# Contents

<table>
<thead>
<tr>
<th>List of Figures</th>
<th>page xi</th>
</tr>
</thead>
<tbody>
<tr>
<td>List of Tables</td>
<td>xiii</td>
</tr>
<tr>
<td>Acknowledgements</td>
<td>xv</td>
</tr>
<tr>
<td><strong>1 The Concealment Controversy: An Introduction</strong></td>
<td></td>
</tr>
<tr>
<td>1.1 The Dispute</td>
<td>1</td>
</tr>
<tr>
<td>1.1.1 Living Discreetly: The UK Supreme Court’s 2010 Judgment</td>
<td>2</td>
</tr>
<tr>
<td>1.1.2 Protective Limits and Protected Acts: Hathaway and Pobjoy’s Response</td>
<td>4</td>
</tr>
<tr>
<td>1.2 Approaching the Puzzle</td>
<td>8</td>
</tr>
<tr>
<td><strong>2 Unpacking the Controversy: Theory and Methods</strong></td>
<td>30</td>
</tr>
<tr>
<td>2.1 Definition of Key Terms</td>
<td>30</td>
</tr>
<tr>
<td>2.2 Theoretical Framework</td>
<td>33</td>
</tr>
<tr>
<td>2.2.1 Discursive Formation: The ‘Homosexual as a Species’</td>
<td>34</td>
</tr>
<tr>
<td>2.2.2 Exerting Power: The Act/Identity Double Bind</td>
<td>37</td>
</tr>
<tr>
<td>2.2.3 Coming out of the Closet: The ‘Discretion’/Disclosure Binarism</td>
<td>45</td>
</tr>
<tr>
<td>2.3 Methodological Approach</td>
<td>48</td>
</tr>
<tr>
<td>2.3.1 Discourse Analysis of Legal Doctrine</td>
<td>48</td>
</tr>
<tr>
<td>2.3.2 Case Studies</td>
<td>51</td>
</tr>
<tr>
<td>2.3.3 Comparative Research</td>
<td>54</td>
</tr>
<tr>
<td>2.3.4 The Contribution of This Study</td>
<td>56</td>
</tr>
</tbody>
</table>
PART I TRACING ‘DISCRETION’ REASONING

3 Rejecting ‘Discretion’: A Turning Point?
  3.1 The Institutional Context: The Qualification Directive and the CEAS 61
  3.2 The Courts: High-Level Rejections of ‘Discretion’ in Europe
    3.2.1 The Concealment Controversy: The UKSC Judgment in HJ (Iran) and HT (Cameroon) 64
    3.2.2 Avoiding Trouble: The Twin Decisions of the Court of Justice of the European Union 68
    3.2.3 The Said and the Unsaid: On Thin Ice 75
  3.3 Conclusion: Half-Hearted Disapproval 77

4 Manifestly Asserted: France
  4.1 The French Context: Favouring Acts 79
  4.2 Public Manifestation 86
  4.3 Claiming Sexual Orientation 93
  4.4 Conclusion: France – ‘Discretion’ Upside Down 101

5 Irreversibly Determined: Germany
  5.1 The German Context: Favouring Identity 103
  5.2 Inescapability and Fateful Determination 107
  5.3 Importance for Identity 115
  5.4 Conclusion: Germany – ‘Discretion’ Reloaded 125

6 Singled Out: Spain
  6.1 The Spanish Context: The Ghostly Substance of Something Extra 128
  6.2 The Singling Out Requirement
    6.2.1 Sexual Orientation as a Convention Ground 132
    6.2.2 Mere Membership and ‘Personal’ Persecution 134
    6.2.3 Criminalisation 135
    6.2.4 Pre-qualification Directive ‘Discretion’ Reasoning 137
  6.3 Significant Transcendence of Harm 139
    6.3.1 From Non-admissibility to Disbelief 139
    6.3.2 ‘Without These Aspects Alone’ 145
    6.3.3 Establishing Nexus: ‘Significant Transcendence’ of Past Persecution 146
    6.3.4 International Guidance and the Resilience of the State Persecution Requirement 152
  6.4 Conclusion: Spain – ‘Discretion’ Implicit 161
## Contents

