlichen Erscheinung und Körpersprache, die er nach dem Eindruck, den das Gericht in den Terminen zur mündlichen Verhandlung nachhaltig gewonnen hat, nicht verstellen kann" (VG Düsseldorf, 01.09.2004, 5 K 1367/00.A).