**PART I CONCLUSIONS: ACTS OR IDENTITY – INVARIABLY ‘DISCREET’**

163

**PART II EXPLORING THE LIMITS OF PROTECTION**

169

### 7 Drawing Lines: Distinguishing Protected Groups from Persecuted Groups

171

7.1 The Convention Grounds and the Problem of Categories 172
7.2 Defining Political Opinion: ‘Three Realisations’ 175
7.3 Acts ‘Beyond Mere Expression’: Grahl-Madsen’s ‘Two Schools of Thought’ 177
7.3.1 The ‘Restrictive Doctrine’: Focus on the Persecutor 178
7.3.2 The ‘Liberal Doctrine’: Focus on the Claimant 180
7.4 Conclusion: Defining Groups, Establishing Membership 182

### 8 Mind the Gap: Particular Social Group and the Limits of Protection

184

8.1 The Protected Characteristics Approach 185
8.2 Search for Limits: The Triviality Concern 187
8.3 The Social Perception Approach 188
8.3.1 Avoiding Protection Gaps? 192
8.3.2 A New Limit: The Singling Out Requirement 194
8.4 Conclusion: Sketching the Boundaries of the Social Group 196

### 9 Human Rights: Messing with the Definition

198

9.1 The Interrelationship between Human Rights and Refugee Law 200
9.1.1 The Context: The Human Rights Approach to Refugee Law 200
9.1.2 The Distinction Problem: The Awkward Fit of Human Rights and Refugee Law 203
9.1.3 Locating the Lesser Scope: Human Rights and Persecution 206
9.2 A Human Rights Understanding of the Convention Grounds? 208
9.2.1 Conceiving Sexual Orientation in Terms of Human Rights: Hathaway and Pobjey 209
9.2.2 Conceiving Religion in Terms of Human Rights: Germany and the CJEU in Y and Z 211
9.3 Two Distinct New Approaches to Persecution 214
9.3.1 Alternative Approach: Focus on Claimant and Convention Ground 215
9.3.2 Additional Approach: Focus on Persecutor and Harm 219
9.4 Responding to the Paradox: Legitimising ‘Discretion’ 222
  9.4.1 The Assumptions: Activity-Based Risks and the Unsafe Closet 223
  9.4.2 The Focus: Anne Frank and Endogenous Harms 226
9.5 Conclusion: Human Rights and Refugee Law – An Unholy Alliance? 228

CONCLUSION 231

10 Conundrums, Paradoxes and Productive Instability 233
  10.1 The Omnipresence of ‘Discretion’ 235
  10.2 Fundamentality, Severity and the Convention Grounds 238
    10.2.1 Caught in the Fundamentality/Severity Paradox 238
    10.2.2 Understanding the Convention Grounds 239
  10.3 The Trouble with the Scope of Protection 242
    10.3.1 The Double Rationale of Refugee Protection: Persecution and Convention Grounds 242
    10.3.2 The Central Conundrum: Between Persecutor and Persecuted 243
  10.4 So What? Implications for Drawing Lines 247
    10.4.1 Reconsidering the Scope of Refugee Protection 247
    10.4.2 Revisiting the Controversy around Hathaway and Pobjoy 249
  10.5 The Way Forward: Productive Instability 251

Annex 253
Annex I European and International Refugee Law 253
Annex II Table of Cases 259
  1 France 259
  2 Germany 266
  3 Spain 270
Bibliography 275
Legislation and Guidelines 275
  Council of Europe 275
  European Union 275
  France 276
  Germany 277
  Spain 277
  United Nations 278
## Contents

<table>
<thead>
<tr>
<th>Cases</th>
<th>279</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>279</td>
</tr>
<tr>
<td>Canada</td>
<td>279</td>
</tr>
<tr>
<td>European Union</td>
<td>280</td>
</tr>
<tr>
<td>France</td>
<td>281</td>
</tr>
<tr>
<td>Germany</td>
<td>282</td>
</tr>
<tr>
<td>New Zealand</td>
<td>283</td>
</tr>
<tr>
<td>Spain</td>
<td>283</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>284</td>
</tr>
<tr>
<td>United States</td>
<td>285</td>
</tr>
<tr>
<td>Literature</td>
<td>285</td>
</tr>
</tbody>
</table>

Index | 299